

California

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

A. California: Rule Amending the Fair Employment and Housing Act

The California Fair Employment and Housing Act (FEHA) prohibits employers from discrimination and harassment against applicants and employees on the basis of a protected classification. The Department of Fair Employment and Housing (DFEH) has issued amendments to the regulations implementing the FEHA. The amended regulations address discrimination on the basis of sex, national origin and ancestry, religious creed, disability, pregnancy, childbirth, and medical conditions related to childbirth. The amended regulations also address discrimination against interns and volunteers, and add new requirements for harassment prevention policies and abusive conduct training.

Employer Coverage

Under the FEHA, a covered employer is one that employs five or more employees for each working day in any 20 consecutive calendar weeks in the current calendar year or preceding calendar year. The amended regulations provide guidance on which employees must be counted to determine whether the employer meets the coverage threshold. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, must be counted. An employee must also be counted regardless of whether the employee's worksite is located within or outside of California, though employees located outside of California are generally not entitled to the FEHA's protections.

Burden of Proof

The amended regulations codify the burden of proof in a FEHA discrimination or retaliation case set forth by the California Supreme Court in *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013). To prevail on a claim for discrimination or retaliation, the plaintiff must demonstrate that a protected classification was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. Note that this burden of proof is not applicable to claims for harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide CFRA or pregnancy disability leave.

Employer's Duty to Prevent Discrimination and Harassment

Under the FEHA, an employer has an affirmative duty to take reasonable steps to prevent and correct discrimination and harassment. The amended regulations expand on this duty by creating new rules regarding the employer's written policies and procedures aimed at preventing harassment.

The amended regulations require all covered employers to develop a written harassment, discrimination, and retaliation prevention policy. Moreover, the amendments require employers to create and implement a process for employees to report harassing conduct and for the employer to resolve those complaints, and the amendments include specific requirements for the design of the process. The amendments also set forth requirements for the content of the written prevention policy.

The internal policy and complaint procedure requirement is in addition to the existing requirement that employers post a workplace poster and provide employees with a copy of the DFEH's sexual harassment brochure. Employers must disseminate their written harassment, discrimination, and retaliation prevention policy using one or more of several enumerated methods. Additionally, if 10% or more workers at an employer's facility or establishment speak a language other than English as their spoken language, the employer must translate the policy into every language that is spoken by at least 10% of the workforce.

If the DFEH determines that an employer failed to take reasonable steps to prevent harassment in the workplace, the Department can seek "non-monetary preventative remedies" against the employer even if there is no evidence of underlying discrimination or harassment. Reasonable steps are determined based on a number of factors, including whether the employer provided prevention training and policies.

Abusive Conduct Training

In 2015, the FEHA was amended to add abusive conduct training to the harassment training mandated for employers of 50 or more employees. The amended regulations set forth extensive guidelines for the design, content, and dissemination of the abusive conduct training. While the amendments do not specify an amount of time or portion of the training that needs to be dedicated to the prevention of abusive conduct, they state that it should be covered "in a meaningful manner." The amendments also enhance the recordkeeping requirements employers must follow with respect to maintaining records of attendance, course completion, and training materials. Notably, with respect to webinars, employers must maintain a copy of the webinar, all written materials used by the trainer, all written questions submitted during the webinar, and documentation of all written responses or guidance the trainer provided during the webinar.

Driver's Licenses and National Origin Discrimination

The California Vehicle Code was amended in 2014 to require the DMV to issue a certain class of driver's license to a person who cannot submit satisfactory proof that s/he is legally authorized to be in the United States, so long as the individual meets all other qualifications for a license and provides proof of his or her identity and California residency. The statute includes a provision prohibiting discrimination against an individual holding or presenting this type of license under the state's Unruh Civil Rights Act and any other law.

The amended regulations provide that discrimination against a holder of this type of driver's license violates the FEHA's prohibition against national origin and ancestry discrimination. In addition, the amendments provide that an employer can require an applicant or employee to hold or present a driver's license only if:

- possession of a driver's license is required by state or federal law; or
- possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law.

The amendments further provide that an employer's policy requiring applicants or employees to present or hold a driver's license may be evidence of a FEHA violation if the policy is not uniformly applied or is not supported by a legitimate business purpose.

Religious Creed Accommodation

The FEHA prohibits discrimination on the basis of religious creed and requires an employer to accommodate an employee's religious observances. The amendments bring the

regulations in line with the statute by clarifying that a person's religious creed "encompasses all aspects of religious belief, observance, and practice, including religious dress and grooming practices." Per the amended regulations, a reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement and, unless expressly requested by an employee, is not reasonable if it requires segregation of the employee from customers or the general public. Additionally, an employer's policies on workplace dress and grooming standards must "take into account" religious dress and grooming practices.

Additional Developments

Along with the more significant changes outlined above, the amendments add other provisions designed to bring the regulations in line with the provisions in the FEHA. The amendments:

- recognize a separate right of action for human trafficking under the FEHA, if the individual has also alleged a claim for discrimination on the basis of a protected classification;
- create a definition for "intern" and add provisions already codified in the FEHA statute that prohibit discrimination and harassment against individuals serving in an unpaid internship "or any other limited-duration program to provide unpaid work experience";
- provide a definition for an independent contractor, or "person performing services pursuant to a contract";
- provide definitions for quid pro quo and hostile work environment harassment, and add provisions mirroring those in the FEHA statute regarding employer liability for sexual harassment committed by a supervisor, coworker, or third party;
- clarify that discrimination and harassment on the basis of sex includes discrimination on the basis of gender identity, gender expression, and transgender status, and provide definitions for those terms;
- clarify that the length of pregnancy disability leave is four months per pregnancy, and that four months translates to 1/3 of a year or 17.33 weeks;
- recognize that transgender individuals disabled by pregnancy are entitled to protection under the FEHA against discrimination on the basis of pregnancy, childbirth, or a related medical condition;
- update the required poster regarding pregnancy accommodation, "Your Rights and Obligations as a Pregnant Employee," and require an employer whose workforce at any facility comprises 10% or more persons whose spoken language is not English to post a translation of the notice into every language that is spoken by at least 10% of the workforce; and
- provide a definition for "support animal" (as opposed to an "assistive animal") and recognize that a support animal may constitute a reasonable accommodation for individuals with certain disabilities.

2 CCR 10500 to 2 CCR 11132 (Effective Date 04/01/2016).

B. Cure of Access Violations

California law provides for minimum statutory damages of either \$1,000 or \$4,000, in addition to actual damages, for disability discrimination relating to violations of construction-related public access standards. A plaintiff may be eligible for such statutory damages if s/he experienced difficulty, discomfort or embarrassment due to the violation.

15-Day Correction

The amendments provide a window of opportunity for businesses to resolve minor, technical construction-related issues. Specifically, the amendments establish a presumption that certain technical violations are not a cause of difficulty, discomfort, or embarrassment for purposes of minimum statutory damages where the defendant is a small business and corrects the violation within 15 days of service of the summons and complaint. For purposes of this provision, a small business is defined as having 50 or fewer employees. The applicable technical violations include improper signage (indicating access features, etc.), parking lot conditions (faded paint in accessible parking spaces, color of parking signs, etc.) and detectable warning surfaces on ramps.

120-Day Exemption

The amendments also provide a 120-day exemption from liability for minimum statutory damages in certain cases. Businesses with 50 or fewer employees that hire a Certified Access Specialist (“CAsp”) to inspect the business’s property have 120 days from the inspection date to resolve any violations identified. The business will not be subject to the minimum statutory damages if all construction-related violations are corrected within 120 days of the date of the inspection.

Cal. Civ. Code § 55.53 and § 55.56, Cal. Gov. Code § 4459.7, § 4459.8, § 8299.06, § 65941.6 and § 65946 (Effective Date 05/10/2016).

C. Retaliation against Family Members

California law prohibits an employer for discriminating or retaliating against an employee or applicant because s/he exercised rights protected under the state’s wage and hour laws. California’s whistleblower protection law prohibits an employer from discharging or in any manner discriminating, retaliating, or taking any adverse employment action against any employee or job applicant because the employee or applicant has engaged in protected conduct. In addition, the state health and safety laws prohibit an employer from taking adverse action against an employee for making a complaint or engaging in other protected conduct.

The new law amends these statutes to extend their protections to an employee who is a family member of a person who engaged in, or was perceived to engage in, the protected conduct or who made a complaint protected by these statutes. The amendments do not provide a definition for “family member.”

Cal. Lab. Code § 98.6, Cal. Lab. Code § 98.6, 1102.5 1102.5 and Cal. Lab. Code § 6310 (Effective Date 01/01/2016).

Joint Liability with Labor Contractors

Tammy D. McCutchen, principal with Littler Mendelson PC, oversaw the firm’s review and update of this state employment law workbook addendum.

California law prohibits a person or entity from entering into a contract for labor or services with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor, if the person or entity knows, or should know, that the contract or agreement does not include sufficient funds for the contractor to comply with laws or regulations governing the labor or services to be provided. Under the law, a client employer will be jointly liable with the labor contractor for violations of wage and hour or workers' compensation law.

The amendment exempts certain categories of employers from the joint liability provisions, including motor carriers, household goods carriers and cable operators, in connection with specific types of contracts and subcontracts.

Cal. Lab. Code § 2810.3 (Effective Date 01/01/2016).

D. Reasonable Accommodation Requests

The California Fair Employment and Housing Act (FEHA) prohibits discrimination and harassment on the basis of a protected classification, including religion and disability. The FEHA requires an employer to provide reasonable accommodation of, among other things, a person's disability and religious beliefs and prohibits discrimination against any person because he or she opposed any practices forbidden under the FEHA or because the person has filed a complaint. This amendment adds a prohibition against retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

Cal. Gov. Code § 12940 (Effective Date 01/01/2016).

E. Unfair Immigration-Related Employment Practices

Federal law requires employers to verify that all new hires are eligible to work in the United States. Each new hire must document his or her identity and authorization to work in the U.S. by completing the federal Form I-9 and presenting at least one form of identification. California law prohibits employers from engaging in unfair immigration-related practices. The new state law clarifies that it is unlawful for an employer to:

- request more or different documents than are required by federal law for employment verification;
- refuse to honor documents that appear to be genuine, or refuse to honor documents or work authorization based on the specific status of the authorization; or
- attempt to reinvestigate or reverify an existing employee's work authorization using an unfair immigration-related practice.

Employers that violate the new law are subject to a penalty imposed by the Labor Commissioner of up to \$10,000 per violation and are liable for equitable relief. Applicants or employees that believe they have been subject to a violation of the new law may file a complaint with the Division of Labor Standards Enforcement.

Cal. Lab. Code § 1019.1 (Effective Date 01/01/2017).

F. Protections for Janitorial Workers

California passed a law that provides protections to all janitors, whether they are employees, independent contractors, or franchisees ("covered workers"). The law covers employers:

1. of at least one employee and one or more covered workers, and
2. that enter into contracts, subcontracts, or franchise agreements to provide janitorial services.

Recordkeeping Requirements. The new law provides that covered employers must keep for three years accurate records of the following information:

- names and addresses of all employees;
- hours each employee worked daily, including the start and end times;
- wages and wage rates paid each payroll period;
- age of every minor employee; and
- any other conditions of employment.

Registration. Covered employers are also required to register with the Labor Commissioner of the Division of Labor Standards Enforcement (DLSE) annually, effective July 1, 2018, at a cost of \$500 per year. To register, the employer must complete an application that details the employer's business structure.

Enforcement. To ensure compliance with the new law, the DLSE will not register or renew the registration of any covered employer that has not satisfied a final judgment for unpaid wages to a covered worker, or that has not made the contributions required by the Unemployment Insurance Code or Social Security and Medicare tax contributions. Additionally, the covered employer registry will be public. Covered employers that fail to register will be fined \$100 per day, up to \$10,000. The law also penalizes non-covered employers and entities that contract with covered employers that do not have a current and valid registration.

Anti-Harassment. The law also contains several anti-harassment provisions. Covered employers must give all covered workers a copy of the Department of Fair Employment and Housing pamphlet DFEH-185, entitled "Sexual Harassment." Additionally, the DLSE will establish a biennial, in-person sexual violence and harassment prevention training program for covered employers and covered workers by January 1, 2019.

Cal. Lab. Code § 1420 – Cal. Lab. Code § 1420 1434 (Effective Date 01/01/2017).

G. Amends the Unruh Civil Rights Act to expand protection to citizenship, primary language, and immigration status

The Unruh Civil Rights Act prohibits discrimination, harassment, and retaliation in all business establishments on the basis of sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation. This amendment extends these protections by adding citizenship, primary language, and immigration status as protected classes. The protections apply to individuals perceived to have any characteristic within the listed categories as well as individuals associated with a person who has or is perceived to have any characteristic within the listed categories. Unless otherwise required by federal, state or local law, services or documents are not required to be provided in a language other than English. Verification of an individual's immigration status and any discrimination based upon verified immigration status, if required by federal law, do not constitute violations of the Unruh Civil Rights Act.

Cal. Civ. Code § 51 (Effective Date 01/01/2016).

II. Pre-Employment Inquiry Guidelines

California law prohibits employers from asking applicants certain questions about sealed convictions or arrests that did not result in convictions. Likewise, employers may not use this information to influence their employment decisions, such as promotion or termination. The amendments broaden these restrictions to include questions about an applicant's "arrest, detention, processing, diversion, supervision, adjudication, or court disposition" that may have occurred while the applicant was subject to the process and jurisdiction of a court. Employers are also prohibited from using this information in making employment decisions.

Certain employers are exempt, however. Employers in health facilities may inquire about incidents that occurred when the applicant or employee was subject to the process and jurisdiction of a juvenile court where an applicant was convicted of a felony or misdemeanor under any law enumerated in Penal Code section 290 (Sex Offender Registration) or Health & Safety Code section 11590 (Registration of Controlled Substance Offenders) during the previous five years.

Cal. Lab. Code § 432.7 (Effective Date 01/01/2017).

III. Family and Medical Leave

A. School Activities Leave and Kin Care Amendments

California has amended its school activities leave law to broaden the permissible uses of leave time, and has amended the kin care statute to align it with the statewide paid sick leave law that took effect July 1, 2015.

School Activities Leave

California's school activities leave law requires employers of 25 or more employees to provide time off for employees to visit their children's school or licensed day care center to participate in school activities. The amendment omits the term "licensed day care center" and replaces it with the more general term "licensed childcare provider." The amendment also broadens the permitted purposes for using school activities leave. In addition to being able to take leave to participate in activities at a child's school, a parent may also use this leave to:

- Find, enroll, or reenroll his or her child in a school or with a licensed child care provider, or
- Address a child care provider or school emergency.

"Child care provider or school emergency" means that an employee's child cannot remain in a school or with a child care provider due to one of the following:

- The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or child care provider.
- Behavioral or discipline problems.

- Closure or unexpected unavailability of the school or child care provider, excluding planned holidays.
- A natural disaster, including, but not limited to, fire, earthquake, or flood.

Leave to find, enroll, or reenroll a child in a school or with a licensed child care provider, or to participate in school activities, is limited to eight hours in any calendar month of the year. Finally, the amendment expands the definition of “parent” to include step-parents, foster parents, grandparents, and individuals who stand in loco parentis for the child.

Cal. Lab. Code § 230.8 (Effective Date 01/01/2016).

Kin Care

The kin care statute requires any employer who provides sick leave for employees to permit an employee to use his or her accrued and available sick leave entitlement to attend to an illness of a child, parent, spouse, or domestic partner of the employee. The amendment aligns the kin care statute with the provisions of California’s paid sick leave law (PSL) by matching the PSL’s definition of family member and its permissible reasons for using leave.

Accordingly, an employee may use kin care leave for the following purposes:

- Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member; or
- To obtain medical, legal, social, or other services to address an incident of domestic violence, sexual assault, or stalking.

“Family member” has the same definition provided under the PSL, and means:

- A biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis, regardless of age or dependency status;
- A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child;
- A spouse;
- A registered domestic partner;
- A grandparent;
- A grandchild; or
- A sibling.

Employers who provide paid time off benefits (PTO) beyond that required under the PSL are impacted by the interplay between the PSL and the kin care statute. Employees of such employers must be allowed to use half the amount of their PTO allotment for kin care. For example, if an employer offers employees 80 hours of PTO per year, but designates 24 hours

(or 3 days) as California PSL, it must also allow an employee to use up to 40 hours (1/2 of the annual accrual) for kin care.

Cal. Lab. Code § 233 (Effective Date 01/01/2016).

B. Paid Sick Leave Amendments

Shortly after its mandatory paid sick leave law finally took effect on July 1, 2015, California approved amendments to the law. The amendments change some critical issues and clarify other areas of concern for California employers. Specifically, the amendments:

Clarify that an employee must work for the same employer for 30 or more days within a year of the commencement of employment to be eligible to use sick leave time.

- Allow for alternative accrual methods for all leave banks. Employers may still provide paid sick time using accrual based on hours worked (1 hour for every 30 hours worked) or frontloading of 24 hours or 3 days, whichever is greater, at the start of the year measurement period. Other accrual methods, however, such as providing a set amount per pay period or per quarter, will now comply with the statute, provided the employee accrues leave on a regular basis, and no less than 24 hours of paid sick time by the 120th calendar day of the year. It is still the case that an employer can avoid carryover only if the full 24 hours or 3 days of leave are frontloaded at the beginning of the designated year.
- Grandfather leave banks existing as of January 1, 2015. Leave policies in place as of January 1, 2015 that provide for accrual: (a) on a regular basis; and (b) of no less than one day or eight hours of accrued leave within three months of employment of each year, and under which the employee was eligible to earn at least three days or 24 hours of sick leave or paid time off within nine months of employment, will comply with the amended law. However, if an employer modifies the accrual method used in the policy it had in place prior to January 1, 2015, the employer must satisfy the alternative accrual methods described above. This change does not prohibit the employer from increasing the accrual amount or rate for a class of employees covered by this subdivision.
- Allow employers with unlimited or undefined leave banks to indicate “unlimited” on the employee’s itemized wage statement.
- Allow employers to calculate the rate of pay for employees using any of the following methods: (1) Paid sick time for nonexempt employees is calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek. (2) Paid sick time for nonexempt employees is calculated by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days of employment. (3) Paid sick time for exempt employees is calculated in the same manner as the employer calculates wages for other forms of paid leave time.
- Clarify that employers are not required to reinstate accrued paid time to an employee if that paid time was paid out at separation of employment.

- Clarify that employers have no obligation to inquire or record the purposes for which an employee uses sick leave or paid time off.
- Clarify that an employer may choose the year to be used (employment, calendar, or 12-month period), except that the 30-day requirement uses a 12-month rolling backwards year.
- For employers in the broadcasting and motion picture industries, delay the requirement to provide notice of the amount of paid sick time available each time wages are paid until January 21, 2016. For all other employers, this obligation begins on July 1, 2015.

Cal. Lab. Code § 246, 247.5 (Effective Date 07/13/2015).

C. California Family Rights Act Amendments

The California Department of Fair Employment and Housing finalized amendments to its regulations implementing the California Family Rights Act (CFRA). The amendments make changes to a number of regulatory provisions, clarifying them and aligning them with the federal Family and Medical Leave Act (FMLA) regulations. The most substantive of the amendments include:

- Changes to the definitions of covered employer and eligible employee;
- New regulations regarding an employee's rights upon return from leave;
- Changes to the regulations regarding a key employee's reinstatement rights;
- Clarification of the relationship between CFRA leave and pregnancy disability leave; and
- Updated notice and posting requirements.

Covered Employers

The CFRA applies to all public and private employers that directly employ 50 or more employees to perform services for a wage or salary. "Directly employ" means the employer maintains an aggregate of at least 50 part- or full-time employees on its payroll for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive.

Under the amended regulations, when counting the number of employees, employers are required to count employees out on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension or other leave, so long as the employer has a reasonable expectation that the employee will later return to active employment. The amendments also expand employer coverage to include successors-in-interest and joint employers. The amended regulations do not define what constitutes a joint employment relationship; rather, they state that such a relationship is "not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality based on the economic realities of the situation." The new regulations are consistent with the expanded theory of joint

employer liability created for wage and hour matters as set forth in Labor Code section 2810.3.

Eligible Employees

The CFRA defines eligible employee as one who has:

- Worked for the employer for more than 12 months;
- Worked 1,250 hours during the 12-month period prior to the commencement of the leave; and
- Worked at a location where there are at least 50 employees employed within 75 miles of the employee's worksite, measured by surface road miles.

The amendments change the language of the 12-month requirement from “more than” 12 months to “at least” 12 months. The amendments also clarify that employment periods prior to a break in service of seven years or more do not have to be counted when determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary. However, nothing prevents employers from considering employment prior to a continuous break in service of more than seven years so long as they do so uniformly, with respect to all employees with similar breaks in service.

The amendments clarify calculation of the 12-month length of service requirement. An employee may become CFRA-eligible while out on a leave of absence. If an employee is not eligible for CFRA leave at the start of a leave (i.e., because the employee has not met the 12-month length of service requirement), the employee may meet this requirement while on leave, because leave to which they are otherwise entitled counts toward length of service (although not for the 1,250-hour requirement). The employer should designate the portion of the leave in which the employee has met the one-year requirement as CFRA leave. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave during which other benefits or compensation are provided by the employer, the week counts as a week of employment.

In addition, the amendments clarify the meaning of “worksite.” A worksite can refer to either a single location or a group of contiguous locations. For employees with no fixed worksite, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

Employees' Rights upon Return From CFRA Leave

The CFRA guarantees employees on CFRA leave the right to reinstatement to their same or a comparable job position. The amended regulations clarify that upon return from leave, the employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority.

Most notably, the amendments include a provision that reinstatement after leave is guaranteed even if the employee has been replaced during leave or his or her position has been restructured to accommodate the employee's absence.

Additionally, the amendments afford the employee an opportunity to re-qualify for his or her former position if he or she somehow became unqualified during leave. For example, if an employee's job duties required her to maintain a license that lapsed as a result of having to take leave, the employee must be allowed the opportunity to renew the license.

Key Employees' Right to Reinstatement

The amended regulations significantly expand the rules regarding key employees' use of CFRA leave. The CFRA's general guarantee of reinstatement after leave may not apply to key employees. The amendments define "key employee" as an employee who is paid on a salary basis and is amongst the highest paid 10% of the employer's employees working within 75 miles of the employee's worksite at the time of the leave request. An employer may refuse to reinstate a key employee to his or her same position or to a comparable position if the employer establishes that all of the following conditions exist:

1. The employee requesting the CFRA leave is a salaried employee;
2. The employee requesting the leave is among the highest paid 10% of the employees who are employed within 75 miles of the worksite at which that employee is employed at the time of the leave request; and
3. The refusal to reinstate the employee is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer.

The amendments set forth new rules for the notification procedure surrounding a key employee's request for CFRA leave. The employer must notify the employee in writing at the time the employee requests CFRA leave that the employee is a key employee and risks losing the right to reinstatement. The employer must then notify the employee at the commencement of leave that while the employer cannot deny CFRA leave, it intends to deny reinstatement on completion of the leave. This notice must be served either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.

After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if he or she did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of reinstatement.

An employer who fails to provide the required notices will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement of the key employee.

During leave, the employee is entitled to continuation of health benefits even if the employer has provided notification that it intends to deny reinstatement. An employee's rights under the CFRA continue until he or she informs the employer that s/he does not wish to return to work, or until the employer actually denies reinstatement at the conclusion of the leave.

Relationship Between CFRA Leave and Pregnancy Disability Leave

The amendments to the regulations address the interplay between the CFRA and the FEHA. The amended regulations expressly provide that the right to take CFRA leave is separate and distinct from the right to take disability leave under the FEHA. The maximum CFRA entitlement of 12 workweeks of leave does not include leave provided as a reasonable accommodation for a physical or mental disability under the FEHA. If an employee has a serious health condition that also constitutes a disability under the FEHA and cannot return to work at the conclusion of her CFRA leave, the employer has an obligation to initiate the interactive process with the employee to determine whether an extension of leave would constitute a reasonable accommodation under the FEHA.

Notice and Posting Requirements

The CFRA regulations require covered employers to post a notice in a conspicuous location in the workplace describing the right to CFRA leave. The amended regulations expand this requirement by setting forth poster specifications: the notice must be posted prominently where it can be readily seen by employees and applicants for employment, and the poster and text must be large enough to be easily read and contain fully legible text. The amended regulations also provide that electronic posting is sufficient to meet the posting requirement.

Additional Changes

In addition to the changes summarized above, the amendments to the CFRA regulations also include:

- Amended definitions for “serious health condition” and “spouse.” The latter brings the CFRA regulations in line with California law permitting same-sex marriages and domestic partnerships.
- New provisions addressing the use of intermittent and reduced-schedule leave for the purpose of bonding time.
- New provisions addressing an employee’s fraudulent use of CFRA leave.
- Changes to the regulations addressing certification of the need for leave, including an updated version of the sample Certification of Health Care Provider Form.
- Clarification and expansion of the provisions requiring continuation of health benefits during CFRA leave.
- Clarification of the regulations addressing how CFRA leave is computed with regard to holidays, overtime, and the use of increments of time for intermittent and reduced-schedule leave.
- Clarification of the rules regarding an employee’s use of PTO and disability or paid family leave benefits during CFRA leave.
- Clarification of the rules regarding an employer’s ability to request fitness-for-duty information.
- Expansion of the provisions addressing employer interference with CFRA leave and associated penalties.

2 CCR 11087 through 2 CCR 11097 (Effective Date 07/01/2015).

D. Unpaid Leave Rights Notification

California law requires employers with 25 or more employees to provide unpaid leave to employees who are victims of domestic violence, sexual assault, or stalking. Such leave can be taken for a variety of purposes, such as to obtain medical attention or psychological counseling. The amendments require covered employers to provide notice to employees of their rights related to the law upon hire and also upon an employee's request. The Labor Commissioner will develop a form to comply with the notice requirements and provide it on its website by July 1, 2017. Employers do not have to comply with the notification requirements until the Labor Commissioner has posted the sample form on its website. If an employer elects not to use the form developed by the Labor Commissioner, the notice provided by the employer to the employees must be substantially similar in content and clarity to the form developed by the Labor Commissioner.

Cal. Lab. Code § 230.1 (Effective Date 01/01/2017).

E. Paid Family Leave Insurance

California has amended its Paid Family Leave (PFL) program. California PFL is a state-run benefits program providing partial wage replacement to eligible workers suffering wage loss when they take leave from work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner, or to bond with a new child. Eligible workers can receive up to six weeks of benefits during a 12-month period. The program is funded through state disability insurance contributions.

For claims beginning on or after January 1, 2016, California's PFL benefit program provides a maximum weekly benefit of \$1,129. To qualify for the maximum weekly benefit, an individual must earn at least \$26,661.83 in a calendar quarter during the base period.

Per the amendments, for claims beginning on or after January 1, 2018, but before January 1, 2022, the maximum weekly benefit will increase to either 60 or 70% of weekly wages, subject to an established maximum weekly benefit. If wages paid during the highest-earning quarter of the individual's base period are \$929 or more, but less than one-third of the state average quarterly wage, the maximum weekly benefit will equal 70% of weekly wages in the highest-earning quarter. If wages paid during the highest-earning quarter are one-third of the state average quarterly wage or more, the maximum weekly benefit will be either: A) 23.3% of the state average weekly wage; or B) 60% of weekly wages in the highest-earning quarter.

Additionally, beginning January 1, 2018, the amendments remove the seven-day waiting period to receive benefits.

Cal. Unemp. Ins. Code § 2655 and Cal. Unemp. Ins. Code § 3303 (Effective Date 01/01/2017).

IV. Wage and Hour Laws

A. Piece Rate Employees' Compensable Activities & Wage Statements

California has rewritten the definition and rules governing the payment of piece-rate compensation. A new law sets forth requirements for the payment of a separate hourly wage for "nonproductive" time worked by piece-rate employees, and separate payment for rest and recovery periods. The law has profound implications for employers, including agricultural and

transportation companies, which historically compensate employees based on piece-rate and activity-based formulas.

Piece Rate Employees' Compensable Activities

The new law applies to all employees compensated on a piece-rate basis. It codifies three basic statutory requirements:

1. Employees must be separately compensated for the time they take rest and recovery breaks. These breaks must be paid at an hourly rate no less than the greater of either the applicable minimum wage or the employee's average hourly wage for all time worked (exclusive of break time) during the work week.
2. Employees must be separately compensated for "other nonproductive time," which is defined as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis." Notably, the statute does not define "activity," and thus does not resolve the practical difficulty created by previous cases holding a piece rate must separately compensate each duty performed. Employers will still face challenges defining what "activity" is compensated by a piece-rate and what closely related activities are not compensated by the piece rate. Employers will have the additional complication of determining what work time is spent in activities that are not "directly related" to the piece rate compensation plan.
3. "Other nonproductive time" must be compensated at an hourly rate no less than the applicable minimum wage. The statute provides that the amount of "other nonproductive time" to be paid may be determined either by actual records or by the employer's "reasonable estimate," but the statute provides no further direction on what differences may exist between the "actual records" or the employer's "reasonable estimate." Employers will be able to satisfy the requirement to pay for other nonproductive time by paying minimum wage for all hours worked, in addition to any piece rate.

Wage Statement Requirements

Employee wage statements will be required to include the following information, besides that which is already required under the general wage statement statute (Labor Code section 226(a)):

- The total hours of compensable rest and recovery periods, the rate of compensation for those periods, and the gross wages paid for those periods during the pay period.
- The total hours of other nonproductive time, the rate of compensation for that time, and the gross wages paid for that time during the pay period.

Employers are not required to specify information regarding the other nonproductive time on their wage statements.

Safe Harbor

The new law provides a limited safe harbor for employers. An employer may assert an affirmative defense to all liability for failure to compensate for rest and recovery periods and

other non-productive time if the employer satisfies all of the following requirements by December 15, 2016:

- The employer makes payments to each of its current and former employees for the amount of break and other non-productive time not separately compensated as now required by the statute during the period July 1, 2012 through December 31, 2015. These payments may be calculated using either of the following methods (at the employer's election):
 - The actual amount of wages due for the break and nonproductive time that must be separately compensated, plus interest; or
 - Four percent (4%) of the employee's gross earnings during that period. If the employer paid additional amounts to cover some of what is now considered other nonproductive time, those amounts (up to 1% of gross earnings) may be deducted from the payments, for a minimum payment of 3% of gross earnings.
- The employer makes a good-faith effort to locate and provide these payments to each of its former employees who would qualify.
- The employer provides written notice to the Department of Industrial Relations by July 1, 2016 of its intention to make these payments.

If an employer satisfies these requirements, it can assert this affirmative defense in any claim or action filed on or after March 1, 2014, unless judgment has already been entered and the time for appeal expired by the end of 2015. The affirmative defense precludes any liability, whether asserted as wages, damages, liquidated damages, statutory penalties, or civil penalties, based solely on the employer's failure to timely pay the employee separately for rest and recovery periods and other nonproductive time for time through December 31, 2015.

Cal. Lab. Code § 226.2 (Effective Date 01/01/2016).

B. Penalties for Race- or Ethnicity-Based Wage Differences

California law prohibits employers from paying different wage rates to employees performing substantially similar work, subject to certain exceptions. An employer that violates California Labor Code section 1197.5 by paying an employee a wage less than the rate paid to an employee of another sex is subject to a fine of not more than \$10,000, or imprisonment for not more than six months, or both. The amendments expand the penalty provision to employers that differentiate in pay due to an employee's race or ethnicity. An employer that pays an employee a wage less than the rate paid to an employee of another race or ethnicity, as provided for in California Labor Code section 1197.5, is now also subject to the law's penalties.

Cal. Lab. Code § 1199.5 (Effective Date 01/01/2016).

C. Employer Bonds for Unsatisfied Wage Payment Judgments, Joint & Several Liability for Unpaid Wages in Property Services & Long-Term Care Industries, and Liability for Minimum Wage, Wage & Hour, and Wage Order Violations

California has enacted new laws governing: 1) employer bonds for unsatisfied wage payment judgments; 2) joint & several liability for unpaid wages in the property services and long-term care industries; and 3) liability for minimum wage, wage and hour, and wage order violations.

Employer Bonds for Unsatisfied Wage Payment Judgments

A new set of statutes could impact employers' ability to do business in California if they do not pay judgments (including a final arbitration award) issued against them for nonpayment of wages.

If an employer has not paid money owed an employee under a final judgment, 30 days have elapsed after the time to appeal from the judgment, and an appeal is not filed, it cannot continue to conduct business in California. This includes conducting business using the labor of another business, contractor, or subcontractor, unless the employer obtains a bond from a California-licensed surety company and files a copy of the bond with the state labor commissioner. The principal sum of the bond must be at least: 1) \$50,000 if the unsatisfied portion of the judgment is no more than \$5,000; 2) \$100,000 if the unsatisfied portion of the judgment is between \$5,000 and \$10,000; or 3) \$150,000 if the unsatisfied portion of the judgment is more than \$10,000. If a bond is canceled or terminated, an employer must obtain a new surety bond and file a copy of it with the commissioner.

A limited exception exists for unionized workforces. The law does not require a bond if employees are covered by a collective bargaining agreement that expressly provides for wages, hours of work, working conditions, a process to resolve nonpayment of wages disputes, and a waiver of the bond requirement. Alternatively, in lieu of filing and maintaining a bond, an employer without a unionized workforce can provide the commissioner a notarized copy of an agreement reached with the individual to whom money is owed. However, if the agreement provides for installment payments, and an installment payment is not made, the bond requirement applies.

The law addresses how unsatisfied judgments may impact entities that purchase a business. If a successor employer receives notice of the predecessor employer's unsatisfied judgment, it is deemed a covered employer and subject to the bond requirements if: 1) its employees are engaged in substantially the same work, in substantially the same working conditions, under the same supervisors; or 2) the new entity has substantially the same production process or operations, produces substantially the same products, or offers substantially the same services, and has substantially the same body of customers.

An employer or other person acting on its behalf that conducts business in violation of the law is subject to a civil penalty of \$2,500. An employer that was previously assessed a penalty and failed to pay it will be subject to an additional \$100 per day penalty for each calendar day it unlawfully conducts business in California, up to \$100,000. Additionally, the commissioner can place a lien on the employer or successor employer's California real property, and on an employer's California personal property.

Additionally, if an employer is unlawfully conducting business in California, the commissioner can issue and serve a stop order prohibiting the use of employee labor until the above obligations are satisfied, if the order would not compromise or imperil public safety of vulnerable individuals' life, health, and care. The order can also prohibit the employer from providing services via use of another business, contractor, or subcontractor. If an order is issued, an employer must pay employees affected by the work stoppage up to 10 days' wages. Orders can be appealed to the commissioner and, if unsuccessful, to state court. However, failure of an employer, owner, director, officer, or managing partner to observe an order constitutes a misdemeanor, which is punishable by 60 days in jail, a fine up to \$10,000, or both.

Finally, the law separately impacts employers in certain industries. For example, employers in the long-term care industry (e.g., nursing homes, hospices) can be denied an initial or renewed license.

Joint & Several Liability for Unpaid Wages in Property Services & Long-Term Care Industries

A new law addresses liability for unpaid wages against individuals or businesses that, as part of their business, contract for services in the property services (e.g., janitorial, security) or long-term care (e.g., nursing homes, hospices) industries. If notice of a state labor commissioner proceeding or investigation is provided, and the employer is found liable for unpaid wages, the individual or business will be jointly and severally liable for wages owed for services performed under the contract, including interest. Joint and several liability will be determined if the individual or entity is provide notice about the administrative complaint, proceeding, or state court action. A limited exception exists concerning unpaid wages to employees covered by a collective bargaining agreement that expressly provides for wages, hours or work, working conditions, a process to resolve disputes concerning non-payment of wages, and a waiver of the joint and several liability provided by the law.

Employers contracting to provide services in these industries must, before entering into such a contract, provide written notice to the other party of any unsatisfied final judgments against the employer for nonpayment of wages. The notice must also provide the new law's text. Additionally, within 30 days of a judgment being entered against the employer, it must provide written notice of any unsatisfied final judgments against it for nonpayment of wages to parties with which it is presently under contract to provide services in the aforementioned industries. Failure to provide either notice is not a defense to joint and several liability.

Note, however, that the law does not impose joint liability on an individual or the owner of a home-based business for any property services, to the extent they are provided at the owner's primary residence that does not have multiple housing units.

Liability for Minimum Wage, Wage & Hour, and Wage Order Violations

A new law provides that an employer or other person acting on its behalf who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any wage order, or violates or causes to be violated the final wages, wage statement / access to personnel records, meal / rest / recovery period, minimum wage, overtime, or expense reimbursement statutes, may be held liable as an employer. Individuals acting on an employer's behalf are limited to a natural person who is an owner, director, officer, or managing agent of the employer.

Cal. Lab. Code § 238 through Cal. Lab. Code § 238.4, Cal. Lab. Code § 238.5, Cal. Lab. Code § 558.1 (Effective 01/01/2016)

D. Right to Cure Pay Stub Violations

California law requires an employer to provide employees with specific information regarding their wages semimonthly or at the time of each wage payment. The required information includes, among other things, the dates of the relevant pay period and the legal employer's name and address. An employee or employees may bring a civil action on behalf of him or herself and other current or former employees under the Private Attorneys General Act (PAGA) if an employer violates the requirement.

The new law amends the PAGA to allow an employer the right to cure a violation before an employee may bring a PAGA claim against the employer for violating the wage statement requirements with regard to pay period dates and legal employer's contact information. To cure a violation, the employer must provide a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date the employer received written notice of the violation pursuant to the PAGA. An employer is only

allowed to cure the same violation once within a 12-month period regardless of the location of the worksite. The civil penalty for a violation is \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

Cal. Lab. Code § 2699, Cal. Lab. Code § 2699.3, and Cal. Lab. Code § 2699.5 (Effective Date 10/02/2015).

E. California 2017 Overtime Exemptions for Computer Software Employees

California law provides that certain computer software employees are exempt from overtime requirements if the employee's hourly rate of pay is not less than a specified rate. The law requires the Department of Industrial Relations to adjust this pay rate on October 1st of each year. Due to a 1.2% increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers from August 2015 to August 2016, the state will increase the minimum hourly rate of pay for computer software employees for purposes of the exemption from \$41.85 to \$42.35.

(Effective Date 01/01/2017).

G. California 2017 Overtime Exemptions for Physician and Surgeons

California law provides that certain computer software employees are exempt from overtime requirements if the employee's hourly rate of pay is not less than a specified rate. The law requires the Department of Industrial Relations to adjust this pay rate on October 1st of each year. Due to a 1.2% increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers from August 2015 to August 2016, the state will increase the minimum hourly rate of pay for computer software employees for purposes of the exemption from \$41.85 to \$42.35.

(Effective Date 01/01/2017).

H. Gender Equity in Wages

California law prohibits employers from paying employees a lower wage rate than that paid to employees of the opposite sex in the same establishment when the employees are working in the same job, under similar working conditions, that requires equal skill, effort, and responsibility. However, a wage differential may be permitted where the employer demonstrates that:

1. the wage differential is based on one or more of the following factors:
 - a) a seniority system;
 - b) a merit system;
 - c) a system that measures wages by quantity or quality of production;
or
 - d) a bona fide factor other than sex, such as education, training, or experience, under certain circumstances;
2. each factor the employer relied upon is applied reasonably, and
3. the factors relied upon account for the entire wage differential.

This amendment clarifies that with respect to the third element, a prior salary earned by any employee does not, by itself, justify any disparity in compensation.

In addition, the amendment prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

1. the wage differential is based on one or more of the following factors:
 - a) a seniority system;
 - b) a merit system;
 - c) a system that measures wages by quantity or quality of production;
or
 - d) a bona fide factor other than sex, such as education, training, or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a race- or ethnicity-based differential in compensation, is job-related with respect to the position in question, and is consistent with a business necessity.
2. each factor the employer relied upon is applied reasonably, and
3. the factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

“Business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. However, this defense is inapplicable if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

Cal. Lab. Code § 1197.5 (Effective Date 01/01/2017).

I. Penalties for Race- or Ethnicity-Based Wage Differences

California law prohibits employers from paying different wage rates to employees performing substantially similar work, subject to certain exceptions. An employer that violates California Labor Code section 1197.5 by paying an employee a wage less than the rate paid to an employee of another sex is subject to a fine of not more than \$10,000, or imprisonment for not more than six months, or both. The amendments expand the penalty provision to employers that differentiate in pay due to an employee’s race or ethnicity. An employer that pays an employee a wage less than the rate paid to an employee of another race or ethnicity, as provided for in California Labor Code section 1197.5, is now also subject to the law’s penalties.

Cal. Lab. Code § 1199.5 (Effective Date 01/01/2017).

J. Wage Statement Information

California law requires that an employer provide an employee with an accurate itemized wage statement in writing containing specified information, either semimonthly or at the time the employer pays the employee’s wages. Among other requirements, the itemized statement must show the total hours worked by the employee, unless the employee’s compensation is

solely based on a salary and the employee is exempt from payment of overtime under subdivision (a) of Labor Code section 515 or any applicable order of the Industrial Welfare Commission. The amendment provides that an employee's itemized wage statement is not required to show total hours worked if:

- The employee's compensation is solely based on salary and s/he is overtime-exempt pursuant to Labor Code section 515(a) or any applicable wage order, or
- The employee is exempt from payment of minimum wage and overtime under any of the following exemptions: •the exemption for persons employed in an executive, administrative, or professional capacity provided in any applicable order of the Industrial Welfare Commission;
- the exemption for outside salespersons provided in any applicable order of the Industrial Welfare Commission;
- the overtime exemption for computer software professionals paid on a salaried basis provided in Labor Code section 515.5;
- the exemption for individuals who are the parent, spouse, child, or legally adopted child of the employer provided in any applicable order of the Industrial Welfare Commission;
- the exemption for participants, director, and staff of a live-in alternative to incarceration rehabilitation program with special focus on substance abusers provided in section 8002 of the Penal Code;
- the exemption for any crew member employed on a commercial passenger fishing boat licensed pursuant to Fish and Game Code sections 7920 et seq. as provided in any applicable order of the Industrial Welfare Commission; or
- the exemption for any individual participating in a national service program provided in any applicable order of the Industrial Welfare Commission.

Cal. Lab. Code § 226 (Effective Date 01/01/2017)

K. Minimum Wage Increases

California has enacted increases to the state minimum wage. The amended law provides for six stepped annual statewide increases from the current minimum wage of \$10 an hour, starting on January 1, 2017, for employees working for employers of 26 or more employees. The increases are delayed for one year for employers of 25 or fewer employees. In addition, the amended law does not bar counties and cities from enacting local minimum wages that are higher than the state's minimum wage.

Date	26 or More Employees	25 or Fewer Employees
January 1, 2017	\$10.50	\$10.00 (current rate)
January 1, 2018	\$11.00	\$10.50

Tammy D. McCutchen, principal with Littler Mendelson PC, oversaw the firm's review and update of this state employment law workbook addendum.

January 1, 2019	\$12.00	\$11.00
January 1, 2020	\$13.00	\$12.00
January 1, 2021	\$14.00	\$13.00
January 1, 2022	\$15.00	\$14.00
January 1, 2023	\$15.00	\$15.00

Starting August 1, 2022, the California Director of Finance will annually calculate the adjusted minimum wage to be implemented on January 1 of the following year. The calculation will be based on a specified formula, which includes a version of the consumer price index (CPI). The law's indexing provision allows only increases to the minimum wage – no decreases.

The scope of the minimum wage's application is set by the amended statute's definition of "employer" and includes entities that could be considered joint employers. There are no carve-outs in the definition of an employer in the amended statute.

In addition to the minimum wage law itself, the increases impact other wage and hour requirements that are based on the state minimum wage:

- To be exempt from state overtime laws, the salaries of executive, administrative, and professional employees, and private school teachers, must be no less than two times the state minimum wage for full-time employment (i.e., 40 hours per week).
- Certain commissioned salespersons' earnings must exceed one-and-a-half-times the state minimum wage to be exempt from state overtime laws.
- Employees paid on a piece-rate basis.
- Certain employees can be required to provide and maintain hand tools and equipment customarily required by the trade or craft if their wages are at least two times the minimum wage.
- Collective bargaining agreement-based exceptions for numerous California laws require that employees' regular hourly rate of pay not be less than 30% more than the state minimum wage.

Finally, the amendment extends California's paid sick leave benefits to qualifying in-home supportive services workers, who are currently exempted from coverage under the state's paid sick leave law. The application of the revised minimum wage takes effect for these workers on July 1, 2018.

Cal. Lab. Code § 245.5, Cal. Lab. Code § 246, and Cal. Lab. Code § 118.12 (Effective Date 01/01/2017).

L. Equal Pay Amendments

Amendments to California's equal pay statute increase wage transparency and make it more difficult for an employer to defend against such claims. When the law takes effect, it will be one of the strongest equal pay laws in the nation.

The amended law prohibits an employer from preventing its employees from disclosing their own wages, discussing others' wages, inquiring about other employees' wages, or assisting another employee with the assertion of his or her rights under the law. However, employers should note the law provides that no one, including the employer, is obliged to make any disclosures concerning employees' wages. The law also prohibits employers from discriminating or retaliating against any employee for invoking the employee's own rights under this amended section, or assisting others to invoke their rights under the newly amended law.

Within one year of an alleged violation, an employee may file a lawsuit concerning unlawful acts. An employee is not required to exhaust administrative remedies before filing suit. Employees who can prove they were discharged, discriminated or retaliated against in violation of the law are entitled to seek reinstatement, recover lost wages and benefits, and obtain equitable relief.

The amendments substantially relax the evidentiary burden of proof on employees complaining of unequal pay based on gender. Moreover, an employer must meet a new and higher standard of demonstrating that any pay difference is tied to an absolute business necessity.

Under the amended law, the time period for keeping records related to employees' terms and conditions of employment (including but not limited to employees' wages and job classifications) is extended from two to three years.

Cal. Lab. Code § 1197.5 (Effective Date 01/01/2016).

M. Wage Theft Investigations

As part of the enforcement provisions of California's wage and hour laws, state law authorizes the Industrial Welfare Commission to subpoena witnesses, and the state superior courts to compel compliance with an order or subpoena of the Commission. An increasing number of local jurisdictions in California have enacted minimum wage ordinances. The majority of these jurisdictions have designated or created local agencies to enforce the local wage laws.

The new law authorizes the legislative body of a city or county to delegate to a county or city official or department head its authority to issue subpoenas. In addition, the new law authorizes the legislative body of a city or county to report noncompliance to the county superior court in order to enforce any local law or ordinance, including, but not limited to, local wage laws. Thus, cities and counties are able to delegate their administrative subpoena authority to a county or city official to investigate allegations of wage theft, and they are also able to enforce their investigative subpoena authority via the superior courts.

Cal. Gov. Code § 53060.4 (Effective Date 01/01/2017).

V. Drug Testing

A. Recreational Marijuana

California voters recently approved the Control, Regulate, and Tax Adult Use of Marijuana Act, which permits adults to possess and use marijuana recreationally. The Act does not change California employment law. Under the Act, employers are specifically allowed to enact and enforce drug and alcohol-free workplace policies that prohibit the use of marijuana by both employees and prospective employees.

Employers are not required to permit or accommodate the use of recreational marijuana in the workplace, and may prohibit any actions or conduct otherwise permitted by the Act on their privately owned property. Additionally, the law does not require employers to commit any acts that would violate either state or federal law. Moreover, the Act does not change existing laws that make it unlawful to operate a vehicle while impaired by marijuana, nor does it excuse any act that would be considered negligence or malpractice if conducted while under the influence of the drug.

The law is codified at California Health and Safety Code sections 11018-11018.2, 11018.5, 11357-11360, 11361.1, 11361.5, 11361.8, 11362.1-11362.45, 11362.84-11362.85, 11362.712-11362.713, 11362.755; Business and Professions Code Division 10; Labor Code section 147.6; Water Code section 13276; Revenue and Taxation Code Division 2, Part 14.5 (commencing with section 34010); and Food and Agricultural Code sections 81000, 81006, 81008, 81010.

VI. Noncompete and Other Employment Agreements

California law regulates certain terms and conditions found in employment contracts. The new law will add conditions regarding the forum in which a California employee may pursue a claim against an employer to all contracts entered, modified, or extended after January 1, 2017. Under the new law, when an employee primarily resides and works in California, an employer cannot require the employee, as a condition of employment, to agree to:

- adjudicate a claim that arose in California outside of the state, or
- waive the substantive protections of California law in an employment contract for claims that arise in California.

If a contract violates either of these requirements, it is voidable by the employee and the claim may be adjudicated in California under California law. The law applies to both litigation and arbitration proceedings.

The new law does not apply to employment contracts where an employee is individually represented by legal counsel while negotiating the portions of the contract that govern where a claim may be adjudicated or the choice of law to be applied in the adjudication.

Cal. Lab. Code § 925 (Effective Date 01/01/2017).

VII. Workplace Safety

A. Automated External Defibrillator Law

California has enacted new legislation to encourage the use of automated external defibrillators (AEDs). California law protects business entities by providing an exemption from civil liability when an individual uses an AED in good faith at the scene of an emergency. Prior to the enactment of SB 658, the law required an entity to maintain and test the AED every 30 days and have a written plan describing the procedures to follow in case of an emergency. Entities that provided up to five AEDs were required to have at least one

employee who was trained in CPR and at least one more CPR-trained employee for every five additional AEDs.

The amended law eliminates the employee CPR training requirements and clarifies that entities are not required to involve a medical doctor or physician to select, place or install an AED. In order for the exemption to apply, the person who uses the AED must be acting in good faith and not for compensation in response to an emergency. The amended law exempts entities that have an AED from civil liability if the entity:

- complies with all regulations governing the placement of an AED;
- notifies the local emergency medical service agency of the existence, location, and type of AED;
- maintains and tests the AED according to the manufacturer's guidelines;
- tests the AED at least twice a year and after each use;
- inspects all AEDs on the premises at least every 90 days; and
- maintains records of the maintenance and testing of the AED as required by the statute.

Cal. Civ. Code § 1714.21 and Cal. Health & Saf. Code § 1797.196 (Effective Date 01/01/2016).

B. Cell Phones and Driving

California law prohibits a person from driving a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication, as defined, unless the electronic wireless communications device is specifically designed, configured, and used to allow voice-operated and hands-free operation.

The new law repeals the existing provisions and reenacts the prohibitions against use of a cell phone or a wireless electronic communications device while driving, but makes certain exceptions. Specifically, the law authorizes a driver to operate a handheld wireless telephone or a wireless electronic communications device in a manner requiring the use of the driver's hand only if:

- the handheld wireless telephone or electronic wireless communications device is mounted on a vehicle's windshield in the same manner a portable Global Positioning System (GPS) is mounted or is mounted on or affixed to a vehicle's dashboard or center console in a manner that does not hinder the driver's view of the road, and
- the driver's hand is used to activate or deactivate a feature or function of the handheld wireless telephone or wireless communications device with the motion of a single swipe or tap of the driver's finger.

The new law defines "electronic wireless communications device" as including, but not limited to, a broadband personal communication device, a specialized mobile radio device, a handheld device or laptop computer with mobile data access, a pager, or a two-way messaging device.

Cal. Veh. Code § 23123.5 (Effective Date 01/01/2017).

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

A. Smoking in Owner-Operated Businesses

California law prohibits smoking in enclosed places at a place of employment. The amendments expand the prohibition on smoking to include owner-operated businesses. An "owner-operated business" is one with no employees, independent contractors, or volunteers, where the owner is the only worker. Owner-operated businesses must now follow the same guidelines as other employers regarding preventing and stopping smoking in places of employment and enclosed spaces.

The amendments expand the definition of an "enclosed space" in which smoking is prohibited to include covered parking lots. Further, the law amends the definition of "place of employment" to eliminate many of the listed exceptions from the definition and to include 20% of the guest room accommodations in a hotel or motel rather than 65%.

Cal. Lab. Code § 6404.5 (Effective Date 06/09/2016).

B. Smoking in the Workplace

California law defines a "tobacco product" as any product containing tobacco leaf, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, or any other preparation of tobacco.

The amendments modify the definition of "tobacco product" to include products containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff. Also included are electronic devices that deliver nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah.

The amendments add a definition of "smoking." "Smoking" means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, whether natural or synthetic, in any manner or in any form. "Smoking" includes the use of an electronic smoking device that creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking.

The definition of "enclosed space" now includes covered parking lots.

Prohibition on Smoking in Places of Employment

The amendments eliminate previous law that allowed smoking in designated employee breakrooms that vented directly to the outside and allowed employers with five or fewer employees to smoke in certain nonwork areas. Therefore, going forward, all places of employment should be smoke-free.

Cal. Lab. Code § 6404.5 and Cal Bus & Prof Code § 22950.5 (Effective Date 06/09/2016).

C. Use of E-Verify

California law permits private employers to use the federal E-Verify system on a voluntary basis to verify that the employees they hire are authorized to work in the United States. This new law makes it an unlawful employment practice for employers to verify an individual's employment authorization status in a manner inconsistent with federal law. Except as required by federal law or as a condition of receiving federal funds, employers cannot use E-Verify at a time or in a manner not required under 8 U.S.C. § 1324a(b), or not authorized under any federal agency memorandum of understanding governing the use of a federal electronic employment verification. For example, an employer is prohibited from using E-Verify to check the employment authorization status of an existing employee or an applicant who has not been offered employment. However, the new law does not prohibit an employer from using E-Verify in accordance with federal law to check the employment authorization status of an applicant who has been offered employment.

The new law also imposes a pre-adverse action notification requirement. If the employer receives a tentative non-confirmation issued by the Social Security Administration (SSA) or the United States Department of Homeland Security (DHS) indicating the information entered in E-Verify did not match federal records, the employer must comply with the required employee notification procedures under any memorandum of understanding governing the use of E-Verify. As soon as practicable, the employer must provide to the employee any SSA or DHS notification containing information specific to the employee's E-Verify case or any tentative non-confirmation notice.

Finally, the new law sets significant penalties for violating its terms. In addition to other available remedies, an employer that violates this law is liable for a civil penalty not to exceed \$10,000 for each violation. Each unlawful use of the E-Verify system on an employee or applicant constitutes a separate violation.

Cal. Lab. Code § 2814 (Effective Date 01/01/2016).

D. National Guard Protections

California law provides protections for state National Guard members ordered into active service by the Governor of California or by the President of the United States for emergency purposes. The law protects these servicemembers' right to reinstatement to private employment after the period of military service is completed. This amendment extends the leave of absence and reinstatement protections to members of the National Guards of other U.S. states who are called into active service by a state governor or by the President of the United States.

The amendment provides that in order to be eligible for reinstatement, the employee must meet all of the following requirements:

1. The employee is an officer or enlisted member of the National Guard of any state;
2. The employee was called to active duty by the governor of the state where s/he serves in the National Guard or by the President of the United States;
3. The employee received a certificate of satisfactory service in the National Guard;
4. The employee is still qualified to perform the duties of the position; and

5. The employee applied for reemployment within 40 days of being released from service in the case of full-time employment, or within five days of being released from service in the case of part-time employment.

The terms and conditions of reinstatement depend on whether the employee held a full-time or a part-time position prior to the period of military service. Temporary employment positions are not eligible for reinstatement protection. An employer must restore a former full-time employee to his or her former position or to a position of similar seniority, status, and pay without loss of retirement or other benefits, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. An employer must restore a former part-time employee to his or her former position or to a position of similar seniority, status, and pay, if any exist. Both full-time and part-time employees are subsequently protected from discharge without cause for one year after reinstatement.

Cal. Mil. & Vet. Code § 395.06 (Effective Date 01/01/2016).

E. Definition of Personal Information

California has amended its data security breach notification law. The law requires any person or business that owns or licenses computerized data that includes personal information ("covered entity") to disclose a breach of the security of the system to individuals affected by the breach. The law defines "personal information" as an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security Number;
- Driver's license number or California identification card number;
- Account number or credit or debit card number in combination with any required security code, access code or password that would permit access to the account; or
- Medical information, including any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional.

The amendment retains the definition, but expands the list above to add the following data elements:

- Health insurance information.
- A user name or email address, in combination with a password or security question and answer that would permit access to an online account.

"Health insurance information" means an individual's insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's application and claims history, including any appeals records.

Cal. Civ. Code § 1798.81.5 (Effective Date 01/01/2016).

F. All-Gender Toilet Facilities

The new law mandates that where a business establishment or place of public accommodation has a single-user toilet facility, defined as a facility that contains no more than one toilet and one urinal with a user-controlled locking mechanism, the facility must be

identified as an all-gender toilet facility. The business must post a restroom sign that complies with Title 24 of the California Code of Regulations that identifies the facility.

Cal. Health & Saf. Code § 118600 (Effective Date 03/01/2017).

G. Automatic Retirement Savings Program

In 2012, California established the California Secure Choice Retirement Savings Trust to provide a statewide payroll deposit retirement savings arrangement for private-sector employees without access to an employer-sponsored retirement plan. The new law provides for the implementation of the program as of January 1, 2017, and makes several changes to the program as originally designed. Once the California Secure Choice Retirement Savings Investment Board (“Board”) opens the California Secure Choice Retirement Savings Program for enrollment, any employer may choose to have a payroll deposit retirement savings arrangement to allow employee participation in the program under the terms and conditions prescribed by the Board. However, employers retain the option at all times to set up any type of employer-sponsored retirement plan, such as a defined benefit plan or a 401(k), Simplified Employee Pension (SEP) plan, or Savings Incentive Match Plan for Employees (SIMPLE) plan, or to offer an automatic enrollment payroll deduction IRA. Such employers are exempt from the requirement to provide a payroll deposit retirement savings arrangement to allow employee participation in the California Secure Choice Retirement Savings Program.

The amended law extends the timeframe in which employers are required to offer the California Secure Choice Retirement Savings Program to employees after the Board opens the program for enrollment:

- within 12 months for employers that do not offer a qualifying retirement savings program and that have more than 100 eligible employees;
- within 24 months for employers that do not offer a qualifying retirement savings program and that have between 50 and 100 employees; and
- within 36 months for employers that do not offer a qualifying retirement savings program and that have between 5 and 50 employees.

The Board will publish and electronically disseminate to employers an information packet describing the details of the program and an employee’s rights and obligations thereunder. Once a participating employer begins its initial launch of the program, the employer must provide the information packet, along with the accompanying disclosure and opt-out forms, to existing employees and to any subsequent new employees at the time of hiring. The employees must sign and return the disclosure form (and the opt-out form, if applicable).

The law provides that an eligible employee must be enrolled in the retirement savings program unless the employee voluntarily chooses not to participate. Unless the employee specifies otherwise, a participating employee’s contribution rate is set at 3% of his or her annual salary or wages. The amended law permits the Board to adjust the contribution amount to no less than 2% and no more than 5% and may vary that amount within the 2-5% range for participating employees according to the length of time the employee has contributed to the program. The amended law further permits the Board to implement annual automatic escalation of employee contributions up to a cap of 8% of an employee’s salary, subject to certain limitations, though a participating employee may elect to opt out of automatic escalation and may set his or her contribution percentage rate at a level he or she determines.

With respect to employer liability, the amended law clarifies that:

- employers are not fiduciaries of the California Secure Choice Retirement Savings Program and are not liable for the administration, investment, or investment performance of the program or the investment returns, program design, and benefits paid to program participants;
- employers do not incur civil liability, and no cause of action may arise against an employer, for acting pursuant to the regulations prescribed by the Board defining the roles and responsibilities of employers that have a payroll deposit retirement savings arrangement to allow employee participation in the program; and
- the program is a state-administered program, not an employer-sponsored program, and if the program is subsequently found to be preempted by any federal law or regulation, employers will not be liable as plan sponsors.

Cal. Gov. Code § 100000, Cal. Gov. Code § 100002, Cal. Gov. Code § 100004, Cal. Gov. Code § 100008, Cal. Gov. Code § 100010, Cal. Gov. Code § 100012, Cal. Gov. Code § 100014, Cal. Gov. Code § 100032, Cal. Gov. Code § 100034, Cal. Gov. Code § 100036, Cal. Gov. Code § 100043, Cal. Gov. Code § 100046, Cal. Gov. Code § 100048, Cal. Gov. Code § 100049, and Cal. Gov. Code § 100050 and Cal. Wel. & Inst. Code § 12302.2 (Effective Date 01/01/2017).

H. Commuter Benefits

California instituted a pilot program to encourage commuting in the San Francisco Bay Area in 2012. The commuter benefit program, as enacted in 2012, requires covered employers (employers with an average of 50 or more full-time employees who work within the Bay Area Air Quality Management District) to provide at least one of the following commuter benefits to their employees:

1. a pre-tax option that allows employees to elect to exclude commuting costs for transit passes, bicycling, or vanpool charges from their taxable wages;
2. an employer-paid benefit option that provides a subsidy to employees equal to the monthly cost of commuting via transit or vanpool, or \$75, whichever is lower;
3. an employer-provided transit option that furnishes no- or low-cost vanpools, busses, or multi-passenger vehicles operated by or for the employer; or
4. an approved alternative commuter benefit that reduces the use of single-occupant vehicles.

Under the 2012 statute, the pilot program was slated to sunset on January 1, 2017. The amended law, however, extends the program indefinitely.

Changes to Prior Statute

The amendments no longer allow bicycle commuters to participate in a pretax program for bicycle expenses, but instead allow employers the option to offer a subsidy to offset the monthly cost of bicycle transportation. If the employer chooses to offer these subsidies for bicycle commuting, the subsidy will be either \$20 or the monthly cost of commuting by bicycle, whichever is lower.

Cal. Gov. Code § 65081 (Effective Date 01/01/2017).

I. Data Security Breach

California law currently requires any person or business that owns or licenses computerized data that includes personal information to, upon discovery, disclose any breach of unencrypted personal information. This amendment expands the notification requirement to include breaches of encrypted personal information that is, or is reasonably believed to have been, acquired by an unauthorized person, and the encryption or security credential—which could render that personal information readable or useable could—was, or is reasonably believed to have been, also impermissibly acquired.

The amendment defines “encryption key” and “security credential” as the confidential key or process designed to render the data useable, readable, and decipherable.

Cal. Civ. Code § 1789.29 and Cal. Civ. Code § 1798.82 (Effective Date 01/01/2017)

J. Data Security Breach Notification

California has amended its data security breach notification law. The law requires any person or business that owns or licenses computerized data that includes personal information (“covered entity”) to disclose a breach of the security of the system in the most expedient time possible and without unreasonable delay. The law also sets forth specific requirements for security breach notification, including that the notification be written in plain language.

Format and Content of Data Security Breach Notification

The amendment creates new requirements for the format and content of a data security breach notification. As a clarification of and expansion on the plain language requirement, the notification must be titled "Notice of Data Breach," and must present the required information under the following headings:

- What Happened
- What Information Was Involved
- What We Are Doing
- What You Can Do
- For More Information

The amendment further provides that the security breach notification must include, at a minimum, the following information:

- The name and contact information of the covered entity reporting the breach;
- A list of the types of personal information that were or are reasonably believed to have been the subject of a breach;

If possible:

- Date of the breach,
- Estimated date of the breach, or

- The date range within which the breach occurred.
- The date of the notice;
- Whether notification was delayed as a result of a law enforcement investigation, if that information is possible to determine at the time the notice is provided;
- A general description of the breach incident, if that information is possible to determine at the time the notice is provided;
- The toll-free telephone numbers and addresses of the major credit reporting agencies if the breach exposed a social security number or a driver's license or California identification card number; and
- If the covered entity providing the notification was the source of the breach, an offer to provide—at no cost—appropriate identity theft prevention and mitigation services to the affected person for not less than 12 months, along with all information necessary to take advantage of the offer to any person whose information was or may have been breached if the breach exposed or may have exposed personal information.

At the discretion of the covered entity, the security breach notification may also include any of the following:

- Information about what the covered entity has done to protect individuals whose information has been breached.
- Advice on steps that the person whose information has been breached may take to protect himself or herself.

The amendment provides additional requirements for the format of the security breach notification. The notice must be designed to call attention to the nature and significance of the information it contains. The title and headings in the notice must be clearly and conspicuously displayed, and the text of the notice must be printed in 10-point type or larger. In addition, the amendment provides a model security breach notification form. Use of the model form is not required so long as the notification is in compliance with the other content and format requirements set forth in the amendment.

Online Substitute Notice

Under certain circumstances, California's data security breach law permits a covered entity to effect data security breach notification via substitute notice. Substitute notice must be carried out via email notice, statewide media notice, and conspicuous posting of the notice on the covered entity's website, if it maintains a website.

With respect to posting the substitute notice online, the amendments clarify that the notice must be posted on the covered entity's website for a minimum of 30 days. "Conspicuous posting" means providing a link to the notice on the home page or on the first significant page after entering the website. The link must be in a type larger than the surrounding text, or in

contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the link.

Cal. Civ. Code §§ 1798.29, 1798.80 and 1798.82. (01/01/2016).

K. California Earned Income Tax Credit Notifications

Both California and federal tax law allow an earned income credit (EITC) against personal income tax, and a payment in excess of that credit amount, to an eligible individual. The federal Earned Income Tax Credit Information Act requires an employer to notify all employees that they may be eligible for the federal earned income tax credit. The new law requires covered employers to notify covered employees that that they may also be eligible for the California Earned Income Tax Credit. A covered employer is any California employer who is subject to, and is required to provide, unemployment insurance to his or her employees, under the California Unemployment Insurance Code. A covered employee is any person who is covered by unemployment insurance by his or her employer pursuant to the Unemployment Insurance Code.

Employers must notify employees within one week before or after, or at the same time, the employer provides to the employee an annual wage summary, including but not limited to a Form W-2 or a Form 1099. The new law sets forth the required language for the notification in the form of a model notice. The employer must provide the required notification by providing a physical copy to the employee or mailing it to the employee's last known address. The notification must include:

- instructions on how to obtain any notices available from the Internal Revenue Service and the Franchise Tax Board including, but not limited to, the IRS Notice 797 and information on the California EITC's website; or
- any notice created by the employer, as long as it contains substantially the same language as the notice described in the above paragraph or in the sample language provided by the amendment.

The new law provides that an employer cannot satisfy the notification requirements by posting a notice on an employee bulletin board or sending it through office mail. However, these methods of notification are encouraged to help inform all employees of the federal and the California EITC.

Cal. Rev. & Tax Code § 19851, Cal. Rev. & Tax Code § 19852, Cal. Rev. & Tax Code § 19853, and Cal. Rev. & Tax Code § 19854 (Effective Date 01/01/2017).

L. Unemployment Insurance: Electronic Reporting and Funds Transfers

The California Unemployment Insurance Code requires employers to make contributions for unemployment insurance premiums and to file a report of contributions, a quarterly return, a report of wages paid, and an annual reconciliation return to the Director of Employment Development. The law also provides that an electronic funds transfer of contributions satisfies the report of contributions filing requirements.

The amendment requires employers with 10 or more employees to file all reports and returns electronically and to make all contributions for unemployment insurance premiums by electronic funds transfer beginning January 1, 2017. Beginning on January 1, 2018, the requirements would be extended to employers with fewer than 10 employees. The Director of Employment Development may grant the employer a waiver from the electronic filing requirements if the employer establishes a lack of automation, a severe economic hardship, a

current exemption from filing electronically for federal purpose, or any other good cause. Employers who fail to file required returns, reports and payments electronically without good cause will be subject to a 15% penalty for failing to timely pay contributions, a \$20 penalty for each unreported wage item, and a \$50 penalty for failing to file a quarterly return electronically. Employers not previously required to use electronic means for submitting payments and information will not be subject to these penalties for failing to use electronic means between January 1, 2017 and January 1, 2019, so long as they file information and remit payments within the time required by law.

California Unemployment Insurance Code §§ 1088, 1110, 1112, 1114, 13002, and 13021; 1112.1.