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I. AT-WILL EMPLOYMENT

A. Statute

The “at-will” rule in California is codified in California LABOR CODE Section 2922, which reads in pertinent part: “An employment, having no specified term, may be terminated at the will of either party on notice to the other.” This rule means that either the employer or the employee may terminate their employment relationship at any time, with or without cause.

B. Case Law

In *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 677 (1988), the California Supreme Court held that it is well established in California, and a fundamental principle of the freedom to contract, that an employer and employee are free to enter into a contract terminable at will. With respect to terminating the employment relationship with or without cause, “cause” has been interpreted to mean a fair and honest cause or reason, acted on good faith, by the employer. *R.J. Cardinal v. Ritchie*, 218 Cal.App.2d 124, 146 (1963). For example, in *Stokes v. Dole Nut Company*, 41 Cal.App.4th 285, 293 (1985), the Court held that an employee creating a competing business constitutes lack of loyalty and creates conflicts of interest that are just cause for termination.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

While there is a presumption under California law that employment is terminable “at-will” when there is no written employment agreement, there are various exceptions to the at-will presumption including: an implied-in-fact covenant to terminate only for good cause; an implied-in-fact covenant of good faith and fair dealing; wrongful termination in violation of fundamental public policy; and state and federal prohibitions against employment discrimination. Accordingly, it is in the best interest of the employer to maintain an employee handbook that includes a strong statement that employment is at-will, and can be terminated at any time with or without cause and with or without notice.

A. Implied Contracts

a. Pugh v. See’s Candies, Inc.

Pugh v. See’s Candies, Inc., 116 Cal.App.3d 311, (1981), overruled in part by *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317 (2000), on other grounds, is the first detailed analysis of the cause of action for breach of an implied in-fact agreement not to terminate except for good cause, based on the court’s “totality of the relationship between the parties” analysis.

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Pugh had worked for See's Candies for 32 years. When initially employed by See's, the president of the company frequently told Pugh "if you are loyal to [See's] and do a good job, your future is secure." *Pugh*, 116 Cal.App.3d at 317. In addition, Laurence See, president of See's from 1951-1969, had a practice of not terminating administrative personnel except for good cause. *Id.* Similarly, Charles B. See, who succeeded Laurence as president, continued the practice of not terminating personnel without good cause. *Id.*

Pugh worked his way up from washing pots and pans to vice-president in charge of production. *Pugh*, 116 Cal.App.3d at 316. During the entire period of his employment, he had not received any formal or written criticism of his work. *Id.* In 1972, Pugh received a gold watch for his accomplishments and 31 years of loyal service. *Id.* In June 1973, Charles Higgins, then president of See's, told Pugh that his services were no longer needed, and that his employment would be terminated immediately. *Id.*, 116 Cal.App.3d at 317. No reason was given for Pugh's termination. *Id.*

As a consequence of the company's action, Pugh filed suit alleging wrongful termination in violation of an implied promise by the company not to terminate without good cause. The California Court of Appeals found sufficient facts in evidence for a jury to determine that such an implied promise existed. *Pugh*, 116 Cal.App.3d at 329. The court held that the "duration of appellant's employment, the commendations and promotion he received, the apparent lack of any direct criticism of his work, the assurances he was given [by Laurence and Charles See], and the employer's acknowledged policies" established an implied-in-fact agreement to terminate only for good cause. *Id.* The court stated that "it is appropriate to consider the totality of the parties' relationship: An agreement may be 'shown by the acts and the conduct of the parties, interpreted in the light of the subject matter and the surrounding circumstances.'" *Id.*, quoting *Marvin v. Marvin*, 18 Cal.3d 660 (1976).

b. Foley v. Interactive Data Corp.

In *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 700 (1988), the California Supreme Court approved this reasoning but held that tort damages were not available for breach of such an implied agreement.

c. Dore v. Arnold Worldwide, Inc.

In *Dore v. Arnold Worldwide, Inc.*, 39 Cal.4th 384 (2006), the California Supreme Court held that an employment contract providing for termination "at any time," without more, does not create an implied-in-fact agreement that termination will occur only for cause. Arnold Communications, Inc. ("AWI"), provided an offer letter to Dore that stated, "please know that as with all of our company employees, your employment with Arnold Communications, Inc. is at will." *Id.* at 388. The letter explained "at will" as follows: "This simply means that AWI has the right to terminate your employment at anytime just as you have the right to terminate your employment with AWI at any time." *Id.*

After his employment was terminated, Dore sued claiming that, because AWI's offer letter only stated that employment was terminable "at any time," and did not expressly explain whether just cause was required for termination, the offer was ambiguous. Dore sought to introduce evidence that the employer had to establish good cause for the termination. *Id.* at 391. The court rejected Dore's argument, explaining that the language allowing termination of employment "at any time," would make no sense if the parties meant that employment could be terminated only with cause. *Id.* The court held "[t]hat AWI's letter went on to define at-will employment as employment that may be terminated at any time did not

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introduce ambiguity rendering the letter susceptible of being interpreted as allowing for an implied agreement that Dore could be terminated only for cause." *Id.* at 392.

1. Employee Handbooks/Personnel Materials

a. Haggard v. Kimberly

On June 8, 1989, Haggard signed an "Employment and Confidentiality Agreement" with her employer, Kimberly Quality Care (KQC). *Haggard v. Kimberly Quality Care, Inc.*, 39 Cal.App.4th 508, 514 (1995). The Agreement contained provisions stating that "either Employee or the Company can terminate the employment relationship at will, at any time, with or without cause or advance notice." *Id.* The Agreement further provided that "no employee or representative of the Company, other than the president of Company, has any authority to enter into [a contrary written] agreement." *Id.* In 1991, Haggard signed and dated an acknowledgment of her receipt of the KQC employee handbook. *Id.* at 515. The acknowledgement reiterated the fact that Haggard was an at-will employee, and that the policies and guidelines in the handbook did not give rise to contractual rights or obligations. *Id.*

In 1992, Haggard's employment was terminated because she allegedly allowed an unlicensed nurse to care for a ventilator patient, which was in violation of KQC's policies and state regulations. *Id.* Haggard filed suit contending that the termination was a breach of an implied-in-fact agreement not to terminate except for good cause. *Id.* She argued that the duration of her employment, promotions, raises, annual performance evaluations, and the KQC employee handbook was all evidence of an implied agreement. *Id.* at 516. On appeal, the appellate court reversed the trial court's decision in favor of Haggard. *Id.* at 513-14.

The court held that the trial court erred by allowing parole evidence of an implied in fact contract, because the 1989 written agreement between the parties had an integration clause which precluded any agreement to the contrary. *Id.* at 521. The court reiterated that "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results." *Id.*, citing *Malstrom v. Kaiser Aluminum & Chem. Corp.*, 187 Cal.App.3d 299, 316 (1986). Haggard asserted that, because the employee handbook included a signed letter by the president and was acknowledged by Haggard, it was evidence of a modification of the 1989 written agreement. *Id.* at 522. However, the court concluded that there was nothing in the employee handbook that modified the at-will provision of the 1989 agreement, and that the handbook was entirely consistent with the 1989 agreement. *Id.* at 524.

b. Walker v. Blue Cross

At-will language in the employee handbook does not establish an at-will relationship as a matter of law. See *Walker v. Blue Cross*, 4 Cal.App.4th 985, 990-91(1992)(abrogated on other grounds in *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317(2000)).

Walker was hired by Blue Cross as an applications clerk in 1969. *Id.* at 990-91. By 1985, Walker had received numerous promotions, and at no time did she receive any negative performance evaluations. *Id.* at 991. Sometime in 1983, Walker fractured her ankle and was unable to work for five months. *Id.* After returning to work, her doctor informed her that additional surgery would be required. *Id.* at 991. Before the additional surgery, Walker spoke to individuals in Blue Cross' personnel office who informed her that under the policy that was in place, she could request an extension of up to 12 months if

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the initial six month leave period was not sufficient. *Id.* at 991. Walker elected to go ahead with the surgery in August 1987. *Id.*

In January 1988, Blue Cross amended its medical leave policy allowing a maximum of six months leave for an employee within an 18-month period. *Walker* at 992. Walker was told that the new policy would apply to her, and no extension would be given. *Id.* Walker reported to work after the expiration of her leave, but her doctor determined that she should take another month off due to increased swelling and discomfort. *Id.* Walker decided to take the advice of her physician and notified her manager of the doctor's evaluation. *Id.* Immediately thereafter, Blue Cross sent Walker a letter informing her that if she did not return to work, her employment would be terminated. *Id.* Walker did not return to work and Blue Cross notified her that her employment had been terminated for violating the new medical leave policy. *Id.*

Walker brought an action against Blue Cross for breach of the implied contract not to terminate except for good cause. *Walker* at 990. The court held that, without an integrated written agreement, signed by the employee, the language in the employee handbook that employment is at-will does not establish the relationship as such as a matter of law. *Id.* at 993 – 94; Furthermore, the court reasoned that viewing the totality of the circumstances, including Walker's 19-plus years of service, consistent promotions, and personnel policies in existence during her employment, there was a triable issue of fact as to whether there was good cause to terminate Walker's employment. *Id.* at 995.

2. Provisions Regarding Fair Treatment

In *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 327(2000), John Guz worked for Bechtel for more than 20 years. During that time, he received regular raises and promotions and good performance reviews *Id.* at 327-28. Bechtel's written personnel policies detailed a form of progressive discipline. The personnel policies also stated that "Bechtel employees have no employment agreements guaranteeing continuous service and may resign at their option or be terminated at the option of Bechtel." *Id.* at 328. Bechtel terminated Guz's employment when it eliminated his work unit and transferred the unit's tasks to another Bechtel office. *Id.* at 330.

Guz contended that his 20 years of service, inclusive of the raises, and promotions were sufficient to create an implied in fact contract requiring good cause to terminate his employment. *Id.* at 341. The California Supreme Court rejected this contention, ruling that an express at-will employment provision could not be trumped by the implied covenant of good faith and fair dealing. "[W]hile the implied covenant requires mutual fairness in applying a contract's actual terms, it cannot substantively *alter* those terms." *Id.* at 327. "The mere existence of an employment relationship affords no expectation, protectable by law, that employment will continue, or will end only on certain conditions, unless the parties have actually adopted such terms." *Id.* at 350.

Moreover, "long duration of service, regular promotions, favorable performance reviews, praise from supervisors, and salary increases do not, without more, imply an employer's contractual intent to relinquish its at-will rights." *Id.* at 341 (citations omitted). "[S]uch events are but natural consequences of a well-functioning employment relationship, and thus have no special tendency to prove that the employer's at-will implied agreement ... has become one that limits the employer's future termination rights." *Id.* The proper issue is "whether the employer's words or conduct, on which the employee reasonably relied, gave rise to that *specific* understanding" that the employee could be terminated only for good cause. *Id.* at 342 (emphasis in original).

3. Disclaimers

The California Supreme Court discussed the impact of disclaimer language contained in an employee handbook in *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 31 (2000). The key facts of the *Guz* case are set forth in Section 2, above. While *Guz* worked for Bechtel, the company had a personnel policy that stated: "Bechtel employees have no employment agreements guaranteeing continuous service and may resign at their option or be terminated at the option of Bechtel." *Id.* at 328. The court explained,

"[D]isclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed."

Id. at 340 (citations omitted).

"Of course, the more clear, prominent, complete, consistent, and all-encompassing the disclaimer language set forth in handbooks, policy manuals, and memoranda disseminated to employees, the greater the likelihood that workers could not form any reasonable contrary understanding." *Id.* at 340, n. 11. The court concluded that Bechtel's policy was not so clear as to foreclose an employee from forming a reasonable understanding that employment would be terminated only for cause. *Id.*

Thus, from an employer's perspective, the best practice is to have the employee acknowledge in writing that he/she is an at-will employee, as an express at-will provision cannot be overcome by proof of an implied contrary understanding addressing the same. *Starzynski v. Capital Public Radio*, 88 Cal.App.4th 33 (2001).

In *Starzynski*, *Starzynski* was employed for almost 20 years and even though he signed an at-will employment contract, his supervisor orally assured him several times that his employment could be terminated only for good cause. *Id.* at 36. *Starzynski* resigned and filed a complaint, alleging wrongful discharge and that he was constructively discharged when he resigned because of intolerable working conditions. *Id.* When summary judgment was granted in favor of defendant, *Starzynski* appealed. *Id.* The appellate court affirmed, finding that the written agreement signed by *Starzynski* clearly and unambiguously told him that his employment was at-will and that only the board of directors, by "affirmative action," could change the at-will nature of *Starzynski's* employment. *Id.* at 39.

An employer should still be mindful, however, that even when the employer issues a handbook with disclaimers stating that the handbook is not intended to create a legally enforceable agreement, some courts have not recognized and given weight to the disclaimer. See *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772 (9th Cir. 1990).

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4. Implied Covenants of Good Faith and Fair Dealing

a. General Dynamics v. Superior Court

Andrew Rose, an attorney, was employed at General Dynamics in its Pomona plant. *Gen. Dynamics Corp. v. Superior Court*, 7 Cal.4th 1164, 1170 (1984). Rose's career at General Dynamics progressed steadily, and after 14 years with the company he was in line to become general counsel. *Id.* General Dynamics abruptly terminated his employment in 1991, stating that the company had lost confidence in Rose's ability to represent the company's interests. *Id.* at 1171.

Rose filed suit contending that General Dynamics breached an implied-in-fact agreement not to terminate his employment except for good cause, and the reasons given for his termination, including leading an investigation of employee drug use at the General Dynamics plant, were pretextual. *Id.* at 1170-71. General Dynamics argued that a client has the "unilateral right ... to terminate the professional relationship [with its attorney] at any time" without liability. *Id.* at 1171. The court disagreed, holding that the relationship between a corporation and its in-house attorney is different than that of an independent practitioner. The court concluded that an attorney's status as legal in-house counsel for an employer does not bar the attorney from maintaining an action for breach of an implied-in-fact agreement. *Id.* at 1177. However, the court noted that "in the case of confidential corporate employees such as attorneys, an employer has wide latitude in determining the circumstances under which it has just or good cause to terminate the relationship." *Id.* at 1179.

b. Scott v. Pacific Gas & Electric Co.

In *Scott et al. v. Pacific Gas & Electric Co.*, 11 Cal.4th 454 (1995), plaintiffs were employed by Pacific Gas & Electric Co. ("PG&E") in a senior managerial capacity when they were demoted. The demotion resulted in a reduction in salary and benefits, as well as a loss of all supervisory authority. *Id.* at 460. Plaintiffs sued PG&E, claiming among other things that PG&E had breached an implied-in-fact contract term not to demote their employees except for good cause. The trial court found that such a contract existed and had been breached, and awarded each plaintiff a substantial amount in compensatory damages for past and anticipated future lost earnings. *Id.* The appellate court reversed, holding that courts should not recognize or enforce such agreements for various reasons of law and public policy. *Id.* at 462. The California Supreme court reversed, holding that there was ample evidence from PG&E's personnel policy manual, and the testimony of one of PG&E's own human resources managers, to support the finding of an agreement to discipline its employees only for good cause. *Id.* at 473.

c. Guz v. Bechtel National, Inc.

During the more than 20 years that Guz worked for Bechtel, he received regular raises, promotions, and good performance reviews. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 327-28 (2000). Bechtel's written personnel policies detailed a form of progressive discipline, so employees could be terminated at Bechtel's option. *Id.* at 328. Bechtel terminated Guz's employment when it eliminated his work unit and transferred the unit's tasks to another Bechtel office. *Id.* at 330.

The California Supreme Court rejected Guz's claim for breach of the implied covenant of good faith and fair dealing. *Id.* at 348. The court ruled that "[w]here the employment contract itself allows the employer to terminate at will, its motive and lack of care in doing so are, in most cases at least,

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irrelevant". *Id.* at 351. Moreover, the implied covenant of good faith and fair dealing could not impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. *Id.*

d. Foley v. Interactive Data Corp.

Foley was hired by Interactive Data Corporation (IDC) in June of 1976 as an assistant product manager. *Foley v. Interactive Data Corp.* 47 Cal.3d 654, 663 (1988). He signed a covenant not to compete as well as a "Disclosure and Assignment of Information" form as conditions of employment. *Id.* Over the course of approximately six and a half years, Foley received a series of salary increases, promotions, awards, bonuses, and superior performance evaluations. *Id.* In January 1983, Foley reported to IDC that his supervisor, Kuhne, was under investigation by the FBI for embezzlement from his former employer. *Id.* at 664. Foley was told to "forget what he heard." *Id.* In March, Kuhne informed Foley that he was being replaced due to performance reasons and he could either accept a transfer or risk demotion. *Id.* About two weeks later, Kuhne told Foley that his choice was resigning or being fired. *Id.*

Foley filed suit seeking both compensatory and punitive damages for wrongful discharge. *Id.* He alleged, inter alia, discharge in violation of an implied covenant of good faith and fair dealing. *Id.* The trial court and court of appeals both found for the defendant and the supreme court affirmed, noting that:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. ... As to the scope of the covenant, '[t]he precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes.'

Id. at 683-84 (citations omitted).

The California Supreme Court acknowledged a contractual remedy for breach of the implied covenant of good faith but would not extend recovery to include tort damages. *Id.* at 699-700. The court stated, "[b]ecause the covenant is a contract term, however, compensation for its breach has almost always been limited to contract rather than tort remedies." *Id.* at 684. In *Foley*, the court reaffirmed the principle that only contract remedies are available for a cause of action alleging wrongful termination, unless the termination was a violation of public policy. *Id.* at 662.

B. Public Policy Exceptions

1. General

Courts may find that an employment relationship is not "at-will" where doing so would tread upon a fundamental public policy that inures to the benefit of the public at large. *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1104 (1992). Nevertheless, the public policy must be specifically recognized by statute, regulation, or constitutional provisions. *See e.g. Green v. Ralee Engineering Co.*, 19 Cal.4th 66 (1998). Moreover, in *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 695 (1988), the California Supreme Court ruled that an employee must show that the violated public policy is fundamental and of benefit to the general public, rather than just to that employee or employer.

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a. Gantt v. Sentry Insurance

Gantt was hired by Sentry to serve as sales manager of its Sacramento office. *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 1087 (1992), overruled in part by *Green v. Ralee Engineering Co.*, 19 Cal.4th 66 (1998), on other grounds. About four months later, Joyce Bruno was hired as liaison between trade associations and the Sacramento and Walnut Creek offices. *Id.* The manager of Sentry's Walnut Creek office sexually harassed Bruno and she complained to Gantt. *Id.* Gantt reported the incident, and the manager was ultimately demoted to sales representative. *Id.* Soon thereafter, Bruno was fired. *Id.* Bruno filed a complaint with the Department of Fair Employment and Housing (DFEH) and Gantt sensed that Caroline Fribance, Sentry's counsel, wanted him to retract his statement that he had reported Bruno's complaints. *Id.* at 1088.

Gantt was interviewed by the DFEH in the presence of Fribance. *Id.* at 1088. After Gantt related Bruno's complaints to the DFEH investigator, Fribance suggested that the DFEH investigate Gantt for sexual harassment because he was trying to deflect attention from his own harassment of Bruno. *Id.* at 1088-89.

Less than two months after the DFEH investigation, Gantt received an award on behalf of his office and then received a demotion the following morning. *Id.* at 1089. Gantt eventually took a position with another company and filed suit for retaliatory discharge. *Id.*

After describing the split of opinion among the appellate courts, the California Supreme Court held that for the public policy exception to at-will employment to be actionable as a tort, a plaintiff must allege violation of a fundamental public policy that inures to the benefit of the public at large. *Id.* at 1093-94.

The Court further stated that "courts in wrongful discharge actions may not declare public policy without a basis in either the constitution or statutory provisions." *Id.* at 1095. Consequently, "Sentry violated a fundamental public policy when it constructively discharged [Gant] "in retaliation for his refusal to testify untruthfully or to withhold testimony" in the course of the DFEH investigation." *Id.* at 1096.

b. Green v. Ralee Engineering Co.

In *Green v. Ralee Eng'g Co.*, 19 Cal.4th 66 (1998), the Supreme Court broadened the definition of what would constitute a fundamental public policy as announced in Gantt.

Green was a night shift quality control inspector for Ralee Engineering, a company whose primary line of work was manufacturing fuselage and wing components for military and civilian aircraft. *Id.* at 72-73. Plaintiff claimed that, in 1990, parts that had failed his inspection were being shipped out to airline assembly companies. *Id.* at 73. He complained about this practice internally but never to outside government sources. *Id.* Ralee terminated Green's employment in 1991, citing a downturn in demand for its products. *Id.* at 73. Green alleged Ralee terminated him for his objections to its inspection and shipping practices. *Id.*

The trial court granted summary judgment in the defendant's favor "because no statute or constitutional provision specifically prohibited" the practices complained about by Green. *Id.* The California Court of Appeals, however, found, and the Supreme Court agreed, that the plaintiff's reliance on the Federal Aviation Act of 1958 as a source of public policy was sufficient to find a basis for his claim.

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Id. at 74. The courts reasoned that "federal safety regulations promulgated to address important public safety concerns may serve as a source of fundamental public policy." *Id.* Thus, to the extent the ruling in *Gantt* can be read to state that important administrative regulations do not constitute fundamental public policy, it is specifically overruled by *Green*. *Id.* at 80, n.6.

2. Exercising a Legal Right

a. Barbee v. Household Auto Finance Corp.

Plaintiff Barbee's employment was terminated after his employer discovered that he was dating one of his subordinates. *Barbee v. Household Auto. Fin. Corp.*, 113 Cal.App.4th 525, 529 (2003). Barbee sued, claiming a violation of public policy pursuant to California Labor Code Section 96(k), which prohibits employers from taking adverse action against an employee for any "lawful conduct occurring during non-working hours away from the employer's premises." *Id.* at 533. The court affirmed summary judgment against the plaintiff in the lower court, indicating the defendant's express policy requiring a supervisor to disclose to the company the existence of a "consensual intimate relationship" with a subordinate employee had been violated. *Id.* Further, the court explained that Labor Code Section 96(k) cannot support a public policy claim because it did not create any new policy primarily providing a procedure by which the labor commissioner could vindicate existing public policies in favor of individual employees. *Id.* at 535-36.

b. Jersey v. John Muir Medical Center

The plaintiff in this case was an at-will hospital employee who was assaulted by a patient. *Jersey v. John Muir Med. Ctr.*, 97 Cal.App.4th 814, 818 (2002). The employee was terminated for bringing a personal injury action against the patient. *Id.* at 818. The court held that this did not violate fundamental public policy. *Id.* at 827.

c. Semore v. Pool

The plaintiff in this case, a chemical plant employee, who had been terminated for his refusal to consent to a papillary reaction eye test to determine whether he was under the influence of drugs, brought an action against his employer and its employee relations specialists alleging several causes of action against the employer. *Semore v. Pool*, 217 Cal.App.3d 1087, 1092 (1990). The trial court found that the employer had a compelling interest that its employees be free of the influence of drugs, that the eye test was a nonintrusive preliminary test, and that the employee should have had an expectation of a reasonable examination to determine fitness for work, and thus the court sustained defendants' demurrer without leave to amend. *Id.* at 1093.

The Court of Appeal reversed, and held that the trial court erred in sustaining the demurrer as to the wrongful termination action and actions for breach of express and implied contracts, since the right to privacy is a protection against nongovernmental as well as governmental intrusion, and the employee's allegation of violation of his right to privacy alleged actions under the public policy exception to the at-will doctrine. *Id.* at 1101.

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3. Refusing to Violate the Law

California public policy encourages employees to notify the appropriate government or law enforcement agency when the employee reasonably believes his/her employer is violating laws protecting corporate shareholders, investors, employees and the general public. Further, courts are not authorized to declare public policy.

In *Yanowitz v. L'Oreal USA, Inc.*, Yanowitz refused a directive from the general manager to terminate a female sales associate who, in the manager's view, was not sufficiently sexually attractive. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1035 (2005). Following the refusal to terminate the employee, the general manager allegedly criticized Yanowitz to such an extent that she left work on disability leave due to stress. *Id.* at 1040. After Yanowitz failed to return to her job, L'Oreal replaced her. *Id.* Yanowitz subsequently filed suit, alleging gender discrimination and illegal retaliation under California law. *Id.* The California Supreme Court held that an employee can maintain a retaliation action against an employer even where the employee's protected activity is 'subtle' and the employer's actions are negligible. *Id.* at 1047. Therefore, the court found that the general manager's conduct towards Yanowitz could be deemed retaliatory, that Yanowitz had engaged in a protected activity, and that she need not specifically state that she considered the general manager's directive discriminatory to oppose the action. See also CAL. LABOR CODE §§ 6310 and 6311 (regarding OSHA protection).

4. Exposing Illegal Activity (Whistleblowers)

Public policy is also invoked where the employee claims he was terminated for being a whistleblower or was terminated for refusing to engage in some unlawful conduct at the employer's request.

Specifically, Labor Code section 1102.5(a) specifically prohibits employers from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance; or from providing information to, or testifying before, any public body conducting an investigation if the employee has reasonable cause to believe that the information discloses a violation of state, federal, or local statute or regulation.

Section 1102.5(b) further prohibits employers from retaliating against employees for disclosing information or engaging in the activities protected in subsection (a). Additionally, employees who refuse to participate in an activity that would result in the violation of federal or state statute, or a violation or noncompliance with a local, state, or federal rule or regulation, are also protected from retaliation by section 1102.5(c).

Any corporation or limited liability company that violates Labor Code section 1102.5 is liable for a civil penalty not exceeding ten thousand dollars (\$10,000.00) **for each violation of the section.**

In *People Ex. Rel. Garcia-Browers v. Kolla's*, the Court held that Labor Code section 1102.5(b) applied to "reports or complaints of a violation made to an employer or agency even if the recipient already knows of the violation." (2023) 14 Cal.5th 719, 729 There, an employee complained to the employer about unpaid wages to which the employer responded by firing the employee and threatening to report her immigration status. Despite the employer already having knowledge of the unpaid wages

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before the employee's complaint, the Court held that the Labor Code protected an employee from retaliation for disclosing an unlawful activity to a person who is already aware of the violation.

a. Reeves v. Safeway Stores, Inc.

Plaintiff William Reeves made several complaints that women in his workplace were being sexually harassed. *Reeves v. Safeway Stores, Inc.*, 121 Cal.App.4th 95, 100 (2004). Reeves directed these complaints to one of the store managers, Fred Demarest. *Id.* Demarest did not take the complaints seriously and failed to relay them to human resources. *Id.* at 100-01.

Thereafter, Sandy Juarez, another Safeway employee, told Demarest that Reeves had shoved her. *Id.* at 102-03. Demarest discussed the incident with various Safeway employees, but not with Reeves. *Id.* at 103. Demarest then reported the events to Safeway's Security Department, which completed the investigation. *Id.* The Security Department advised the district manager, Moira Susan Hollis, that there had been a situation at the store, that Reeves had been abusive to Juarez, that Reeves had been under the influence of alcohol, that Reeves had pushed Juarez, and that Reeves had also been using profanity with and around other employees. *Id.* at 104. Based upon this report, Harris decided to terminate Reeves' employment. *Id.* Harris had no knowledge of Reeves' earlier reports of sexual harassment. *Id.*

Safeway sought summary judgment on Reeves' retaliation claim on the basis that there could be no causation between the protected activity and the termination because Harris, the ultimate decision maker, did not know that Reeves had reported sexual harassment. The appellate court explained that "ignorance of a worker's protected activities or status does not afford a categorical defense unless it extends to *all* corporate actors who contributed materially to an adverse employment decision." *Id.* at 110 (emphasis in original). Because Harris was acting on reports from Juarez, Demarest, and the Security Department, Safeway could not establish a defense based upon ignorance without showing that each of the reporting parties was ignorant of Reeves' protected complaints regarding sexual harassment. *Id.*

b. Rivera v. National Railroad Passenger Corp.

Plaintiff Rivera's employment was terminated for falsification of a timecard and threatening co-workers with physical harm. *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1077 (9th Cir. 2003). The plaintiff claimed his employment was actually terminated because he had reported the alleged use and sale of drugs and stealing of company parts. *Id.* at 1077-78. The court found there was no evidence that plaintiff had ever reported his supervisor's alleged illegal conduct, nor was there any evidence that the individuals who terminated the plaintiff had any knowledge of these allegations. *Id.* at 1079.

c. Collier v. Superior Court

Plaintiff, a former employee of a record manufacturer, brought an action against the manufacturer for wrongful termination in violation of public policy, breach of the covenant of good faith and fair dealing, and breach of an implied contract. *Collier v. Superior Court*, 228 Cal.App.3d 1117, 1121 (1991). Specifically, plaintiff alleged that he was terminated in retaliation for checking on, trying to prevent, and reporting to defendant possible illegal conduct (bribery and kickbacks, tax evasion, drug trafficking, money laundering, and violations of the federal antitrust laws) by other employees. *Id.* Defendant employer demurred to the cause of action for wrongful termination in violation of public policy, and the trial court sustained the demurrer without leave to amend. *Id.*

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The Court of Appeal set aside the demurrer, holding that plaintiff's report served not only the interests of his employer, but also the public interest in deterring crime and the interests of innocent persons (recording artists, state and federal tax authorities, and record retailers) who stood to suffer specific harm from the suspected illegal conduct. *Id.* at 1124. The court further held that retaliation by an employer when an employee seeks to further the well-established public policy against crime in the workplace seriously impairs the public interest, even when the employee is not coerced to participate or restrained from exercising a fundamental right. *Id.* at 1125.

III. CONSTRUCTIVE DISCHARGE

To prove constructive discharge an employee must show the employer intentionally created or knowingly permitted working conditions so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize a reasonable person in the employee's position would be compelled to resign.

A. Turner v. Anheuser-Busch, Inc.

In January 1984, plaintiff Turner began working for defendant Anheuser-Busch, Inc. (ABI) in its sales department. *Turner v. Anheuser-Busch, Inc.*, 7 Cal.4th 1238, 1243 (1994). Turner's initial position was "branch off-premises coordinator." *Id.* In May 1985, Turner was reassigned as the "assistant supervisor route sales," where he retained the same salary and level of responsibility. *Id.* Between 1984 and 1987, Turner received overall "good" ratings on written job performance evaluations. *Id.* However, in his 1988 evaluation, Turner received a "needs improvement" rating. *Id.* at 1244. In giving Turner the 1988 evaluation, ABI supervisors cited specific incidents and alleged that Turner's job performance had deteriorated. *Id.* Turner denied his supervisors' allegations and criticized their decision to delay discussion of the particular incidents, rather than discussing them at the time they occurred. *Id.*

On January 3, 1989, Turner tendered a letter of resignation to ABI, effective February 1, 1989. *Id.* After his departure, Turner filed suit against ABI alleging constructive wrongful discharge. *Id.* Turner based his constructive discharge claim on "three kinds of allegedly intolerable conditions that he claims precipitated his resignation in 1989: (1) the alleged illegal acts of other ABI employees which he observed and reported in 1984; (2) his reassignment in 1985; and (3) his low performance rating in 1988." *Id.* at 1254.

In discussing Turner's constructive discharge claim, the court stated:

In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. For the purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents or supervisory employees.

Id. at 1251.

Based on this reasoning, the court held that Turner's work environment was not sufficiently "intolerable" or "aggravated" to support his constructive discharge allegations. The court stated that "the

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mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." *Id.* at 1254. "Moreover, the so-called illegal acts in 1984 and Turner's 1985 reassignment were too remote in time and context from the 1989 resignation." *Id.* at 1255.

B. Gibson v. Aro Corp.

Gibson was the head of Aro's sales force for the Western United States from 1967 to July 1987. *Gibson v. Aro Corp.*, 32 Cal.App.4th 1628, 1631 (1995). In July 1987, Aro's top management decided to make changes to their sales force, and as a result, demoted Gibson to the position of field sales representative. *Id.* at 1631-32. After his demotion, Gibson quit his job even though his salary remained well above others in the position to which he was demoted. *Id.* at 1633. He filed a wrongful termination action alleging his demotion constituted constructive discharge. The court held that the demotion was not a constructive discharge because it would not be enough to compel a reasonable person to resign. *Id.* at 1635-36. The court further concluded that Gibson could not establish a cause of action for constructive discharge because he never notified Aro that the working conditions after his demotion were "intolerable." *Id.* at 1638-39.

C. Colores v. Board of Trustees of the California State University

Plaintiff was the director of procurement, contracts, and support services at California State University Los Angeles. *Colores v. Board of Trustees of the Cal. State Univ.*, 105 Cal.App.4th 1293 (2003). She started working for the University in 1977 as a receptionist, receiving positive performance reviews and progressive salary increases throughout her time. Plaintiff later developed fibromyalgia, was classified an ADA employee, and by the time of her resignation could work only four hours a day by doctor's orders.

During 1996 and 1997, in the course of carrying out her duties, Plaintiff discovered evidence of misappropriations of University funds, equipment, and inventories in the custodial, construction, and building maintenance department. *Id.* at 1308. She informed her supervisor, who subsequently fired the custodial director, and implemented an accountability program, in which Plaintiff assisted. *Id.* at 1302. The University president subsequently replaced Plaintiff's supervisor. Plaintiff later presented evidence her new supervisor had engaged in conduct she claimed was designed to force her resignation, including making it appear Plaintiff's performance was of a low quality and even dishonest.

The evidence showed Plaintiff's supervisor instructed more than one person to document Plaintiff for termination without providing specific reasons; demanded through subordinates that Plaintiff make unlawful orders; engaged in massive reorganizations of the department Plaintiff oversaw without her knowledge or input; refused to speak with Plaintiff about matters pertinent to her duties, while remaining open to others; and put Plaintiff under the supervision of an individual who gave her excessive and unnecessary assignments far in excess of what Plaintiff could accomplish in her four hour days. *Id.* at 1308-11. Plaintiff claimed all this aggravated her medical condition, which involved fatigue and pain. Ultimately Plaintiff took full-time medical leave in July 1998, and a medical retirement in November 1998. *Id.* at 1302.

The Court overruled the trial court's order granting the University summary judgment. *Id.* at 1311. It held the evidence raised a triable issue as to whether a reasonable person in Plaintiff's position would find work conditions so intolerable or aggravated that she would feel there was no reasonable alternative but to resign.

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D. Simers v. Los Angeles Times Communications, LLC

Simers was a sports columnist for the Los Angeles Times and had held that position since 2000. In 2013, Simers suffered from a stroke, but recovered quickly and was soon back at his job writing thrice-weekly columns. Two and a half months later, the Times reduced the plaintiff's columns to two per week, and his editors expressed the dissatisfaction of upper management with several recent columns written by Simers. After learning that a Hollywood produce was developing a television show loosely based on Simer's life, the Times, viewing this development as a possible ethical breach, put Simer's columns on holiday for ten days and then, in June of 2013, suspended the column pending an investigation.

Following the completion of an investigation two months later, the Times issued a final written warning to Simers that removed him from his position as columnist and made him a senior reporter with no reduction in salary. Simer's lawyer informed the Times that he could not work in this environment and considered the action a constructive termination.

In addressing whether a constructive termination had in fact occurred, the Second District Court of Appeal confirmed that the standard to be applied is an objective one. (*Simers v. Los Angeles Times Communications, LLC* (2018) 18 Cal.App.5th 1248, 1270.) The court held that the proper focus of any determination must be "on the working conditions themselves," and "not on the plaintiff's subjective reaction to those conditions." (*Id.* at 1275.) The standard, the court held, does not change simply because the plaintiff is a prominent columnist. To hold otherwise would subject the determination to a subjective standard, contrary to law. (*Id.*) Essentially, the focus must remain on the working conditions themselves, rather than on the employee's reaction to the conditions.

IV. WRITTEN AGREEMENTS

A written or oral employment contract can override the at-will employment presumption and create a contract to terminate only for cause. If an employment contract specifies that you will terminate only for cause, this creates an implied covenant requiring you to exercise "good faith and fair dealing" in the employment relationship. *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 350 (2000).

A. Standard "For Cause" Termination

California courts define the term "good cause" to mean "fair and honest reasons, regulated by *good faith* on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." Emphasis added. *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal.4th 93, 108 (1998).

1. Employer's "Good Faith" Basis for Termination

a. Cotran v. Rollins Hudig Hall Int'l, Inc.

Plaintiff Cotran headed the West Coast international office of Rollins Hudig Hall International, Inc. ("RHHI"), an insurance brokerage firm. *Id.* at 96. RHHI received a complaint that Cotran was sexually harassing two female employees. *Id.* at 96-97. RHHI interviewed the two employees who had allegedly

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been harassed and obtained sworn affidavits from them. *Id.* at 97. RHHI conducted an investigation that included interviews of 21 people who had worked with Cotran, including five he identified as favorable witnesses. *Id.* After providing Cotran with an opportunity to provide an explanation and defense, RHHI concluded that it was more likely than not that Cotran had engaged in harassment. *Id.* RHHI then terminated Cotran's employment. *Id.* at 98.

Cotran sued, claiming that his employment had been terminated in violation of an implied agreement not to be dismissed except for "good cause." At trial, Cotran testified that he had been engaged in consensual relationships with both of his accusers. *Id.* at 98-99. He produced evidence that at least one of the accusers had sought a substantial pay increase on the same day that Cotran met with his supervisors at RHHI to discuss the allegations against him. *Id.*

The trial court instructed the jury as follows:

What is at issue is whether the claimed acts took place. . . . The issue for the jury to determine is whether the acts are in fact true. . . . Those are issues that the jury has to determine. Where there is an employment agreement not to terminate an employee except for good cause, an employer may not terminate the employment of an employee unless such termination is based on a fair and honest cause or reason. In determining whether there was good cause, you must balance the employer's interest in operating the business efficiently and profitably with the interest of the employee in maintaining employment.

Id. at 99.

The trial court refused an instruction, requested by RHHI, directing the jury not to substitute its opinion for the employer's. *Id.* The jury concluded that Cotran had not engaged in any of the behavior on which RHHI based its decision to terminate his employment and returned a verdict in Cotran's favor. *Id.*

The California Supreme Court concluded that the trial court had applied the incorrect standard, stating:

"An employer must have wide latitude in making independent, good faith judgments about high-ranking employees without the threat of a jury second-guessing its business judgment. Measuring the effective performance of such an employee involves the consideration of many intangible attributes such as personality, initiative, ability to function as part of the management team and to motivate subordinates, and the ability to conceptualize and effectuate management style and goals. *Although the jury must assess the legitimacy of the employer's decision to discharge, it should not be thrust into a managerial role.*"

Id. at 100-01 (emphasis in original) (internal citations omitted).

b. Silva v. Lucky Stores, Inc.

Plaintiff Silva was a grocery store manager and 28-year employee of Lucky Stores, Inc. *Silva v. Lucky Stores, Inc.*, 65 Cal.App.4th 256 (1998). Lucky terminated Silva's employment after an internal

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investigation concluded that he had violated the employer's policies against sexual harassment and had engaged in harassing behavior with two subordinate employees. *Id.* at 259.

Summary judgment was granted in favor of the employer, after the court concluded that the undisputed evidence showed the employer had "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion . . . supported by substantial evidence." *Id.* at 276. Silva conceded that sexual harassment by a store manager of subordinate female employees constituted good cause to terminate the manager. *Id.*

Silva contended there were triable issues of *fact* as to whether Lucky's decision to terminate his employment for violation of company policies constituted a reasoned conclusion supported by substantial evidence. *Id.* at 277. Specifically, Silva objected to the investigator having relied upon "double and triple hearsay" as well as gossip and rumor. In sustaining the summary judgment, the appellate court noted that, "[s]uch comments may be a predictable result of fact finding proceedings conducted without the procedural formalities of a trial. They are not substantial evidence. However, while [the investigator] included such comments in his investigation notes, they did not form the basis for his conclusion that the [alleged sexual harassment] incidents had probably occurred. Those conclusions were based on the statements of the complainants, the percipient witnesses to the incidents and Silva's admissions that physical contact had occurred in both incidents." *Id.* The appellate court affirmed the summary judgment.

2. "Good Cause" Termination

a. Malmstrom v. Kaiser Aluminum & Chemical Corp.

Plaintiff Malmstrom contended that Kaiser Aluminum & Chemical Corp. had impliedly agreed to employ him until his retirement. *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 187 Cal.App.3d 299 (1986). Kaiser terminated Malmstrom's employment in a reduction in force that cut the number of employees in the plant where Malmstrom worked from 95 to 38. *Id.* at 309.

Kaiser moved for summary judgment arguing, among other things, that it had good cause to terminate Malmstrom's employment. *Id.* at 307. The appellate court affirmed on this ground stating, "[w]hen the implied promise of continued employment is found, it is only a promise not to terminate the employment without 'some good reason.' Here... Kaiser presented undisputed evidence of the depressed condition of its aluminum can business and its business decision to reduce its staff with the result that Malmstrom's services were no longer needed. Kaiser had a 'fair and honest cause or reason, regulated by good faith' to terminate Malmstrom." *Id.* at 321 (internal citations omitted).

b. Stokes v. Dole Nut Co.

Plaintiffs Stokes and Embrey were both long-term employees of Dole Nut Co. and worked at its plant in Orland. *Stokes v. Dole Nut Co.*, 41 Cal.App.4th 285, 288 (1995). The Orland plant received, processed, packaged, and shipped various types of nut crops, with almonds accounting for about 95 percent of its production. *Id.* At the time of his termination, Stokes was the salaried night shift manager for the Orland plant. *Id.* at 289. At the time of his termination, Embrey was the salaried production supervisor for the Orland plant. *Id.*

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During their employment with Dole, the plaintiffs founded and operated a wholly owned corporation known as Embrey & Stokes Trucking Co., Inc. ("EST"), which Dole used to haul crops from growers to the Orland plant. *Id.* EST acquired some 40 acres of property, which included ten acres that were leveled and fenced, but not planted. *Id.* at 676-77, 41 Cal. App. 4th at 289. Over a period of more than two years, Stokes and Embrey developed plans to construct and operate an almond processing plant on the 10 acres. *Id.* at 289-91. Stokes and Embrey sought financing to build the plant and loan guarantees through the Farmers Home Administration and other agencies. *Id.* Stokes and Embrey claimed that they would not be competing with Dole because their source of almonds was not a Dole grower. *Id.* at 292.

When Dole management learned of the plans, Dole decided to terminate the plaintiffs' employment. *Id.* Dole management believed it would be impossible for Stokes and Embrey to be employees of Dole at the same time as they were in competition with it. *Id.* The plaintiffs, particularly Embrey, had access to confidential company information, including production plans, profit goals, operating problems, and strategies to overcome such problems. *Id.*

In concluding that Dole had sufficient cause for terminating the plaintiffs' employment, the appellate court explained, Plaintiffs were managerial or supervisory-level employees. They, and particularly Embrey, had access to confidential company information. Extensive acts had been performed by them, or by their agents on their behalf, toward the objective of establishing a competing business. The documents they produced in support of their efforts to establish the competing business show that they understood they would be in competition with Dole and that they intended to rely upon the 'key contacts' they had made through their employment with Dole in competing successfully with it. Under these circumstances Dole could properly conclude that it would be difficult, or even impossible, for plaintiffs to pursue Dole's interests with undivided loyalty. It was not necessary for Dole to wait to see whether they would engage in actual tortious misconduct; their outside activities had progressed to the point that conflicts of interest compromised Dole's right to their undivided loyalties. This was sufficient cause for termination.

Id. at 296.

3. Termination of Employment for a Specified Term

When the employment relationship is for a specified term, it may be terminated only for a willful breach of duty by the employee in the course of his employment, the employee's habitual neglect of duty, or the employee's continued incapacity to perform his or her duties. CAL. LABOR CODE § 2924.

Section 2924 of the Labor Code was applied in *Story v. San Rafael Military Acad.*, 179 Cal.App.2d 416 (1960). In that case, plaintiff Story had signed a contract for the school year, in which he agreed to teach and "perform such additional services as may be required" by the Academy. *Id.* at 417. Story refused to perform dormitory duty, which was a customary duty for the Academy's teachers. As a result, the Academy terminated his employment. *Id.* In affirming judgment for the Academy, the appellate court stated, "[Story] stated that he would not perform a substantial term of his contract. This was an anticipatory breach. The breach was clearly substantial. It was willful and intentional and related to an important part of [Story's] duties. He would not have been hired if he had not agreed to perform the duties in question." *Id.*

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B. Status of Arbitration Clauses

1. Arbitration of Individual Employment Claims

Employees can be compelled to arbitrate wrongful termination or employment discrimination claims brought under the California Fair Employment and Housing Act. A mandatory employment arbitration agreement is lawful and enforceable if it meets all of the following criteria: "(1) [it] provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." *Armendariz v. Found. Health Psychcare Services, Inc.*, 24 Cal.4th 83, 102 (2000), abrogated on other grounds by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)(held that Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts); *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064 (2003)(extending *Armendariz* requirements to employer-mandated arbitration of tort claims for wrongful discharge in violation of public policy, i.e., claims under *Tameny v. Atlantic Richfield Co.*, (1980) 27 Cal.3d 167); *See also Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal.4th 495, 508 (2005)(declining to extend *Armendariz* requirements to common law claims generally).

The *Armendariz* decision pre-dated the United States Supreme Court decision, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001), which held that employment agreements are enforceable under the Federal Arbitration Act. On remand, the Ninth Circuit Court of Appeals determined that Circuit City's arbitration agreement was unconscionable under California law and thus unenforceable. In so doing, the Ninth Circuit relied on the "unconscionability" doctrine articulated by the California Supreme Court in *Armendariz*. *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002).

a. Cione v. Foresters Equity Services, Inc.

In *Cione v. Foresters Equity Services, Inc.*, 58 Cal.App.4th 625, 630 (1997), Cione began employment with Foresters Equity Services (FESCO) in 1988 at which time he signed a form, the U-4, containing an arbitration clause by which he agreed to arbitrate any dispute, claim or controversy. FESCO was a "member" firm of the National Association of Securities Dealers, Inc. (NASD). *Id.* In 1991, Cione entered into a written employment agreement that contained provisions regarding the length of his employment and methods for terminating the agreement. *Id.* at 631. "This written employment agreement ... also included an "integration" clause providing: 'This Agreement contains the entire understanding of the parties hereto with respect to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants, or undertakings, other than those expressly set forth or referred to in this Agreement.'" *Id.*

In 1994, when Cione sued for wrongful termination, FESCO filed a motion to compel arbitration based upon the U-4 agreement. *Id.* at 631-32. When there is a binding arbitration agreement, disputes between an employee of a national stock exchange and his employer are governed by the FAA (Federal Arbitration Act). *Id.* at 633-34. However, while federal law determines the scope of the arbitration agreement, state law governs the general contract issue, of whether there is a valid arbitration agreement. *Id.* at 634. The trial court denied FESCO's motion to compel arbitration and FESCO appealed. *Id.* at 632.

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Regardless of the written employment agreement's integration clause and its failure to include a separate arbitration clause, the appellate court reversed and ordered the superior court to enter an order granting FESCO's motion to compel arbitration. *Id.* at 630. The court reasoned that FESCO had a contractual right as a third party beneficiary to enforce its original agreement with Cione. *Id.* at 636-37. The court further based its decision on the strong public policy favoring arbitration stating, "under California law, '[d]oubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. The court should order them to arbitrate unless it is clear that the arbitration clause cannot be interpreted to cover the dispute.'" *Id.* at 642.

b. Jones v. Humanscale Corp.

In *Jones v. Humanscale Corp.*, 130 Cal.App.4th 401 (2005), the California Court of Appeals handed employers a major victory in the areas of non-competition, choice of law, and arbitration. The *Jones* case involved an employer's attempt to specify in its employment contracts with its employees that the law of its home state, New Jersey, would control instead of California law. *Id.* at 405. The Court of Appeal observed that once the arbitrator decided the choice of law issues, it was not for the trial judge to substitute his judgment for that of the arbitrator and apply California law with respect to the non-competition issue. *Id.* at 411. Moreover, the court ruled that although the arbitrator's order that the employee pay half of the costs of the arbitration violated California law, the remedy should have been simply to order the refund of that portion of the costs to the employee rather than invalidate the entire arbitration agreement. *Id.* at 411-12.

c. Preston v. Ferrer

In *Preston v. Ferrer*, 552 U.S. 346 (2008), a fee dispute arose between television personality Alex Ferrer (better known as television's "Judge Alex") and his attorney, Arnold Preston. The California Talent Agency Act ("TAA") specifies that California's Labor Commissioner is to adjudicate, in the first instance, disputes between agents and the talent they represent. The losing side can then request a trial de novo in the superior court. In the instant case, Ferrer and Preston had an arbitration agreement. Ferrer contended that the dispute could not be arbitrated at all because of the TAA, or, in the alternative, that any arbitration had to await the Labor Commissioner's exercise of its primary jurisdiction. The Supreme Court, in its 8 to 1 decision, rejected Ferrer's claim, citing the provision in the Federal Arbitration Act ("FAA") that arbitration contracts are valid, irrevocable, and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 352-353.

The Supreme Court held that the FAA preempted the Labor Commissioner's exercise of primary jurisdiction, observing that "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Id.* at 353. The FAA reflects Congress' "intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Id.*, quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). The Supreme Court's holding in *Preston* is likely to create a statute of limitations trap for the unwary, applicable especially in Fair Employment and Housing Act ("FEHA") cases.

d. Pearson Dental Supplies, Inc. v. Superior Court

In *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal.4th 665 (2010), an arbitrator ruled in favor of employer Pearson Dental Supplies that the plaintiff, Luis Turcois was time-barred from raising his

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age discrimination complaint because he failed to submit to arbitration more than one year after his termination pursuant to a mandatory arbitration agreement he signed during his employment.

The California Supreme Court held that when "an employee subject to a mandatory employment-arbitration agreement is unable to obtain a hearing on the merits of his FEHA claims, or claims based on other unwaivable statutory rights, because of an arbitration award based on legal error, the trial court does not err in vacating the award." *Id.* at 680. Although an arbitration agreement can place certain restrictions on when and in what forum an employee can raise a claim against an employer, an arbitration agreement cannot prevent an employee from submitting claims to prosecutorial agencies. Since the California Supreme Court ruled on the type of administrative agency proceedings that can be precluded from arbitration agreements, employers should make sure that the mandatory arbitration language waiving an employee's right to pursue adjudicatory actions is in compliance with the Pearson opinion.

e. Cruise v. Kroger

In *Cruise v. Kroger*, 233 Cal.App.4th 390 (2015), the Court found that an arbitration clause in an employment application is itself sufficient to establish that an employee and employer agrees to arbitrate disputes arising out of the employment relationship, even if the mediation and arbitration policy is not attached. The plaintiff had signed an employment application that included a broadly-worded arbitration clause, which constituted an enforceable agreement to arbitrate. The plaintiff's employment-related claims all fell within the scope of that agreement. While the employment application incorporated by reference, it did not attach the employer's mediation and binding arbitration policy. The Court of Appeal reasoned that the application established that the parties agreed to arbitrate because (1) the plaintiff had acknowledged in writing that she understood the mediation and arbitration policy applied to all employees; (2) the arbitration clause further provided the arbitration policy was incorporated into her employment application; and (3) the arbitration clause also provided that the arbitration policy applied to any employment-related disputes between employees.

f. Labor Code Section 925

Effective January 1, 2017, arbitration provisions cannot require employees who primarily reside and work in California to arbitrate or adjudicate their employment related claim outside of California. Cal. Labor Code § 925(a)(1). Additionally, arbitration provisions cannot deprive the employee of the substantive protection of California law with respect to controversies arising in California. *Id.* § 925(a)(2). These prohibitions, however, applies only to contracts entered into, modified, or extended on or after January 1, 2017. *Id.* § 925(f).

2. Review by Second Arbitrator

a. Cummings v. Future Nissan

The court in *Cummings v. Future Nissan*, 128 Cal.App.4th 321 (2005), enforced an arbitration agreement that provided for review of the arbitration decision by a second arbitrator. The terms of the employment agreement provided that either the employer or the employee could submit a written request that a second arbitrator either affirm, reverse, or modify the arbitration award under "the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following [a] court trial." *Id.* at 324. The first arbitrator awarded \$159,000 to Cummings, but the reviewing arbitrator reversed and rendered an award in favor of Future Nissan.

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Cummings moved to vacate the second arbitrator's award, arguing that the second level of arbitral review was unconscionable. *Id.* The trial court rejected Cummings' position, noting that the second-level review process was not unconscionable under the *Armendariz v. Found. Health Psychcare Services, Inc.* decision. *Id.* at 324-25. The court noted that Future Nissan was responsible for the second-level review costs, the review process applied equally to both parties, the review did not otherwise destroy the fundamental purpose of the contractual arbitration provision, and it was completed within a reasonable amount of time. *Id.* at 325.

b. Little v. Auto Stiegler, Inc.

In *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 1071-76 (2003), the California Supreme Court determined that an arbitration provision permitting appeal of any arbitration award over \$50,000 was unduly one-sided, as it was very unlikely that an award in excess of that amount would be awarded in the employee's favor. However, with that provision severed, the arbitration agreement was enforced.

3. Arbitration of Class Actions

a. Iskanian v. CLS Transportation Los Angeles

The California Supreme Court in *Iskanian v. CLS Transportation*, 59 Cal.4th 348 (2014) ruled that the Federal Arbitration Act preempts its previous decision in *Gentry v. Superior Court (Circuit City Stores)*, 42 Cal.4th 443 (2007), which had invalidated class action waivers in most wage and hour actions. The *Iskanian* court upheld class action waivers in arbitration agreements. Notably, the California Supreme Court also held that an arbitration agreement precluding representative Private Attorney General Act claims is invalid as a matter of California public policy. The Court also maintained its rule in *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013)(Sonic II), such that courts may find arbitration agreements unconscionable if they do not provide protections similar to the wage claim statute.

b. AT&T Mobility LLC v. Concepcion

In April 2011, the United States Supreme Court held that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). While the court did not explicitly address employment arbitration agreements, its application extends beyond consumer arbitration agreements as it announces a general policy to enforce private arbitration agreements. *AT&T Mobility LLC* expressly overrules the consumer arbitration rule announced by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).

c. Brown v. Ralphs Grocery Co.

In *Brown v. Ralphs Grocery Co.*, 197 Cal.App.4th 489 (2011), plaintiff brought a class action and representative action under the Private Attorney General Act of 2004 against her employers alleging Labor Code violations. The Second District held that under *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), plaintiff had the burden of establishing that the arbitration provision was invalid and that such burden required a factual showing under the four-factor *Gentry* test. *Id.* at 497. The trial court erred in invalidating the class action waiver contained in plaintiff's employment contract because plaintiff did not meet her evidentiary burden under *Gentry. Id.*

d. Cable Connection, Inc. v. DIRECTV, Inc.

Cable Connection, Inc. v. DIRECTV, Inc., 44 Cal.4th 1334 (2008), arose in a commercial setting and examined whether class-wide arbitration could proceed when the arbitration agreement was silent on class action lawsuits and class-wide arbitration. The court held that the requirement in 9 U.S.C. Section 9 for confirmation of arbitration awards unless grounds for vacatur and modification existed under 9 U.S.C. Sections 10, 11 did not preempt state law allowing parties to contract for an expanded scope of judicial review. The court further held that the parties to an arbitration agreement could take themselves out of the general rule that the merits of the award were not subject to judicial review by clearly agreeing that legal errors were an excess of arbitral authority reviewable by the courts under California Code of Civil Procedure Sections 1286.2 and 1286.6. Thus, the court of appeal erred by refusing to enforce the parties' clearly expressed agreement providing for judicial review of legal error. The majority arbitrators committed a legal error in ordering class-wide arbitration based on an incorrect conclusion that it was a substantive right independent of the arbitration agreement; thus, it was appropriate for the arbitration panel to reconsider the availability of class-wide arbitration as a matter of contract interpretation and commercial arbitration procedure.

e. Securitas Security Services USA, Inc. v. Superior Court (Edwards)

In *Securitas Security Services USA, Inc. v. Superior Court (Edwards)*, 234 Cal.App.4th 1109 (2015), the California Court of Appeal invalidated an arbitration agreement for including a representative action waiver combined with a non-severability clause.

In this case, the employer presented its employees with an arbitration agreement, the acceptance of which was not mandatory. Instead, employees were allowed 30 days to opt-out of the agreement by calling a toll-free number and opting out. If the employees did not exercise their opt-out right, they became bound by the agreement to arbitrate any and all employment disputes. Like many arbitration agreements, Securitas' arbitration agreement contained a class action and representative action (PAGA) waiver provision, stating that the parties waived any right to bring a class or representative action and that their individual disputes would be subject to binding arbitration.

The plaintiff in this case did not opt out of the arbitration agreement, and subsequently filed a wage and hour lawsuit in state court, including class and representative PAGA claims.

The Court of Appeal held that *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014) rendered the parties' PAGA waiver unenforceable, regardless of whether the employee had the ability to opt out.

4. Mandatory Arbitration Agreements at the Outset of Employment

Labor Code section 432.6 was codified by Assembly Bill No. 51 to prohibit employers from requiring employees to enter into arbitration agreements covering claims under the Fair Employment and Housing Act (FEHA) and the Labor Code as a condition of employment. Notably, it also makes a violation of section 432.6 an "unlawful employment practice" under the FEHA and also prohibits employers from retaliating against an applicant or employee who refuses to agree to an arbitration agreement. Furthermore, it applies to agreements "entered into, modified, or extended on or after January 1, 2020."

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It bears noting, however, that several groups have already challenged AB-51 in federal court on the basis that it is preempted by the Federal Arbitration Act. As of February 2021, a Federal Judge in the Eastern District of California has issued a preliminary injunction enjoining Assembly Bill 51 from prohibiting employers from requiring mandatory arbitration agreements as a condition to employment.

V. ORAL AGREEMENTS

A. Promissory Estoppel

An oral contract that is based on the conversations between an employer and employee is just as binding as a written contract. California recognizes a cause of action for promissory fraud. *Lazar v. Superior Court*, 12 Cal.4th 631, 635 (1996). The "elements of fraud, which give rise to the tort action for deceit, are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Id.* at 638.

1. Lazar v. Superior Court

In *Lazar*, the court explained that "[promissory fraud] is a subspecies of the action for fraud and deceit ... where a defendant fraudulently induces the plaintiff to enter into a contract." *Id.* It applies in situations where a promise is made by a party without any intention of that party performing the promise. *Id.* In *Lazar*, the plaintiff was recruited by Rykoff-Sexton, Inc. ("Rykoff") to fill a general manager position in its Los Angeles office. *Id.* at 635. Before joining Rykoff, Lazar had been working and living in New York.

During the recruitment process, Lazar told Rykoff that he was concerned about leaving a secure job in New York and uprooting his family to move to Los Angeles. *Id.* Rykoff orally assured him that his job would be secure and would involve significant pay increases as well as advancement within the organization. *Id.* at 635-36. Lazar was also told that the company was strong financially, and they anticipated solid growth and a profitable future. *Id.* at 636. Based on Rykoff's assurances, Lazar moved his family to Los Angeles. *Id.* Lazar performed his job in an exemplary fashion. *Id.* After his arrival, the West Coast region achieved its sales budget for the first time. *Id.* In addition, Lazar was able to significantly lower the overall operating costs within his department. *Id.* Despite these successes, less than two years after he was hired, Lazar was told that his job was being eliminated due to management reorganization. *Id.* at 636-37.

Lazar sued Rykoff and alleged several causes of action, including fraudulent inducement of an employment contract. *Id.* at 637. He alleged that Rykoff knew that the representations that it made to induce him to accept employment were false. *Id.* at 639. The trial court sustained Rykoff's demurrer on all causes of action, and the court of appeal agreed. *Id.* at 637. The California Supreme Court granted review to determine the limited issue of whether a plaintiff can bring a cause of action for fraudulent inducement of an employment contract. *Id.* at 638. Rykoff argued that Lazar's fraud cause of action is barred by the Court's holdings in *Hunter v. Up-Right, Inc.*, 6 Cal.4th 1174 (1993) and *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988). *Id.* at 639. Specifically, Rykoff asserted that these two decisions stood for the proposition that terminated employees are limited to contract damages, and they can obtain tort damages only by bringing a cause of action for wrongful termination in violation of public policy.

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The court disagreed, holding that Lazar had properly pleaded a cause of action for promissory fraud based on the misrepresentations made to induce him to accept employment. *Id.* The court stated that if Lazar's allegations were true, they would establish all of the elements of promissory fraud. *Id.* The court distinguished *Hunter*, stating that *Hunter* is limited to situations in which a misrepresentation was aimed only at effecting termination of employment. *Id.* at 641.

In this case, Lazar could state all of the elements of promissory fraud because Rykoff's actions had induced Lazar to detrimentally alter his position to accept employment, not effectuate termination. *Id.* at 642. The court also distinguished *Foley*, stating that the main issue in *Foley* was "whether tort remedies should be available for employment terminations that allegedly breach the implied covenant of good faith and fair dealing." *Id.* at 644. The court concluded that "our concern in *Foley* not to create potential tort recovery in every discharge case does not weigh as heavily here, where plaintiff alleges a traditional fraud cause of action." *Id.* at 644-45.

2. Starzynski v. Capital Public Radio, Inc.

In *Starzynski v. Capital Public Radio, Inc.*, 88 Cal.App.4th 33 (2001), a California Court of Appeal ruled that an employee with nearly 20 years on the job whose supervisor had promised him job security was nevertheless an at-will employee.

In 1979, Charles Starzynski began working as a program director for Capital Public Radio. *Id.* at 36. In 1991, he signed an at-will employment agreement that stated only the company's board of directors could modify the agreement. *Id.* Both before and after signing the at-will agreement, Starzynski's supervisor assured him that he would be terminated only for just cause. *Id.* Starzynski resigned in 1998, claiming constructive discharge due to intolerable working conditions. *Id.* Starzynski filed a lawsuit for wrongful termination, alleging the existence of an implied contract to terminate him only for good cause despite the written at-will agreement. *Id.*

The court ruled that the supervisor's oral promises of continued employment did not create an implied contract because Starzynski signed a clearly written acknowledgement that his employment was at-will. *Id.* at 39. The court held that "an at-will provision in an express written agreement, signed by the employee, cannot be overcome by proof of an implied contrary understanding." *Id.* at 41.

3. Helmer v. Bingham Toyota Isuzu

In *Helmer v. Bingham Toyota Isuzu*, 129 Cal.App.4th 1121, 1123 (2005), plaintiff Kevin Helmer filed suit against defendants Bingham Toyota Isuzu and Bob Clark, his former employer and supervisor, for promissory fraud and also sought future lost income to compensate him for his lower pay. The plaintiff alleged that he was fraudulently induced to leave his prior job due to false promises made to him by defendant Clark. *Id.* The court of appeals found that Clark's statement went beyond a promise of an appropriate salary, in that Clark made a specific promise that had Helmer been employed for the previous nine months, he would have earned \$70,000. Moreover, the court observed that a plaintiff may recover economic damages, including future lost income, from an employer who fraudulently induces the employee to leave a secure job, so long as the damages are not speculative or remote. *Id.* at 1131. The court then found that substantial evidence existed to support the jury's finding that Helmer was entitled to recover lost future income due to the fraudulent inducement by Bingham and Clark for Helmer to leave his prior employment. *Id.* Thus, the holding in *Helmer* demonstrates that exaggerations or false

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promises made by an employer during the recruiting process may be the basis for substantial liability when those promises do not materialize.

B. Fraud

In *Hunter v. Up-Right, Inc.*, 6 Cal.4th 1174, 1179 (1993), Hunter was hired as a welder for Up-Right in January 1973. By 1980, he was promoted to welding supervisor, a position he held for seven years. *Id.* In September 1987, Hunter's supervisor, Pat Nelson, told him "there had been a corporate decision to eliminate his position . . ." *Id.* Hunter inquired about the possibility of working in a lesser position within the company, but was refused. *Id.* As a result, Hunter signed a document setting forth his resignation. *Id.*

In August 1988, Hunter brought several actions against Up-Right alleging, inter alia, fraud, claiming Nelson's statement that the position was being eliminated was false. *Id.* The jury found in favor of Hunter, and the Court of Appeal affirmed. *Id.* at 1180. The California Supreme Court granted review solely to decide whether an employee can recover tort damages based on a cause of action for fraud predicated on a misrepresentation used to effectuate termination of employment. *Id.* at 1178. The court held that "wrongful termination of employment ordinarily does not give rise to a cause of action for fraud or deceit, even if some misrepresentation is made in the course of the employee's dismissal." *Id.* The court stated that a fraud cause of action allowing tort recovery is available to an employee only if "[he or she] can establish all of the elements of fraud with respect to the alleged misrepresentation that is separate from termination of the employment contract . . ." *Id.* The court noted that:

A misrepresentation not aimed at effecting termination of employment, but instead designed to induce the employee to alter detrimentally his or her position in some other respect, might form the basis for a valid fraud claim even in the context of a wrongful termination.

Id. at 1185.

C. Statute of Frauds

Under California's Statute of Frauds, an agreement that, by its terms, is not to be performed within a year from the making of the agreement is invalid unless some note or memorandum thereof is in writing and subscribed by the party to be charged or by the party's agent. CAL. CIV. CODE § 1624(a)(1).

However, the Statute of Frauds is not applicable to employment agreements. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 672-73 (1988). "Even if the original oral agreement had expressly promised plaintiff "permanent" employment terminable only on the condition of his subsequent poor performance or other good cause, such an agreement, if for no specified term, *could* possibly be completed within one year. Because the employee can quit or the employer can discharge for cause, even an agreement that strictly defines appropriate grounds for discharge can be completely performed within one year -- or within one day for that matter." *Id.* (citations omitted).

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VI. DEFAMATION

A. General Rule

1. Libel

“Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.” CAL. CIV. CODE § 45.

2. Slander

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

- a. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
- b. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
- c. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
- d. Imputes to him impotence or a want of chastity; or
- e. Which, by natural consequence, causes actual damage.

CAL. CIV. CODE § 46.

B. References

California employers have a limited privilege with respect to providing references for current or former employees. CAL. CIV. CODE § 47(c) creates the following privilege:

In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or

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not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

Even with this privilege, defending a defamation action based upon an unfavorable job recommendation may be difficult. In *Agarwal v. Johnson*, 25 Cal.3d 932 (1979), disapproved on other grounds, *White v. Ultramar, Inc.*, 21 Cal.4th 563 (1999), Plaintiff Agarwal brought a claim for defamation against his former employer and two of its managers after they advised a prospective employer that he lacked knowledge of his job and was uncooperative. In sustaining the judgment in Agarwal's favor, the California Supreme Court explained:

The malice referred to by the statute is actual malice or malice in fact, that is, a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person. The factual issue is whether the publication was so motivated. 'Thus the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff, or by any cause other than the desire to protect the interest for the protection of which the privilege is given.'

The jury's verdict can be sustained if the record contains any substantial evidence upon which the jury could make a finding that the communication was malicious. Here, Agarwal's evidence indicated that there had been no dissatisfaction with, or criticisms of, his job knowledge and cooperation until the last two days of his employment with McKee. French admitted that he had never before terminated an employee who had been in his department for such a short time and so shortly after a new assignment. The termination was ratified by Johnson, Regh, and Aufmuth. French's deposition contradicted his testimony that Agarwal refused to work for him. Johnson, French and others indicated that while there had been problems with both the quality of Agarwal's work and his personality and ability to work with others from the start, no criticisms or negative comments on his job performance had ever been communicated to him. Agarwal had also not been informed of the "marginal" rating that he had received in the June 1970 evaluation report. Thomas' memo bore a date after Agarwal's termination. French, Johnson, Regh and Aufmuth all indicated that, in fact, Agarwal was terminated for insubordination, but that ground was not stated in order to protect his severance benefits. These facts, coupled with Agarwal's testimony concerning French's racial epithet which he reported to Regh, and his consistent denials of the charges of poor performance and insubordination, could lead the jury to believe that the statements of lack of job knowledge and lack of cooperation were maliciously motivated for the purpose of terminating Agarwal.

Id. at 944-45 (citations omitted).

C. Privileges

California Civil Code Section 47 provides in pertinent part:

A privileged publication or broadcast is one made: . . . (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested This subdivision applies to and includes a communication concerning the job performance or

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qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer

While the employer “generally bears the initial burden of establishing that the statement in question was made on a privileged occasion, ... thereafter the burden shifts to plaintiff to establish that the statement was made with malice.” *Taus v. Loftus*, 40 Cal.4th 683 (2007).

The employer's privilege to disclose the reasons for an employee's termination was discussed in *King v. United Parcel Service, Inc.*, 152 Cal.App.4th 426 (2007). King served as a supervisor for United Parcel Service, Inc. (“UPS”). UPS learned that King supervised a driver who falsified his timecard and had reason to believe that King had asked or encouraged the driver to submit a false timecard, so as to avoid violating federal regulations limiting driving time. UPS conducted a neutral investigation, concluded that King had played a role in the falsification, and terminated his employment for violating UPS's integrity policy. Thereafter, UPS told some of the drivers whom King supervised that King had been fired for violating the company's integrity policy. In affirming summary judgment in favor of UPS, the appellate court explained that, “because an employer and its employees have a common interest in protecting the workplace from abuse, an employer's statements to employees regarding the reasons for termination of another employee generally are privileged.” King was not able to prove that UPS acted with malice in disclosing the reasons for his termination. In addition, the court rejected King's argument that UPS had over-publicized the reasons for his termination and had, therefore, defeated the privilege.

One employee's communications to another employee regarding a former employee may also be protected by the common interest privilege. In *Kelly v. General Telephone Co.*, 136 Cal.App.3d 278 (1982), Plaintiff, who had voluntarily terminated his employment and later reapplied for the position, sued his former employer claiming he was determined “ineligible for rehire” because of slanderous statements by another employee. Plaintiff alleged his former supervisor, Tom Hansen, had told his own supervisor Plaintiff “misused company funds by buying materials without the proper authorization and falsified invoices.” *Id.* at 284, internal quotation marks omitted. Plaintiff claimed these statements were made with malice, and were allegedly conveyed to other people in the personnel office who as a result deemed Plaintiff ineligible for rehire. Though the Court held the complaint should withstand demurrer, it stated the employer may be protected by the common interest privilege. “Communication among a company's employees that is designed to insure honest and accurate records involves such a common interest.” *Id.* at 285.

Effective January 1, 2024, Civil Code Section 47.1 allows defendants in a defamation suit to allege a privilege defense for communications made without malice about factual information related to an incident of sexual assault, harassment, or discrimination experienced by the individual making the communication.

D. Other Defenses

1. Truth

In employment cases, plaintiffs often claim they were injured by postemployment references that were adversely false or by false statements made during a pre-termination investigation. In California, defendants may be exonerated if they can prove the allegedly defamatory statements are true. See *Gantry Construction Co. v. Am. Pipe & Constr.*, 49 Cal.App.3d. 186, 192-96 (1975).

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“Truth, of course, is an absolute defense to any libel action. In order to establish the defense, the defendant need not prove the literal truth of the allegedly libelous accusation, so long as the imputation is substantially true so as to justify the ‘gist or sting’ of the remark.” *Campanelli v. Regents of the Univ. of Cal*, 44 Cal.App.4th 572, 581-82 (1996) (internal citations omitted). In *Campanelli*, the plaintiff had been the head basketball coach at the University of California at Berkeley (“Cal”). *Id.* at 576. Robert Bockrath, who was Cal’s athletic director, overheard “a frustrated and angry Campanelli address sharp criticism to the players in the locker room.” Thereafter, Campanelli’s employment was terminated. *Id.*

“Campanelli’s firing received ‘wide coverage in local and national press, radio and television.’” *Id.* at 576. Bockrath gave an interview to the New York Times explaining the reasons for Campanelli’s termination. Recalling the coach’s final tirade, Bockrath said, “There were things that were unwarranted and inexcusable. ... It was so incredibly bad. I said, ‘Sheesh, something must be done.’ The players were beaten down and in trouble psychologically. Every other word was a four-letter one. . . .” *Id.* at 577.

In dismissing the action, the court found that the truth of these statements precluded Campanelli’s recovery:

Campanelli’s own allegations, coupled with assertions of fact which he attached to his complaint and incorporated therein, show that he engaged in temper tantrums directed at his players which included verbally abusive and profane remarks of a personal nature, to the extent that seven members of the team wanted to transfer unless he was fired. Through these concessions, Campanelli has admitted the essential accuracy of Bockrath’s statement that the players were ‘in trouble psychologically.’ For this additional reason, the demurrer to the cause of action against Bockrath was properly sustained without leave to amend.

Id. at 582.

2. No Publication

“[F]or defamatory matter to be actionable, it must be communicated, or ‘published,’ intentionally or negligently, to ‘one other than the person defamed.’” *Cabesuela v. Browning-Ferris Indus.*, 68 Cal.App.4th 101, 112 (1998). Publication need not be to the public or a large group; communication to a single individual is sufficient. *Ringler Associates, Inc. v. Maryland Cas. Co.*, 80 Cal.App.4th 1165, 1179 (2000).

In *Cabesuela*, Plaintiff was truck driver for Browning-Ferris Industries, who attended a company health and safety meeting. *Cabesuela*, 68 Cal.App.4th at 105-06. During this meeting, he objected to the company extending the driver’s work hours. *Id.* at 106. Plaintiff asserted this was a health and safety risk, then discussed a workplace murder-suicide that had recently occurred at Browning-Ferris. *Id.* The Browning-Ferris district manager told Plaintiff “that she took [his] words at the meeting to be a threat of physical violence.” *Id.* Plaintiff was suspended and his employment was thereafter terminated for “violence or threats of violence.” *Id.* In affirming judgment in the employer’s favor, the appellate court stated, “The fact that defendants orally and in writing accused plaintiff of threatening violence, without more, does not constitute ‘publication’ for the purposes of Civil Code Sections 46 and 45.” *Id.*

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3. Self-Publication

The general rule is that, where the person defamed voluntarily discloses the contents of a libelous communication to others, the originator of the libel is not responsible for the resulting damage. *Shoemaker v. Friedberg*, 80 Cal.App.2d 911, 916 (1947). In *Davis v. Consol. Freightways*, 29 Cal.App.4th 354, 376 (1994), the former employee was unable to establish defamation because he admitted he had talked about the incident inside and outside of his employer, trying to garner support.

However, defendant employers do not always escape liability, even in situations where the plaintiff has published the allegedly defamatory statements. The employer will be liable if a plaintiff can show that “self-publication” was reasonably foreseeable. Foreseeability is shown “where the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.” *McKinney v. County of Santa Clara*, 110 Cal.App.3d 787, 796 (1980). McKinney, a police officer, sued his former employer for libel and slander. *Id.* at 792. McKinney claimed he was compelled to repeat the alleged defamatory statements whenever he applied for jobs as a police officer in order to explain the basis for his dismissal. *Id.* The court concluded that there was a “strong causal link between the actions of the originator and the damage caused by republication.” *Id.* at 797. McKinney was the first California case to apply the “strong compulsion to repeat” standard to the issue of defamation. If a plaintiff cannot meet this standard, the defendant will likely prevail.

4. Invited Libel

There are no pertinent California cases discussing the question of invited libel.

5. Opinion

Defamation is available only for false statements of fact, and not mere statements of opinion. This limitation is based in free speech rights. “Under the First Amendment there is no such thing as a false idea ... [C]ourts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating [the former] as constitutionally protected ...” *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596 (1976) (internal quotation marks and citations omitted).

In the employment context, plaintiffs whose claims are based upon performance evaluations may expect to face “strong judicial disfavor.” *Jensen v. Hewlett-Packard Co.*, 14 Cal.App.4th 958, 964 (1993). In *Jensen*, the court held that:

Unless an employer’s performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior, it cannot support a cause of action for libel. This is true even when the employer’s perceptions about an employee’s efforts, attitude, performance, potential or worth to the enterprise are objectively wrong and cannot be supported by reference to concrete, provable facts.

Id. at 965 (citations omitted).

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In *Jensen*, the court reasoned that an evaluation consists of one's opinion; therefore, no comments in the evaluation could be interpreted as "false statements of fact," a requirement for proving libel. *Id.* at 970.

On the other hand, in *Kahn v. Bower*, 232 Cal.App.3d 1599, 1609 (1991), the court held an accusation of plaintiff's "incompetence" was "reasonably susceptible of a provably false meaning" and therefore "actionable as against the objection that they lack the requisite factual content" (though a judgment on the pleadings for defendant was proper on other grounds).

E. Job References and Blacklisting Statutes

Under California Labor Code Section 1050, "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor." An individual aggrieved by a violation of Section 1050 may pursue a civil action against any person, agent, or officer who violated the statute and recover treble damages. CAL. LABOR CODE § 1054.

F. Non-Disparagement Clauses

California employers routinely place non-disparagement clauses in severance and settlement agreements. Represented employees will often request that these clauses be mutual, so that the employer agrees not to disparage the former employee. As an alternative, some employees will request that the employer agree to provide a letter of reference or a neutral reference only.

No California case discusses enforceability of non-disparagement clauses against employers. As enforced against employees, the California Court of Appeal, in *Edwards v. Arthur Andersen LLP*, 142 Cal.App.4th 603 (2006), overturned on other grounds in *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937 (2008), rejected an employee's challenge a non-disparagement provision violated California's whistleblower statute (Labor Code section 1102.5). Plaintiff sued his former employer for interference with prospective economic advantage for refusing to release him from a non-compete agreement unless he signed a non-disparagement agreement as to the former employer. He claimed the agreement constituted a "independently wrongful" act (an element of the interference with economic advantage tort), in that it violated Labor Code 1102.5's prohibition on employers from making, adopting, or enforcing "any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency ... the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute ... rule or regulation." The Court disagreed with Plaintiff's claim. It "discern[ed] nothing inherently unlawful about a party generally agreeing not to disparage another." *Id.* at 811. The Court noted that while the provision could not "hinder an employee's cooperation with government officials", the whistleblower statute applied to "workplace rules and regulations meant to govern employees' conduct. The [agreement], ... was ... proposed at the end of [plaintiff's] tenure with [his former employer], and did not constitute a rule or policy governing his conduct as an" employee there. *Id.* at 811-12.

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VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

California recognizes a cause of action against an employer or co-employee for intentional infliction of emotional distress in limited circumstances. A prima facie case:

“[R]equires [1] outrageous conduct by the defendant, [2] intention to cause or reckless disregard of the probability of causing emotional distress, [3] severe emotional suffering and [4] actual and proximate causation of the emotional distress. There is liability for conduct ‘exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress’ Ordinarily mere insulting language, without more, does not constitute outrageous conduct. . . . [L]iability ‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ “

Cole v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 155 (1987) (citations omitted).

Generally, the state workers’ compensation law, CALIFORNIA LABOR CODE SECTIONS 3600 *et seq.*, provides the exclusive remedy for emotional distress claims, including those arising from termination of employment or from the actions of the employer. “[W]hen the employee’s claim is based on conduct normally occurring within the workplace, it is within the exclusive jurisdiction of the Workers’ Compensation Appeals Board.” *Id.* at 149.

“[W]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer’s decisions as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance resulting in disability.” *Id.* at 155-156.

“[I]njuries arising from termination of employment ordinarily arise out of and occur in the course of the employment within the meaning of Labor Code section 3600. . . .” *Shoemaker v. Myers*, 52 Cal.3d 1 (1990) (holding that wrongful termination causes of action are barred by the exclusive remedy provisions of the Workers’ Compensation law).

However, the workers’ compensation law does not bar claims for intentional infliction of emotional distress based upon extreme and outrageous conduct that exceeds the normal risks of the employment relationship. *Livitsanos v. Superior Court*, 2 Cal.4th 744, 782 (1992).

Prior to the decision in *Cole*, supra, actions that recognized as sufficient to sustain a claim for intentional infliction of emotional distress included: use of racial epithets, *Alcorn v. Anbro Eng’g, Inc.*, 2 Cal.3d 493 (1970), and misrepresentations regarding employer-provided medical coverage for the employee’s minor child who suffered from a serious medical condition, *Wayte v. Rollins Inn Inc.*, 169 Cal.App.3d 1, 17 (1985).

Subsequent to *Cole* the courts have allowed claims to proceed for harassment based upon sexual orientation, *Kovatch v. Cal. Cas. Mgmt. Co.*, 65 Cal.App.4th 1256 (1998), disapproved on other grounds by

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Aguilar v. Atlantic Richfield Co., 25 Cal.4th 826 (2001), and wrongful discharge in violation of public policy, *Phillips v. Gemini Moving Specialists*, 63 Cal.App.4th 563, 577 (1998), abrogated on other grounds by *Vasquez v. Franklin Management Real Estate Fund, Inc.*, 222 Cal.App.4th 819 (2013).

Similarly, since the decision in *Cole*, the courts have rejected claims for intentional infliction of emotional distress arising out of the breach of contract that occurred when an employer induced new hire to “come to the United States from India to work as a general manager but, within just a few months of his arrival, reduced his salary and pressured him to resign.” *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal.App.4th 338 (2010).

In *Singh* the court accepted that after plaintiff resigned his employment, he returned to the workplace to “return some items and pick up his last paycheck.” During that visit he was confronted by his employer’s bookkeeper and by the president and owner of the company. When the company president “threatened to physically throw him out of the office and grabbed him by the lapels.” Yet, the court reversed the jury’s special finding that the conduct of the employer was “outrageous and was a substantial factor in causing Singh to suffer severe emotional distress.” In reversing the trial verdict, the court of appeals wrote, “We conclude that such misconduct all occurred in the normal course of the employer-employee relationship. The misconduct all occurred in the workplace and involved criticism of job performance or other conflicts arising from the employment. Although the misconduct was offensive and clearly inappropriate, we believe that it all arose from risks encompassed within the compensation bargain.” *Id.* at 367-368.

The courts recognize that there is no bright line test available to distinguish between employers’ actions that fall within the compensation bargain and those outside of it. In *Operating Engineers Local 3 v. Sylvia J. Johnson, Individually and as Chief Probation Officer*, 110 Cal.App.4th 180 (2003), the plaintiffs sought damages for emotional injury resulting when “Johnson violated Vinson’s [plaintiff] right to privacy by announcing at a March 17, 1999 managerial meeting, in the presence of numerous other employees with no interest in the matter, that Vinson would be reprimanded and directing her to write her own letter of reprimand, and by then distributing to a much larger number of additional employees the minutes of the meeting, in which this disciplinary action was reported in bold print.” Defendant asked the court of appeal to reverse the jury verdict awarding plaintiff damages for the invasion of her privacy and for the emotional distress. In upholding the verdict the court wrote:

“A disciplined employee may allege the invasion of his or her privacy almost as easily as one may allege the intentional infliction of emotional distress. While an employee establishing such a claim is entitled under our view to pursue the cause of action in superior court, if the claim is rejected it follows that the matter should never have been in superior court in the first place. It is hardly desirable to have the jurisdictional determination dependent on the outcome of the case on its merits. . . . Ultimately, this consequence may be attributable to the difficulty, if not the inherent impossibility, of adopting a bright line test to distinguish between a normal and abnormal “part of the employment relationship.” As the preceding discussion makes clear, our Supreme Court has steadfastly rejected any such bright-line approach.” *Id.* at 191(citations omitted).

B. Negligent Infliction of Emotional Distress

There is no independent tort of negligent infliction of emotional distress. Rather, negligent infliction claims are a species of negligence. *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 984

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(1993); *Delfino v. Agilent Technologies, Inc.*, 145 Cal.App.4th 790, 818 (2007). Accordingly, at its core, the tort of negligent infliction of emotional distress is simply a negligence claim.

Even if a claim for negligent infliction of emotional distress exists in connection with employment terminations, the exclusive remedy for injuries caused by an employer's negligence is usually workers' compensation. *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 713-714 (1994).

VIII. PRIVACY RIGHTS

A. Generally

A right of action for invasion of privacy may be based upon the Privacy Initiative in article I, section 1 of the California Constitution, which states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy.*" The state constitutional right to privacy may be enforced against private parties as well as government entities. *Hill v. Nat'l Coil. Athletic Ass'n*, 7 Cal.4th 1, 19 (1994).

The California Supreme Court defined the essential elements of a state constitutional cause of action for invasion of privacy as: (1) the identification of a specific, legally protected privacy interest; (2) a reasonable expectation of privacy on plaintiff's part; and, (3) a serious invasion of privacy that is sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. *Id.* at 36-37.

The court in *Hill* recognized that "[t]he diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test.'" *Id.* at 37.

Invasion of privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

Id. at 36-37 (citations omitted).

California also recognizes a common law right of privacy:

The common law right of privacy contains several important limiting principles that have prevented its becoming an all-encompassing and always litigable assertion of individual right. Initially, not every kind of conduct that strays from social custom or implicates personal feelings gives rise to a common law cause of action for invasion of privacy. The various branches of the privacy tort refer generally to conduct that is 'highly offensive to a reasonable person,' thereby emphasizing the importance of the *objective context* of the alleged invasion, including: (1) the likelihood of serious harm, particularly to the emotional sensibilities of the victim; and (2) the presence or absence of countervailing interests based on competing social norms which may render defendant's conduct inoffensive, a

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legitimate public interest in exposing and prosecuting serious crime that might justify publication of otherwise private information or behavior. Moreover, the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, *i.e.*, he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability.

Id. at 25-26.

In *Puerto v. Superior Court*, 158 Cal.App.4th 1242 (2008), the California Court of Appeal, after applying the invasion of privacy claims test set forth in *Hill*, held that protecting employees' privacy rights by adopting an opt-in procedure (rather than an opt-out procedure) before their telephone numbers and addresses could be disclosed in the course of discovery was improper, in that the information was not particularly sensitive and disclosure would not significantly intrude upon their privacy rights.

The First District of the California Court of Appeal has held, however, that certain information of potential putative class members must be separately analyzed for consideration of whether a limited nuanced approach may be applied to balance the privacy interests of third parties with a litigant's interest in pursuing discriminatory FEHA claim, and whether less intrusive means exists to obtain the sought information. *Life Technologies Corp. v. Superior Court*, 197 Cal.App.4th 640 (2001). In *Life Technologies*, plaintiff propounded interrogatories seeking information regarding former employees including dates of termination, the ages of employees terminated, the reasons for the termination and whether severance benefits were offered and accepted to the terminated employees. *Id.* at 647-648.

The Court of Appeal held that the trial court failed to conduct a separate analysis for each of the requests and failed to "consider whether a more nuanced approach to the different categories of data would satisfy the balance that must be taken between privacy interests and a litigant's need for discovery." *Id.* at 655-656. Further, if the balancing of interests weighs in favor of disclosure, considerations of reasonable notice to third-parties and protection of third-party employee's information once disclosed should be adopted. *Id.* at 653.

In *Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319 (2007), the California Supreme Court concluded that the names and salaries of public employees earning \$100,000 or more per year, including peace officers, were not exempt from public disclosure under the California Public Records Act. The Court held that disclosure of the salary information at issue would not constitute an unwarranted invasion of personal privacy.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to verify that an individual is authorized to be employed in the United States. 8 U.S.C. 1324a *et seq.* If an employer knowingly employs an individual that is not authorized to work in the United States, the employer is subject to civil and criminal penalties. 8 U.S.C. 1324a©(4) *et seq.* Pursuant to the requirements of the IRCA, the eligibility of an individual's ability to legally work in the United States must be confirmed within three business days of the employee's first day of work. 8 U.S.C. 1324a *et seq.* If you comply with the

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verification requirements and subsequently learn that the individual is not authorized to work in the United States, you may no longer employ the individual. 8 U.S.C. 1324a(a)(2).

Each employer must fill out an I-9 Employment Eligibility Verification Form. 8 U.S.C. 1324a(1)(A) An employer is not required to fill out an I-9 Form for: (1) employees hired prior to November 6, 1986 and continuously employed by the same employer, (2) casual employees performing irregular domestic service in a private residence, (3) independent contractors and (4) workers provided by contract services (i.e., temporary agencies). The list of acceptable documents which employer may use to verify an employee's eligibility to work in the United States may be found directly on the I-9 form. Go to <https://www.uscis.gov/i-9> for a copy of the current form. Documents that appear to be valid on their face must be honored. 8 U.S.C. 1324(a)(6).

Although California does not mandate its use, employers may choose to utilize an online verification program (E-Verify) which compares the information on the I-9 against federal government databases to verify an employee's eligibility to work in the United States. The only exception to the voluntary utilization of the E-Verify program pertains to the employment of certain federal contractors or subcontractors. In these instances, E-Verify may be required.

The I-9 form is not filed with the United States government. Rather, the employer must complete and retain a copy of the form for inspection by government officials, including the Department of Homeland Security, Department of Labor or the Department of Justice. The forms must be maintained for three years after the date of hire or one year after termination of the employee, whichever is later. 8 U.S.C. 1324a(b)(3) Failing to comply with these requirements subject the employer to the following penalties:

- Fines for failing to complete, retain or make the forms available for inspection range from \$110 to \$1,100 per individual form;
- Civil penalties from \$375 to \$16,000 per violation (depending upon first or subsequent offense) for knowingly hiring or retaining employees who are not authorized to work in the United States;
- If a pattern is established that the employer knowingly hires or continues to employ unauthorized employees, the offending employer may be subject to penalties as high as \$3,000 per unauthorized employee and/or six months of imprisonment. 8 U.S.C. 1324a(e)(4).

Under California law, however, an employer is not permitted to examine an individual about their immigration status unless when necessary by clear and convincing evidence to ensure compliance with federal immigration law. Government Code Section 7285. Further, all workers, regardless of immigration status, are entitled to all rights and remedies under California law (with the exception of reinstatement). *Id.*

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2. Background Checks

a. Credit Reports

LABOR CODE § 1024.5 places limits on employers' use of credit checks and prohibits an employer from obtaining a consumer credit report for employment purposes unless the position of the person for whom the report is sought is any of the following:

- (a) A position in the state Department of Justice;
- (b) A managerial position (defined as an employee covered by the executive exemption set forth in Wage Order 4 of the Industrial Welfare Commission);
- (c) That of a sworn peace officer or other law enforcement position;
- (d) A position for which the information contained in the report is required to be disclosed by law or to be obtained;
- (e) A position that provides regular access to certain personal information (bank or credit card account number, social security number, and date of birth), if the access is for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment;
- (f) A position in which the person is or would be a named signatory on 'he employer's bank or credit card account, or authorized to transfer money or enter into financial contracts on 'he employer's behalf;
- (g) A position that involves access to confidential or proprietary information (using the same definition found 'n the state's Uniform Trade Secrets Act); or
- (h) A position that involves regular access to \$10,000 or more of cash. There is an exception built into the law for financial institutions.

LABOR CODE § 1024.5 contains notice requirements as well. First, the employer is required to provide a written notice informing the person for whom a consumer credit report is sought of the specific reason for obtaining the report. The notice shall also inform the person of the source of the report, and shall contain a box that the person may check off to receive a copy of the credit report. If the person asks for the report, the employer shall ask the credit reporting agency to provide a copy to the person at the same time the employer receives it and it must be provided without charge.

Whenever employment is denied either wholly or partly because of information contained in a consumer credit report, the employer must inform the person and supply the name and address of the consumer credit reporting agency. No person shall be held liable for any violation of these notice provisions if he or she shows by a preponderance of the evidence that, at the time of the alleged violation, he or she maintained reasonable procedures to assure compliance with the law.

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b. Investigative Consumer Reports

CIVIL CODE § 1786.10, *et seq.*, governs the use of Investigative Consumer Reports which supplies information about character, general reputation, personal characteristics and mode of living. Specific notices requirements are set forth in CIVIL CODE § 1786.16, which includes (in part) a disclosure to the employee that an investigative consumer report will be made about his/her character, general reputation, personal characteristics and mode of living, the report's permissible purpose, the investigative consumer reporting agency's name address and telephone number and the requested investigation's nature and scope. Further disclosure requirements are set forth in CIVIL CODE § 1786.22.

Employers must obtain the individual's written authorization to obtain the report and must provide through a check box which permits the person to request a copy of any report prepared. If a report is requested, the report must be sent within three business days upon receipt. It is important for employers to provide proper notifications to the individual before taking action based on the content of an investigative consumer report, including providing a copy of the Pre-Adverse Action Disclosure, a copy of the report and a Fair Credit Reporting Act – Summary of Your Rights.

These laws do not apply to employers that obtain an investigative consumer report if wrongdoing or misconduct is suspected. CIVIL CODE § 1786.16(c).

c. Criminal History

The Equal Employment Opportunity Commission issued its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions" which offers guidance on practices utilized by employer's in obtaining information from job applicants concerning their criminal history. Although the guidance is not a regulation, it does provide a list of factors the EEOC may consider when determining whether to file charges for an alleged prohibited practice. Generally, an employer must show that the criminal history screening practice not only relates to business necessity but also relates to the job at issue. The EEOC sets forth criteria under a "targeted screen" and individualized assessment that an employer may use to show that a screening practice is job related and a business necessity.

The EEOC guidance may be found at: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

Effective January 1, 2018, the Fair Employment and Housing Act requires employers with five or more employees to comply with certain procedures regarding the use of criminal history information for hiring purposes. Employers are prohibited from making any inquiry into conviction history until after a conditional employment offer has been extended to the applicant. Employers are also prohibited from considering an arrest not followed by conviction, convictions that have been sealed, expunged, or eradicated, or referrals/participations in pre- or post-trial diversion programs. GOV. CODE § 12952.

The California Civil Rights Department, formerly known as the Department of Fair Housing and Employment or DFEH, created new FEHA regulations that require an employer conduct an individualized assessment before the employer denies an applicant whose offer was conditionally based completely or partially on the applicant's criminal history.

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C. Other Specific Issues

1. Workplace Searches

Employees' privacy rights in connection with employer-provided computers were analyzed in *TBG Ins. Services Corp. v. Superior Court*, 96 Cal.App.4th 443 (2002). An employee was provided a computer for use at work as well as one for use at home. *Id.* at 445. The employee signed an agreement that both computers were meant to be used for work only and were subject to monitoring by the employer. *Id.* After discovering that the employee had been viewing pornographic websites on his computer at work, the employer asked to review the computer the employee was using at home. The employee agreed to return the computer, but only if he could first delete personal information that he and his family members had placed on the computer. The court held, because the employee had signed a consent to the company monitoring of the computers, he had waived the right of privacy and could not claim any reasonable expectation of privacy in the home computer. *Id.*

In *Holmes v. Petrovich Development Co.*, 191 Cal.App.4th 1047 (2011), a California appellate court held that an employer was entitled to access communications between an employee and her private attorney about alleged workplace harassment that was transmitted from employer's computer system because the employer had an explicit policy stating that any communications on its system were not private and were subject to monitoring by the employer. Whether a right of privacy exists depends upon whether there is a reasonable expectation of privacy in the communication. The court held that the employee had no reasonable expectation of privacy in light of the employer's written policy.

For purposes of a summary judgment motion, a Court of Appeal held that there was a genuine issue of material fact as to whether a plaintiff employee had a reasonable expectation of privacy related to personal emails on her work computer where an employer did not adopt or disclose a policy regarding the monitoring of employee emails and where provisions in a union Collective Bargaining Agreement provided "Employees subject to this Agreement should have a reasonable expectation of privacy and to be secure from unreasonable searches and seizures on his/her person and his/her work area to the extent provided by law." *Doe v. City and County of San Francisco*, 835 F.Supp.2d 762, 769-770 (N.D. Cal. 2011).

2. Electronic Monitoring

The California Penal Code prohibits wiretapping and related activities. California is different than most states, in that monitoring and taping communications is unlawful unless *all* parties to the communication give their consent. The prohibited activities include:

- a. Intentional wiretapping;
- b. Willfully reading or attempting to read or learn the contents of any communication in transit;
- c. Using or attempting to use or publicize information obtained through wiretapping or obtaining communications in transit;
- d. Eavesdropping on or recording confidential communications; and

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- e. Disclosing the contents of a telephone or telegraph message to a person other than the intended recipient without the recipient's authorization.

CAL. PEN. CODE §§ 631, 632, and 637.

The California Labor Code specifically prohibits an employer from making an audio or video recording of any employee in a restroom, locker room, or room designated by an employer for changing clothes, unless authorized by court order. CAL. LABOR CODE § 435(a). A recording made in violation of Section 435 may not be used for any purpose. CAL. LABOR CODE § 435(b). Violation of Section 435 constitutes an infraction. CAL. LABOR CODE § 435(c). However, even hidden cameras do not invade the employees' privacy when the employer's purpose is lawful and the camera is located in a non-private area, where there is a diminished expectation of privacy. See *Sacramento County Deputy Sheriff's Ass'n v. County of Sacramento*, 51 Cal.App.4th 1468, 1487 (1997). In *Sacramento County*, the County had placed a hidden video camera, which had no audio capabilities, in a small office after learning that thefts of inmate property were probably occurring in that office. The employees claimed that they had a subjective expectation of privacy, because they used the office to tuck in their shirts or adjust bandages around a knee injury. The Court found that the employees' ability to close the office door was not sufficient to create a legitimate, objective expectation of privacy, and the employer's security interests outweighed any possible expectation of privacy. *Id.*

3. Social Media

As employees are turning more and more to internet social media outlets to vent frustration or opinions concerning their employment, employers must use caution when determining its course of action to address perceived problems with statements or comments made by its employees. Online discussions between co-workers on social websites such as Facebook or Twitter may be deemed a protected concerted activity.

This very issue was highlighted in an action filed by the National Labor Relations Board ("NLRB") in *American Medical Response of Connecticut, Inc. v. International Brotherhood of Teamsters, Local 443*, Case No. 34-CA-12576 (Oct. 27, 2010 NIL Region 34). In this Complaint, the NLRB charged that the employer infringed upon "concerted protected activity" through disciplining and terminating an employee that posted unfavorable comments about her employer on Facebook. The case ultimately settled. As part of the settlement, the employer agreed to revise internet and blogging policies concerning wages, hours and working conditions with co-workers and others while outside of work. Undoubtedly, as the use of social websites by employees increase, new case law will develop as to what constitutes a "concerted protected activity."

Moreover, pursuant to legislation adopted in 2012, employers are now restricted from requesting access to social media sites of applicants and employees, with the exception of necessary access as part of an investigation. LABOR CODE § 980. However, an employer may require an employee to disclose a username, password or other method in order to access an employer-issued electronic device. *Id.* Nothing the code affects an "employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media issued solely for purposes of that investigation or a related proceeding. LABOR CODE § 980(c).

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4. Taping of Employees

See discussion above of "Electronic Monitoring" in Section VIII.C.2.

5. Release of Personal Information on Employees

The right to privacy protects an employee from the improper release of information from his/her personnel file to third parties. *Board of Trustees, Stanford University v. Superior Court*, 119 Cal.App.3d 516 (1981). Generally, an employee's personnel records must be kept in a manner which prevents unauthorized use or disclosure to third parties, including credit information (CIVIL CODE § 1785.20.5) and medical information (CIVIL CODE § 56.20; see below Section VII.C.6.).

6. Medical Information

Invasion of privacy in medical information was analyzed in *Pettus v. Cole*, 49 Cal.App.4th 402 (1996). Pettus had been employed by DuPont for 22 years when he requested stress related disability leave. *Id.* at 414. To determine whether Pettus had such a disability, DuPont arranged and paid for Pettus to attend three psychiatric evaluations. *Id.* at 415. After these meetings, the information obtained by these psychiatrists was released to DuPont without any attempt to obtain authorization from Pettus. *Id.* Based upon this confidential information, DuPont requested that Pettus enroll in an inpatient alcohol treatment program. *Id.* Pettus refused to do so and DuPont subsequently terminated his employment. *Id.*

The appellate court found that DuPont violated California's Confidentiality of Medical Information Act (CMIA), California Civil Code Sections 56-56.07, by using confidential information to Pettus' detriment. *Id.* at 414. DuPont's use of the material did not fall within any exceptions to the CMIA. *Id.* at 452.

The court also held that DuPont violated Pettus' autonomy privacy rights (*i.e.* "interest in making intimate personal decisions about an appropriate course of medical treatment for his disabling stress condition, without undue intrusion or interference from his employer"). *Id.* at 458. The court employed the following privacy analysis in arriving at its decision: (1) does the plaintiff have a legally protected privacy interest; (2) does the plaintiff have a reasonable expectation of privacy; (3) the seriousness of the intrusion; (4) defendant's countervailing interests; and (5) inquiring about less intrusive alternatives. *Id.* at 439.

In *Melissa Ignat v. Yum!Brands, Inc.*, 214 Cal.App.4th 808 (2013), the California Court of Appeal observed that a former employee may sue her employer and immediate supervisor for verbal public disclosure of private rights. The court held that "disclosure in writing is not required to maintain a cause of action for public disclosure of private facts."

The plaintiff in that case suffered from bi-polar disorder and occasionally missed work due to the side effects of medication adjustments. Plaintiff claimed that after returning to work from an absence, her supervisor had informed everyone in her department about her medical condition and that, as a result, she was "shunned" and a co-worker asked if she was going to "go postal." The plaintiff filed suit alleging a single cause of action for invasion of privacy by public disclosure of private facts.

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7. California Consumer Privacy Act

The California Consumer Privacy Act grants consumers certain rights regarding personal information that is owned by businesses. This includes the right to request disclosure of the specific kinds of personal information a company has collected and to have that information deleted. The CCPA offers some clarification as it relates to data collected through the employment process.

Specifically, beginning January 1, 2020, the CCPA requires, among other things, that a covered employer provide a notice at or before the collection of the personal information of employees, job applicants, or independent contractors that is collected in the course of employing, recruiting, or contracting with them. Additionally, a covered business must provide a notice to all other consumers at or before the collection of their personal information. The CCPA's definition of personal information is a broad one: "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."

The notice provided by the employer must identify the categories of personal information and list the business purposes for which each category of personal information will be used. Furthermore, businesses are prohibited from using the personal information collected for any other reason that is not specifically listed on the notice.

The CCPA further requires employers to employ reasonable physical and electronic security measures with respect to the storage of private information.

The CCPA only applies to for-profit business that:

- (1) Do business in California;
- (2) Collect the personal information of consumers, including employees; and
- (3) Satisfy any of the following criteria: (a) have annual gross revenues over \$25 million; (b) annually receive, sell, or share personal information about more than 50,000 or more California residents or households or 50,000 devices; or (c) derive 50% or more of their annual revenue from selling personal information of consumers.

IX. WORKPLACE SAFETY

A. Negligent Hiring

In California, an employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. California follows the rule stated in RESTATEMENT (SECOND) OF AGENCY § 213, which provides: "A person conducting an activity through servants . . . is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons . . . involving the risk of harm to others. . . ." See *Underwriters Insurance Co. v. Purdie*, 145 Cal.App.3d 57, 69 (1983).

California courts have cited, with approval, Comment d of the RESTATEMENT, which reads in part:

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The principal may be negligent because he has reason to know that the servant . . . , because of his qualities, is likely to harm others in view of the work . . . entrusted to him. . . . An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. . . . Liability results under the rule . . . , not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . ."

See RESTATEMENT (SECOND) OF AGENCY § 213, Comment d (emphasis added); see also *Evan F. v. Hughson United Methodist Church*, 8 Cal.App.4th 828 (1992).

In *Diaz v. Carcamo*, 51 Cal.4th 1148 (2011), the California Supreme Court held that an employer's concession that it was vicariously liable for its employee's negligence renders evidence concerning negligent hiring and retention of employee irrelevant. For instance, if a Plaintiff is injured in an automobile accident caused by a negligent employee, and Plaintiff asserts claims on theories of respondeat superior and negligent entrustment, hiring or retention, and employer admits vicarious liability in the course of discovery, the Plaintiff may not pursue the negligent entrustment, hiring or retention claim.

The California Supreme Court extended the reach of the *Carcamo* holding and pierced the immunity claimed by a school district in *C.A., a Minor v. William S. Hart Union High School District*, 53 Cal.4th 861 (2012). Here, the court clarified that the vicarious liability of the district flowed not from the intentional tort by its employee who sexually violated his student, but from the district's breach of its duty ". . . of due care in their administrators' and supervisors' 'selection of [instructional] employees and the close monitoring of their conduct. . . ." *Id.* at 878.

B. Negligent Supervision/Retention

An employer's duty to avoid negligent hiring or supervision also extends to its employees. The California Court of Appeal held that an employer's liability to its employees may be founded on the employer's ratification of tortious acts by its management in *Ventura v. ABM Industries Incorporated*, 212 Cal.App.4th 258 (2012). Here, Ms. Ventura successfully sued her employer for negligent supervision and hiring and for violation of California CIVIL CODE § 51.7 (right to freedom from violence), based on the harassment and an act of violence by a supervisor. The verdict in her favor was affirmed by the court. The court found that the employer waived its right to assert workers' compensation as a bar to the claims of negligent supervision by failing to assert the issue at trial. The court wrote, "Where a complaint indicates that an employment relationship exists between a plaintiff and a defendant, it is the defendant's burden to plead and prove that the act applies." Further, in addressing the assertion by the employer that it could not be held liable for ratifying the supervisor's acts, the court cited *C.R. v. Tenet Healthcare Corp.*, 169 Cal.App.4th 1094, 1110 (2009).

'[A]n employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. [Citations.] The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citation.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort,

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such as assault or battery. [Citations.] Whether an employer has ratified an employee's conduct is generally a factual question. [Citation.]'

C. Interplay with the Workers' Compensation Bar

1. In General

The California Occupational Safety and Health Act of 1973 was enacted with the express purpose of "assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, [and] assisting and encouraging employers to maintain safe and healthful working conditions. . . ." LABOR CODE § 6300. In furtherance of that purpose LABOR CODE § 6400(a) imposes on every employer the obligation to provide a " . . .place of employment that is safe and healthful for the employees therein." At multiemployer worksites that obligation extends to the employers whose employees are present, the employer who creates a hazard, the employer responsible for safety and health conditions under contract or by practice in the industry, and the employer who had the responsibility for correcting a hazard. LABOR CODE § 6400(b). These obligations may be enforced through penalties

To enforce this obligation the legislature created the Division of Occupational Safety and Health (Cal OSHA).

2. Employer Serious and Willful Misconduct

Additionally, the legislature provided a mechanism of enforcement through the workers' compensation appeals board. LABOR CODE §4553 and 4553.1 establish an uninsurable risk for employers who commit serious and willful misconduct resulting in injury to an employee.

Employer serious and willful misconduct arises only from the misconduct of "the employer, or his managing representative", of one of the partners or general superintendent of a partnership, or of an executive, managing officer or general superintendent of a corporation. LABOR CODE §4553(a)-c). The elements of employer serious and willful misconduct for violation of a safety order are set out in LABOR CODE §4553.1 as follow: The WCAB must find that (1)a safety order and the conditions making the safety order applicable were known to and violated by a particular named person as identified in §4553 or (2)that the condition making the safety order applicable was obvious, created a probability of serious injury; (3)that the failure of the designated person to correct the condition constituted a reckless disregard for the probable consequences; (4)that the violation of the safety order was the proximate cause of the injury; and (5)the specific manner in which the order was violated.

Thus, in *Bigge Crane & Rigging Company v. Workers' Compensation Appeals Board, Paul Hunter*, 188 Cal.App.4th 1330 (2010), the court of appeal reversed the WCAB finding of serious and willful misconduct on the basis that an injury resulting from directions given by a crane operator with 30 years' experience did not emanate from a managing officer or supervisor.

The California Supreme Court discussed the burden of proof required to show employer serious and willful misconduct in *Mercer-Fraser Company v. Industrial Accident Commission and Dawn Thalia Soden*, 40 Cal.2d 102 (1953), disapproved on other grounds by *LeVesque v. Workmen's Comp. App. Bd.*, 1 Cal.3d 627 (1970). In its analysis the court reviews the spectrum of tortious conduct that runs from simple negligence through willful and wanton. In its discussion of the various standards of negligence utilized in

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different contexts, the court concluded that none adequately described the burden intended by the legislature to apply in workers' compensation. "Rather, the true rule is that serious and willful misconduct is basically the antithesis of negligence, and that the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute willful (sic) misconduct; conversely an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences, cannot properly be classed as the less culpable conduct which is termed negligence. It follows that a finding of serious and willful misconduct cannot be sustained upon proof of mere negligence of any degree." *Id.* at 120.

A finding of employer serious and willful misconduct entitles the injured worker to receive an increase of 50% of compensation "otherwise recoverable" together with costs and expenses not to exceed \$250. LABOR CODE §4553. The risk of such an award may not be covered by insurance. INSURANCE CODE §11661. However, the insurance code does permit coverage for an employer's cost of defense.

Though the liability imposed on the employer may not be transferred through insurance coverage, the courts have found it is not punitive. "To be sure, the serious and willful misconduct remedy provided by section 4553 is 'punitive' in the sense that it requires an employer to pay an injured employee more than would be required in the absence of such misconduct. Thus the remedy departs to some extent from the no-fault principle upon which our workers' compensation system is primarily based. It bears noting, however, that this departure may be made only in the event of an exceptionally high degree of employer fault, surpassing even gross negligence." (Citations omitted). *Ferguson v. Workers' Comp. Appeals Bd.*, 33 Cal.App.4th 1613 (1995).

In *Ferguson*, the Applicant slipped and fell on a wet floor while employed as a general merchandise clerk, resulting in the need for medical treatment and vocational rehabilitation. She was paid temporary disability indemnity and awarded a permanent disability of \$66,780. Applicant also sought a 50% increase in her award under section 4553. It was found that there were no safety mats on the linoleum floor in the kitchen area, which was frequently wet and slippery from water and grease as a result of spray from a sink and a backedup (sic) drain. It was also undisputed that the employer knew of the dangerous condition, as other employees had fallen and complained to management. Applicant's work supervisor was aware of the dangerous condition, but chose not to put down safety mats because they were a "nuisance." Instead, employees were advised to "walk like a duck" in the wet kitchen area. Other than advising employees to walk carefully, management took no action to correct the hazardous condition. The court of appeal reversed the workers' compensation appeals board decision that held the 50% increase in benefits applied only to the indemnity Applicant received (the temporary disability, permanent disability and rehabilitation benefits) and did not apply to her medical benefits received. The WCAB had concluded that to calculate the increase based on the medical benefits received, both past and future, would impose unconstitutionally excessive punitive damages. In disagreeing, the court wrote, "Consequently, so long as an award for increased compensation under section 4553 calculated on the basis of all compensation received by the injured worker, including indemnity as well as nonindemnity benefits, does not provide the injured worker more than is necessary to fully compensate the worker for all damages he or she sustained as a result of the injury caused, at least in part, by the willful misconduct of the employer, the award does not constitute punitive damages and is therefore not constitutionally excessive. *Id.* at 1624.

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Serious and willful misconduct also may be found for a violation of the general obligation to provide a safe place to work. In *Bekins Moving & Storage Company v. Workers' Compensation Appeals Board and Glen D. Garner*, 103 Cal.App.3d 675 (1980), the Court of Appeal upheld the WCAB finding that the employer's conduct constituted serious and willful misconduct by its failure to provide a safe place to work when its employee's injury resulted from a wallboard that was not properly fastened, which condition was made known to the supervisor prior to the injury. However, "The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts to simple negligence." *Mercer-Fraser*, 40 Cal.2d at 11.

3. Statutory Civil Liability

An employer may be liable at law to its employees under statutory exceptions to the general rule of workers' compensation exclusivity. LABOR CODE §3602 sets forth the circumstances in which an employer may be liable for the injury or death as follow:

(1) "Where the injury or death is proximately caused by a willful physical assault by the employer." See *Herrick v. Quality Hotels, Ins & Resorts, Inc.*, 19 Cal.App.4th 1608 (1993).

(2) "Where the employees injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment." See *Foster v. Xerox Corp.*, 40 Cal.3d 306 (1985).

(3) "Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person." See *Behrens v. Fayette Manufacturing Co.*, 4 Cal.App.4th 1567 (1992). In *Behrens* the court of appeal supported the trial courts grant of summary judgment for the employer when the plaintiff/employee suffered injury "when attempting to lock off a wind turbine manufactured by the employer that had been sold to a third party." The employee was in contact with the turbine as a primary purpose of her job and not as a consumer.

Additionally, under LABOR CODE §4558 an employer may be liable at law for injuries or death of an employee resulting from "the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." See *Burnelle v. Continental Can Co.*, 193 Cal.App.3d 315 (1987).

When an action at law may be maintained under one or more of the above exceptions, there is concurrent liability for workers' compensation benefits. "Where an employee, or his or her dependents, receives the compensation provided by this division and secures a judgment for, or settlement of, civil damages pursuant to those specific exemptions to the employee's exclusive remedy set forth in subdivision (b) of Section 3602 and Section 4558, the compensation paid under this division shall be credited against the judgment or settlement, and the employer shall be relieved from the obligation to pay further compensation to, or on behalf of, the employee or his or her dependents up to the net amount of the judgment or settlement received by the employee or his or her heirs, or that portion of the judgment as has been satisfied." LABOR CODE §3600(b). The effect of the receipt of workers'

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compensation benefits is to create a credit against the employer's obligations in the civil court action. See *Burnelle, supra*.

However, when one of the statute-provided exceptions permits the injured worker to maintain a civil action, the employer is only liable for the injury or death of the employee and damages are not payable for loss of consortium. In *LeFiell Manufacturing Company v. Superior Court*, 55 Cal.4th 275 (2012), the California Supreme Court determined that an action for loss of consortium could not be maintained by the spouse of the employee injured through the removal of a guard on a power press machine. The court wrote, "The Court of Appeal's conclusion that the availability of an action at law pursuant to section 4558 for employee's power press injuries results in all of his claims falling outside the workers' compensation system, and its further conclusion that, consequently, spouse's derivative loss of consortium claim also falls outside the compensation bargain of section 3600, and is thus not barred by the exclusivity rule, were in error. What the Court of Appeal appears to have overlooked is that, notwithstanding the availability of a civil action at law for his power press injuries, employee's claims arising from his industrial accident remain compensable under the workers' compensation system." *Id.* at 285-286.

Thus, the court concluded, since the actions may be maintained simultaneously, the exclusivity of the workers' compensation system continues to apply to all, except to the very limited extent set forth in the statute. In the absence of an express authorization of an action for loss of consortium, the spouse may not seek damages as such damages are disallowed under the workers' compensation laws.

An employer may be liable for civil damages in the absence of a statutory exception, even though workers' compensation benefits have been paid, when the injured person proves the absence of an employment relationship, according to the California Court of Appeal, Sixth Appellate District in *Minish v. Hanuman Fellowship*, 214 Cal.App.4th 437 (2013).

Ms. Minish sustained severe injuries when she fell from the prongs of a forklift. As a result of the injuries she received workers' compensation benefits when the Hanuman Fellowship reported the injury to its workers' compensation carrier and identified her as its volunteer. Ms. Minish retained counsel who filed a petition for serious and willful misconduct of the employer in which she was identified as a volunteer. Additionally, her attorney filed an Application for Adjudication of Claim with the workers' compensation appeals board in which she was identified as a volunteer. The court of appeal held that it was an error for the trial court to grant summary adjudication in favor of Hanuman's claim that Ms. Minish was barred from civil damages by virtue of judicial estoppel. Instead, the court held that there remains an issue of fact whether she was a volunteer at the time of the injury and covered by the workers' compensation insurance existing for that purpose, or was present in some other capacity.

D. Firearms in the Workplace

According to federal OSHA, there are currently no specific standards for workplace violence.

There are no Cal/OSHA regulations addressing firearms in the workplace, except that firearms are prohibited in or near a motor vehicle transporting explosive materials. TITLE 8 CALIFORNIA CODE OF REGULATIONS 5652.

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E. Use of Mobile Devices

Effective January 1, 2017, VEHICLE CODE section 23123.5 was amended to prohibit drivers from operating a motor vehicle “while holding and operating a handheld wireless telephone or an electronic wireless communication device unless the [device] is specifically designed and configured to allow voice-operated and hands-free operation, and it is used in that manner while driving.” The revised section, states that the device “may be operated in a manner requiring the use of the driver’s hand while the driver is operating the vehicle *only if* . . . [the device] is mounted on a vehicle’s windshield . . . 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 [device] with the motion of a single swipe or tap of the driver’s finger.” *Id.* § 23123.5(c). This policy, however, does not apply to emergency service professionals using a device while operating an authorized emergency vehicle in the course and scope of their duties. *Id.* § 23123.5(e).

If an employer maintains a Bring Your Own Device policy, the employer must properly reimburse the employee for all expenses arising out of the business use of the employee owned device as per LABOR CODE section 2802. For example, in *Cochran v. Schwan’s Home Services, Inc.*, 228 Cal.App.4th 1137 (2014), the California Court of Appeals held that the labor code was violated if an employee “was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.”

Cal/OSHA regulations applying to use of mobile devices include the following:

8 CALIFORNIA CODE OF REGULATIONS § 1616.1: A crane operator may not allow diversion of his attention through the use of mobile devices, including cellular phones (other than when used for signal communications).

F. Emergency Conditions

Senate Labor Code Section 1139 prohibits a employer from threatening or taking adverse action against an employee who refused to report to or left a workplace because the employee had a reasonable belief that the workplace was unsafe. The bill also prevents an employer from disallowing access to an employee’s phone to seek emergency assistance, assessing the safety of the situation, or communicating with a person to confirm their safety.

G. Workplace Violence

Effective July 1, 2024, Labor Code Section 6401.9 mandates that employers create and adopt a workplace violence protection plan that is either included as part of the required Illness Prevention Plan or a standalone document. The bill also requires employers train employees on the plan and create workplace violence incident logs. The law does not apply to law enforcement agencies, employees working from a location of their choice, and employers with fewer than 10 employees working at the same location at any given time.

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X. TORT LIABILITY

A. Respondeat Superior Liability

CIVIL CODE § 2338 states:

Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

“Under the theory of respondeat superior, employers are vicariously liable for tortious acts committed by employees during the course and scope of their employment.” *Vogt v. Herron Const., Inc.*, 200 Cal.App.4th 643 (2011).

Employers can be liable for intentional torts of their employees under respondeat superior principals. In *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652 (1946), a principal California Supreme Court case on the issue, plaintiff was injured when a coworker threw a carpenter’s hammer, severely injuring him. The Court reasoned “[i]t is settled that an employer is liable for willful and malicious torts of his employee committed in the scope of the employment.” *Id.* at 654. The Court rejected an argument for the requirement that the willful act was intended to “further [the employer’s] interests,” holding “[i]t is sufficient ... if the injury resulted from a dispute “arising out of the employment.” *Id.* Stated otherwise, the coworker’s conduct was “an immediate outgrowth” of his employment. *Id.* at 656.

In *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal.4th 291 (1995), an ultrasound technician employed by defendant hospital sexually assaulted the plaintiff during the course of an ultrasound. Though the Court reasoned the technician’s employment “provided the opportunity for him to meet ... and be alone with [plaintiff] in circumstances making the assault possible,” it held the assault was not typical of or broadly incidental to, or a generally foreseeable consequence of, the hospital’s enterprise. *Id.* at 299-300. The Court reasoned more than but-for causation was required and that the incident’s “motivating emotions [must be] fairly attributable to work-related events or conditions.” *Id.* at 301. “Here the opposition was true: a technician simply took advantage of solitude with a naïve patient to commit an assault for reasons unrelated to his work.” *Id.*

B. Tortious Interference with Business/Contractual Relations

California recognizes both tortious interference with contract and tortious interference with prospective economic advantage. “A stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract.” *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990).

To prevail on a cause of action for intentional interference with contractual relations, a plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

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To establish the claim, the plaintiff need not prove that a defendant acted with the primary purpose of disrupting the contract, but must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his or her action.

Reeves v. Hanlon, 33 Cal.4th 1140, 1148 (2004).

In *Reeves*, Defendants Hanlon and Green, both attorneys, worked at the law offices of Plaintiff Reeves & Associates (Reeves). Hanlon and Green resigned, without notice or warning, and formed their own firm, Hanlon & Green (H&G). H&G then persuaded Reeves's employees to join H&G, personally solicited Reeves's clients to discharge Reeves and to instead obtain services from H&G, misappropriated Reeves's trade secrets, destroyed computer files and data, and withheld Reeves' property, including a corporate car. Reeves sought to recover under a variety of theories, including intentional interference with contractual relationships, interference with prospective business opportunity, and conspiracy to interfere with prospective economic advantage. *Id.* at 1145. The California Supreme Court concluded that:

[A] plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage. That is, to recover for a defendant's interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act -- i.e., an act "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard" - - that induced an at-will employee to leave the plaintiff. Under this standard, a defendant is not subject to liability for intentional interference if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment.

Id. at 1152-53.

The court in *Reeves* also set forth the elements of a claim for intentional interference with prospective economic advantage: "[A] plaintiff must plead and prove (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the defendant's acts." *Id.*

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

The general rule prohibiting non-compete agreements is stated in California BUSINESS AND PROFESSIONS CODE § 16600, which declares that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." There are two narrow statutory exceptions to this general rule: BUSINESS AND PROFESSIONS CODE §§ 16601 and 16602 permits broad covenants not to compete where a person sells the goodwill of a business or substantially all of the assets of a business; BUSINESS AND PROFESSIONS CODE § 16601 also permits broad covenants not to compete where a partner agrees not to compete in anticipation of dissolution of a partnership.

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California courts have recognized that BUSINESS AND PROFESSIONS CODE § 16600 codifies a strong public policy that every citizen shall have the right to pursue any lawful employment. *See e.g., Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.App.4th 881, 900 (1998); *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal.App.4th 853, 859 (1994).

The California Supreme Court has construed § 16600 to invalidate non-competition agreements unless their enforcement is necessary to protect the former employer's trade secrets. *Muggill v. The Reuben H. Donnelly Corp.* 62 Cal.2d 239, 242 (1965); *Metro Traffic Control, Inc.*, 22 Cal.App.4th at 859. In *Edwards v. Arthur Andersen, LLP*, 44 Cal.4th 937 (2008), a defendant accounting firm required plaintiff employee to sign a noncompetition agreement as a condition of employment. Defendant argued that the noncompetition agreement was valid under the federal "narrow restraint" exception, and that the court should adopt a "narrow restraint" exception to § 16600. The California Supreme Court concluded that the firm's noncompetition agreement was invalid under § 16600 because it foreclosed an employee from working in his chosen profession. In other words, customer non-solicitation covenants are simply not enforceable.

In addition, courts have rejected contractual provisions restricting an individual's ability to gain employment. As stated in *Continental Car-Na-Var Corp. v. Moseley*:

Equity will to the fullest extent protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should . . . be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary to follow any of the common occupations of life. . . . A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided that such competition is fairly and legally conducted.

Continental Car-Na-Var Corp. v. Moseley (1994) 24 Cal.2d 104, 110.

In the absence of a trade secret, "the right to compete fairly outweighs the employer's right to protect clients against competition from former employees." *American Credit Indemnity Co. v. Sacks*, 213 Cal.App.3d 622, 634 (1989); *see also Kolani v. Gluska*, 64 Cal.App.4th 402, 405-407 (1998)(affirming that covenant not to compete of sales representative was unenforceable after employee quit his job and went to work for competitor).

Conditioning employment on employee executing an unenforceable non-compete agreement will subject an employer to a wrongful discharge claim. *D'Sa v. Playhut, Inc.*, 85 Cal.App.4th 927 (2000) (employee who was terminated for refusing to sign unenforceable non-compete could assert wrongful discharge claim); *Thompson v. Impaxx, Inc.*, 113 Cal.App.4th 1425 (2003); *Latona v. Aetna U.S. Healthcare, Inc.*, 82 F.Supp.2d 1089 (C.D. Cal. 1999); *but see Lillge v. Verity*, No. C 07-02748-MHP, 2008 WL 906466, at *18-20 (N.D. Cal. Apr. 1, 2008) (employer could demand that its employees sign a non-disclosure/confidentiality agreement that was only designed to protect trade secrets but not limit or restrict competition).

Published on October 16, 2023, Business and Professional Code Section 16600 codified existing case law into black letter law. The bill made it unlawful for an employer to include a noncompete clause in a contract or require an employee to enter a noncompete agreement that does not satisfy an

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exception. Employers are also required to notify employees, current or former, who were employed after January 1, 2022, whose contracts contained a non-exempt noncomplete clause that the clause is void. Employers are required to provide such notice in writing by February 14, 2024.

Moreover, Senate Bill 669 broadened Business and Professional Code section 16600, and added Business and Professions Code section 16600.1.

B. Blue Penciling

In general, California courts will not rewrite a broad covenant not to compete into an agreement restricting use of confidential information or other unfair competition. See *Dowell v. Biosense Webster, Inc.*, 179 Cal.App.4th 564, 578 (2009). In *Kolani v. Gluska*, the court refused to reform an overbroad agreement that contained a savings clause, stating “Illegal contracts are void. . . . The ‘savings’ clause in the agreement authorizes a court to revise the noncompete covenant if it is ‘unfair’ or ‘commercially unreasonable,’ not if it is illegal. No case we have found approves of the rewriting of an illegal covenant not to compete in the manner proposed here.” 64 Cal.App.4th 402, 407 (1998).

However, courts may reform overbroad covenants not to compete that are given in connection with the sale of a business or goodwill. See *John F. Matull & Associates, Inc. v. Cloutier*, 194 Cal.App.3d 1049 (1987).

C. Confidentiality Agreements

Confidentiality and Non-Disclosure agreements are enforceable under California contract law. See *ViChip Corp. v. Lee*, 438 F.Supp.2d 1087, 1098-1099 (N.D. Cal. 2006) (employee held liable for breach of contract for violating confidentiality/nondisclosure agreement).

In *American Paper & Packaging Products, Inc. v. Kirgan*, the employer relied upon a confidentiality agreement in support of its assertion that its customer lists were protectable trade secrets. 183 Cal.App.3d 1318, 1325 (1983). The agreement stated, in relevant part,

[The] parties hereby stipulated [*sic*] that, as between them, the foregoing matters are important, material, and confidential and gravely affect the effective and successful conduct of the business of Contractor, and its goodwill. . . .’ The ‘foregoing matters’ referred to included any list of names, addresses or telephone numbers of customers whether compiled by the subcontractor or provided to subcontractor by the contractor and any ‘information concerning the business of Contractor, . . . its plans, processes, or other data of any kind . . .

Id.

The court determined that, because other evidence did not support the conclusion that the customer lists had been treated as confidential, they were not protectable. The court explained, “[a]n agreement between employer and employee defining a trade secret may not be decisive in determining whether the court will so regard it. The court should view all of the evidence presented in making its determination.” *Id.* (citations omitted).

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However, other courts have found that the existence of a trade secret agreement is one factor that may be considered in determining whether the information at issue is a protectable trade secret. The employer obtained damages and injunctive relief based upon former employees' use of customer lists in *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514 (1997). The court found substantial evidence of Morlife's reasonable efforts to protect the information based upon the following:

Morlife intended its customer information to remain secret and undertook steps to secure that end. The company president recognized the importance of the customer information to the company referring to it as its "main asset." He explained, "Without it, there's no business." For this reason customer information was stored on computer with restricted access. Moreover, in its employment contract signed by Perry, Morlife included a confidentiality provision expressly referring to its customer names and telephone numbers. The Morlife employee handbook contained an express statement that employees shall not use or disclose Morlife secrets or confidential information subsequent to their employment including "lists of present and future customers."

Id. at 1523.

In *Courtesy Temporary Service, Inc. v. Camacho*, 222 Cal.App.3d 1278 (1990), the Court of Appeal held that a temporary agency's customer list was protected information under the Uniform Trade Secrets Act because the customer list was the product of a substantial amount of time, expense and effort. *Id.* Former employees of the temporary agency utilized the list to start a competing business. The Court of Appeal determined that the customer information compiled (i.e., customer's sales volume, profit margins, special employment needs, particular likes and dislikes and pay rates and mark ups) were of the nature and character that was not readily ascertainable to competitors and were not divulged to persons outside the business. *Id.* at 1286-1291. The Court also held that even if the customer list did not qualify as a "protected trade secret," the use of the list by the Company's former employees should have been enjoined as a result of the employee's unfair and deceptive practices violations pursuant to BUSINESS AND PROFESSIONS CODE § 17200, *et seq.* *Id.* at 1291.

A slightly contrary holding was reached in *Abba Rubber Company v. Seaquist*, 235 Cal.App.3d 1 (1991). In *Abba Rubber*, the Court of Appeal held that information which is readily ascertainable by others in a particular industry may still qualify as a trade secret so long as it has *not yet* been ascertained by others in the industry. *Id.* at 21 (emphasis added).

1. Customer Non-Solicitation Provisions

California considers customer non-solicitation agreements to be a form of a covenant not to compete and therefore subject to the restrictions of BUSINESS AND PROFESSIONS CODE § 16600. See *Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937,948-50 (2008)(holding that customer non-solicitation agreements were unenforceable restraints on competition under Section 16600); *The Retirement Group v. Galante*, 176 Cal.App.4th 1226, 1239-40 (2009); *Dowell v. Biosense Webster, Inc.*, 179 Cal.App.4th 564, 575-78 (2009); *Thompson v. Impaxx, Inc.*, 113 Cal.App.4th 1425, 1429 (2003); *Kolani v. Gluska*, 64 Cal.4th 402, 407 (1998) (broadly worded customer nonsolicitation clause in employment agreement was held invalid).

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2. Solicitation of Employees

The general rule is that it is legally permissible for one competitor to solicit and hire the at-will employees of a competitor, as long as the competitor does not otherwise engage in other unlawful activity. Such employees are not a protected trade secret. See *Reeves v. Hanlon*, 33 Cal.4th 1140, 1154 (2004); *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal.App.4th 708, 713 (2007); *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal.App.4th 853, 860 (1994).

California has a strong California public policy supporting the mobility of employees, as well as allowing California-based employers the unrestricted right to recruit employees. See *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, 83 Cal.App.4th 409, 427 (2000), disapproved on other grounds in *Reeves v. Hanlon*, 33 Cal.4th 1140 (2004); *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.App.4th 881, 900-01 (1998).

No hire" or "no switching" agreements entered into between employer and either employer's employees or competitors will not be enforced in California. *Silguero v. Creteguard*, 187 Cal.App.4th 60, 68-70 (2010); *VL Systems, Inc. v. Unisen Inc.*, 152 Cal.App.4th 708,712-14 (2007).

3. Choice of Law Clauses

California courts will not permit employers to insert into employment contracts that another state's law will apply and to avoid application of California law to California based employee. See *e.g.*, *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.App.4th 881 (1998) (non-resident who moved to California not bound by covenant not to compete with former Maryland employer); *Frame v. Merrill, Lynch, Pierce Fenner & Smith, Inc.*, 20 Cal.App.3d 668, 673 (1971); *In re Gault South Bay Litig.*, No. C 07-04659-JW, 2008 WL 4065843, at *13-15 (N.D. Cal. Aug. 27, 2008).

D. Trade Secrets Statute

California has adopted the Uniform Trade Secrets Act, with some modifications, as CIVIL CODE § 3426 *et seq.* The statute prohibits misappropriation of trade secrets, which is defined as:

- (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
- (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - A. Used improper means to acquire knowledge of the trade secret; or
 - B. At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
 - i. Derived from or through a person who had utilized improper means to acquire it;

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- ii. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
- iii. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
- iv. Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

CAL. CIV. CODE § 3426.1.

“Trade secret” is defined as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

CAL. CIV. CODE § 3426.1(d).

While an employee's memory of the specific identities of a company's best customers may be protected as a trade secret, courts are generally hesitant to consider broad categories of knowledge, such as "general business know-how," to be protected under the UTSA. *In re Providian Credit Cards*, 96 Cal.App.4th 292, 309 (2002).

Information is not a trade secret if it is “readily ascertainable through public sources” or not maintained in confidence. *See American Paper & Packaging Products, Inc. v. Kirgan*, 183 Cal.App.3d 1318, 1326 (1986); *Klamath-Orleans Lumber, Inc. v. Miller*, 87 Cal.App.3d 458, 461 (1978); *Abba Rubber Co. v. Seaquist*, 235 Cal.App.3d 1, 19-20 (1991).

To have independent value, a trade secret must be "sufficiently valuable and secret to afford an actual or potential economic advantage to others." *Yield Dynamics, Inc. v. TEA Systems Corp.*, 154 Cal.App.4th 547, 564 (2007).

Under the California version of the UTSA, Courts have held that a former employee's use or disclosure of confidential customer information to solicit new accounts on behalf of a new employer constitutes the misappropriation of a properly protected trade secret. *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1526 (1997); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Garcia*, 127 F.Supp.2d 1305, 1306 (C.D. Cal 2000).

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California's statute deviates from the UTSA in that there is no requirement that information be generally known to public for trade secret rights to be lost. Information can constitute a legally protectable trade secret even though it is reasonably ascertainable from public sources as long as it has not yet been ascertained by others in the industry. Conversely, if a competitor is aware of information because of legitimate reason or through proper means, but the public is unaware, trade secret protection will be lost. See *ABBA Rubber Co. v. Seaquist*, 235 Cal.App.3d 1, 21, fn. 9 (1991); *Readylink Healthcare v. Cotton*, 126 Cal.App.4th 1006, 1020-1021 (2005); *Spring Design, Inc. v. Banessandnoble.com, LLC*, No. C 09-05185-JW, 2010 WL 5422556, at *10-11 (N.D. Cal. Dec. 27, 2010)(applying California law).

California's case law varies as to whether customer information and customer lists are considered trade secrets. The inquiry by courts is generally fact intensive, and will depend on the specific business or industry involved, and whether the information can be obtained easily from public sources. See *Readylink Healthcare v. Cotton*, 126 Cal.App.4th at 1017-1021 (1995); *Morelife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1523 (1995) (customer information in specialized roof replacement industry held to be trade secret); *American Credit Indemnity Co. v. Sacks*, 213 Cal.App.3d 622, 634 (1989)(customer insurance info held to be trade secret); but see *American Packaging & Paper Products, Inc. v. Kirgan*, 183 Cal.App.3d 1318 (1986) (customer list held not to be trade secret); *Scott v. Snelling & Snelling, Inc.*, 732 F.Supp.1034, 1044 (N.D. Cal. 1990)(customer information for temporary personnel agency not trade secret since readily discoverable through public sources).

Examples of information which can be considered trade secrets include the following:

- Internally developed techniques, formulas, and specifications regarding industrial or consumer products. See *Schlage Lock Co. v. Whyte*, 101 Cal.App.4th 1443, 1456 (2002); *Components for Research, Inc. v. Isolation Prods., Inc.*, 241 Cal.App.2d 726 (1966); Information relating to any research, development, tests, reports, or studies regarding a particular product. See *Daniel Orifice Fitting Co. v. Whalen*, 198 Cal.App.2d 791 (1962);
- Information concerning a company's business plan that includes its financial goals and its strategies for manufacturing, production, marketing, packaging, and distribution of its products. See *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1265 (7th Cir. 1995);
- Computer software and databases. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (applying California version of UTSA);
- "Negative know-how" or "negative research," which includes information obtained, through expensive and lengthy research, of processes and procedures that will not work. See *Courtesy Temporary Serv., Inc. v. Camacho*, 222 Cal.App.3d 1278, 1287 (1990); *Morton v. Rank Am., Inc.*, 812 F.Supp. 1062, 1073 (C.D. Cal. 1993) (applying California version of UTSA).
- Strategic business information, such as cost and pricing information, sources of supply, and marketing and business plans. *Whyte v. Schlage Lock Co.*, 101 Cal.App.4th 1443, 1456 (2002); *Riess v. Sanford*, 47 Cal.App.2d 244 (1941).
- Employee lists that contain or reflect confidential information, such as compensation, particular customer relationships, or areas of expertise. *Bancroft-Whitney Co. v. Glen*, 64 Cal.2d 327 (1966).

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- Identity of vendors or suppliers to wholesale or retail outlets may qualify. *Citizens of Humanity LLC v. Costco Wholesale Corp.*, 171 Cal.App.4th 1, 13-16 (2009), disapproved on other grounds by *Kwikset Corp. v. Superior Court*, (2011) 51 Cal.4th 310.

E. Other Considerations

1. No-Hire Provisions

The validity of no-hire contracts between companies has been challenged under California Business and Professions Code Section 16600. *VL Systems, Inc. v. Unisen, Inc.*, 152 Cal.App.4th 708 (2007). VL Systems, Inc. (VLS) and Star Trac Strength (Star Trac) entered into a short-term computer consulting contract. The contract provided that Star Trac would not hire any VLS employee for 12 months after the contract's termination, subject to a liquidated damages provision. Within the 12 month period, Star Trac hired David Rohnow, a VLS employee. Rohnow had not performed any work for Star Trac and had not even been employed by VLS while the Star Trac contract was performed. Moreover, Rohnow applied to Star Trac as the result of a website posting, not as the result of any relationship between VLS and Star Trac. VLS sued Star Trac for breach of contract and the trial court awarded it part of the amount it sought under a liquidated damages provision.

The appellate court determined that as written, the no-hire provision was unenforceable as a matter of law. The court explained, "This type of contractual provision . . . may seriously impact the rights of a broad range of third parties. In this case, those third parties not only included the VLS employees who actually performed work for Star Trac under the contract, but all of those who did not, including Rohnow, who was not even employed by VLS at the time." It noted that "enforcing this clause would present many of the same problems as covenants not to compete and unfairly limit the mobility of an employee who actively sought an opportunity with Star Trac." As a result, the no-hire provision was held unenforceable.

2. State Unfair Competition Act

California's Unfair Competition Act, which was intended to proscribe "unfair trade practices," is breathtakingly broad in its reach. In cases brought under BUSINESS AND PROFESSIONS CODE § 17200, a plaintiff need only allege that the complained-of business practice was "unfair." The statutes themselves are extraordinarily broad. For example, § 17200 proscribes unfair competition that includes "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . ."

Section 17200 prohibits five different types of conduct in the disjunctive: (1) An unlawful business act or practice; (2) An unfair business act or practice; (3) A fraudulent business act or practice; (4) Unfair, deceptive, untrue or misleading advertising; and (5) Any act prohibited by BUSINESS AND PROFESSIONS CODE § 17500. While Section 17200 originally sprang from the law of unfair competition as between competing businesses, § 17200 no longer forbids only those practices that threaten competition and business competitors. Indeed, its main use has become the protection of consumers from practices that are deemed to be "unfair."

Section 17200 was applied in the employment context in *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163 (2000). Cortez, a former employee, sued Purolator Air Filtration Products Company for back overtime pay that had accrued when Purolator's predecessor, Servodyne Company,

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had failed to comply with certain regulations when converting to a four-day workweek. *Id.* at 169. In addition to her individual claim, the worker brought a claim seeking to recover "restitution" of the overtime wages withheld from approximately 175 Purolator employees. *Id.* at 169-70. The worker won her individual claim. *Id.* at 170. However, the trial court concluded that there was no basis for injunctive relief and denied the requested restitution to the other, unnamed Purolator employees. *Id.* Both Cortez and Purolator appealed. *Id.*

The California Supreme Court permitted the unnamed plaintiffs to recover back pay as restitution, despite earlier cases holding that back pay claims are ones for damages. *Id.* at 177-78. The court found that the entitlement to overtime pay is a property right of the employee that the employer has acquired, thus fitting squarely within the confines of § 17200. *Id.* As a result, plaintiffs can now expand the scope of their claims by filing under § 17200, which has a four-year statute of limitations, rather than the two years available for torts and the three years applicable to claims for statutory violations.

XII. DRUG TESTING LAWS

A. Public Employers

In *Loder v. City of Glendale*, the plaintiff sued to challenge an employment-related drug-testing program, which was applied to all applicants who had been offered positions by the city and to current employees seeking promotions. 14 Cal.4th 846 (1997). Loder argued that the program violated a provision of California's Confidentiality of Medical Information Act (CMIA), CIVIL CODE § 56, as well as the Fourth Amendment of the United States Constitution. *Id.* at 856.

The California Supreme Court determined that the program did not violate the CMIA as that Act could not "reasonably be interpreted to regulate the circumstances under which an employer may require job applicants or current employees to submit to a medical examination or drug test..." *Id.* at 862. Further, the program did not violate California's Fair Employment and Housing Act or the federal Americans with Disabilities Act. *Id.* at 865.

While the court further determined that the drug-testing program did implicate the Fourth Amendment, the court held that the program did not violate the Constitution when the tests were given to job applicants because the employer has a reasonable interest in suspicionless drug testing of applicants. *Id.* at 876. However, as to current employees seeking promotion, the program was unconstitutional because an interest in a "drug-free" workplace was not sufficient justification for conducting such tests. *Id.* at 880-81. Finally, the court held that, contrary to the court of appeal's holding that any pre-promotional drug testing would only be valid where the job "could have an immediate disastrous consequence upon public safety or security," the court stated that the city was free to design a new drug-testing program for its employees seeking promotion. *Id.* at 899.

B. Private Employers

Although the *Loder* case involved a government employer subject to the Fourth Amendment prohibition against unreasonable search and seizure, private employers are subject to the state constitution and its limits on invasion of privacy. *Loder v. City of Glendale*, 14 Cal.4th 846, 890-98 (1997).

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In *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1 (1994) the court held a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. *Id.* at 39-40. A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. *Id.* at 40. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. *Id.*

XIII. STATE ANTI-DISCRIMINATION STATUTES

The Fair Employment and Housing Act (FEHA), GOVERNMENT CODE § 12926 *et seq.*, is the primary statutory scheme prohibiting discrimination in the workplace. Employees may also bring claims for violation of CIVIL CODE § 51.7, part of the Ralph Civil Rights Act of 1976, which broadly provides that all persons have the right to be free from violence and intimidation by threat of violence based on, among other things, race, religion, ancestry, national origin, political affiliation, sex, gender, genetics, hairstyle, or position in a labor dispute.

A. Employers/Employees Covered

1. Discrimination

FEHA prohibits discrimination by employers, a term that is defined as “any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except . . . a religious association or corporation not organized for private profit.” GOVERNMENT CODE § 12926(d). In determining whether a person regularly employs five or more persons, all employees are counted, even if the employee does not work full time. *Robinson v. Fair Employment & Housing Commission*, 2 Cal.4th 226 (1992).

2. Retaliation

FEHA also prohibits retaliation, which is any adverse employment action that results when an employee opposes practices that FEHA forbids, or the employee “has filed a complaint, testified, or assisted in any proceeding” under the FEHA. GOVERNMENT CODE § 12940(h).

3. Harassment

The provisions of the FEHA prohibiting harassment define “employer” as “any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.” GOVERNMENT CODE § 12940(j)(4)(a). For the most part, “employer” does not include a religious association or corporation not organized for private profit. GOVERNMENT CODE § 12940(j)(4)(b).

Employers are also responsible for harassment by non-employees where the employer knows or should have known of the sexual harassment and fails to take immediate and appropriate corrective action. GOVERNMENT CODE § 12940(j)(1).

4. Individual Liability

a. Individual Supervisory Employees Held Liable For Their Acts of Harassment

Penne Page worked for 3NET Systems, Inc. (3NET) as an assistant controller. *Page v. Superior Court*, 31 Cal.App.4th 1206, 1208 (1995). Page complained to the company president and chief executive officer, claiming that she had been repeatedly subjected to sexual harassment from the vice-president of the company. *Id.* at 1209. 3NET failed to take any action to prevent this behavior after Page reported it. *Id.* In considering the personal liability of supervisors, the court held that “the policy of deterring and eliminating harassment and retaliation in employment is served by holding a supervisor liable for his own acts that are violative of [the Fair Employment and Housing Act] in accordance with the plain language of FEHA. *Id.* at 1213.

b. Individual Supervisory Employees Not Held Liable For Personnel Decisions Made That Are Later Determined To Be Discriminatory

The issue of whether the legislature, in passing the FEHA, GOVERNMENT CODE § 12900 *et seq.*, intended to create a risk of personal liability in individual supervisory employees for acts of employment discrimination was addressed in *Janken v. GM Hughes Electronics*, 46 Cal.App.4th 55 (1996). In accordance with many courts around the country, the court in *Janken* determined that the statutory language in question did not intend to place such individual liability on supervisory employees. *Id.* at 62-63.

In setting forth the distinction between harassment and discrimination, the court in *Janken* determined that, while the legislature did intend to place individual supervisory employees at risk for personal liability for acts constituting harassment, they did not intend to do so for personnel decisions that may later be considered to be discriminatory. *Id.* at 63. The court stated as follows: “[H]arassment consists of conduct outside the scope of necessary job performance; conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. It is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job.” *Id.* (citations omitted).

Discrimination claims may arise out of decisions made by supervisory employees. *Id.* at 63-64. The court reasoned that such decision-making is a type of conduct necessary for management of the employer's business and essential to the employee's supervisory position. *Id.* at 64-65.

The plaintiffs in *Janken* argued that where FEHA § 12941 states “it [is] unlawful for ‘an employer’ to discriminate on the basis of age” (“employer” is defined in § 12926(d) to include “any person regularly employing five or more persons, or any person acting as an agent of an employer”), this language imputes liability upon individual supervisory employees. *Id.* at 65. However, the court held that the use of the term “agent” is only to ensure the liability of employers for discriminatory action taken by their supervisory employees, and that the “managers have the proper incentives to adequately discipline wayward employees, as well as to instruct and train employees to avoid actions that might impose liability.” *Id.* at 76, citing *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995).

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The *Janken* court further held that:

[The] alleged conduct [by Hughes], if first proven true and if then proven motivated by prohibited considerations, would constitute discrimination, not harassment. Since we have concluded that only employers--and not individual supervisory employees--are at risk of liability for discrimination, and since only discrimination is alleged here, the trial court was correct in dismissing the individual supervisory employees.

Id. at 79-80. The court reasoned "[i]mposing personal liability on supervisory employees would create conflicts of interest and chill effective management while providing little or no additional protection to victims of discrimination." *Id.* at 72.

B. Types of Conduct Prohibited

The California Fair Employment and Housing Act, GOVERNMENT CODE § 12940(a), makes it an unlawful employment practice for an employer: to refuse to hire or employ any person; to refuse to select the person for a training program leading to employment; to bar or to discharge the person from employment or from a training program leading to employment; or to discriminate against the person in compensation or in terms, conditions, or privileges of employment based upon that person's membership in a protected class. The statute provides the following protected classes: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, gender, gender identity, gender expression, age, and sexual orientation of any person. It is also an unlawful employment practice to discriminate based upon the employer's perception that the person has any of the protected characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics. GOVERNMENT CODE § 12926(m).

Discrimination based on pregnancy and breastfeeding is also prohibited. GOVERNMENT CODE § 12926(q)(1). Breastfeeding and related breastfeeding medical conditions are now included in protected class of "sex" as defined under the FEHA statutory scheme. Employers are now required by law to update their discrimination and harassment notices to reflect the change in this definition. (AB 2386; GOVERNMENT CODE § 12940, *et seq.*) Furthermore, pursuant LABOR CODE § 1030, every employer must provide a reasonable amount of break time (which can run concurrent to the break time already provided the employee) to accommodate an employee desiring to express breast milk for the employee's infant child. Moreover, the employer must make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private.

In addition, any woman disabled as the result of pregnancy or childbirth is entitled to protected leave. Pregnancy disability leave is provided in addition to any leave available under the California Family Rights Act. GOVERNMENT CODE § 12945.

An employer may not discriminate against an employee on the basis of his or her gender identity. Gender identity includes the employee's sex or the employer's perception of the employee's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee's sex at birth. GOVERNMENT CODE § 12926(q)(1). Employees are specifically allowed to appear or dress in a manner consistent with their gender identity.

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Reasonable accommodations must be made for employees with respect to religious dress and grooming practices. (AB 1964; GOVERNMENT CODE § 12940, *et seq.*)

Effective January 1, 2015, AB 1443 amends GOVERNMENT CODE § 12940 to expand anti-discrimination and anti-harassment prohibitions under the FEHA to include interns and those in training programs with respect to the “selection, termination, training or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of the person.”

Effective January 1, 2015, AB 1660 amends the FEHA to say that “national origin” discrimination includes, but is not limited to, discrimination on the basis of possessing a driver’s license granted under Section 12801.9 of the VEHICLE CODE.

Pursuant to VEHICLE CODE § 12801.9, the Department of Motor Vehicles must issue a license to people who are not in the country legally if they are otherwise qualified for the license. Those licenses indicate on their face that the holder is allowed to drive, but the license “does not establish eligibility for employment, voter registration, or public benefits.” Therefore, it is a violation of the FEHA for employers to discriminate against employees because they hold such licenses, or to ask to see the license.

Using driver’s licenses to confirm eligibility to work upon hiring is presumably still permitted since it is permitted by federal law. If an employee must drive as part of the job, checking a driver’s license is appropriate. However, beyond that, employers need to review under what circumstances they ask California employees or applicants to show their driver’s licenses.

1. Sex Discrimination/Sexual Harassment

- a. Lyle v. Warner Brothers Television Productions

Plaintiff Amaani Lyle was a comedy writers’ assistant who worked on the production of the *Friends* television show. *Lyle v. Warner Brothers Television Productions*, 38 Cal.4th 264 (2006). During the job interview, plaintiff was told that the show dealt with sexual matters and, as a result, the writers told sexual jokes and engaged in discussions about sex. Plaintiff responded that sexual discussions and jokes did not make her uncomfortable. *Id.* at 2759.

Lyle worked for four months before her employment was terminated. She then brought an action that included claims of sexual harassment, discrimination on the basis of race and sex, and termination in violation of public policy. The evidence showed that the writers regularly engaged in sexually coarse and vulgar language and gestures. The writers engaged in explicit discussion of their own sexual experiences and made specific comments about the cast members. However, Lyle had no recollection of any employee on the *Friends* production ever saying anything sexually offensive about her directly to her. No one on the production ever asked Lyle out on a date or sexually propositioned her. Likewise, no one ever demanded sexual favors of her or physically threatened her. *Id.*

In affirming the award of summary judgment in the employer’s favor, the California Supreme Court stated: “evidence of hostile, sexist statements is relevant to show discrimination on the basis of sex.

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. . . However, while the use of vulgar or sexually disparaging language may be relevant to show such discrimination, it is not necessarily sufficient, by itself, to establish actionable conduct.” *Id.* at 280. “[A]n employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. . . . That is, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions. . . . Moreover, when a plaintiff cannot point to a loss of tangible job benefits, she must make a ‘commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.’” *Id.* at 283-844.

b. Department of Health Services v. Superior Court

Plaintiff McGinnis alleged her supervisor had harassed her with inappropriate comments and unwelcome physical touching. *Dep’t of Health Services v. Superior Court*, 31 Cal.4th 1026, 1035 (2003). The behavior had continued for almost two years before McGinnis reported the conduct to management. *Id.* The employer investigated and found the supervisor had violated company policy. *Id.* The court found that while an employer is strictly liable for sexual harassment by a supervisor, if the employee unreasonably failed to report the harassment and thereby unnecessarily sustained additional damages, those damages are not recoverable. *Id.* at 1049.

c. Sheffield v. Los Angeles County Dep’t of Social Services

Plaintiff Sheffield, a female, was asked on a date by a female co-worker. She declined and rebuffed the co-worker’s advances over the next several days. Within a week matters had deteriorated to the point that the co-worker physically attacked Sheffield at her desk. *Sheffield v. Los Angeles County Dep’t of Social Services*, 109 Cal. App. 4th 153, 156-59 (2003). The plaintiff reported the unsolicited flirtation to her supervisor the day it began. *Id.* at 157. The court held that liability for hostile environment can be established by demonstrating harassment that was severe or pervasive, but not necessarily both. *Id.* at 161. Despite the fact that the alleged harassment occurred only over the course of a week, the violent component of the conduct was sufficiently severe to constitute a hostile environment. *Id.* at 163-64.

d. Miller v. Department of Corrections

At one California prison, the warden, over a period of several years, had sexual affairs with at least three subordinate female employees. *Miller v. Dep’t of Corrections*, 36 Cal. 4th 446, 466 (2005). Because of these relationships, the warden promised and granted the three women unwarranted favorable treatment, including special assignments, preferential promotions, and other work privileges. *Id.* at 466-67. Eventually, other female employees complained about the preferential treatment; however, the warden refused to intervene and retaliated against the complaining employees. In response, two female former employees sued the California Department of Corrections, claiming that the warden’s favoritism constituted sexual harassment in violation of the FEHA. *Id.* at 450. The Supreme Court of California concluded that an employee may establish a claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism, in itself, was so severe and pervasive that it altered working conditions and created a hostile work environment (i.e., a demeaning message is conveyed to female employees that they are viewed by management as ‘sexual playthings’ or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or management). *Id.*

e. Brennan v. Townsend & O’Leary Enterprises

Former Vice President sued Townsend & O’Leary Enterprises for wrongful termination and hostile work environment as a result of inappropriate comments by the Company’s Executive Director to other co-workers. *Brennan v. Townsend & O’Leary Enterprises*, 199 Cal.App.4th 1336 (2011). The former Vice President complained of emails and comments that an Executive Director made to other employees and alleges that as a result of her complaints she was wrongfully terminated. *Id.* The conduct consisted of six separate events which occurred over a period of 5 years. *Id.*

The Court of Appeal evaluated the totality of circumstances using the following factors: (1) the nature of the unwelcome sexual acts or works (2) the frequency of offensive encounters, (3) the total number of days in which all of the offensive conduct occurs and (4) the context in which the sexually harassing conduct occurred. *Id.* at 1347. The Court acknowledged that under FEHA, a Plaintiff must show a pattern or practice of repeated, routine or general nature of sexual harassment. *Id.* at 1355. In this instance, however, the Court held there was insufficient evidence to establish a pervasive or hostile work environment because the Plaintiff was never assaulted, subjected to unwelcome physical contact or verbal abuse, threatened, propositioned, or subjected to explicit language direct at her or to anyone else in her presence. *Id.* at 1353. Further, the alleged conduct was sporadic and isolated, which fail to show pervasive sexual harassment. *Id.* at 1355.

2. Pregnancy Discrimination

Plaintiff Fatmeh Badih worked as a medical assistant in the medical offices of Dr. Leonard Myers. *Badih v. Myers*, 36 Cal.App.4th 1289, 1291 (1995). Myers, who disapproved of interracial relationships, found out that Badih was dating someone outside of her race. When Badih told Myers that she had gotten married, he got very upset and lectured her on how marriages like hers do not last. *Id.* at 1291-92. He said it would even be especially bad if children were involved. Approximately nine months later, Badih told Myers that she was pregnant. *Id.* at 1292. Myers told her that he “[could not] take this anymore If [Badih] had told [him] that [she was] going to get married and have babies, [he] wouldn’t have never hired [her] in the first place.” *Id.* Shortly thereafter, Myers fired Badih.

Badih brought suit against Myers alleging wrongful discharge in violation of public policy. *Id.* at 1291. She alleged that she was discharged because of her pregnancy. A jury returned a verdict in favor of Badih. *Id.* at 1292. On appeal, Myers argued that since he had fewer than five employees, he was exempt from the provisions of the FEHA that prohibited pregnancy discrimination. *Id.* at 1293. The appellate court disagreed, holding that pregnancy discrimination is a form of sex discrimination, and thus is prohibited by both the FEHA and the California Constitution, Article I, § 8. *Id.* at 1296. Therefore, an employer is liable for wrongful discharge in violation of public policy even if it is exempt from the FEHA because the California Constitution applies to employers of any size. *Id.*

Ada Abed was a pregnant dental assistant extern who brought an action against her employer, Western Dental Services, Inc., for thwarting her application for a position at the company by falsely telling her that no position was available. *Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 731.

Abed had enrolled in an externship program with Western Dental’s Napa office and regularly received high marks throughout her time there. *Id.* at 732-733. In March of 2015, Western Dental approved an open requisition for a dental assistant in the Napa office and solicitation for application was

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publicly posted. *Id.* The recruiting manager did not know whether the posting was to create a pool of applicants for positions that, while not currently open, might open in the future, or whether the opening was to advertise for an actual open position. *Id.* In any case, Abed expressed an interest in applying for the Napa position, but overheard statements that others at the Napa office were uninterested in hiring her due to her pregnancy. *Id.* Two weeks after her pregnancy became known to the other employees, Abed was told that there were no openings at the Napa office, and she accordingly did not submit an application. *Id.* After Abed completed her externship, however, the Napa office recruited another extern who they then extended an offer to for employment as a dental assistant. *Id.* at 735.

The Court of Appeal for the First District held that these circumstances and misrepresentations that no job was available were sufficient for establishing a prima facie case of pregnancy discrimination for purposes of summary adjudication of a FEHA claim. *Id.* at 739-741. Although the court noted that in many cases a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure-to-hire, a job application is not necessarily an element of the claim. *Id.* Accordingly, the court confirmed that Abed's failure to apply for the position did not automatically defeat her claim, and that Western Digital's conduct in causing her not to apply by falsely telling her for discriminatory reasons that no positions were available were sufficient for the survival of Abed's claim. *Id.* at 740.

The Contraceptive Act of 2022 prohibits employers with 5 or more employees from discriminating against an employee who decided to "use or access a particular drug, device, or product, or medical service for reproductive health."

3. Sexual Orientation Discrimination

Kovatch began working for California Casualty Management Company (CCMC) as an insurance sales representative. *Kovatch v. California Casualty Management Co.*, 65 Cal.App.4th 1256, 1262 (1998), disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826 (2001). After approximately four years, he transferred to a sales supervisor position in the San Diego office. *Id.* at 1262. Kovatch claimed that at CCMC's San Diego office, "he suffered a continuous pattern of harassment and discrimination based on his sexual orientation." *Id.* at 1262-63. He alleged that his supervisor had made various discriminatory statements, including, "[l]et me make something loud and clear to you, Dan. I don't like you. You're a faggot, and there is no place for faggots in this company." *Id.*

Kovatch sent a facsimile to CCMC's human resources department in which he complained that 'inconsistencies in rules and policies in the San Diego Office' had created an 'uncomfortable and hostile work environment' for him." *Id.* at 1263. After taking extended leave for a stress-related disability, Kovatch declined to return to his position in the San Diego office. *Id.* at 1264. He filed an action against CCMC and his supervisors alleging, among other things, constructive discharge based upon the ongoing harassment due to his sexual orientation. *Id.* at 1265. Although the trial court granted summary judgment, the appellate court reversed, stating: "A plaintiff who was actually discharged because of his or her sexual orientation may bring a tort claim for wrongful termination in violation of public policy. Likewise, a plaintiff who was constructively discharged because of harassment based on actual or perceived sexual orientation may bring such a claim." *Id.* at 1266-67 (citations omitted).

4. Age Discrimination

Use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a

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group. The disparate impact theory of proof may be used in claims of age discrimination. Courts are to interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. GOVERNMENT CODE §§ 12940 and 12941.

a. Jennings v. Marralle

Jennings filed suit against her former employer, Marralle, alleging that her termination was in violation of a public policy prohibiting age discrimination in the workplace. *Jennings v. Marralle*, 8 Cal.4th 121, 125 (1994). This action was brought despite the fact that her employer was exempt from the age discrimination provisions of the FEHA, GOVERNMENT CODE § 12926. *Id.* at 125-26. The plaintiff argued that regardless of her employer's size, it should still be held liable because the general public policy of the FEHA prohibiting age discrimination overrides any contrary provisions exempting employers with five or less employees. The California Supreme Court rejected the plaintiff's argument, holding that, because the FEHA expressly exempts employers with five or fewer employees from its age discrimination provisions, and there is no other statute or constitutional provision that prohibits age discrimination, there is no "fundamental public policy" precluding age discrimination by small employers. *Id.* at 132.

b. Esberg v. Union Oil Co.

In *Esberg v. Union Oil Co.*, the California Supreme Court held that the protection against age discrimination expressly outlawed unlawful employment practices such as hiring, discharge, reducing, suspending, or demoting an employee because of his or her age. 28 Cal.4th 262 (2002). Therefore, all other forms of age discrimination in employment practices were not unlawful under the state's anti-discrimination statutes. *Id.* at 268-69. However, in direct response to this case, the California Legislature expanded the statutory prohibitions against age discrimination in employment, such that protections against discrimination on the basis of age are now as broad as anti-discrimination protections for all other protected classes. See GOVERNMENT CODE § 12490.

5. Disability Discrimination

Under GOVERNMENT CODE § 12926, individuals with physical or mental disabilities are entitled to statutory protection. Unlike federal law, however, the disability need not "substantially" limit a major life function. Instead, a mental or physical disability is protected if it simply limits a major life activity, that is if it makes the achievement of the major life activity difficult. GOVERNMENT CODE §§ 12926(k) and 12926.1(c). Another significant difference between California's statute and the federal Americans with Disabilities Act is that, in California, the disability is determined without consideration of mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations. GOVERNMENT CODE §§ 12926(i)(1)(A) and 12926(k)(1)(A).

Under these provisions, employers and employment agencies are now expressly prohibited from asking any medical, psychological, or disability-related questions of any job applicant or employee, unless the question is job-related and consistent with business necessity. GOVERNMENT CODE § 12940(d). The statute expressly states that an employer commits an unlawful employment practice when the employer fails to engage in a timely, good faith, interactive process to determine effective reasonable accommodations, if any, at the request of an employee or applicant with a known disability. GOVERNMENT CODE § 12940(n).

This law extends disability discrimination to violations of state or federal law or to those who refuse to participate in an activity that would result in a violation of the non-compliance with a state or federal law, rule or regulation. Additionally, employers are prohibited from retaliating against employees who are exercising these rights. The Attorney General is required to establish a whistleblower hotline.

Leanne Jensen was the victim of an armed robbery at the Wells Fargo branch where she worked as the branch manager. *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 249 (2000). After the robbery, Jensen developed post-traumatic stress disorder that prevented her from returning to her branch manager position. *Id.* at 249-50. Jensen applied for a number of alternate jobs but was not selected. *Id.* at 250. Wells Fargo did, however, offer Jensen a temporary position, which she turned down. *Id.* at 251.

The appellate court determined that Wells Fargo was not entitled to summary judgment because its offer of a temporary job was not a reasonable accommodation. *Id.* at 264. To prevail in an action for failure to accommodate, the employer must establish through undisputed facts that:

(1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith.

Id. at 262-63. In addition, when reassignment of an existing employee is at issue, an employer must give preferential consideration to that employee, and disabled employees should not be forced to compete with non-disabled employees. *Id.* at 265.

6. Mental Disability

The following conditions may qualify as a mental disability under FEHA:

- Post-traumatic stress disorder. *Jensen v. Wells Fargo*, 85 Cal.App.4th 245 (2000).
- Bipolar disorder. *Wills v. Sup. Ct.*, 194 Cal.App.4th 312 (2011).
- Depression. *Auburn Woods Home Ass'n v. FEHC*, 121 Cal.App.4th 1578 (2009).
- Obsessive compulsive disorder. *Humphrey v. Memorial Hosp. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).
- Adjustment disorder with mixed anxiety and depressed mood. *Diaz v. Federal Express Corp.*, 373 F.Supp.2d 1034 (C.D. Cal.2005).

7. Violence or Threats of Violence

An employee may state a claim for violation of CIVIL CODE § 51.7, which broadly provides that all persons have "the right to be free from violence, or intimidation by threat of violence" based on, among other things, race, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.

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These rights may be enforced by a private action for damages. *See* § 52, subd. (b). Section 52.1 allows a civil action for damages and equitable relief for interference, by threats, intimidation or coercion, with the exercise of constitutional or other rights provided by law. The section also provides criminal sanctions for violations. Attorney fees may be awarded under both statutes. *Stamps v. Superior Court*, 136 Cal.App.4th 1441, 1445-46 (2006). An employee may base a claim for violation of CIVIL CODE § 51 on allegations of workplace violence, threats of physical violence, intimidation, and even placing the employee in an unsafe work environment when the behavior is related to a status protected by the statute.

8. Retaliation

FEHA also prohibits retaliation, which is any adverse employment action that results when an employee opposes practices that FEHA forbids, or the employee “has filed a complaint, testified, or assisted in any proceeding” under the FEHA. GOVERNMENT CODE § 12940(h). While the term, “adverse employment action” does not appear within FEHA, it refers “to the kind, nature, or degree of adverse action against an employee that will support a cause of action under a relevant provision of an employment discrimination statute.” *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal.4th 1028, 1049 (2005). Moreover, “although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” *Id.* at 1052. Therefore, while the California Supreme Court has espoused the materiality test (whether the action materially affected the terms and conditions of employment as the appropriate standard for defining what constitutes an adverse employment action), it has also broadly examined the conduct that may constitute an “adverse employment action” under the FEHA, choosing to analyze such conduct within the totality of the circumstances. *Id.* at 1036. Indeed, in *Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, the Fourth District Court of Appeal held that the court must consider “the totality of circumstances when determining whether the plaintiff has suffered an adverse employment action.” *Id.* at 92. In so doing, the court declined to hold that each act alleged by the plaintiff needed to separately constitute an adverse employment action. *Id.*

Additionally, the California Supreme Court held in *Jones v. The Lodge at Torrey Pines Partnership*, 42 Cal.4th 1158 (2008) that non-employer individuals cannot be held liable for retaliation under the California Fair Employment and Housing Act (FEHA). The court’s 4-3 decision extended the rule in *Reno v. Baird*, a 1998 decision which held that individuals cannot be held personally liable for discrimination under the FEHA. The court found that all of the reasons for exempting individuals from liability for discrimination apply equally, and perhaps even more forcefully, to retaliation. “If an employee gains a reputation as a complainer,” the majority reasoned, “supervisors might be particularly afraid to impose discipline on that employee or make other lawful personnel decisions out of fear the employee might claim the action was retaliation for complaining.” The court pointed out that a supervisor facing personal liability for normal personnel actions such as demotion, termination, and failure to promote, for instance, would face a conflict of interest every time the supervisor considered taking action against an employee. *Cf. Fitzsimons v. California Emergency Physicians Medical Group*, 205 Cal.App.4th 1423 (2012) (holding a partner has standing to sue partnership for retaliation under FEHA where she alleges she was removed from position for reporting harassment of employees).

Torrey Pines creates a clear basis for dismissing retaliation claims against individual defendants. Further, *Torrey Pines* will allow out-of-state employers to remove cases to federal court (and successfully

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oppose motions to remand) where the plaintiff defeats jurisdiction by asserting a retaliation claim against an individual defendant.

9. Cannabis Use

Effective January 1, 2024, Assembly Bill No. 2188 prevents employers from discriminating against an employee for off the job and away from the workplace cannabis use. While an employer may still drug test potential employees, the employer cannot refuse to hire a candidate if the drug test screened for non-psychoactive cannabis metabolites. The bill does not apply to certain candidates and employees, including employees in the building and construction trades and employees whose job requires a federal background investigation or clearance.

C. Administrative Requirements

Before proceeding with a civil action for violation of the FEHA, an aggrieved employee must exhaust his or her administrative remedies by filing a complaint with the Department of Fair Employment and Housing (DFEH). GOVERNMENT CODE § 12965(b). In most cases, the DFEH complaint must be filed within one year of the last alleged unlawful employment practice. GOVERNMENT CODE § 12960(d). In the case of allegations of employment discrimination, the employee has three years from the alleged unlawful practice. (GOVERNMENT CODE § 12960(e).) The time limit may be extended by 90 days if the aggrieved employee first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence. GOVERNMENT CODE § 12960(d)(1). If the employee is a minor, the time limit expires from the date the employee attains the age of majority. GOVERNMENT CODE § 12960(d)(4).

The DFEH has broad authority to investigate and prosecute complaints. *See* GOVERNMENT CODE § 12930(d). However, if the DFEH fails to close its file or issue an accusation within 150 days after a complaint is filed, it must give the complaining party notice of the ability to request a right to sue letter. GOVERNMENT CODE § 12965(b). “If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint.” *Id.*

The complaining party may also request an immediate right-to-sue notice, upon filing of the DFEH complaint. Because of the administrative backlog, many complaining parties, particularly those who are represented by counsel, will elect to skip the administrative process.

Any action must be brought within one year of the date of the right-to-sue notice. GOVERNMENT CODE § 12965(b).

The requirement of exhaustion of administrative remedies does not apply to common law claims, such as claims for tortious discharge in violation of public policy or intentional infliction of emotional distress.

[A]lthough an employee must exhaust the FEHA administrative remedy before bringing suit on a cause of action under the act or seeking the relief provided therein, exhaustion is not required before filing a civil action for damages alleging nonstatutory causes of action. An employee, of course, may elect to waive the statutory cause of action and remedies, and proceed directly to court on the common law claims . . . alternatively, the

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employee may pursue both the administrative and the judicial avenues, either sequentially or simultaneously, in the latter case amending his or her complaint to join the FEHA cause of action once the Department has issued the right-to-sue letter.

Rojo v. Kliger, 52 Cal.3d 65, 88 (1990) (citations omitted).

D. Remedies Available

Remedies for violation of the FEHA may include: (1) back pay; (2) reinstatement or front pay; (3) injunctive relief; (4) compensatory damages for pain and suffering, including emotional distress damages; (5) punitive damages; and (6) reasonable attorneys' fees and costs. There are no limits on the amount of compensatory or punitive damages available under FEHA.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee who has given reasonable prior notice may be discharged for taking time off to serve on a jury or appear in court as a witness. LABOR CODE § 230.

B. Voting

An employee can take up to two hours of time off with pay when voting in a statewide election. ELECTIONS CODE § 14000.

C. Family/Medical Leave

1. California Family Rights Act

California provides for family care leave under the California Family Rights Act (CFRA). GOVERNMENT CODE § 12945.2. Formerly, the entitlement to CFRA leave was identical to the entitlement to leave under the federal Family and Medical Leave Act (FMLA). As of January 1, 2005, however, CFRA leave was expanded to provide protected time off to care for the employee's domestic partner and children or parents of the employee's domestic partner. See FAMILY CODE § 297.5.

The employer's obligation to notify employees of their right to CFRA leave was addressed in *Faust v. California Portland Cement Co.*, 150 Cal.App.4th 864 (2007). Michael Faust worked as a lube specialist for California Portland Cement Company (CPC). He sent an e-mail accusing unnamed employees of internal theft and misconduct. After Faust's supervisors told his co-workers about this e-mail, the co-workers began to shun Faust and would not respond to his requests for assistance. Faust developed extreme anxiety and panic attacks while at work. *Id.* at 869.

Faust left work and, shortly thereafter, began treatment in a 30-day psychiatric program. He provided CPC with documentation of medical impairment and a work release, with a diagnosis of anxiety, stress, phobic disorders, depressive, and bipolar mood disorders. Faust's medical care provider limited psychiatric benefits to 30 days and Faust's medical release was limited to the same 30-day period. At the end of the 30 days, Faust's psychiatrist told him to stay away from stress.

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After the psychiatric care, Faust continued to experience severe back pain, which was treated by a chiropractor. Faust provided CPC with a note from the chiropractor that stated Faust was unable to work for another month. CPC believed the note was inadequate and called Faust for additional information. Mrs. Faust returned the call, saying that CPC could speak with her, Faust's chiropractor, or Faust's workers' compensation attorney. CPC insisted on speaking with Faust and, when he did not return call, terminated his employment.

CPC was unable to obtain summary judgment because it did not establish that it had met its statutory requirement of notifying Faust of his right to take leave under the CFRA. CPC offered no evidence that it had posted a notice or otherwise given Faust notice of his right to CFRA leave. *Id.* at 881.

In *Ely v. Wal-Mart, Inc.*, plaintiff Kathleen Ely was hired by Wal-Mart as a department manager at its La Quinta store in November 1992. 875 F.Supp. 1422, 1424 (1995). In April 1994, she suffered an injury that required emergency surgery. *Id.* at 1424. Ely called her supervisors two days after the surgery and told them that she would provide them with a back-to-work date as soon as her doctor released her. *Id.* In June 1994, Ely returned to work but was told by the store manager that she would not be reinstated to her former position. *Id.* The store manager told her that she could take a position as a cashier that paid less money or be terminated. *Id.* Ely refused to take the position and was subsequently fired. *Id.*

Ely sued Wal-Mart for several causes of action, including wrongful discharge in violation of public policy. *Id.* at 1423. She contended that the public policies in the CFRA, GOVERNMENT CODE § 12945.2, prohibited Wal-Mart's conduct. *Id.* Wal-Mart attempted to have Ely's claim dismissed, arguing that a tort cause of action must be based upon a public policy that is fundamental and well-established, "and this section of FEHA cannot be used to bring a violation of public policy cause of action." *Id.* at 1424. The court of appeals disagreed, holding that the CFRA is an adequate source of public policy to support a cause of action for wrongful discharge in violation of public policy where an employee is terminated for taking a family or medical leave. *Id.* at 1429. The court reasoned that the public policy underlying the FEHA, to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination, is the same for the CFRA. *Id.* at 1428.

In *Lonicki v. Sutter Health Central*, 43 Cal. 4th 201 (2008), a nurse requested medical leave from a full-time job because of major depression and work-related stress. She also had a part-time job as a nurse for a different employer, but she did not take medical leave from the second job. The California Supreme Court, in a 4-3 decision, held that working for another employer while on medical leave from a similar job is not conclusive evidence that the employee is able to do the job for the original employer. While a person's ability to do such work might constitute evidence that he or she is not suffering from a serious health problem, it is not dispositive. The court also held that an employer may challenge an employee's requests for medical leave even if it did not follow the California Family Rights Act (CFRA) procedures for obtaining an independent physician's assessment of an employee's health. Further, the court ruled that while employers are not required to obtain a third medical opinion as part of the FMLA/CFRA medical certification process, they run the risk a court or jury will disagree with the employer's conclusion based on a second opinion that an employee does not have a "serious health condition."

2. Paid Family Leave

In July 2004, California became the first state in the nation to provide paid family leave. CAL. UNEMPLOYMENT INS. CODE §§ 3300 *et seq.* Employees are eligible for up to eight weeks of compensated time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new

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child. *Id.* at § 3301. Payment is provided through the California State Disability Insurance program, which is funded by payroll deductions. The paid family leave statute is a compensation scheme, not a job protection. Thus, unless the employee has leave protections under the FMLA or the CFRA, there is no requirement to hold the job.

Employers must notify their employees of the ability to take paid family leave. Mandatory publications are available from the California Employment Development Department or can be downloaded at <http://www.edd.ca.gov/direp/de1858.pdf>.

In January 2023, Government Code section 12954 amended Cal. Government Code § 12945.2 to expand the class of people for whom an employee may take leave or paid sick leave to care for to “any individual by blood or whose association with the employee is the equivalent of a family relationship.” An employer has the discretion to limit an employee to one individual per 12-month period..

3. California Mandatory Paid Sick Leave

California enacted the Healthy Workplace Healthy Family Act of 2014 (AB1522), which became effective January 1, 2015. The Act provides that all employees who, on or after July 1, 2015, work in California for 30 or more days within a year from the beginning of employment, are entitled to paid sick leave. Employees, including part-time and temporary employees, will earn at least one hour of paid leave for every 30 hours worked (or 24 hours of sick leave per year). The right to accrue and take sick leave begins on the first day of employment or July 1, 2015, whichever is later. The employee must also satisfy a 90 day employment period before the employee can take any sick leave.

Employees covered by a qualifying collective bargaining agreement, in-home supportive services providers, and certain employees of air carriers are not covered by this law, if they receive compensated time off at least equivalent to the requirements of the new law.

Employees may use the paid leave for themselves or a family member for preventive care or care of an existing health condition or for specified purposes if the employee is a victim of domestic violence, sexual assault, or stalking. Family members include the employee’s parent, child, spouse, registered domestic partner, grandparent, grandchild, and sibling. Preventive care would include annual physicals or flu shots. For partial days, the employer can require the employee to take at least two hours of leave. Otherwise, the determination of how much time is needed is left to the employee’s discretion.

While full time employees will generally earn slightly more than eight days a year, employers can limit the amount of paid sick leave the employee can take in one year to 24 hours or three days. The employer can also cap the amount of sick leave an employee may accrue to six (6) days or 48 hours.

Employers must show on the employee’s pay stub, or a document issued the same day as the paycheck, the amount of sick leave the employee has available. Employers must also keep records documenting the number of hours the employees earn and use for three years.

Employers must further individually notify all employees hired prior to January 1, 2015 of changes to terms and conditions of employment that relate to paid sick leave within 7 days of the actual change. Employers must also comply with LABOR CODE section 2810.5(a) regarding notice to employees concerning any new or previously paid sick leave program.

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If an employer has a paid time off policy that already provides employees with an amount of paid leave that meets the requirements of this law, the employer is not required to provide additional sick leave.

Sick leave does not vest and does not need to be paid out upon the employee's termination unless the employer's policy provides for a payout. However, if the employee leaves the employment and is rehired by the same employer within 12 months, the employee can reclaim what was remaining in the sick leave bank.

Effective January 1, 2024, Senate Bill 616 (Labor Code section 246(b)(4)) increased the minimum amount of sick leave that covered employers must provide per year to 40 hours (5 days). The accrual rate remained the same. The bill also established that no sick pay needs to be paid at termination, an employer may advance sick days prior to accrual, and an employer must provide written notice with the amount of sick leave available.

4. San Francisco Mandatory Paid Sick Leave

San Francisco's Paid Sick Leave Ordinance became effective on February 5, 2007. California's Healthy Workplace Healthy Family Act does not preempt San Francisco's local Paid Sick Leave Ordinance. Employers with employees performing work in San Francisco are required to comply with both laws.

All persons working in San Francisco, including part-time employees, are entitled to paid sick leave. Under the San Francisco Administrative Code, Chapter 12W, employees must accrue at least one hour of paid sick leave for every 30 hours worked. Paid sick leave must begin to accrue no later than 90 days after the start of employment. For employees hired on or after January 1, 2017, however, leave begins to accrue when employment begins, but cannot be used until the 90th day of employment.

Employees may use all of their paid sick leave for their own illness or to provide care for a sick child, parent, sibling, grandparent, grandchild, spouse, domestic partner, or "designated person." Employees who do not have a spouse or registered domestic partner must be allowed to designate one person for whom the employee can use his or her paid sick leave. Effective January 1, 2017, "parent" now includes a person who stood *in loco parentis* when an employee was a minor child, as well as a biological, adoptive, foster or stepparent, or guardian of the employee's spouse or registered domestic partner. Employees must be given the opportunity to designate no later than the date on which the employee has worked 30 hours after paid sick leave begins to accrue. The employee must have a window of 10 days to make this designation. In addition, each year, the employee must be notified of the right to change the designation and be given a 10-day window to make the changes.

Employers may cap the amount of sick leave accrued at 72 hours. For small businesses with fewer than 10 employees, the cap is set at 40 hours. Employers may not adopt a policy under which all unused sick leave is lost at the end of the calendar or fiscal year. The ordinance requires that accrued, unused sick leave must carry over from year to year, up to the amount of the cap. Unused sick leave need not be paid to the employee upon termination of employment.

Furthermore, if an employer has a paid time off policy that already provides employees with an amount of paid leave that meets the requirements of this ordinance, the employer is not required to provide additional sick leave.

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Employers are required to keep records documenting hours worked and paid sick leave taken by employees. These records must be maintained for a period of four years.

One significant potential problem for employers under the Ordinance is that sick leave may not accrue in partial hours. However, many payroll systems are designed to accrue leave, including partial hours, based upon the number of hours worked in a specific pay period.

Another problem for employers is how to comply with the Ordinance for exempt employees who do not fill out time sheets. The requirements that sick leave accrue at the rate of one hour for every 30 hours worked and that employers keep records documenting hours worked applies to all employees. There is no exception for exempt employees. If the ordinance is applied strictly, employers must maintain time records for exempt employees.

A third potential problem is that employers may use only reasonable means to verify that an employee's use of paid sick leave is lawful. The statute does not define what types of means would be considered reasonable. Employers often require doctor's notes from employees who appear to have been abusing sick leave. The restriction of "only reasonable means" may well become the subject of litigation.

Assuming that sick leave is used at the maximum of eight hours per workday on which sick leave is used, counting hours in excess of eight per day worked would cause employees who regularly work overtime and exempt employees who may work in excess of 40 hours per week to accrue sick leave at a proportionally higher rate than other employees. Fortunately, this can be controlled by implementing caps on vacation accrual.

Employers are required to post a notice of the right to sick leave in a conspicuous place in the workplace or jobsite. The notice must be posted in English, Spanish, and Chinese and any language spoken by at least 5% of the employees at the workplace or jobsite. The official notice is located at <http://sfgsa.org/modules/showdocument.aspx?documentid=8726>.

It is unlawful for the employer to use paid sick leave taken under the Ordinance as a basis for discipline, discharge, demotion, suspension, or any other adverse action.

Finally, the Ordinance prohibits employers from retaliating against employees who exercise any right under the Ordinance. The anti-retaliation provisions are broad and will apply to employees who request paid sick leave, who assert that the employer has not properly accrued sick leave, and who file a complaint making good faith allegations that the employer has not complied with the paid sick leave requirements.

5. Leave for Child's School Activities

An employee who is a parent or guardian of a child may take up to eight hours in a calendar month and up to 40 hours in a year to participate in activities of the child's school or licensed child day care facility. The employee must give the employer reasonable advance notice. LABOR CODE § 230.8.

6. Los Angeles Mandatory Paid Sick Leave

Los Angeles's Mandatory Paid Sick Leave is part of its Minimum Wage Ordinance, which became effective July 1, 2016. The Ordinance applies to employers with 26 or more employees, but is deferred for one year, until July 1, 2017, for employers with 25 or fewer employees. Under the Ordinance, employees accrue 1 hour of paid sick leave for every 30 hours worked, and are entitled to take up to 48 hours of sick leave in each year of employment, calendar year, or 12-month period. Employees are eligible to use their accrued paid sick leave beginning on the 90th day of employment. Unused accrued paid sick leave shall carry over to the following year of employment. Employers may cap the accrual at 72 hours. Employers who already have a paid leave or paid time off policy that is equal to or no less than 48 hours per year do not have to provide additional paid sick leave. A full version of the Ordinance can be found here: http://clkrep.lacity.org/online/docs/2014/14-1371_ORD_184320_6-2-16.pdf.

7. Leave for Child's Suspension from School

An employee who is a parent or guardian of a child suspended from school is entitled to take time off to attend a portion of the school day in his or her child or ward's classroom if the school has asked the employee to do so and if the employee gives the employer reasonable advance notice. LABOR CODE § 230.7.

D. Pregnancy/Maternity/Paternity Leave

Unlike the FMLA, leave taken for disability because of pregnancy, childbirth, or related medical conditions is excluded from the CFRA's definition of leave because of the employee's own serious health condition. Whenever an employee takes time off related to a pregnancy, the employer must consider not only family leave, but also California's Pregnancy Disability Leave (PDL) laws. A female employee in California, is guaranteed up to four months or 17 1/3 weeks of PDL leave in addition to 12 weeks of family care and medical leave under the FMLA or CFRA. PDL leave is available to all employees of an employer with five or more employees who are disabled by pregnancy, childbirth, or a related medical condition. GOVERNMENT CODE § 12945. There is no length of service requirement before an employee affected by pregnancy is eligible for pregnancy disability leave.

An employer is required to provide only six weeks of protected leave to a female employee for a normal pregnancy, childbirth, or related medical condition. If the employee's healthcare provider finds that the pregnancy, childbirth, or related medical condition involves a high risk or complication, then the condition is deemed to be "not normal." For example, if a woman suffers from severe morning sickness or needs to take time off for prenatal care, she may be considered disabled by pregnancy and the disability period may begin to run. A woman is considered disabled by pregnancy, childbirth, or related medical conditions if a healthcare provider considers that she is unable to work at all because of the pregnancy, childbirth or related medical condition, or is unable to perform any one or more of the essential functions of her job without undue risk to herself or her unborn child. 2 CAL. CODE REGS. § 7291.2(g).

A pregnancy disability leave may be taken intermittently or on a reduced work schedule when medically advisable. An employer may limit leave increments to the shortest period of time that the employer's payroll service uses to account for absences or use of leave.

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Four months or 17 1/3 weeks is the maximum period of leave that is required for any pregnancy-related disability under the PDL. A woman who is physically and mentally capable of returning to work before the expiration of four months is *not* entitled to a full four month leave of absence. The disability period is defined by the actual disability on which the claim is premised.

California adopted Amended Pregnancy Disability Regulations which became effective on December 30, 2012. 2 CAL. CODE REGS. §§ 7291.2 – 7291.18. Pursuant to these amended regulations, there are notice requirements and other changes to pregnancy disability law. Inclusive of these changes are the calculations of the leave available under PDL. The four month period is calculated by the number of days an employee would normally work in a four month period:

- Full Time employees (5 days; 40 hours per week): 693 hours of leave.
- Part Time Employees (20 hours per week): 346.5 hours of leave.
- Any employee who normally works 48 hours per week: 832 hours of leave.

Further, PDL is not subject to an “annual limit.” Thus, if a female employee miscarried and became pregnant again later that year, the employee’s right to take up to four months off under PDL would not be reduced by the amount of PDL leave used during the first pregnancy.

Paternity leave is subject to Paid Family Leave laws. See discussion above of "Paid Family Leave" in Section XIV.C.2.

Finally, effective January 1, 2018, the California New Parent Leave Act (NPLA) expands who may take baby bonding leave in California. The NPLA covers employees working for employers with 20 or more employees within 75 miles of the employee wishing to take up to 12 weeks for baby-bonding leave within one year of the employee’s child’s birth, adoption, or foster care placement. Under the NPLA, covered employers are prohibited from interfering with an eligible employee’s right to take NPLA leave, or discriminating, or retaliating against an employee for taking such leave, or for giving information or testimony about his or her own NPLA leave or another person’s parental leave in an inquiry or proceeding relating to NPLA rights. GOVERNMENT CODE § 12945.6(g), (h).

1. Benefits Available under PDL

The employee must be allowed to use any accrued vacation leave and any other paid leave during her disability leave. CAL. CODE REGS. TIT. 2 § 7291.11(a) *et seq.* She is entitled to receive SDI benefits during the time she is unpaid because she is unable to perform regular customary work on account of an injury or illness resulting from the pregnancy. *Id.*

The employer is required to provide the same benefits for pregnant workers that it provides for other workers whose ability or inability to work is similar. *Id.* During the period of unpaid pregnancy disability leave, the employee is entitled to accrual of seniority and to participate in health plans. CAL. CODE REGS. TIT. 2 § 7291.11(d). These benefits thus apply and accrue, and include all insurance plans, employee benefit plans, pension and retirement plans and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by an employer for any reason other than pregnancy disability. *Id.*

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2. Notice Requirements

An employee who intends to take a disability leave under the statute may be required to give the employer reasonable notice of the date the leave will begin and the estimated time she intends to return to work. CAL. CODE REGS. TIT. 2 § 7291.17. The employer must give its employees reasonable advanced notice of any notice requirements it adopts. CAL. CODE REGS. TIT. 2 § 7291.16. The employer's failure to give such notice precludes it from taking any adverse action against the employee for failing to give the required notice. CAL. CODE REGS. TIT. 2 § 7291.16(c)(2).

A physician's certificate may be required to verify the disability on account of pregnancy, so long as certificates are required to verify other temporary disabilities. Cal. Code Regs. Tit. 2 § 7291.17(b). Second or third medical opinions may not be required. The only information the employer may ask the employee to provide is the date she became disabled due to pregnancy, the probable duration of the period or periods of disability, and the explanation that due to disability, the employee is unable to work at all or is unable to perform one or more essential functions of her position without undue risk to herself, other persons, or the successful completion of her pregnancy. See generally CAL. CODE REGS. TIT. 2 § 7291.17.

E. Employers May Need to Provide "Reasonable Accommodations" under FEHA Even if Employee Has Already Exhausted Statutory Leaves

In *Sanchez v. Swissport, Inc.*, a California Court of Appeal reversed a trial court's ruling which dismissed Plaintiff's First Amended Complaint against her employer, Swissport, for discrimination based on pregnancy and pregnancy-related disability. Plaintiff was employed as a "cleaning agent" for a year and a half when she sought a temporary leave of absence after she was diagnosed with a high risk pregnancy requiring bed rest. 213 Cal.App.4th 1331 (2013). Plaintiff took leave on February 27, 2009, and her "due date" was October 19, 2009. Swissport terminated Plaintiff on July 14, 2009. As of the date of her termination, Plaintiff had exhausted all leave available under Pregnancy Disability Leave (PDL) laws and the California Family Rights Act (CFRA).

The trial court dismissed Plaintiff's Complaint after it granted Swissport's pre-trial motion wherein Swissport argued it could not be liable to Plaintiff because Plaintiff was afforded the maximum available statutory time off under PDL laws and CFRA. Plaintiff argued on appeal she was entitled to "reasonable accommodations" under California's Fair Employment and Housing Act (FEHA) independent of PDL and CFRA as she would have been able to perform all "essential functions" of her job with "reasonable accommodations." The Court of Appeal agreed.

In analyzing the FEHA statutory scheme along with the PDL laws, the Court of Appeal emphasized the PDL's express language that "this section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth under any other provision" of FEHA. As such, the Court of Appeal highlighted that that PDL laws imposed additional requirements on employers and that they in no way supplant any other protections afforded under FEHA.

The Court of Appeal further recognized that a "reasonable accommodation" that does not impose undue hardship on the employer must be provided to pregnant employees pursuant to sex and disability discrimination laws within FEHA. The Court of Appeal noted that in certain circumstances disability leave may exceed four months and a leave of absence for a finite period in excess of four

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months may be deemed a “reasonable accommodation.” The plain language of the PDL laws makes clear that its remedies augment, rather than supplant, protections and remedies afforded in the FEHA. This case is also a reminder that employers need to be diligent when ensuring compliance with all leave laws which often overlap.

F. Day of Rest Statutes

California does not have a day of rest statute, as such. However, if an employee works seven consecutive days in a workweek, he or she is entitled to time and one-half for the first eight hours worked on the seventh consecutive workday. LABOR CODE § 510.

G. Military Leave

California law provides that all employers shall grant temporary military leave to qualifying employees to serve in the uniformed services. MIL. & VET. CODE, § 394 *et seq.* Private employers shall provide up to 17 unpaid days annually and public employers shall give up to 180 unpaid days in a year. Leave shall be available to any officer, warrant officer, or enlisted member of the military or naval forces of the state or the United States. The leave law also prohibits discrimination against any serviceperson because of his/her military service.

H. Domestic Violence, Sexual Assault, or Stalking Leave

Employers with 25 or more employees now have an affirmative duty to inform their employees of their right to take time off for domestic violence, sexual assault, or stalking. LABOR CODE § 230.1 (h)(1). Employers must provide this information to new hires upon hire, and to other employees upon request. *Id.* This duty, however, does not take effect until the Labor Commissioner develops a form that the employer could use to comply with the notice requirements. *Id.* § (h)(3). The Labor Commissioner has until July 1, 2017, to develop the form. *Id.* § 230.1(h)(2).

I. Leave of Absence Following Organ Donation

An employee is entitled to a leave of absence not exceeding 30 business days in a one-year period when the employee is an organ donor for purposes of donating their organ to another person. Additionally an employee who donates bone marrow to another person is entitled to a leave of absence not exceeding five business days.

J. 2021 COVID-19 Supplemental Paid Sick Leave

Beginning March 29, 2021 and ending on September 30, 2021, employers with more than 25 employees are required to provide employees with COVID-19 supplemental paid sick leave under the following circumstances:

(1) The covered employee is subject to a quarantine or isolation period related to COVID-19, or has been advised by a healthcare provider to quarantine due to COVID-19, or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

(2) The covered employee is caring for a family member who is either subject to a quarantine or isolation period related to COVID-19 (see note below) or has been advised by a

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healthcare provider to quarantine due to COVID-19, or the employee is caring for a child whose school or place of care is closed or unavailable due to COVID-19 on the premises; or

(3) The covered employee is attending a vaccine appointment or cannot work or telework due to vaccine-related symptoms.

It bears noting that this leave is retroactive and goes back to January 1, 2021, which means that covered employees who took qualifying leave between January 1, 2021 and March 28, 2021 can request payment for that leave if it was paid by the employer.

Full-time employees who worked or were scheduled to work an average of at least 40 hours per week in the two weeks before the leave is taken are entitled to 80 hours of COVID-19 supplemental paid sick leave.

Part-time employees with variable schedules who have worked for an employer over a period of more than 14 days, the employee is entitled to fourteen times the average number of hours the covered employee worked each day for the employer in the six months (or less, if the employee has not worked six months) preceding the date the covered employee took COVID-19 supplemental paid sick leave.

Part-time employees with variable schedules who have worked for an employer for a period of 14 days or fewer (i.e., are newly hired) will be entitled COVID-19 supplemental paid sick leave in an amount equal to the hours that they have worked in the preceding two weeks.

XV. STATE WAGE AND HOUR LAWS

A. Minimum Wage

As of January 1, 2021, California's minimum wage is \$13.00 per hour for employers with 25 employees or less, and \$14.00 per hour for employers with 26 employees or more. Over the next few years, however, minimum wage will increase for said employers, respectively, as follows:

- January 1, 2021: \$13.00/hour; \$14.00/hour.
- January 1, 2022: \$14.00/hour; \$15.00/hour.
- January 1, 2023: \$15.000/hour; \$15.00/hour

Some California jurisdictions have adopted local minimum wage ordinances or "living wages." These may apply to all employees working in the jurisdiction or they may apply only to entities doing business with the local jurisdiction. *Compare, e.g.,* San Francisco Admin. Code Ch. 12R. Los Angeles, Oakland, San Jose, and many other cities have also adopted minimum wage or living wage ordinances.

As of January 1, 2024, the minimum wage for all employees, regardless the number of employees, is \$16.00/hour. Additionally, the minimum salary for an exempt employee is \$66,560 per year.

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1. Bond Requirement for Contesting Minimum Wage Violations

Effective January 1, 2017, any person who contests an assessment for minimum wage violations must post a bond with the Labor Commissioner equal to the total amount of any minimum wages, liquidated damages, and overtime compensation that are due and owing as determined by the assessment, excluding penalties. LABOR CODE § 1197.1(c)(3). If the assessment is affirmed, the bond will be forfeited if the employer does not pay the damages at issue within 10 days of the entry of the judgment. *Id.* § 1197.1(c)(4).

2. Failure to Pay Minimum Wage

Any intentional failure to pay minimum wage results in a \$100.00 penalty for each employed, for each pay period in which the employee was underpaid (in addition to an amount sufficient to recover the underpaid wages, liquidated damages, and any other penalties). LABOR CODE § 1197.1. For each subsequent violation for the same offense, the penalty increases to \$250.00 for each employee, for each pay period in which the employee is underpaid, regardless of whether the initial violation was intentionally committed. *Id.*

Additionally, pursuant to LABOR CODE section 1197.1, penalties for Labor Code violations can also be applied to companies that pay or cause an employee to be paid “a rate of compensation that is less than set by contract.” *Id.*

B. The California Fair Pay Act

The California Fair Pay Act took effect on January 1, 2016. Codified in LABOR CODE section 1197.5, the California Fair Pay Act prohibits employers from paying any of its employees wage rates that are less than what it pays employees of the opposite sex for “substantially similar” work. Work is “substantially similar” if it is similar in “skill, effort, and responsibility, and performed under similar working conditions.” LABOR CODE § 1197.5(a). Employers, however, may justify wage differential among its employees based on one or more of the following factors: seniority system; merit system; system that measures earnings by quantity or quality of production; and any bona fide fact other than sex. *Id.* § 1197.5(a)(1).

Effective January 1, 2017, the California Fair Pay Act was expanded to also prohibit wage disparity based on “race and ethnicity.” *Id.* § 1197.5(b). The Act was also revised to clarify that “prior salary shall not, by itself, justify any disparity in compensation.” *Id.* §§ 1197.5(a)(3) and 1197.5(b)(3).

C. Deductions from Pay

Employers must provide employees with itemized wage statements on paydays, containing the following information:

- (1) gross wages earned, (2) total hours worked by the employee (non-exempt employees only), (3) the number of piece-rate units earned and any applicable piece rate (if applicable), (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive

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dates of the pay period, (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number may be shown, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate (for non-exempt employees only).

LABOR CODE § 226(a). Any employer that commits a “knowing and intentional” violation of this section and thereby causes an employee to “suffer injury” is liable for penalties in the amount of \$50 per employee for the first pay period and \$100 per employee for subsequent pay periods, up to an aggregate of \$4,000. *Id.* § 226(e). In addition, an employer may be liable for civil penalties of \$250 per employee for an initial violation and \$1,000 per employee for a subsequent violation. *Id.* § 226.3.

An employee suffers an “injury” for purposes of section 226 when either “the employer fails to provide a wage statement” or the “employer fails to provide accurate or complete information as required by any one or more of [the nine items required by 226(a)] and the employee cannot promptly and easily determine from the wage statement alone” one or more of those nine items. “Promptly and easily” is defined to mean that “a reasonable person would be able to readily ascertain the information without reference to other documents or information.” LABOR CODE § 226(e).

An employer may withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, or when a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement. LABOR CODE § 224.

It is unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee. LABOR CODE § 221. An employer may legally advance commissions to its employees prior to the completion of all conditions for payment and, by agreement, charge back any excess advance over commissions earned against any future advance should the conditions not be satisfied. *Steinhebel v. Los Angeles Times Communications, LLC*, 126 Cal App 4th 696 (2005).

D. Overtime Rules

Non-exempt employees are entitled to overtime pay if they work more than eight hours in any workday. The overtime rate is time and one-half for all hours above eight and less than 12 in a single day. After 12 hours in a workday, the employee is entitled to double time. In addition, even if the employee does not work more than eight hours in any given day, but works more than 40 hours in a single workweek, he or she is entitled to receive overtime pay. LABOR CODE § 510.

If an employee works seven consecutive days in a workweek, he or she is entitled to time and one-half for the first eight hours worked on the seventh consecutive workday. LABOR CODE § 510. In addition, employees are entitled to double time for any time after the first eight hours if they work on the seventh consecutive day of any workweek.

E. Meal and Rest Periods

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Employees are entitled to specified meal and rest periods. These breaks are specified in the wage orders adopted by the Industrial Welfare Commission (IWC), which are industry-specific. Most of the wage orders provide that any non-exempt employee who works more than five hours is entitled to a thirty-minute meal period. If the employee works less than six hours, the meal period may be waived by mutual consent. So long as the employee is relieved of all responsibility and permitted to leave the premises, the meal period is unpaid time.

Non-exempt employees are also entitled to one 10-minute rest period for each work period of four hours or major fraction thereof. The rest period should be at or near the middle of the work period. However, if the employee's total workday is less than three and one-half hours, no rest period is required.

LABOR CODE § 226.7 prevents employers from requiring any employee to work during any meal or rest period mandated by an applicable order of the IWC:

If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

The additional pay has been classified as a wage, rather than a penalty. *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007). The determination that the additional pay constitutes a wage means that the statute of limitations on such claims is three years, rather than the one year applicable to claims for penalties.

In *Curcini v. County of Alameda*, 164 Cal.App.4th 629 (2008), the California Court of Appeal held that the County of Alameda, as a charter county, was not subject to the California Labor Code's provisions regarding overtime or meal and rest periods, and that the County and its employees were further immune from liability (under the California Government Code) for fraud and misrepresentation causes of action.

In *Brinker Restaurant Corp. v. Sup. Ct.*, 53 Cal.4th 1004 (2012) the California Supreme Court held that an employer is obligated to relieve its employee of all duties during a meal period or rest break, with the employee at liberty to use that break or period for whatever purpose the employee desires. The employer, however, has no obligation to ensure that the employee does no work. The employer must (1) provide employees an uninterrupted 30 minute meal period, (2) allow the employee to leave the premises, and (3) ensure the employee is relieved of all duty for the entire period. The court further provided that, consistent with the language of Labor Code section 512, an employer need not provide a second meal period until the end of the tenth hour of work for employees who work more than 10 hours in a day, regardless of when the employees finished their first meal period. Employees may waive the second meal period, with the consent of the employer, if they did not waive the first meal period and they do not work more than 12 total hours in the workday.

F. Cool Down Periods

Effective January 1, 2015, LABOR CODE §226.7 is amended to require employers to count as time worked any "recovery period." Section 226.7 defines "recovery period" as a "cooldown period afforded

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an employee to prevent heat illness.” Before the passage of SB 1360, California law was silent on whether such recovery periods should be counted as paid time.

Section 226.7 now creates civil liability in the amount of one additional hour of pay to employees for each workday that the employer fails to provide a "cool-down" break.

G. Payment of Wages Upon Termination of Employment

If an employer discharges an employee, the employer must immediately pay all wages earned and unpaid at the time of discharge, including all accrued, unused vacation. LABOR CODE § 201. Vacation time is paid at the employee’s final rate of pay, without regard to when the vacation pay was earned. LABOR CODE § 227.3. The place of the final wage payment for employees who are terminated (or laid off) is the place of termination. LABOR CODE § 208.

Generally, if an employee resigns from his or her employment with at least 72 hours of notice, final wages and vacation pay are due at the time of termination. If the employee has not given 72 hours notice, the final pay is due within 72 hours of the employee’s final day of employment. The place of final wage payment for employees who quit without giving 72 hours prior notice and without specifically requesting that their final wages be mailed to them, is at the office of the employer within the county in which the work was performed. LABOR CODE § 208. However, an employee who quits without providing a 72-hour notice is entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing constitutes the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting. LABOR CODE § 202.

If an employer willfully fails to pay the full amount of wages due to an employee upon termination, the employer may be subject to a waiting time penalty. This penalty is the employee’s daily wage, payable for each day the wages remain unpaid, up to a maximum of 30 days. LABOR CODE § 203. The penalty accrues for each day the wages remain unpaid, including Saturdays, Sundays, and holidays. As a result, the maximum penalty will exceed the employee’s monthly take-home pay. An employee is not entitled to the penalties if he or she refuses to accept full payment, including any penalty due under LABOR CODE § 203, or hides to avoid receipt of payment.

LABOR CODE § 210 also imposes a \$100.00 first-time penalty for late-paid or incorrect wages. Section 210 further imposes a \$200.00 penalty for each subsequent violation (or for any willful or intentional violation) plus 25% of the wages owed.

1. Fines for Failure to Timely Release An Employee’s Personnel File Upon Request

Employers must respond to an employee’s request for their personnel file within 30 days. Violation of this statute may result in a fine of \$750, injunctive relief and attorneys’ fees. LABOR CODE § 1198.5.

Employers are also required to permit employees to inspect or copy their payroll records. LABOR CODE §226(b.) When an employer who receives a written or oral request from a current or former employee to inspect or copy his or her payroll records, the employer shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request. Failure by an employer to permit a current or former employee to inspect or copy his or her payroll records within the

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21 calendar day period entitles the current or former employee to recover a penalty from the employer in a civil action before a court of competent jurisdiction. LABOR CODE §226(c) and (f).

2. Penalties for Labor Code Violations

The California Labor Commissioner, Division of Labor Standards Enforcement, may impose penalties for a variety of wage and hour law violations. For example, the civil penalties for failure to pay minimum wages or overtime are, for a first offense, \$50.00 per employee per pay period for which the employee was underpaid and, for any subsequent offense, \$100.00 per employee per pay period in which the employee was underpaid. LABOR CODE § 558. In addition, an employer who willfully fails to maintain the records of employees' addresses, payroll records, and wage records required by law may be liable for a civil penalty of \$500.00. LABOR CODE § 1174.5. Moreover, any person who violates the provisions regarding working hours and overtime pay "is guilty of a misdemeanor." LABOR CODE § 553.

Employees who are subjected to Labor Code violations are entitled to recover 25 percent of many of the civil penalties, which were previously available only in actions pursued by the California Labor Commissioner. The civil penalties may be awarded in addition to any other pre-existing remedies. Employees are required to give the Division of Labor Standards Enforcement and the employer notice of and the opportunity to cure a violation before proceeding with a lawsuit. Employees cannot pursue penalties over small, technical violations, such as the use of the wrong sized type on required workplace posters. LABOR CODE §§ 2698 and 2699.

3. Individual Liability: Officers, Directors, And Managers Held Not Personally Liable To Employees For Unpaid Overtime

In *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005), the plaintiff filed a class action lawsuit against his former company and its officers and directors, alleging that they intentionally misclassified him and other employees as exempt from overtime pay in violation of the California Labor Code. The California Supreme Court, in affirming the lower court's holding that the individual corporate agents were not personally liable for unpaid overtime wages, observed that the individual defendants were not "employers" under the Labor Code. *Id.* at 1085-86.

The California Supreme Court abrogated the *Reynolds* opinion holding that the applicable wage order of the Industrial Welfare Commission (IWC), and not the common law, defines the employment relationship and thus who may be liable in an action to recover unpaid minimum wages. *Martinez v. Combs*, 49 Cal.4th 35 (2010). Thus, "'any person who directly or indirectly, or through an agent or other person, employed or exercised control over wages, hours or working conditions of any person may be liable,' is broad enough to reach through straw men and other sham arrangements to impose liability on the actual employer." *Id.* at 71. The Supreme Court held, however, that its holding in *Reynolds* that IWC's definition of employer does not impose liability on individual corporate agents acting within the scope of the agency is proper. *Id.* at 66.

H. Commission Agreements

Where an employee enters into an employment contract for services to be rendered within the state that involves the payment of commissions, the employment contract must be put in writing and describe the method by which the commissions shall be computed and paid. The definition of "commissions" specifically excludes payments such as short-term productivity bonuses, certain

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temporary, variable incentive payments, and certain other bonuses and profit-sharing plans. LABOR CODE § 2751.

The court in *Keyes Motors, Inc. v. DLSE*, 197 Cal.App.3d 557 (1988), held commissions arise from the sale of a product and that to constitute a commission, the compensation must be a percentage of the price of the product or service which is sold. Alternatively, a commission may be based proportionally on the number of products or services sold. *Areso v. Car Max*, 195 Cal.App.4th 996 (2011). Generally, bonuses are not considered commission, unless they meet the scheme set forth in *Keyes Motors*, because bonuses are not predicated upon the price of a particular product or service but are usually based on reaching a minimum amount of sales or making a minimum number of pieces.

In instances where the employee terminates his or her employment, the language of the contract must be considered to determine whether the employee will be owed any commissions generated after termination. For example, where the contract for commissions is clear and unambiguous, and there are substantial duties that must be performed in order to complete the sale, the employee who voluntarily terminates without accomplishing those tasks is not entitled to recover. *Hudgins v. Neiman Marcus Group, Inc.*, (1995) 34 Cal.App.4th 1109, 1120.

XVI. INDEPENDENT CONTRACTOR CLASSIFICATION

A. Labor Code Sections 2775-2787

In 2020, Assembly Bill No. 5 went into effect, which established a set of parameters for employers seeking to label workers as independent contractors instead of employees. This test was referred to as the ABC test, and is based on the test employed by the California Supreme Court in the *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 case. After AB-5 became effective, the legislature passed Assembly Bill No. 2257, which again modified the rules previously established by AB-5, but maintained the core of the ABC test, as expressed in LABOR CODE sections 2775-2787.

Presently, to be classified as an independent contractor, most workers must satisfy the ABC test, and must:

1. Be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
2. Perform work that is outside the usual course of the hiring entity's business; and
3. Be customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

If one of the above-listed categories is not proven, then the worker is classified as an employee, not an independent contractor. Many exceptions to the ABC test exist, which result in the application of the "Borello test" in lieu of the ABC test to determine if a worker is an independent contractor or employee. This is a reference to the Supreme Court's ruling in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341.

Under *Borello*, multiple factors are considered to determine whether a worker is an employee or independent contractor, including whether the potential employer has all necessary control over the

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manner and means of accomplishing the result desired, although such control need not be direct, actually exercised, or detailed. Other factors considered include:

1. Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
2. Whether the work is a regular or integral part of the employer's business;
3. Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
4. Whether the worker has invested in the business, such as in the equipment or materials required by their task;
5. Whether the service provided requires a special skill;
6. The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
7. The worker's opportunity for profit or loss depending on their managerial skill;
8. The length of time for which the services are to be performed;
9. The degree of permanence of the working relationship;
10. The method of payment, whether by time or by the job;
11. Whether the worker hires their own employees;
12. Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
13. Whether or not the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-employee relationship).

Occupations where the *Borello* test applies, instead of the ABC test under LABOR CODE §§ 2775 *et seq.*, include the following:

- Certain occupations in connection with creating, marketing, promoting, or distributing sound recordings or musical compositions;
- Certain licensed insurance agents, brokers, and persons who provide underwriting inspections, premium audits, risk management, or loss control work for the insurance and financial service industries;
- Certain licensed physicians, surgeons, dentists, podiatrists, psychologists, or veterinarians;

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- Certain licensed attorneys, architects, landscape architects, engineers, private investigators and accountants;
- Certain registered securities broker-dealers or investment advisers or their agents and representatives;
- Certain direct salespersons;
- Certain manufactured housing salespersons;
- Certain licensed commercial fishers (only through December 31, 2022 unless extended by the Legislature);
- Certain newspaper distributors or carriers (only through December 31, 2021 unless extended by the Legislature);
- Certain persons engaged by an international exchange visitor program;
- Certain competition judges; and
- Certain home inspectors, as defined in Section 7195 of the Business and Professions Code, and subject to the provisions of Chapter 9.3 (commencing with Section 7195) of Division 3 of that code.

There are also occupations or contracting relationships where LABOR CODE §§ 2775 *et seq.* imposes *additional requirements* to be met in order to apply the *Borello* test instead of the ABC test, including:

- Certain professional services contracts for marketing; human resources administration; travel agents; graphic design; grant writers; fine artists; enrolled agents licensed to practice before the IRS; payment processing agents; still photographers / photojournalists; videographers; photo editors to a digital content aggregator; freelance writers, translators, editors, copy editors, illustrators, or newspaper cartoonists; content contributors, advisors, producers, narrators, or cartographers for a journal, book, periodical, evaluation, other publication or educational, academic, or instructional work in any format or media; licensed barbers, cosmetologists, electrologists, estheticians, or manicurists (manicurists only through December 31, 2021); specialized performing arts Master Class Instructors, appraisers, registered professional foresters, and data aggregators, as defined.
- Relationships between two individuals working on a single engagement event, defined as a stand-alone non-recurring event in a single location, or a series of events in the same location no more than once a week.
- Certain individuals performing work under a subcontract in the construction industry, including construction trucking (with certain specific conditions applicable to construction trucking only through December 31, 2021). *Borello* and LABOR CODE § 2750.5 apply to determine whether the individual is an employee of the contractor if initial requirements are met.

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- Certain service providers who are referred to customers through referral agencies to provide services including, but not limited to, graphic design, web design, photography, tutoring, consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, minor home repair, moving, errands, furniture assembly, animal services, dog walking, dog grooming, picture hanging, pool cleaning, yard cleanup, and interpreting.
 - The following services are excluded: services provided in an industry designated as a high hazard industry, janitorial, delivery, courier, transportation, trucking, agricultural labor, retail, logging, in-home care, or construction services other than minor home repair.
- Certain individuals performing services pursuant to a third party's contract with a motor club to provide motor club services.
- Certain bona fide business-to-business contracting relationships.

The initial requirements mentioned above depend on the nature of the services provided and the individuals involved. For example, neither LABOR CODE § 2775 and the ruling of *Dynamex* apply to bona fide business-to-business contracting relationships, and the independent contractor/employee determination will be determined by *Borello* if the following criteria are satisfied:

(1) The business service provider is free from the control and direction of the contracting business entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(2) The business service provider is providing services directly to the contracting business rather than to customers of the contracting business. This subparagraph does not apply if the business service provider's employees are solely performing the services under the contract under the name of the business service provider and the business service provider regularly contracts with other businesses;

(3) The contract with the business service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services;

(4) If the work is performed in a jurisdiction that requires the business service provider to have a business license or business tax registration, the business service provider has the required business license or business tax registration;

(5) The business service provider maintains a business location, which may include the business service provider's residence, that is separate from the business or work location of the contracting business;

(6) The business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed;

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(7) The business service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity;

(8) The business service provider advertises and holds itself out to the public as available to provide the same or similar services;

(9) Consistent with the nature of the work, the business service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract;

(10) The business service provider can negotiate its own rates;

(11) Consistent with the nature of the work, the business service provider can set its own hours and location of work; and

(12) The business service provider is not performing the type of work for which a license from the Contractors' State License Board is required, pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

B. Proposition 22

Proposition 22 was known more formally as the App-Based Drivers as Contractors and Labor Policies Initiative, and it was designed to allow companies operating in the gig economy to avoid the application of the ABC test. With the passage of Proposition 22, both ride-hail (i.e., Uber, Lyft) and delivery drivers are exempt from the ABC test requirements in order to be classified as independent contractors.

XVII. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking In The Workplace

1. Smoking

No employer may knowingly or intentionally permit, and no individual should engage in, the smoking of tobacco-containing products within an enclosed space at a place of employment. This law also prohibits non-employees from smoking within enclosed workplaces. "Enclosed space" includes lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of each building and are not specifically defined otherwise. LABOR CODE § 6404.5(b).

An employer who permits any nonemployee access to the workplace on a regular basis does not violate the statute so long as the employer has (1) posted appropriate signs, and (2) made appropriate requests for nonemployees to stop smoking in enclosed areas of the workplace.

Effective June 9, 2016, section 6404.5 no longer provides any exceptions to smoke-free workplace protections.

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2. Drugs

California's Supreme Court has concluded employers have no duty under the Fair Employment and Housing Act (FEHA) to make "reasonable accommodation" for marijuana use permitted by California's Compassionate Use Act. *Ross v. Raging Wire Telecommunications, Inc.*, 42 Cal.4th 920 (2008). The Court also unanimously ruled that the plaintiff could not maintain a common law action for wrongful termination in violation of public policy for his former employer's failure to accommodate marijuana use. Rather, the Court reaffirmed its watershed drug testing decision in *Loder v. City of Glendale*, holding that "[u]nder California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions." *Id.* at 384.

B. Health Benefit Mandate for Employers

Provisions of the PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, P.L.111-148 (ACA) are being implemented in 2014 that will effect an employer's decision whether to provide a health care benefit to its employees. According to United States Government's website, BusinessUSA, starting in 2015, businesses with 50 or more employees who don't offer insurance that meets certain minimum standards to their full-time employees could be required to make an Employer Shared Responsibility payment. U.S. GOVERNMENT, HEALTH CARE INSURANCE OPTIONS AND CHANGES YOU SHOULD KNOW ABOUT (2013), [HTTP://BUSINESS.U.S.A.GOV/HEALTHCARE](http://business.usa.gov/healthcare).

- Businesses with 50 or more employees will be obligated to make an Employer Shared Responsibility Payment if, "(1) An employer does not offer coverage to at least 95% of its full-time employees (and their dependents), OR (2) The coverage offered to employer's full-time employees is not "affordable" or does not provide "minimum value". *Id.* at [HTTPS://BUSINESS.U.S.A.GOV/SITES/DEFAULT/FILES/SBA%20ACA%20101%20DECK%20-%20UPDATED%20JULY%202013%20\(DISCLAIMER\).PDF](https://business.usa.gov/sites/default/files/sba%20aca%20101%20deck%20-%20updated%20july%202013%20(disclaimer).pdf)

The ACA does not obligate a California employer to provide health insurance to its employees, but it does obligate it to provide certain information to the Treasury Department. According to the July 17, 2013 bulletin of the U.S. Treasury, The ACA includes information reporting (under section 6055) by insurers, self-insuring employers, and other parties that provide health coverage. It also requires information reporting (under section 6056) by certain employers with respect to the health coverage offered to their full-time employees. That reporting obligation originally was to be January 1, 2014. Implementation now is scheduled to begin January 1, 2015.

While the ACA does not obligate a California business to purchase coverage or to provide healthcare benefits to its employees, the California law does mandate certain minimum healthcare obligations. All California employers are obligated to provide workers' compensation insurance or must qualify as self-insured to meet workers' compensation obligations. Among the benefits of workers' compensation is medical treatment for the industrial injury for the life of the injured worker. LABOR CODE § 4600.

Workers' compensation benefits need not be paid for first aid injuries, those that are normally treatable without the attention of a physician, but the employer must provide access to first aid treatment. LABOR CODE § 2440.

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C. Immigration Laws

The California legislature promulgated a general finding that "(a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. (b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law." LABOR CODE §1171.5 and GOV'T. CODE § 7285.

The California Court of Appeal relied on this declaration in part in finding that "the prevailing wage law and the post-Hoffman statutes are not preempted by the IRCA." *Reyes v. Van Elk, Ltd.*, 148 Cal.App.4th 604 (2007). In *Reyes*, undocumented employees sued their employers for failing to pay prevailing wages under California's prevailing wage law, CAL. LABOR CODE §§ 1720-1861. The superior court granted summary judgment in favor of the employers. The court of appeal reversed, despite the argument that the California law was preempted by the federal Immigration Reform Act of 1986. The court held that "Because legislation providing for the payment of prevailing wages comes under the historic police powers of the state, the presumption is that legislation is not superseded by the IRCA. Defendants do not cite any provision in the IRCA preempting state wage and hour legislation. The only specific preemption provision prohibits state or local law from imposing civil or criminal sanctions upon those who employ unauthorized aliens. That provision is irrelevant to the wage claims asserted by plaintiffs. Thus, the IRCA does not expressly preempt state wage laws." (Internal citations omitted). *Id.* at 616.

D. Right To Work

California courts hold that unions and employers may create an Agency Shop. The concept authorizes the parties to a collective bargaining agreement to require that employees pay dues to the union for the benefits received from collective union action. The California Constitution implies the right of every individual to seek employment. However, the courts have held that the right is not unlimited. "This right to work is not an absolute one but may be limited by an agreement between a union, acting as bargaining agent for all employees, and the employer, that membership in the union be a condition to employment." *International Sound Technicians of Motion Picture Broadcast & Amusement Industries v. Superior Court of Los Angeles County*, 141 Cal.App.2d 23 (1956), abrogated on other grounds by *Fullerton v. Int'l Sound Technicians of Motion Picture, Broadcast and Amusement Industries Local 695 of the Int'l Alliance of Theatrical Stage Employees and Moving Picture Machine Operations of the United States and Canada*, 194 Cal.App.2d 801 (1961).

The right to maintain an Agency Shop requiring union membership has been upheld by the California Supreme Court in public works projects, *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal.4th 352 (1999). It also has been statutorily granted to the superior courts agreement with court employees. GOV'T. CODE §3502.5.

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E. Lawful Off-duty Conduct (including lawful marijuana use)

Employers cannot prohibit employees from discussing or disclosing their wages, or for refusing to agree not to disclose their wages. LABOR CODE § 232(a) and (b).

Employers cannot require that an employee refrain from disclosing information about the employer's working conditions, or require an employee to sign an agreement that restricts the employee from discussing their working conditions. LABOR CODE § 232.5.

Employers may not refuse to hire, or demote, suspend, or discharge and employee for engaging in lawful conduct occurring during nonworking hours away from the employer's premises. LABOR CODE § 96(k). However, in *Grinzi v. San Diego Hospice Corp.*, 120 Cal.App.4th 72 (2004), the court held that LABOR CODE §§ 96(k) and 98.6 do not support a public policy against employee discharge based on lawful off-work conduct that is "otherwise unprotected by the Labor Code." *Grinzi* expands on the holding by the same appellate division in *Barbee v. Household Automobile Fin. Corp.*, 113 Cal.App.4th 525 (2003), that Section 96(k) does not itself establish any public policy but only gives the Labor Commissioner jurisdiction over employee claims for violations of "recognized constitutional rights." Both the *Grinzi* and *Barbee* courts rejected broader interpretations that could have restricted employers' prerogatives to discipline employees for off-work conduct.

Employers cannot adopt any rule preventing an employee from engaging in political activity of the employee's choice. LABOR CODE §§ 1101 and 1102.

Employers cannot prevent employees from disclosing information to a government or law enforcement agency when the employee believes the information involves a violation of a state or federal statute or regulation, which would include laws enacted for the protection of corporate shareholders, investors, employees, and the general public. LABOR CODE § 1102.5.

F. Gender/Transgender Expression

Effective January 1, 2012, the Gender Nondiscrimination Act (AB 887) was enacted to define "gender identity" and add "gender expressions" to the Fair Employment and Housing Act. GOVERNMENT CODE §§ 12940, 12945, 12945.2.

G. Private Attorneys General Act (PAGA)

PAGA authorizes a plaintiff to bring a representative action under LABOR CODE § 2698, *et seq.*, that allows the "aggrieved employee" to recover Labor Code civil penalties on behalf of the state and other aggrieved employees, who receive 25% of any penalty recovered (with the remainder going to the state). LABOR CODE § 2698. An employee's right to bring such an action cannot be waived. *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382-383.

PAGA applies only to civil penalties that are otherwise only enforceable and recoverable by the Labor Commissioner for violations of one of the provisions listed in LABOR CODE § 2699.5. Hence, it does not apply to actions for penalties that are recoverable directly by the employee. *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377.

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This Act does not limit an employee's ability to pursue other remedies that may be available under state and/or federal law "either separately or concurrently with an action taken under [PAGA]." LABOR CODE § 2699(g)(1); *Caliber Bodyworks, Inc. v. Superior Court, supra*, 134 Cal.App.4th 365, 375. The California Supreme Court in *Kim v. Reins International California, Inc.* (S246911), that employees do not lose standing to pursue a claim under the Labor Code Private Attorneys General Act of 2004 (PAGA) if they settle and dismiss their individual claims for Labor Code violations.

Notably, any penalties sought as part of a settlement agreement must be reviewed and approved by the court pursuant to LABOR CODE § 2699.

H. Other Key State Statutes

1. Domestic Partner Benefits

Effective January 1, 2005, registered domestic partners shall have the same rights, protections, and benefits, as are granted to spouses. FAMILY CODE §297.5. As a result of this change, any employment related benefits or leaves available to spouses must be made available to registered domestic partners.

Thus, As of January 1, 2005, the California Family Rights Act leave was expanded to provide protected time off to care for the employee's domestic partner and children or parents of the employee's domestic partner. See FAMILY CODE § 297.5. And, employees are eligible for up to six weeks of compensated time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child. UNEMP. INS. CODE §3301.

2. Genetic Testing

Employers may not test any employee, applicant, or other person for the presence of a genetic characteristic. GOV'T. CODE §12940(o).

3. OSHA Protection

The California Occupational Safety and Health Act of 1973 was enacted with the express purpose of "assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, [and] assisting and encouraging employers to maintain safe and healthful working conditions. . ." LABOR CODE § 6300. In furtherance of that purpose LABOR CODE § 6400(a) imposes on every employer the obligation to provide a ". . . place of employment that is safe and healthful for the employees therein." At multiemployer worksites that obligation extends to the employers whose employees are present, the employer who creates a hazard, the employer responsible for safety and health conditions under contract or by practice in the industry, and the employer who had the responsibility for correcting a hazard. LABOR CODE § 6400(b). These obligations may be enforced through penalties.

To enforce this obligation the legislature created the Division of Occupational Safety and Health (Cal/OSHA). The division has the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment. LABOR CODE § 6307. Further, the division must investigate the "causes of any

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employment accident that is fatal to one or more employees or that results in a serious injury or illness, or a serious exposure." LABOR CODE § 6313.

Cal/OSHA is charged as follows: "If, upon inspection or investigation, the division believes that an employer has violated Section 25910 of the Health and Safety Code or any standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code, or any standard, rule, order, or regulation established pursuant to this part, it shall with reasonable promptness issue a citation to the employer." LABOR CODE § 6317. Further, pursuant to LABOR CODE § 6323, "If the condition of any employment or place of employment or the operation of any machine, device, apparatus, or equipment constitutes a serious menace to the lives or safety of persons about it, the division may apply to the superior court of the county in which such place of employment, machine, device, apparatus, or equipment is situated, for an injunction restraining the use or operation thereof until such condition is corrected."

Penalties that Cal/OSHA may impose are civil obligations of the employer and are entitled "Regulatory, General, Serious, Repeat, Willful, and Failure to Abate". 8 CALIFORNIA CODE OF REGULATIONS § 336. The cost imposed on the employer varies with the nature of the violation, the seriousness of the violation, the employer's efforts to abate the violation or the employer's repeat violation.

An investigation may be commenced by the division "on its own motion, or upon complaint . . . However, if the division receives a complaint from an employee, an employee's representative, including, but not limited to, an attorney, health or safety professional, union representative, or government agency representative, or an employer of an employee directly involved in an unsafe place of employment, that his or her employment or place of employment is not safe, it shall, with or without notice or hearing, summarily investigate the complaint as soon as possible, but not later than three working days after receipt of a complaint charging a serious violation, and not later than 14 calendar days after receipt of a complaint charging a nonserious violation." LABOR CODE § 6309.

"Every employer shall file a complete report of every occupational injury or occupational illness . . . to each employee which results in lost time beyond the date of the injury or illness, or which requires medical treatment beyond first aid." LABOR CODE § 6409.1

Understanding the definition of first aid is an important element in complying with the employer's reporting obligation. The definition of first aid differs with the context of its use. For OSHA reporting, first aid is defined by a complete list of treatments that are deemed first aid and any treatment that is not included in the list is beyond first aid regardless of the profession of the provider. 8 CAL. CODE REGS. 14300.7(b)(5)(B).

4. Sexual Harassment Prevention Training

Employers with 50 or more employees must provide at least two hours of classroom or other effective interactive training and education on sexual harassment prevention to all supervisors. Training must be completed within six months following an employee being hired or promoted to a supervisory position, and every two years thereafter. The training must include discussion and practical examples of (1) the legal prohibitions against sexual harassment under federal and state law; (2) prevention of sexual harassment; (3) correction of situations involving sexual harassment; and (4) remedies for victims of sexual harassment. GOV'T CODE § 12950.1. Furthermore, Government Code sections 12950 and 12950.1 will now require employers with five or more employees to provide at least two hours of sexual

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harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every two years thereafter.

As of January 1, 2015, the training which covered employers provides must include training for prevention of abusive or bullying behavior. (AB 2053 amended Government Code section 12950.1.) "Abusive conduct" is defined as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious." The amendment does not make "abusive conduct" unlawful or remove the requirement that harassment be on the basis of a protected class in order to be actionable.

As of January 1, 2020, an employer with 5 or more employees must provide, by January 1, 2021, at least 2 hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least 1 hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within 6 months of their assumption of a position. (GOV'T. CODE § 12950.1) The same training must thereafter be provided once every two years. (*Id.*)

Additionally, every employer is required to provide to its employees information about sexual harassment, either by providing the employees with a copy of the information sheet made available by the Department of Fair Employment and Housing or in any form that is assured to reach every employee. The information included in the distribution must at a minimum address the following: (1) The illegality of sexual harassment. (2) The definition of sexual harassment under applicable state and federal law. (3) A description of sexual harassment, utilizing examples. (4) The internal complaint process of the employer available to the employee. (5) The legal remedies and complaint process available through the department. (6) Directions on how to contact the department. (7) The protection against retaliation provided by Title 2 of the California Code of Regulations for opposing the practices prohibited by this article or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by, the department or the council. GOV'T. CODE § 12950

A claim that the required information did not reach a particular employee "shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment." GOV'T. CODE § 12950(d). But, the failure an employer to do so entitles the department to seek an order requiring the communication. However, the courts have allowed a plaintiff to avoid summary adjudication dismissing her complaint for failure of an employer to provide the warning.

In *Myers v. Trendwest Resorts, Inc.*, 148 Cal.App.4th 1403 (2007), the court reached the conclusion that "Trendwest failed to show it complied with section 12950, a defect noted in plaintiff's appellate brief." In this case the employer offered evidence that it distributed information about its anti-harassment policy through posters in its office regarding sexual harassment, and had distributed a DFEH pamphlet. The court determined this evidence was insufficient to avoid trial on the issue, because there was inadequate evidence that the information actually reached the plaintiff or that the information was distributed during the plaintiff's employment tenure. *Id.* at 1426.

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5. WARN Act

California requires 60-day notice before a mass layoff, termination or relocation of employees. The California provisions are similar to the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* There are, however, some notable key distinctions. See LABOR CODE §§ 1400 – 1408. Notice is not required if mass layoff is required or necessitated as a result of a physical calamity or act of war.

The penalty for failure to give the required notice includes back wages and lost benefits of employment, such as medical expenses that would have been covered by the employee's benefit plan. LABOR CODE § 1402.

6. Workers' Compensation Protection

An employee may not be terminated or otherwise discriminated against for filing a Workers' Compensation claim. LABOR CODE § 132a.

In *Judson Steel Corp. v. Workers' Comp. Appeals Bd.*, 22 Cal.3d 658 (1978), the California Supreme Court wrote that actions against the employer for violating the section were permitted whenever there was a relationship between an industrial injury and termination. "The policy of protection which the workers' compensation laws declare can only be effectuated if an employer may not discharge an employee because of the employee's absence from his job as the consequence of an injury sustained in the course and scope of employment."

The consequences of *Judson Steel* included that an employer had no legally clear method of terminating an industrially injured person, no matter the duration of the employee's absence from work. The burden shifted to the employer to prove that any termination following an industrial injury was necessitated by the realities of doing business. "We held that a worker proves a violation of section 132a by showing that as the result of an industrial injury, the employer engaged in conduct detrimental to the worker. If the worker makes this showing, the burden shifts to the employer to show that its conduct was necessitated by the realities of doing business. *Id.* We emphasized that the employer must demonstrate that its action was 'necessary' and 'directly linked to business realities.'" *Barns v. Workers' Comp. Appeals Bd.*, 216 Cal.App.3d 524 (1989).

The element of intent to discriminate that was lessened in *Judson Steel* and *Barnes* was reinstated by the California Supreme Court in its decision in *Department of Rehabilitation v. Workers' Comp. Appeals Bd.*, 30 Cal.4th 1281 (2003). "By prohibiting 'discrimination' in section 132a, we assume the Legislature meant to prohibit treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim." *Id.* at 1300.

7. Salary History

As of January 1, 2018, California employers are barred from relying on or seeking out an applicant's salary history information in determining whether to offer employment or what salary to offer. LABOR CODE § 432.3.

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The California Fair Pay Act further requires that an employer must provide the pay scale for the applicant's position. It also defines "applicant" as an individual who is seeking employment with the employer and is not currently employed in any capacity. "Pay scale" is also defined as a salary or hourly wage range.

However, an employer may ask applicants their salary expectation for the position. Furthermore, if an applicant voluntarily and without prompting discloses salary history information to a prospective employer, section 432.3 does not prohibit the employer from considering or relying on that voluntarily disclosed salary history information in determining the salary for that applicant.

8. Lactation Accommodation

SB-142 was passed and became law in October 2019. This law requires that work locations have rooms for lactation that are "safe, clean, and free of hazardous materials." Rooms must also contain a surface to place a pump and personal items. LABOR CODE §§ 1030, 1031. Employers must also provide access to electricity or alternative devices and access to a sink and a refrigerator near the employee's workspace. Employers with fewer than 50 employees may seek a hardship exemption to avoid providing the same.

I. Limitations on Confidentiality Provisions in Settlements

Settlements involving complaints of harassment often include confidentiality provisions that prevent the victims/survivors from disclosing the underlying facts, thus protecting the harasser. Code of Civil Procedure section 1001, effective January 1, 2019, provides that any settlement agreement entered into on or after January 1, 2019, that prevents the disclosure of factual information about claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, is void. Furthermore, the section permits, where a request is made, a provision that can shield the claimant's identity and facts that could lead to the discovery of his or her identity. However, this does not apply where a public entity or public official is a party to the agreement.

Additionally, Government Code section 12964.5 effectively prohibits employers from conditioning an employee's continued employment, or receipt of a raise or bonus, on (1) the employee signing a release of their rights to file a claim; or (2) the employee signing a statement that the employee does not have any claims against the employer. Employers are also prohibited from requiring the employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to make any direct or indirect statement about unlawful acts in the workplace, including, but not limited to, sexual harassment, discrimination, and retaliation. The clause is unlawful and unenforceable if it violates the rule, and the employer is in violation of the Fair Employment and Housing Act. . The rule applies to both employment and separation agreements. An exception to this section is a negotiated settlement agreement to resolve an underlying claim.

J. Ban on No-Rehire Provisions in Settlement Agreements

Assembly Bill No. 749, passed in October of 2019, prohibits an agreement to settle an employment dispute from containing a provision that prohibits, prevents, or otherwise restricts a settling party that is an aggrieved person from working for the employer against which the aggrieved person has filed a claim or any parent company, subsidiary, division, affiliate, or contractor of the employer. See LABOR CODE §§ 1002.5, *et seq.* The settling parties are nevertheless still free to agree to end an existing

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employment relationship or to prohibit or restrict the aggrieved person from obtaining future employment with the employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.