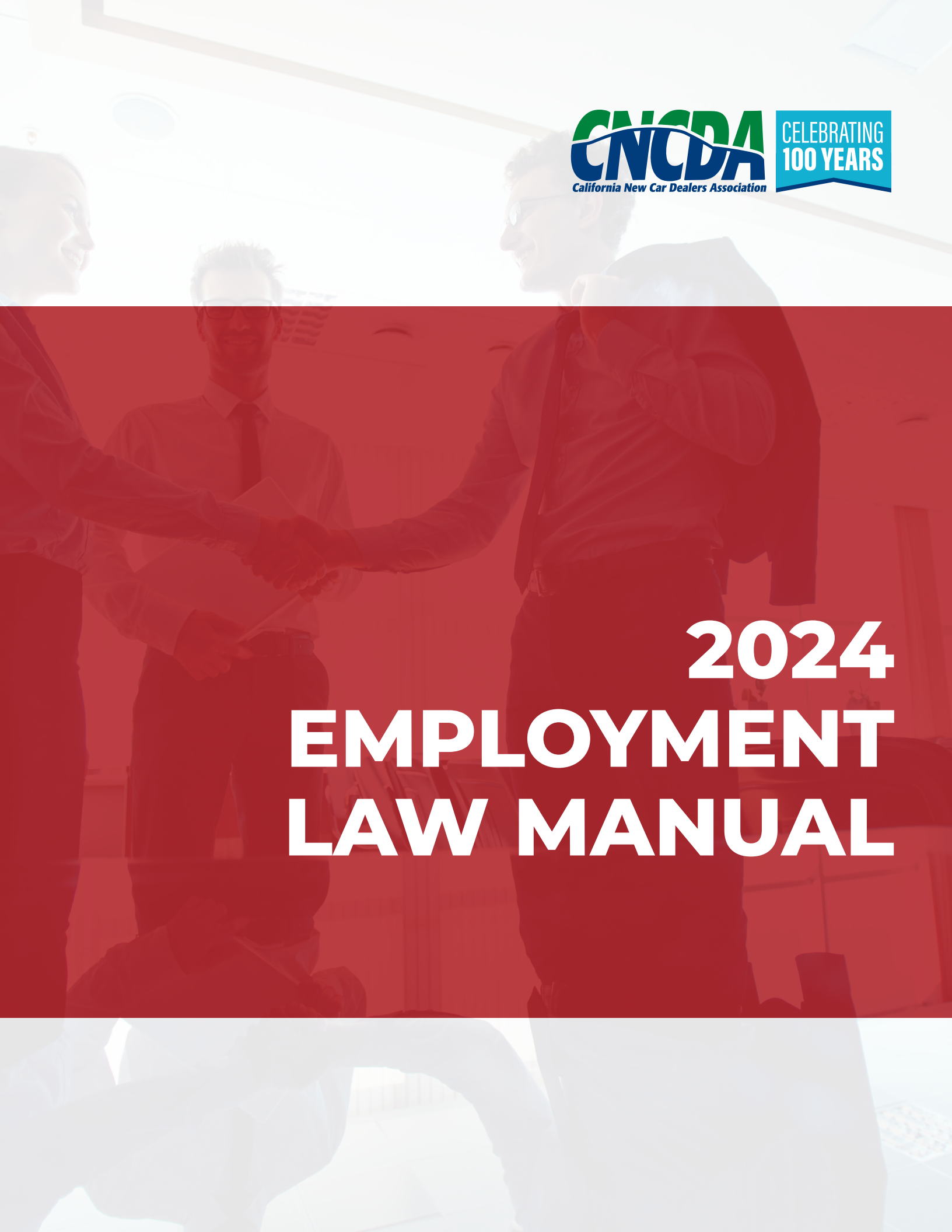




CELEBRATING
100 YEARS

The background of the cover is a photograph of three business professionals in an office setting. A woman on the left and a man on the right are shaking hands, while another man stands between them, smiling. The image is overlaid with a semi-transparent red filter. The text '2024 EMPLOYMENT LAW MANUAL' is written in large, white, bold, sans-serif capital letters across the lower right portion of the image.

2024 EMPLOYMENT LAW MANUAL



2024 Auto Dealer Employment Law Manual

By
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Updated April 8, 2024

IMPORTANT NOTICE

Purpose of Manual.

This California Employment Law Manual has been authored by Littler Mendelson, P.C., for use by the California New Car Dealers Association and its Members. Its purpose is to assist California vehicle dealers with legal compliance in employment areas.

Not Legal Advice.

This publication is not intended, nor should it be received, as legal advice or a substitute for legal advice. It is intended as a source of guidance to California vehicle dealers and as an aid in recognizing and dealing with legal issues. The law is subject to constant change and there may have been developments since this publication was last published or revised. This publication should not under any circumstances be considered as a substitute for consultation with your attorney. Neither the authors nor California New Car Dealers Association make any express or implied warranty with regard to the use of this publication. The reader and his or her attorney must depend upon their own knowledge of the law and expertise in the use of this publication.

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Chapter 1: Hiring



The hiring process not only signals the initiation of the employment relationship, but also the starting point of an employer's obligations under state and federal law. This chapter provides an overview of rules governing the hiring process, including:

- Permissible questions during the hiring process;
- Background checks under the "Ban the Box" law;
- Prohibited inquiries into salary history;
- Documents to be provided upon hiring; and
- California's at-will doctrine.

As discussed further below, these rules should be closely reviewed by all members of management with involvement in the hiring process. Dealers should always keep in mind that federal and state laws relating to discrimination, harassment, privacy, and other protections apply not just to employees, but to job applicants as well.

DEALER SPOTLIGHT: YOU CAN BE SUED BY SOMEONE YOU “FAILED” TO HIRE

Although most litigation arises near the end of an employment relationship, dealers should be aware that unsuccessful job applicants may be able to assert claims against the company if they contend that they were unfairly denied an employment opportunity. For instance, in the dealer industry where most employees are male, a female applicant may claim that she was passed over in favor of a less-qualified male applicant (or, if a pattern and practice can be established, a group of female applicants may be able to file a class action lawsuit). In September 2023, the Equal Employment Opportunity Commission (“EEOC”) filed a lawsuit in San Luis Obispo against a moving company, claiming that the employer engaged in a consistent pattern of age discrimination by refusing to hire qualified job applicants who were 40 or older. Make sure that your recruiting and hiring practices and decisions are consistent with all equal employment opportunity laws, as discussed in Chapter 4 below.

Inquiries During Hiring

All managers involved in the hiring process should be trained on how to conduct job interviews fairly and correctly. Interview questions should be devised to assess a candidate’s ability to perform the essential functions of the job. Questions should not touch upon protected criteria (summarized further in Chapter 4), as such inquiries could be unlawful or create the appearance of discriminatory conduct should the applicant not be hired.

DEALER TIP: NO SUBSTITUTE FOR MANAGER TRAINING

Dealers often employ mid-level managers who are promoted from within and thus do not have prior management experience. If these mid-level managers are involved in the hiring process, it is critical that they be trained on the appropriate protocols (including lawful and unlawful questions to ask applicants, proper and improper bases for employment decisions, and appropriate timing and process for drug testing, background checks, and use of E-Verify), as interviewing managers’ actions can have significant legal ramifications.

Below are examples of lawful and unlawful interview questions under California law.

Permissible and Impermissible Interview Questions

	You May Ask:	You Should Not Ask:
ADDRESS/ RESIDENCE	“What is the best way to contact or reach you?” “Can you be reached at this address? If not, would you care to leave another?” “Can you be reached at these telephone numbers? If not, would you care to leave another?”	“Do you own your home or rent?” “Do you live with your spouse?” “With whom do you live?”

	You May Ask:	You Should Not Ask:
AGE	Only questions that verify non-minor status; i.e., "Are you over 18?" "If hired, can you show proof of age?" "If under 18, will you be able to submit a work permit after being hired?"	"How old are you?" "What is your date of birth?" "What is your age?" "When were you born?" Dates of attendance or completion of elementary or high school. Any questions that imply a preference for persons under 40 years of age, e.g., you should not state "We are a young, innovative company and look for young, energetic types."
AIDS/HIV	"Are you able to perform the essential functions of the job applied for with or without a reasonable accommodation?"	Any question that is likely to elicit information regarding whether an applicant (or current employee) has AIDS/HIV.
ARRESTS & CONVICTIONS	None. You should never ask any questions regarding arrests or convictions.	Criminal history inquiries should be reserved for Human Resources or employment law counsel and should not be made during an interview; see discussion below regarding the "Ban the Box" law. No statements should be made that imply a preference for not hiring individuals with an arrest or criminal history, e.g., you should not state "We only hire individuals with clean background checks."
CITIZENSHIP/ BIRTHPLACE	"Are you authorized to work in the U.S.? If hired, you will be required to submit verification of your legal right to work in the United States." BUT be sure to ask this of all applicants, not just persons appearing to the interviewer to speak a primary language other than English or be foreign-born.	"Are you a United States citizen?" "Where were you born?" Or any questions regarding birthplace or citizenship status of applicant, applicant's spouse, parents, or other relatives.
COLOR OR RACE	Never ask about or mention color, race, ethnicity, and/or national origin.	Any questions concerning race or color of skin, eyes, hair, etc. Should not require applicant to affix a photograph to application, nor should applicant be given the option of attaching a photograph.
COURT RECORDS (see also "Arrests & Convictions" above)	"Has a court, jury, or government agency ever made a finding that you committed unlawful harassment or discrimination?"	"Have you ever filed for bankruptcy?" "Have you ever sued or filed claims or complaints against your employer?" "Have you ever been a plaintiff in a lawsuit?"
PHYSICAL OR MENTAL CONDITION, DISABILITY	"Can you, with or without reasonable accommodation, perform the essential duties of the job(s) for which you are applying (see attached job description)?" "Are you currently able to perform the essential duties of the job(s) for which you are applying?" If the disability is obvious, or disclosed, you may	Questions regarding applicant's general medical condition, state of health, or illnesses. "Are you disabled?" "Do you have any physical disabilities or handicaps?" "Have you ever filed for or received workers' compensation?" What medical problems the applicant may have, or the amount of sick time or medical leave taken at his or her last job. An employer MAY NOT make any medical inquiry or conduct any medical examination prior to making a

	You May Ask:	You Should Not Ask:
	ask about accommodations. Statement that offer of employment may be contingent upon applicants passing a job-related physical examination.	conditional offer of employment and then only if a job necessity based on the duties of the job. Questions that may reveal an applicant's family medical history or other genetic information. Never tell an applicant that they need to be able to perform all duties, or be able to perform at 100% (or statements like that).
DRUG USE	Current or recent use of illegal drugs, with the exception of marijuana BUT ask these sorts of questions of all applicants, not only person appearing to the interviewer to be an illegal drug user.	Questions about past addictions. Questions about use of prescription drugs or frequency of alcohol use. Questions about off-duty use or past use of marijuana.
EDUCATION	"Are you presently enrolled or do you intend to enroll in school?" "What subjects did you excel in at school?" "Did you participate in extracurricular activities?" "What did you select as your major?" "Did you work an outside job while attending school? Doing what? What did you like/dislike about your part-time job during school?" "Are you interested in continuing your education? Why? When? Where?" "Did your education prepare you for the job you are seeking with us? In what ways?"	"Who paid for your educational expenses while you were in school?" "Did you go to school on a scholarship?" "Do you still owe on student loans taken out during school?" "When did you graduate from high school?"
EXPERIENCE, SKILLS & ACTIVITIES	"Do you have any special skills or knowledge?" "Were your skills recently obtained?" "When did you last use a computer (or any other specific program, machine, or skill)?" "Do you enjoy being active in community affairs?" "Are there any activities which have provided you with experience, training, or skills which you feel would be helpful to a position with us?" "How will your involvement in [activity] affect your work here?"	"Does your physical condition make you less skilled?" For activities, do not ask about involvement in politics.
SALARY	"What are your salary expectations?" "How much in monthly sales did you generate at your last job?" "What was your position at your last job?" The	"What was your salary at your last/current job?" "How much did you earn in bonuses or commissions?" "What type of benefits did/do you receive at your last/current job?" See discussion below regarding "Inquiries into Salary

	You May Ask:	You Should Not Ask:
	dealer must tread carefully when asking these types of questions and make clear to the applicant that it is not asking for salary history information.	History Prohibited."
FAMILY	"Do you have any commitments that would prevent you from working regular hours of [describe work schedule, e.g., 9 am to 5 pm]?" "Can you work overtime, if needed?" "Are you now or do you expect to be engaged in any other business or employment? If 'yes,' what kind of business or employment is it? How much time does it require?"	"How many children do you have?" "Who takes care of your children while you are working?" "Do your children go to day care?" "What does your husband (or wife) think about your working outside the home?" "What does your husband (or wife) do?" "What is your husband's (or wife's) salary?" Name of spouse or children of applicant. "Is your spouse the same gender as you?"
MARITAL STATUS	"Please state the name(s) of any relatives already employed by this company or a competitor." "Whom should we contact in case of an emergency?"	"Is it Mrs. or Miss?" "Are you single? Married? Divorced? Separated? Engaged? Widowed?" "Do you have a domestic partner?" "What is your maiden name?" Identity of applicant's spouse.
MILITARY SERVICE	If military experience is shown, ask only how that would translate to your environment. For example, "Did your military service and training provide you with skills you could put to use in this job?"	"Have you served in the army of a foreign country?" "What type of discharge did you receive from the U.S. military service?" "Can you provide discharge papers?"
NAME	"Have you ever used another name?" "Is any additional information relative to change of name, use of an assumed name, or nickname necessary to enable a check on your work and educational record? If yes, please explain."	"What is your maiden name?" If the applicant discloses another name: "Why did you change your name?"
NATIONAL ORIGIN	"Are you prevented from being employed in the United States because of your visa or immigration status?"	Avoid asking questions related to nationality, lineage, ancestry, national origin, descent, or parentage of applicant, applicant's parents, or spouse. Examples include: "What is your national origin?" "Where were you born?" "What is the origin of your name?" "What is your native language?" "What country do your ancestors come from?" "Do you read, write, or speak Korean (or another foreign language)?" (Unless based on job requirements). "How did you acquire the ability to read, write, or speak a foreign language?"
NOTICE IN CASE OF EMERGENCY	Name and address of <i>person</i> to be notified in case of accident or emergency.	Name and address of <i>relative</i> to be notified in case of accident or emergency.

	You May Ask:	You Should Not Ask:
ORGANIZATIONS	"Do you enjoy being active in community affairs?" (Avoid asking for more information about any organization of which the name or character indicates the race, color, creed, sex, sexual orientation, physical or mental disability, medical condition, age, marital status, religion, pregnancy status, national origin, ancestry, or political affiliation of its members.) Examples of roles in community organizations that relate to skill sets of the job (as long as you follow the above parameters).	For a list of all organizations, clubs, societies, or lodges to which the applicant belongs. If an applicant discloses involvement in an organization that suggests they are in a protected category, do not ask questions related to that protected category, e.g., "Do you support gay marriage?" "Do you support [name of political candidate]?" Asking about political activities or organizations is also prohibited.
PHOTOGRAPHS	For a photograph after hiring for identification purposes.	Any applicant to submit a photograph before hiring, whether mandatory or optional.
PREGNANCY	"How long do you plan to stay on the job?" "Are you currently able to perform the essential duties of the job(s) for which you are applying, with or without accommodation?"	"Are you pregnant?" "When was your most recent pregnancy terminated?" "Do you plan to become pregnant?" Any questions about medical history concerning pregnancy and related matters.
PRIOR EMPLOYMENT	"How did you overcome problems you faced there?" "Which problems frustrated you the most?" "Of the jobs indicated on your application, which did you enjoy the most, and why?" "What were your reasons for leaving your last job?" "Have you ever been discharged from any position? If so, for what reason?" "What were your greatest accomplishments?"	"How many sick days did you take at your old job?" "Did you file any claims against your former employer?" "Have you sustained any work-related injuries?"
REFERENCES	"By whom were you referred for a position here?" "Can you provide names of persons willing to provide professional and/or character references for you?"	Questions asked of applicant's former employers or acquaintances that the employer would be prohibited from asking the applicant, such as questions that elicit information specifying the applicant's race, color, religion, national origin, disability, age, or sex.

	You May Ask:	You Should Not Ask:
RELIGION OR CREED	"Do you have any commitments that would prevent you from working a standard work schedule of [describe work schedule, e.g., 9 am to 5 pm, Monday through Friday]?" "Are you available to work on weekends?" (if there is a legitimate business reason for this question).	"What is your religion?" "What church do you go to?" "What are your religious holidays?" "Does your religion prevent you from working weekends or holidays?"
SEXUAL ORIENTATION/ GENDER IDENTITY	Avoid asking any questions about an applicant's sexual orientation or gender identity.	"Are you gay/lesbian/bisexual/transgender?" "Do you have a domestic partner?" "What is your view regarding same-sex partner benefits?"

Employment Eligibility Requirements

Eligibility to Work

Verifying Eligibility to Work: The federal Immigration Reform and Control Act of 1986 ("IRCA") prohibits the knowing employment of workers who are not authorized to work in the United States. Under IRCA, a dealer must verify the identity and employment eligibility of every new hire. To implement this requirement, employers and employees must complete the Department of Homeland Security's Employment Eligibility Verification form (Form I-9). The employer is responsible for ensuring that the I-9 is complete, the required documentation is provided, and the documentation "appears on its face to be genuine."¹ Employers must use the correct version of Form I-9; use of an incorrect version may result in fines.²

In August 2023, the U.S. Citizenship and Immigration Services ("USCIS") released a revised version of Form I-9 (marked with a date of "08/01/23" in the lower left corner), to be used for all new hires and rehires as of November 1, 2023.³

The new Form I-9 is a major change from the last iteration in that it has returned to a one-page format (used from 1986 until 2013). However, the new version has two Supplements— A and B — and thus is considered a "one-page plus." It also brings several improvements, including a new checkbox for employers enrolled in E-Verify to indicate remote, virtual examination of identity and employment authorization documents.⁴

A pdf version of the Form I-9 is available, with features that employers may find helpful (e.g., pop-up information boxes and drop-down menus for Lists A, B, C of acceptable documents). Although it can

¹ 8 U.S.C. 1324a(b)(1)(A).

² See Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

³ For the newest Form I-9, see <https://www.uscis.gov/sites/default/files/document/forms/i-9.pdf>; See Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023). The revised Form I-9 with an addition date of 08/01/23, is available on the USCIS website (www.uscis.gov).

⁴ See Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023)

be filled out on a computer/tablet/mobile device, it cannot be signed electronically unless the signer has an electronic I-9 system.⁵

The Form I-9 and Instructions are available in Spanish; however, the Spanish form is only valid for use in Puerto Rico. In the United States, employers may print the Spanish version for reference (it is suggested that the Spanish Form I-9 be laminated so that it is not inadvertently used), but must complete the English version.⁶

All the above documents and the USCIS's M-274 - Handbook for Employers are available on the USCIS website.⁷

As of August 1, 2023, an employer may use the alternative procedure — virtual verification of an employee's documentation — in lieu of physical verification. This procedure is only available to qualified employers who are: (1) in good standing in the E-Verify program; (2) enrolled in E-Verify for all hiring sites in the United States for which they seek to use the alternative procedure; (3) have complied with all E-Verify requirements, including verifying the employment eligibility of newly hired employees in the United States; and (4) have completed an E-Verify tutorial/training concerning fraud awareness and antidiscrimination.⁸

To utilize the alternative virtual verification, qualified employers must:

1. Examine remotely the front and back of their employees' identity and employment authorization documentation or acceptable receipt to determine that the documentation reasonably appears genuine;
2. Conduct a live interaction with the employee presenting the same documentation discussed above to ensure the documentation reasonably appears to be genuine and relate to the employee;
3. Indicate on Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable; and
4. Retain clear and legible copies (front and back) of all documents presented by employees.⁹

The employer's representative must then attest, under penalty of perjury, that:

1. The representative has examined the original documentation presented by the employee;
2. Such documentation "appears to be genuine" and relates to the named individual; and
3. To the best of the representative's knowledge, the employee is authorized to work in the United States.

Employers are not expected to be experts at detecting fraudulent documents. Whether a document appears to be genuine incorporates a standard of reasonableness.¹⁰

⁵ See Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

⁶ See <https://www.uscis.gov/i-9>; see also Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

⁷ See <https://www.uscis.gov/i-9>; see Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

⁸ See Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

⁹ See Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

¹⁰ 8 U.S.C. § 1324a(b)(1)(A); see Jorge R. Lopez, Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

Ultimately, if a document does not reasonably appear to be genuine or to relate to the person presenting it, the employer must not accept it. Note that a “receipt” (e.g., for the application for a replacement document) may not be used as evidence of work authorization unless it is for replacement of a lost, stolen, or damaged document.¹¹ The form entitled “Lists of Acceptable Documents” is subject to change (and has been changed in past years) so it is critical to use the correct version of the Form I-9 and keep abreast of any further changes to the lists.¹²

If a new employee is unable to present the required documents within three business days of hire, he or she cannot continue in employment. Federal law allows, but does not require, employers to make copies of the employee’s verification documents to attach to Form I-9. Employers do not need to submit the Form I-9 to any government agency, but they must keep each employee’s Form I-9 (and the verification documents if the employer’s policy is to copy them) on file for all current employees as long as employed. For former employees, the Form I-9 and documentation must be retained for at least three years or for one year after employment ends, whichever is longer.¹³

Who May Complete Form I-9? Under federal law, an employer or its authorized representative, including personnel officers, foremen, agents, or notaries public, may complete Form I-9. California law adds a requirement for notaries. An employer that designates a notary as its authorized representative for completing Form I-9 is required to use a notary that is a qualified and bonded immigration consultant.¹⁴

Using E-Verify: E-Verify is an Internet-based system that compares information from the Form I-9 to government records to confirm that an employee is authorized to work in the United States. Although E-Verify uses information from the Form I-9, they are separate systems. It is unlawful for an employer to use E-Verify to check the employment authorization status of an applicant who *has not* received an offer of employment. However, employers may use E-Verify to check the employment authorization status of a person who *has* received an offer of employment. The use of E-Verify is voluntary (employers are able, but not required, to use E-Verify for new hires).¹⁵ In addition, except as required by federal law or as a condition of receiving federal funds, it is an unlawful employment practice for an employer to use E-Verify to check the employment authorization status of an *existing* employee or an applicant who has not been offered employment, or use E-Verify at a time or in a manner not required or authorized under federal law.¹⁶

Upon using E-Verify to check the employment authorization status of a person, if the employer receives a tentative non-confirmation (issued by the Social Security Administration or the U.S. Department of Homeland Security) indicating that the information entered in E-Verify did not match federal records, the employer must give the employee any tentative non-confirmation or any other information issued by the Social Security Administration or Department of Homeland Security containing information

¹¹ 8 C.F.R. § 274a.2(b)(1)(vi).

¹² See Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

¹³ 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2)(i); see USCIS, Retaining Form I-9, available at <https://www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-form-i-9>; see also Jorge R. Lopez and Bruce E. Buchanan, *Littler on I-9 Compliance & Work Authorization Visas* (2023).

¹⁴ See Cal. Bus. & Prof. Code §§ 22440-22449; see also Cal. Gov’t Code § 8223(c).

¹⁵ See Cal. Lab. Code §§ 2811-2813.

¹⁶ See Cal. Lab. Code § 2814(a).

specific to the employee's case.¹⁷ The notification shall be furnished as soon as practicable. An employer who violates the E-Verify law may face a civil penalty of up to \$10,000 for each violation.¹⁸

REMEMBER

If an employer chooses to utilize E-Verify, it should be used *consistently* in the screening of all job applicants who have received an offer of employment. Selective use of E-Verify based on a candidate's appearance can give rise to a discrimination claim on the basis of race, color, or national origin. Anyone who utilizes E-Verify should be trained on its proper use.

Discrimination Based on Immigration/Citizenship Status

The California Unruh Civil Rights Act ("Unruh Act") prohibits discrimination, harassment, and retaliation on the basis of an individual's immigration status, primary language, or citizenship. However, verification of an individual's immigration status and any discrimination based upon verified immigration status, where required by federal law, does not constitute a violation of the Unruh Act. For instance, it is not unlawful for a dealer to terminate an employee if the dealer lawfully learns that the employee is unauthorized to work in the United States.¹⁹

Unfair Immigration-Related Practices

Employers are prohibited from engaging in unfair immigration-related practices against an applicant or employee in retaliation for the individual exercising rights under state or local laws applicable to employees. An "unfair immigration-related practice" is any of the following when taken for retaliatory purposes:

- Requesting more or different documents than are required under federal immigration law or refusing to honor documents that on their face reasonably appear to be genuine;
- Using E-Verify to check the individual's employment authorization at a time or in a manner not otherwise required or not authorized under any Memorandum of Understanding governing the use of E-Verify;²⁰
- Threatening to file or filing a false police report;
- Threatening to contact or contacting immigration authorities;
- Refusing to honor documents tendered that on their face reasonably appear genuine;
- Refusing to honor documents or work authorization based on the specific status of the authorization;

¹⁷ See Cal. Lab. Code § 2814(b).

¹⁸ See Cal. Lab. Code § 2814(c).

¹⁹ See Cal. Civ. Code § 51(b), (g).

²⁰ Dealers participating in the E-Verify program are required to enter into a Memorandum of Understanding with the Department of Homeland Security which discusses the shared and agreed upon responsibilities for participating in this government program. A sample E-Verify Memorandum of Understanding for Employers is available at <https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf>.

- Attempting to reinvestigate or reverify an existing employee's work authorization using an unfair immigration-related practice; or
- Reverifying the employment eligibility of a current employee at a time or in a manner not required by 8 U.S.C. Section 1324a. However, this does not include:
 - Reverifying an employee's employment authorization in a time and manner consistent with federal regulations;
 - Taking lawful action to review an employee's employment authorization upon knowing that the employee is or has become unauthorized to be employed in the U.S.;
 - Reminding an employee, at least 90 days before the date verification is required, that the employee must present appropriate documentation showing continued authorization; or
 - Taking lawful action to correct any errors or omissions on a missing or incomplete Form I-9.²¹

Reporting or threatening to report an employee's citizenship or immigration status or that of a family member because the employee has exercised a right under the California Labor Code, such as raising concerns about his or her compensation or ability to take breaks, is prohibited.²²

An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.²³

BEWARE!

Employers that violate California Labor Code Section 1019.1, which contains the unfair immigration-related practices outlined above, are subject to a penalty imposed by the Labor Commissioner of up to \$10,000 per violation and are liable for equitable relief. Applicants or employees who believe they have been subject to a violation of the law may file a complaint with the Division of Labor Standards Enforcement. Employers that violate Section 1019.2 are also subject to a civil penalty of up to \$10,000, recoverable by the Labor Commissioner.

Immigration and Customs Enforcement (“ICE”) Access to Worksites

Generally, unless otherwise required by federal law, employers are prohibited from consenting to immigration enforcement agent access to nonpublic areas of the worksite and employee records in certain circumstances unless the agent provides a judicial warrant or subpoena. Employers must provide specified notices to current employees and any authorized representative regarding ICE inspection of employment records. Employers are expressly prohibited from re-verifying a current employee's employment eligibility when not otherwise required by federal law.²⁴

²¹ See Cal. Lab. Code § § 1019.1, 1019.2.

²² See Cal. Bus. & Prof. Code § 494.6.

²³ See Cal. Lab. Code § 1024.6.

²⁴ Cal Gov't Code §§ 7285.1, 7285.2

In addition, employers are required to notify each current employee (and any applicable union representative) of any inspection of I-9s or other employment records conducted by ICE within 72 hours of receiving notice of the inspection. Such notice must be posted in the language the employer normally uses to communicate employment-related information to the employee, and must include the name of the immigration agency conducting the inspection, the date the employer received the Notice of Inspection, the nature of the inspection (to the extent known), and a copy of the Notice of Inspection.²⁵ In addition, the Labor Commissioner has developed a template posting for employer use.²⁶

BEWARE!

An employer that violates these provisions will be subject to significant civil penalties ranging from \$2,000 to \$5,000 for a first violation (although the penalty for a first-time offense with regard to the re-verifying prohibition could be more or less than this amount), and up to \$10,000 for subsequent violations.

Background Checks

Pre-Employment Drug Testing

Pre-Employment Drug Testing Can Be Permissible: Drug testing job applicants is permissible if the dealer uses methods that are no more intrusive than necessary to ensure an effective test process and accurate test results, consistent with new legal requirements discussed in the Dealer Spotlight below regarding prohibitions/restrictions on testing for marijuana. At a minimum, all initial positive tests should be confirmed by a certified laboratory, and applicants given an opportunity to explain, in confidence, any reason that a positive test result should be disregarded, such as information that the individual has a prescription for the drug detected. Applicants who undergo drug testing are entitled to a copy of their positive test results unless they affirmatively elect otherwise pursuant to the Investigative Consumer Reporting Act.²⁷ Dealers intending to test applicants must establish pre-employment drug testing policies and apply them uniformly, without targeting certain candidates for testing.

²⁵ Cal. Lab. Code § 90.2.

²⁶ https://www.dir.ca.gov/DLSE/LC_90.2_EE_Notice.pdf.

²⁷ See Cal. Civil Code §§ 1786.10-1786.40; see also *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997).

DEALER SPOTLIGHT: HOW DOES THE LEGALIZATION OF RECREATIONAL MARIJUANA AND STRICTER TESTING REQUIREMENTS AFFECT CALIFORNIA EMPLOYERS?

California Proposition 64, passed in November 2016, makes recreational use of marijuana legal. However, employers are not required to “permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace.”²⁸ Two new laws, effective on January 1, 2024, restrict how employers may respond to employee off-duty cannabis use. Under the first law (AB 2188), employers are prohibited from discriminating against employees and applicants simply because they engaged in off-the-job marijuana use, unless the individual seeks or holds one of the exempted roles. In addition, AB 2188 makes it unlawful for an employer to discriminate against employees and applicants on the basis of a drug test that measures only “nonpsychoactive cannabis metabolites in [the individual’s] hair, blood, urine, or other bodily fluids.”²⁹ The second law (SB 700), restricts employers’ ability to ask applicants about prior cannabis use. Specifically, SB 700 amends the Fair Employment and Housing Act (“FEHA”) to make it “unlawful for an employer to request information from an applicant for employment relating to the applicant’s prior use of cannabis” including the applicant’s criminal history, absent an applicable exception.³⁰ Dealers should consult with counsel to ensure their company’s anti-discrimination policies and drug use policies are compliant with evolving California law. Dealers who wish to conduct testing for marijuana should also consult with their testing administrators or laboratories to ensure appropriate test specimens and test methodologies are used to measure only psychoactive rather than nonpsychoactive marijuana components.

DEALER TIP: CONSISTENCY MATTERS

To avoid potential discrimination claims, dealers should treat similar situations in a similar fashion. For instance, dealers should act consistently with respect to drug test results. A prospective candidate who is not hired due to a failed test may be able to show that his or her hiring process was discriminatory if a similarly-situated candidate was hired despite similar drug test results. Dealers should create an internal policy related to the drug testing of job applicants and be sure to follow it consistently.

Consumer Reports for Employment Purposes

Current California law limits when dealers can lawfully use consumer reports and imposes notice and disclosure obligations on employers who intend to do so. Employers in California can only request job applicant or employee credit reports for certain positions, outlined below. California’s Consumer Credit Reporting Agencies Act (“CCRAA”), like its federal counterpart, the Fair Credit Reporting Act (“FCRA”), is triggered when a dealer orders a consumer background report from a vendor (commonly known as “consumer reporting agencies”) for employment purposes.

Advance Consent Required: Before ordering a consumer background report concerning a job applicant or employee, the dealer must notify the individual in writing of both the intended use of the

²⁸ Cal. Health and Safety Code § 11362.45(f).

²⁹ Cal. Gov’t Code § 12954.

³⁰ Cal. Gov’t Code § 12954.

report and the basis for the dealer's permissible use of the report.³¹ The applicant or employee can request to receive a copy of the report.

WHEN CAN CONSUMER CREDIT REPORTS BE USED IN THE HIRING PROCESS?

Dealers can use consumer reports containing credit information in connection with hiring and personnel decisions only under limited circumstances. Specifically, dealers are permitted to use consumer credit reports only if the individual is applying for or works (or will work) in the following positions:

1. A managerial position (defined as any employee covered under the executive exemption [discussed further in Chapter 3]);
2. A position that affords regular access to bank or credit card account information, Social Security numbers, and dates of birth, provided, however, that access to this information does not merely involve routine solicitation and processing of credit card applications in a retail establishment;
3. A position where the individual is or will be a named signatory on the bank or credit card account of the dealer and/or authorized to transfer money or authorized to enter into financial contracts on the dealer's behalf;
4. A position that affords access to confidential or proprietary information, such as customer credit information; or
5. A position that affords regular access during the workday to the dealer's, a customer's, or a client's cash totaling at least \$10,000.³²

Adverse Action Notices: Before an adverse action is taken against a job applicant or employee (e.g., refusal to hire) wholly or partly because of information in the report, a dealer must:

- Provide a written pre-adverse action notice to the individual if the dealership is considering rejecting the candidate based on the report;
- Provide the individual the name, address, and telephone number of the consumer reporting agency that furnished the report;
- Provide a statement that the decision to take adverse action was based in whole or in part upon information contained in a consumer report; and
- Provide written notice of the following rights:
 - The right to obtain a free copy of the report within 60 days; and
 - The right to dispute the report's accuracy or completeness.
 - A reasonable time after the pre-adverse action notice is provided (at least eight business days), an adverse action notice must be sent.

³¹ See Cal. Civ. Code § 1785.20.5.

³² See Cal. Lab. Code § 1024.5.

Checking Applicant Criminal Records

California employers are subject to a state-wide "Ban the Box" law under the FEHA (*i.e.*, prohibiting employers from asking applicants, as part of an initial screening process, whether they have ever been convicted of a crime).³³ The law restricts an employer's ability to make pre-hire and personnel decisions based on an individual's criminal history.

In July 2023, the California Civil Rights Council approved revisions to the FEHA's regulations governing inquiries into and consideration of a job applicant's criminal history in making employment decisions under Cal. Code Regs. tit. 2, § 1107.1. The council amended regulations (1) pertaining to the consideration of conviction history prior to a conditional job offer; (2) pertaining to consideration of certain types of conviction records; (3) governing what employers must do when they intend to rely on criminal records to rescind a conditional job offer; (4) covering labor contractors, union hiring halls, and client employers; (5) prohibiting disparate treatment; (6) determining adverse impact; (7) outlining procedural requirements; (8) covering situations when an employer seeks the Work Opportunity Tax Credit provided under Section 51 of the Internal Revenue Code; and (9) defining terms used in Cal. Code Regs. tit. 2, § 1107.1. The amendments also expand the definition of "Applicant" to include "an existing employee who is subject to a review and consideration of criminal history because of a change in ownership, management, policy or practice." The amended regulations went into effect October 1, 2023. Given these changes, dealers that use criminal records to vet candidates should consider a privileged review of their policies, procedures, and other documents relating to the screening process (*e.g.*, job applications, offer letters, guidelines for recruiters, adjudication standards, pre-adverse notices, *etc.*).³⁴

What Are Dealers Prohibited From Asking? A dealer with five or more employees may not ask a job applicant to disclose any conviction information until the applicant is determined qualified for the position. A dealer is not prohibited from conducting a conviction history background check so long as the dealer does not:

1. Include on any application for employment, before the employer makes a conditional offer of employment to the applicant, any question that seeks the disclosure of an applicant's conviction history;
2. Inquire into or consider an applicant's conviction history, including any inquiry about conviction history on any employment application, before the applicant receives a conditional offer of employment; and
3. Consider, distribute, or disseminate information about any of the following while conducting a criminal history background check in connection with any application for employment:
 - a. An arrest that did not result in a conviction, subject to the exceptions in Labor Code Sections 432.7(a)(1) and (f)(1);
 - b. Referral to or participation in a pretrial or post-trial diversion program; and

³³ See Cal. Gov't Code § 12952.

³⁴ See Rod Fliegel and Alice Wang, *Upcoming Changes in California's Law Regarding Criminal Background Checks*, Littler Insight (Jan. 5, 2023); Rod Fliegel and Alice Wang, *Changes in California's Regulations Regarding Criminal Records Approved*, Littler ASAP (August 1, 2023).

- c. Convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law.
4. Interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under the Ban the Box statute.³⁵

Further, "conviction history" includes an arrest for which an individual is out on bail or his or her own recognizance pending trial.

What Is The Procedure For Considering An Applicant's Criminal History? If after the applicant receives a conditional offer of employment the dealer conducts a criminal history background check, the dealer is still prohibited from denying an applicant a position solely or in part because of the applicant's conviction history. Rather, the dealer must first perform an individualized assessment. The assessment requires an employer to consider:

1. The nature and gravity of the offense and conduct;
2. The time that has passed since the offense or conduct and completion of the sentence; and
3. The nature of the job held or sought.

Once the dealer makes a preliminary decision that the applicant's conviction history is disqualifying, the dealer must:

1. Provide the applicant with written notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;
2. Include a copy of the conviction history report, if any; and
3. Provide an explanation that the applicant has the right to respond to the notice within at least five business days, and that the response may include submission of evidence challenging the accuracy of the conviction record, or evidence of rehabilitation, mitigating circumstances, or both.

A dealer is prohibited from making any final determination based on conviction history during the five-business-day period. If the applicant timely notifies the dealer in writing that he or she is disputing the conviction history and is taking steps to obtain evidence to support this, the dealer must provide five additional business days to respond to the notice. The dealer must also consider any additional evidence or documents the applicant provides in response to the notice before making a final decision. If the dealer ultimately decides to deny an applicant based on the conviction history, the dealer must notify the applicant of this in writing and include notification of any existing procedure the dealer has to challenge the decision, as well as notification of the applicant's right to file a complaint with the Civil Rights Department ("CRD").³⁶

³⁵ Cal. Gov't Code § 12952(a).

³⁶ Cal. Gov't Code § 12952(c).

NOTE: NEW AGENCY NAME

In July 2022, the name of the Department of Fair Employment and Housing (“DFEH”) was changed to the Civil Rights Department (“CRD”), “to more accurately reflect the department’s broadening duties, which include enforcement of laws prohibiting hate violence, human trafficking, discrimination in business establishments, and discrimination in government-funded programs and activities, among others.” See <https://calcivilrights.ca.gov/aboutcrd/>. CRD is the largest civil rights agency in the country.

DEALER TIP: BE MINDFUL OF LOCAL “BAN THE BOX” ORDINANCES

Because California’s “Ban the Box” law does not preempt local laws, dealers in certain locations, such as San Francisco, Oakland, Emeryville, Los Angeles, and Santa Monica, must also comply with local ordinances like the San Francisco Fair Chance Ordinance. Consult your local ordinances or with counsel in these areas.

Inquiries into Salary History Prohibited

California’s salary history inquiry restrictions, effective January 1, 2018, prohibit California employers from inquiring into an individual’s salary history.³⁷ Salary history information includes the rate of compensation as well as other benefits. State law prohibits employers from:

- Relying on an applicant’s prior salary history “as a factor in determining whether to offer employment...or what salary to offer an applicant,” and/or
- Seeking salary history information orally or in writing, directly or indirectly.

The law also requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment. Effective January 1, 2019, *pay scale* means a salary or hourly wage range. *Reasonable request* means a request made after an applicant has completed an initial interview with the employer. Further, the term *applicant* or *applicant for employment* means an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.³⁸ Employers should consider providing pay scale information in writing to have a record of compliance.

The law does not prohibit an applicant from voluntarily, without prompting, disclosing salary history and does not prohibit an employer from considering or relying on that voluntary disclosure. Consistent with the California Fair Pay Act (discussed in more detail in Chapter 2 below), however, nothing in the law may be construed to allow prior salary, by itself, to justify any disparity in compensation between employees performing substantially similar jobs. Further, the law does not apply to salary history information disclosable to the public pursuant to federal or state law. In addition, employers may not

³⁷ See Cal. Lab. Code § 432.3.

³⁸ See Cal. Lab. Code § 432.3(c) (as amended by Cal. AB 2282 (July 2018)); see also Alexandra Hemenway, *California Provides Guidance Regarding Salary History Ban*, Littler ASAP (Aug. 7, 2018)

prohibit employees from sharing salary information with each other, or inquiries about the salaries of others.³⁹

Effective January 1, 2023, the equal pay provisions in the California Labor Code have been amended to create even greater pay transparency protections. California employers must provide a pay scale to an employee for the employee's current job position, if requested by the employee. Employers with 15 or more employees must include pay scale for a position in any job posting. If the employer uses a third party to announce and publish job postings, the employer must provide the pay scale to the third party and that entity must include the pay scale in the job posting. *Pay scale* means the salary or hourly wage range that the employer reasonably expects to pay for the position.⁴⁰

CAUTION!

With recent legislation regulating inquiries into prior salary and criminal background, dealers should work with counsel to ensure all of their application and pre-employment paperwork is facially compliant. In addition, dealers should ensure management and HR are up to speed regarding the requirements of these legislative measures and the procedures that employers must now follow.

Documentation to Provide Upon Hiring

It is wise for dealers to prepare sets of personnel documents which they provide to all employees upon hiring. Further, a one-page "new hire checklist" is useful for memorializing that each document was received by the employee and, where applicable, signed and returned back to the employer.

Employee Handbooks

All dealers are strongly advised to make employee handbooks available to all employees. Handbooks are an indispensable tool for employers, as they set forth workplace rules and policies. By memorializing these policies and requiring employees to acknowledge receipt of their handbooks, employers can help to ensure that employees cannot reasonably claim ignorance of workplace requirements. Similarly, handbooks provide an important vehicle by which employees can be advised of their legal rights and the avenues by which they can raise workplace concerns (e.g., an anti-harassment policy which sets forth a complaint procedure).

It is imperative that a dealer's handbook be prepared by counsel and customized for its operations. As discussed throughout this publication, there is an expansive patchwork of laws which applies to employers of varying sizes. Dealers should reference only those laws which apply to their operations.

In August 2023, the National Labor Relations Board ("NLRB" or "Board") in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), adopted a strict new legal standard for evaluating whether employee work rules are lawful under the National Labor Relations Act, signaling a drastic change from prior law. The Board's new standard provides for a case-by-case review and heightened scrutiny of rules and policies in employee handbooks. The Board now considers an employer's work rule presumptively unlawful if it "could" (rather

³⁹ See Cal. Lab. Code § 1197.5(k)(1).

⁴⁰ See Cal. Lab. Code § 432.3.

than “would”) be interpreted to limit employee rights, meaning rules may be invalidated even if there are alternative interpretations that are consistent with employee rights. Whether a rule implicitly limits protected activities under the new standard will not be considered from the standpoint of a “reasonable” employee, but instead based on the perspective of someone “economically dependent” on the employer who considers engaging in activity protected by the Act.⁴¹ Dealers are advised to have their handbooks and workplace rules reviewed on a regular basis by legal counsel to account for new legal developments and with an eye toward the Board's new standard, to avoid unintended interference with protected activities.

Tax Documents to Provide Upon Hiring

W-4: The Internal Revenue Service (“IRS”) requires this form so employers can withhold the correct federal income tax from employee pay.⁴²

DE-4 Exemption Certificate: An exemption certification by the Employment Development Department (“EDD”)⁴³ enables the employer to determine the number of withholding exemptions to be allowed in computing the tax required to be deducted and withheld from employee pay.⁴⁴

Note: Under California law, dealers must notify all employees within one week before or after, or at the same time, the dealer provides to the employee an annual wage summary (e.g., a Form W-2 or a Form 1099) that they may be eligible for the California Earned Income Tax Credit (“EITC”). The dealer must provide the required notification of potential eligibility by providing a physical copy to the employee or mailing it to the employee's last known address. The notification must include instructions on how to obtain any notices available from the Internal Revenue Service and the Franchise Tax Board.⁴⁵ You must hand the notice directly to the employee or send it by first-class mail to the employee's last known address. You will not meet the notification requirements by posting Notice 797 on an employee bulletin board or sending it through office mail. However, you may want to post the notice to help inform all employees of the EITC. You can download copies of the notice at www.irs.gov/FormsPubs. AB 1355, signed by Governor Newsom in September 2023, authorizes the employer, until January 1, 2029, to provide the foregoing notification via email to an employee's email account, if the employee affirmatively, and in writing or by electronic acknowledgment, opts into receipt of electronic statements or materials. The law prohibits the employer from discharging or taking other adverse action against an employee who does not opt into receipt of electronic statements or materials.

Existing California law prescribes a system for the payment of benefits to unemployed individuals who meet specified eligibility criteria. The existing law requires an employer to supply, pursuant to authorized regulations, each individual at the time they become unemployed with copies of printed statements or materials relating to claims for benefits. Existing law provides that the failure of an employer to comply with these provisions is a misdemeanor.

⁴¹ See Frederick Miner and Melissa Shingles, *NLRB Adopts Tough New Standard for Workplace Rules*, Littler ASAP (Aug. 8, 2023).

⁴² Available at <https://www.irs.gov/pub/irs-pdf/fw4.pdf>.

⁴³ Available at http://www.edd.ca.gov/pdf_pub_ctr/de4.pdf.

⁴⁴ See Cal. Unemp. Ins. Code § 13040.

⁴⁵ See Cal. Rev. & Tax. Code § 19853.

Wage & Hour Issues in Hiring

Wage Theft Prevention Action ("WTPA"): At the time of hiring, and any time the information changes, employers must provide, in writing, employment-related information to *non-exempt* employees,⁴⁶ containing the following data:

- Rate(s) of pay and basis thereof (by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable);
- Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances;
- Regular payday;
- Employer's name, including both the employer's legal name and any "doing business as" names used by the employer;
- Physical address of the employer's main office or principal place of business, and a mailing address, if different;
- Employer's telephone number;
- Name, address, and telephone number of employer's workers' compensation insurance carrier;
- Any other information the Labor Commissioner deems material and necessary;
- That an employee: may accrue and use sick leave; has a right to request and use accrued paid sick leave; may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and has the right to file a complaint against an employer who retaliates.⁴⁷

The WTPA notice must be provided at the time of hiring. The Division of Labor Standards Enforcement ("DLSE") provides online model notices in English, Vietnamese, Chinese, Korean, Tagalog, and Spanish. The English version of the DLSE's model notice is two pages long, which contains all of the required categories set forth above, including the employer's name, the employee's rate of pay, and the accrual of sick pay.

The WTPA does not apply to an employee who is covered by a collective bargaining agreement if the agreement "expressly provides for":

- Wages;
- Hours of work;
- Working conditions of the employee;
- Premium wage rates for all overtime hours worked; and
- A regular hourly rate of pay for those employees of not less than 30% more than the state's minimum wage.⁴⁸

⁴⁶ As discussed further, commission pay plans should be in writing and acknowledged by signature of both the employee and dealer.

⁴⁷ See Cal. Lab. Code §§ 2810 *et seq.*

⁴⁸ See Cal. Lab. Code § 2810.5(c)(3).

In October 2023, the Governor signed AB 636, effective January 1, 2024, which expands the WTPA to require employers to provide new employees with information for the county where the employee works regarding federal or state emergency or disaster declarations that were issued within 30 days before the employee's first day of employment and that may affect their health and safety during their employment.⁴⁹ The WTPA also contains a section pertaining to Paid Sick Leave. As discussed below, the Governor signed SB 616, which increases California's paid sick leave requirements from three days (or 24 hours) to five days (or 40 hours). Dealers will need to update this part of the notice as well.⁵⁰ Dealers are encouraged to consult with counsel to ensure their notices are compliant with these new requirements.

Benefits and Leave

Disability Insurance and Paid Family Leave Program: Employers must provide new employees a notice informing them of their disability insurance rights and benefits due to the employee's own sickness, injury, or pregnancy, or the employee's need to provide care for any sick or injured family member, or the employee's need to bond with a minor child within the first year of the child's birth or placement in connection with foster care or adoption.⁵¹

The EDD makes available online⁵² the following notices to give to new employees:

- DE 2515 and DE 2515/S (Disability Insurance Provisions – English and Spanish)
- DE 2511 (Paid Family Leave Program Brochure - English)

Family and Medical Leave: Any dealer with five or more employees, which publishes an employee handbook that describes other kinds of personal or disability leaves available to its employees, must include a description of California Family Rights Act ("CFRA") leave in its handbook. The employer may include both pregnancy disability leave and CFRA leave requirements in a single notice. An attorney or human resources professional can assist you with incorporating the minimum notice requirements in your handbook. Covered employers are encouraged, but not required, to give a copy of the CFRA notice to each new employee, ensure that copies are otherwise available to new employees, and disseminate the notice in any other way.⁵³ (See Chapter 5 below for a more detailed discussion of dealer obligations with respect to protected leaves of absence.)

Victims of Domestic Violence, Sexual Assault, or Stalking: Employers with 25 or more employees must inform each new employee upon hire (and other employees upon request), in writing, of the employee's rights with respect to domestic violence or related crimes under Labor Code Section 230(c), (e), and (f). If the employer elects not to use the state-approved form, the notice provided must be substantially similar in content.⁵⁴

⁴⁹ See Bruce Sarchet and Joy Rosenquist, *Employment Law Update 2023: New Employment Law for the New Year*, Littler Insight (Nov. 27, 2023).

⁵⁰ The new notice can be found at https://www.dir.ca.gov/dlse/lc_2810.5_notice.pdf.

⁵¹ See Cal. Unemp. Ins. Code § 2613.

⁵² Available at http://www.edd.ca.gov/disability/di_forms_and_publications.htm.

⁵³ Cal. Code Regs. tit. 2, § 11095(b). As of April 1, 2019, employers are required to display an updated notice, which is available at <https://calcivilrights.ca.gov/family-medical-pregnancy-leave/>.

⁵⁴ See Cal. Lab. Code § 230.1. The model notice (Rights of Victims of Domestic Violence, Sexual Assault and Stalking) is available in English at https://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice.pdf and in Spanish at https://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice_spanish.pdf.

Workers' Compensation

All dealers must notify, **orally or in writing**, new employees, either at the time an employee is hired or by the end of the employee's first pay period, of the employee's right to receive workers' compensation benefits should he or she be injured on the job at any time while employed.⁵⁵

Additionally, employers must provide their new employees, either at the time the employee is hired or by the end of the first pay period, **written notice** of certain information set forth in California Labor Code Section 3550, such as how to get emergency medical treatment if needed. The California Department of Industrial Relations ("DIR") provides a "Time of Hire" pamphlet which dealers can access free of charge and give to their employees in order to comply with this requirement.⁵⁶

Medical Provider Network Plan

The written Medical Provider Network ("MPN") implementation notice which must be given to all covered employees needs to, at a minimum, include the following information:

- That medical treatment for new work injuries will be provided through the MPN as of the effective date of coverage unless the employee properly pre-designates a physician or medical group prior to injury;
- The effective date of coverage under the new MPN;
- That existing work injuries may be transferred into the new MPN, and the employee should check with their claims adjuster for more information; and
- That more information about the MPN can be found on the workers' compensation poster or by asking the employer.⁵⁷

The following language may be used for the written MPN implementation notice provided to covered employees:

"Unless you pre-designate a physician or medical group, your new work injuries arising on or after <INSERT EFFECTIVE DATE OF NEW MPN> will be treated by providers in a new Medical Provider Network, <INSERT NEW MPN NAME>. If you have an existing injury, you may be required to change to a provider in the new MPN. Check with your claims adjuster. You may obtain more information about the MPN from the workers' compensation poster or from your employer."

The Department of Industrial Relations provides online sample notices in English and Spanish.⁵⁸

The MPN implementation notice may be provided by mail or included on or with an employee's paystub or paycheck, or may be distributed through electronic means, including email, if the employee has regular electronic access to email at work to receive this notice prior to the implementation of the MPN. If the employee cannot receive this notice electronically at work within the required timeframe, then the employer must ensure that this information is provided to the employee in writing prior to the implementation of the MPN.

⁵⁵ See Cal. Code Regs. tit. 8, § 15596.

⁵⁶ Available at <http://www.dir.ca.gov/dwc/dwcrep.htm#2>.

⁵⁷ See Cal. Code Regs. tit. 2, § 9767.12.

⁵⁸ Available at http://www.dir.ca.gov/dwc/mpn/dwc_mpn_main.html.

DEALER TIP: NEW HIRE REPORTING

Dealers are required to report all new hires to the Employment Development Department's New Employee Registry within 20 days of their start-of-work date. Specifically, dealers must share the employee's full name, Social Security number, address, and start-of-work date. New hire reports are matched against child support records at the state and national levels to locate parents who are not paying owed child support. Also, Form OL 16A (Salesperson Change of Employment) must be completed when a salesperson is employed or terminated and can be downloaded here: <https://www.dmv.ca.gov/portal/file/salesperson-change-of-employment-ol-16a-pdf/>.

Non-Compete Agreements and Proprietary Information

Non-Compete Agreements

Unlike other states, California prohibits "non-compete" agreements which bar an employee from working for a competitor in the future. Specifically, Section 16600 of the California Business and Professions Code states 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."⁵⁹

However, there are two contexts that represent limited exceptions to the general rule against enforceability:

- "Goodwill of a Business" – A person who sells his or her ownership interest in a business entity may agree with the buyer to refrain from proceeding with a similar business within a particular area in which the sale occurred.
- "Termination of Ownership Interest" – Similar to the preceding example, persons who terminate their ownership interest can agree that they will not carry on their business in the same area.

Effective January 1, 2024, two additions to the Business and Professions Code expand the reach and consequences of California's restriction on non-compete agreements. SB 699 creates Business and Professions Code Section 16600.5, which provides that any contract that is void under Section 16600 is unenforceable "regardless of where and when the contract was signed." While this provision clearly intends to apply California rules to contracts and employees outside of California, it should still be subject to standard choice-of-law analyses. Companies outside of California generally have contracts that call for the application of their own state's laws. California courts respect those clauses unless the contracts contradict a strong public policy, such as California's aversion to restrictive covenants. In recent cases California courts have examined the connections between the parties and the proposed forum states and have applied the law of the state with a greater interest in enforcing its law. If neither the employer nor the employee has significant connections to California, California law should not apply regardless of what these new laws say to the contrary. Application of California law to matters wholly within another state also raises constitutional concerns. A state law that places an undue burden on interstate commerce that exceeds the local benefits of the law runs afoul of the "dormant

⁵⁹ Cal. Bus. & Prof. Code § 16600.

commerce clause." California's attempt to extend the reach of Section 16600 into other states may therefore face constitutional challenges to its enforcement.

The new law also provides that employers may not enter into a contract with an employee or prospective employee that includes a provision that is void under Section 16600, and further provides that any company that enters into or attempts to enforce such a contract commits a civil violation. The new law also provides that an employee, former employee, or prospective employee may bring a private action to enforce the law for injunctive relief, actual damages, or both, plus attorneys' fees. AB 1076 both amends Business and Professions Code Section 16600 and creates a new statute, Section 16600.1. The amended Section 16600 confirms California's precedent that any noncompete clauses, no matter how narrowly tailored, are void unless they satisfy a statutory exception. It also provides that the application of Section 16600 "shall not be limited to contracts where the person being restrained from engaging in a lawful profession, trade, or business is a party to the contract." The new Section 16600.1 states it is unlawful to include a noncompete clause in an employment contract, and requires any companies using such a contract to issue a notice to all current and former employees who were employed after January 1, 2022 that the noncompete clauses in those contracts are void. The deadline for this highly unusual "our noncompete clause is void" notice was February 14, 2024.⁶⁰

DEALER TIP: CONFIDENTIALITY AGREEMENTS

Despite this expansive policy against non-compete agreements in California, employers are nonetheless free to enter into agreements with employees not to disclose confidential information⁶¹ and dealers may wish to consider asking employees who deal with proprietary information to enter into confidentiality agreements. Under certain circumstances, dealers may have a legitimate proprietary interest in customer information and also have a duty to maintain such information in a confidential manner. However, California courts have held that post-termination employee and customer non-solicit requirements, like non-compete requirements, are void.⁶² In light of California's expansive prohibitions against employee non-complete and non-solicit agreements, and the enactments of SB 699 and AB 1076, dealers are advised to seek advice of legal counsel if they are planning on entering into confidentiality agreements with employees.

Managing Proprietary Information

As a general rule, any information which a dealer considers to be proprietary should be maintained separately from day-to-day records. Some dealers elect to keep such records in folders marked "CONFIDENTIAL," whereas others maintain these records in file cabinets to which only a few people have access. Similarly, any proprietary information maintained on a server or electronic file-keeping system should be properly segregated so that only authorized individuals have access.

If an employee approaches a dealer with proprietary information from a past employer, that information should not be used by the dealer under any circumstance. Further, the dealer should consider conducting an investigation to determine the extent to which such information was used at

⁶⁰ Cal. Bus. & Prof. Code § 16600.5, as amended by SB 699 (Cal. 2023); see Walt Pfeffer, Joy Rosenquist, and Bruce Sarchet, *California's Non-Compete Shakeup*, Littler ASAP (Oct. 17, 2023).

⁶¹ See *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998).

⁶² See *AMN Healthcare, Inc. v. AYA Healthcare Services, Inc.*, 28 Cal. App. 5th 923 (2018).

the dealer's operations. The dealer may need to consult with legal counsel to assess additional steps to be taken (e.g., terminating the employee) so that the dealer is not implicated in any potentially unlawful conduct.

California's At-Will Doctrine

The "At-Will" Rule

Legal Overview: Employment relationships in California are presumed to be "at will," meaning that absent any agreement to the contrary, an employer can terminate an employee with or without cause at any time. However, at-will employment relationships cannot be terminated for an unlawful reason. Accordingly, through contractual agreements, rulings from the court system, and laws passed by the Legislature, there is an expansive mosaic of exceptions to the "at-will" rule.

Restrictions on "At-Will" Status

Express Contractual Restrictions on At-Will Employment: In dealerships, express agreements to bypass the at-will presumption are typically found in unionized operations where there is a collective bargaining agreement governing the terms and conditions of some workers' employment. In these instances, the parties may have negotiated a "just cause" provision, meaning that employment cannot be terminated unless the employer can establish "just cause." Outside of the union context, express contracts typically only appear for some high-level executives, who may have negotiated a specified term (e.g., two years) of employment.

DEALER TIP: WHAT IS "JUST CAUSE"?

Employers generally want to avoid tying employee terminations to a "just cause" requirement. Typically, "just cause" is a term of art defined by the employment agreement or collective bargaining agreement. Theft, document falsification, or workplace violence are all examples of misconduct which may constitute "just cause" with a single bad act. By contrast, poor work performance or borderline insubordination may require a pattern of unacceptable behavior in order for there to be "just cause." Dealers should document unsatisfactory conduct through written warnings, progressive discipline, or performance improvement plans. Dealers should also ensure that they act consistently with respect to all violations of their policies. A failure to do so may raise concerns that an employee is being unfairly targeted or subjected to disparate treatment.

Implied Contractual Restrictions on At-Will Employment: California law also recognizes the existence of implied agreements – not memorialized in writing – that an employee can only be terminated for just cause. California courts, in determining whether an implied contract exists, examine the following factors:

- The personnel policies and practices of the employer;
- The employee's longevity of service;
- Actions or communications by the employer reflecting assurances of continued employment; and

- Practices in the industry.⁶³

For instance, in *Pugh v. See's Candies, Inc.*,⁶⁴ the employer gave assurances of job security to the plaintiff throughout his 32 years of service. The employer also maintained a practice of terminating administrative employees only for cause. Upon his ultimate discharge, the plaintiff alleged he was terminated without cause in breach of an implied-in-fact employment contract. The appellate court agreed that the circumstances of the plaintiff's employment gave rise to an implied contract that his employment could be terminated only for cause. The court held that longevity of service without criticism, adoption of policies promising fairness, assurances of continued employment by company officers, merit raises, and numerous promotions up through the ranks could imply a contractual obligation not to discharge without cause. An at-will employment agreement is a good idea to implement and maintain at your dealership because it may effectively preempt an employee's claims for contractual breach.

Implied Covenant of Good Faith and Fair Dealing: Under California law, a covenant of good faith and fair dealing is implied in every contract. This covenant requires the contracting parties to be fair to one another in applying contractual terms and, where circumstances arise that the contracting parties did not anticipate, neither party should act in bad faith to deprive the other of contractual benefits. For example, in *Jenkins v. Family Health Program*,⁶⁵ the plaintiff alleged that when she was hired, the employer represented that her employment would not be terminated except for good cause. She claimed that, despite her satisfactory performance, the employer suddenly and without warning demanded that she sign a letter of resignation, stating that if she refused she would be fired and that it would be very difficult for her to obtain employment elsewhere. The court held that the employer's termination of the plaintiff's employment was without good cause and in conscious and reckless disregard of her rights, resulting in a breach of the implied covenant of good faith and fair dealing.

Maintaining At-Will Status

At-Will Language: At-will employees should receive and acknowledge offer letters and policy documents with strong written affirmations of their at-will status. For example:

At-Will Employment: *Your employment with the Company is for no specified period and constitutes at-will employment, meaning that either you or the Company will be entitled to terminate your employment at any time and for any reason, with or without cause. Any contrary representations that may have been made to you are superseded by this offer. This is the full and complete agreement between you and the Company on this term. Although your job duties, title, compensation, and benefits, as well as the Company's personnel policies and procedures may change from time to time, the "at-will" nature of your employment may only be changed in an express written agreement signed by you and a duly authorized officer of the Company.*

At-Will Language by Itself Is Not Enough: The mere insertion of at-will language into an offer letter does not, by itself, uphold an employee's at-will status. The employer's subsequent conduct is critical to upholding at-will status. In one case, a court advised that "factors other than express terms are relevant

⁶³ See *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

⁶⁴ 203 Cal. App. 3d 743 (1988).

⁶⁵ 214 Cal. App. 3d 440 (1989).

to determining the existence of an implied employment agreement."⁶⁶ Moreover, as discussed further in Chapter 4 below, there are numerous laws that were passed by Congress and the state Legislature which also prohibit termination due to unlawful reasons (e.g., discrimination and retaliation).

TAKEAWAYS

- Include at-will employment language in offer letters, employee handbooks, and policy documents.
- Discuss at-will status with employees upon hiring.
- Refrain from any promises regarding continued employment.
- Train managers to understand at-will status and how they should not act to undermine it.

Follow internal policies and procedures with respect to discipline.

Employee Discipline

Dealers should develop consistent policies governing how they discipline their employees and respond to violations of policy which could lead to termination. Although not legally required, many dealers have multi-step "progressive discipline" policies. These policies may require a variety of steps before termination, such as oral warnings, written warnings, second written warnings, and/or performance improvement plans. The advantage of such policies is that they create a record of a pattern of misconduct which may warrant termination. Thus, if an employee sues for wrongful discharge, the dealer is well-equipped to demonstrate that legitimate business reasons justify the decision to terminate. Conversely, and as touched upon above, some infractions such as theft may fall outside the progressive disciplinary rubric and constitute grounds for immediate dismissal.

DEALER TIP: BUILD FLEXIBILITY INTO YOUR PROGRESSIVE DISCIPLINE STEPS

Dealers with a progressive discipline policy should expressly state in the policy that employees may be subject to immediate termination without going through each step or any steps in the process, at the employer's sole discretion. This will help the dealer explain why an employee who has received, for example, an oral warning is not "entitled" to receive written warnings or other discipline before termination can occur, depending on the scope and nature of the performance deficiencies at issue.

Above all, the golden rules for dealers are: (1) consistency and (2) training. It is imperative that dealers act consistently with respect to discipline and terminations. Failing to do so may justifiably raise concerns of unfair or disparate treatment, which may lead employees or a court to conclude that other, unlawful reasons motivated the dealer's decision. Consistency, in turn, is ingrained in management by comprehensive managerial training. Managers involved in the disciplinary process must be trained in how to cogently communicate their concerns to subordinates, memorialize the misconduct or poor performance, and ensure consistency in their treatment of employees.

⁶⁶ *Soules v. Cadan*, 2 Cal. App. 4th 390 (1991), *overruled on other grounds by Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994).

Chapter 2: Recordkeeping Obligations



California law strongly protects the right of employees to access information related to their employment. This section summarizes a dealer's basic obligations pertaining to the:

- Maintenance and production of personnel files;
- Maintenance of wage records; and
- Required workplace postings under California and federal law.

These requirements should be reviewed with all human resources, payroll, and managerial staff. Failing to comply with these recordkeeping requirements could not only subject dealers to penalties but also places them at a severe disadvantage in litigation.

Personnel Files

Employer Duties

Maintaining Personnel Files: Dealers are required to (1) maintain a copy of each employee's personnel records for a period of not less than four years after termination of employment and (2) make a current employee's personnel records available for inspection, and if requested by the employee or representative, provide a copy at the place where the employee reports to work, or at another location agreeable to the employer and the requester. If the employee is required to inspect or receive a copy

at a location other than the place where he or she reports to work, no loss of compensation to the employee is permitted. Dealers must also make a *former* employee's personnel records available for inspection, and if requested by the former employee or representative, provide a copy at the location where the employer stores the records, unless the parties mutually agree in writing to a different location.⁶⁷

Which Records Must Be Made Available? Personnel records should contain those documents which are used to determine the employee's qualifications for employment, promotion, additional pay, disciplinary action, or termination.⁶⁸

Timing of Inspections: Record inspections must be allowed at reasonable times and intervals, but not later than 30 calendar days from the date the employer receives a written request. Upon a written request, the employer shall provide a copy of the personnel records within 30 calendar days at a charge not to exceed the actual cost of reproduction.

Penalties for Failing to Provide Personnel File: If an employer fails to permit a current employee, former employee, or representative to inspect or copy personnel records within the times specified, or times agreed to by mutual agreement, the current employee, former employee, or the Labor Commissioner may recover a penalty of \$750 from the employer. A current or former employee may also bring an action for injunctive relief to obtain compliance and may recover costs and reasonable attorneys' fees in such an action through the court process.⁶⁹

Leaves of Absences and Former Employees: The right to inspect personnel files extends to employees who are on leave and former employees (so long as the request is made within three years of the employee's termination).

NOTE FOR UNIONIZED DEALERSHIPS

The right to inspect personnel files does not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for all of the following: (1) the wages, hours of work, and working conditions of employees; (2) a procedure for the inspection and copying of personnel records; (3) premium wage rates for all overtime hours worked; and (4) a regular rate of pay of not less than 30 percent above the state minimum wage.

Composition of Personnel Files

Typical Documents Found in an Employee Personnel File:

- The completed employment application, resume, or both, and other basic new hire forms (other than I-9 forms and background/reference check inquiries; see below) such as W-4 forms;
- Offer of employment letter;
- Employment agreement, if any;

⁶⁷ See Cal. Lab. Code § 1198.5; Cal. Gov't. Code § 12946.

⁶⁸ See Cal. Lab. Code § 1198.5.

⁶⁹ See Cal. Lab. Code § 1198.5.

- Signed acknowledgement forms showing receipt of handbooks or employment policies;
- Background check release forms signed by the employee to authorize a check of the employee's credit records, criminal history, driving records, or general background information, and any release of claims the employee may have signed in connection with the reference checks (actual results from these background checks should be maintained in a separate file; see below);
- Any agreements with the company that the employee may have signed, such as an authorization for deductions from the employee's paycheck;
- Signed acknowledgments that the employee has received his or her notice of wages upon hire and annually pursuant to the Wage Theft Prevention Act ("WTPA"). Under California law, it is not mandated that an employer obtain a signed WTPA acknowledgment, but it is recommended that such an acknowledgment be obtained and maintained in the employee's personnel file;
- Any agreement between the company and the employee concerning confidential information;
- Any records of company-owned property that was issued to the employee for use during employment, such as keys, manuals, laptop computers, modems, and cell phones;
- All records that reflect disciplinary action, if any, such as suspensions, written warnings, probation notices, and notes of oral warnings;
- Any commendations regarding the employee's work;
- Records showing any changes in the employee's title, pay, or duties, including internal status change forms, formal applications, email correspondence, memoranda, notes reflecting a demotion, or application for a promotion;
- Records of performance evaluations including completed formal review forms, the employee's comments regarding the performance evaluation, email correspondence, follow-up reports, or other documentation about improvement or progress;
- Specific employment policies pertaining to the employee, including memos concerning any changes in policies;
- Documentation concerning training (attendance, certifications, etc.);
- Employee attendance records, lateness records, and requests for time off for vacations, military leave, personal leave, etc. (FMLA-related paperwork, and any other documents containing medical records, should be maintained in a separate file; see below);
- Termination documentation, including but not limited to, COBRA notification and acknowledgment of receipt, record of termination, resignation letter, or company notice of layoff or termination.

DEALER TIP: TO REVIEW OR NOT TO REVIEW?

Some dealers provide written performance reviews of employees on an annual or periodic basis. While there is no legal requirement to conduct evaluations, it may be useful for a variety of reasons, *e.g.*, to advise employees of their strengths and weaknesses so that they can improve their performance, to help ensure uniformity and consistency in connection with how the dealership treats similarly-situated employees, and to provide some structure for salary and/or bonus considerations and decisions. If evaluations are used, the supervisors and managers completing the forms should be trained to:

- Give fair, objective, and balanced reviews;
- Stick to the facts; and
- Avoid including extraneous observations or opinions that could support a claim of discrimination or bias.

Further, if the employee is subjected to progressive discipline or placed on a Performance Improvement Plan ("PIP"), the dealer must ensure that the process is implemented in a fair and even-handed manner. Moreover, make sure to follow through on any prescribed steps, *e.g.*, if the PIP states that meetings will be held on a weekly basis, confirm that those meetings are held. A plan which the dealer does not carry out can be worse than no plan at all.

Documents NOT to Include in Employee Personnel Files

There are several types of documents that should NOT be kept in personnel files, including:

Medical Records: Medical records should be kept in separate, closely-guarded individual files to ensure that the strict confidentiality requirements of federal law for medical records are honored. "Medical records" should be interpreted broadly to include any documents that mention or record an employee's health or medical condition, including the following:

1. Employee requests for FMLA or short- or long-term disability leave, including formal request forms, email correspondence, and notices sent to employees by the dealership about time off work;
2. Results of medical examinations or drug tests;
3. Voluntary disclosures by the employee about medical conditions, legal prescription drug use, etc.;
4. COVID-19 vaccine information;
5. Information about claims for workers' compensation benefits;
6. Doctor's notes and formal certifications of a serious health condition that are used in substantiating the need for a leave of absence (*e.g.*, for FMLA or short- or long-term disability leave);
7. Information about claims submitted for benefits under the dealer's group health insurance and short- and long-term disability plans; and
8. Records describing or used in the interactive process between the dealer and an employee with a disability in connection with the determination of potential reasonable accommodations.

Background Checks: Background and reference check information should be maintained in a file separate from the personnel file. These files may be adjacent in a cabinet or electronic database, but documentation should not be intermixed. Background and reference check information that should be kept separate includes:

1. Results from background checks, including, but not limited to, an employee's credit record, criminal history, driving records, or general background information;
2. Results from pre-employment drug tests; and
3. Any reference letters received from an employee's previous employer(s).

I-9 Forms: Completed I-9 forms required by the Immigration Reform and Control Act ("IRCA") should not be kept with any other employment records. Since IRCA also contains non-discrimination provisions, these forms should be kept separate from the personnel file to avoid any inference that the information they contain is being used as the basis of an employment decision. However, I-9 forms for all employees should be kept together so that if representatives of the DHS or the Department of Labor request production of I-9 forms during the course of an audit, the company can easily produce the forms without also giving access to other employment documents.

The company must maintain I-9 forms for all current employees. Once the company discharges an employee for any reason (e.g., a "for cause" termination or reduction in workforce, or if an employee voluntarily resigns), then the company may discard the I-9 either three years after the date of hire or one year after the date of termination, *whichever time period is longer*. For example:

- Dealer hires employee A on 1/1/20 and discharges her on 1/1/21. In this case, retain the I-9 until 1/1/23 (three years after hire date is the longer time period).
- Dealer hires employee B on 1/1/10 and discharges him on 1/1/20; retain the I-9 until 1/1/21 (one year after termination date is the longer time period).

A best practice is to maintain I-9s in two separate files one for current employees (in alphabetical order), and one for terminated employees (sorted by I-9 destruction date, to be determined using the above formula as soon as the employee is discharged). When the applicable destruction date occurs, destroy the I-9 using a paper shredder to protect the employee's confidential and private information.

Legal Issues: Maintain separate folders for each employee that contain potential, current, or past legal issue(s). By way of background, an attorney's communications with his/her client are privileged and not generally subject to disclosure. Accordingly, to maintain the privilege, only certain employees (e.g., managers and human resources personnel) should have access to these types of communications and legal files. Other examples of documents that should be maintained separately from personnel files include the following:

1. Correspondence and communications with the company's attorneys regarding an employee (letters, emails, memos, and handwritten notes);
2. Any legal documents such as federal or state charges of discrimination, charges of unfair labor practices (from the NLRB), documents concerning an arbitration, and documents concerning a federal or state court action (e.g., complaints, answers, interrogatories, document subpoenas, and discovery requests);

3. Equal Employment Opportunity self-identification forms;
4. Any minutes, notes, or emails of discussions that occur concerning a disciplinary action. If these notes are relevant to a potential legal issue, managers should maintain separate “desk” files that contain these types of minutes, notes, or emails; and
5. Any minutes, notes, memos, or emails concerning an internal investigation based on a current or former employee's complaint of a violation of any company policy or rule (e.g., a complaint of sexual harassment, wage discrepancy, employee classification as exempt or non-exempt, or accounting inconsistency).

DEALER TIP: PROTECTING PRIVACY

Personnel files often contain highly sensitive third-party information pertaining to other people, which is protected by the third-party right to privacy. Thus, personnel documents should be reviewed prior to their production in response to any requests. Information which should be redacted includes:

- **Employee Information:** Any names or contact information of non-supervisory employees (other than the employee requesting his/her personnel file);
- **Customer Information:** Customer names, addresses, phone numbers, Social Security numbers, credit card numbers, and other identifying information; and
- **Vehicle Information:** Vehicle identification numbers, license plate numbers, and other identifying information.

Inspection of Signed Instruments: Employers are required to give an employee or job applicant, upon request, a copy of any instrument that the employee or applicant has signed relating to the obtaining or holding of employment.⁷⁰

Wage Records

Duty to Maintain Wage Records

Inspection of Wage Records: Dealers are required to permit current and former employees to inspect or copy payroll records pertaining to that current or former employee.⁷¹ A dealer who receives a written or oral request from a current or former employee to inspect or copy his or her payroll records shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request.

Penalties for Failing to Provide Payroll Records: Failure to permit a current or former employee to inspect or copy his or her payroll records within the 21-calendar day period entitles the current or former employee to recover a \$750 penalty from the dealer.⁷²

⁷⁰ See Cal. Lab. Code § 432.

⁷¹ See Cal. Lab. Code § 226(b).

⁷² See Cal. Lab. Code § 226 (c), (f).

CAUTION: DON'T IGNORE LABOR CODE REQUESTS FOR PAYROLL OR PERSONEL RECORDS

Plaintiffs' lawyers will often start their fishing expeditions by sending a letter to the dealer requesting production of payroll and personnel records under Labor Code Sections 226 and 1198.5. Dealers should not let these requests fall through the cracks. As long as counsel provides written authorization by their client for the request, they are entitled to prompt production of these records. Typically there is no point in giving them an automatic right to the \$750 penalty (times two, plus attorneys' fees) if the 21- and 30-day deadlines are not met.

Types of "Wage Records" Which Should Be Maintained: Dealers are required to maintain copies of itemized wage statements. Dealers are also advised to retain copies of time records (e.g., time punch records and time sheets), even though such records arguably do not fall within the scope of "wage records" under the California Labor Code. Should there be litigation, time records can be a critical piece of evidence.

Additionally, dealers must maintain accurate "production records" where there are employees compensated on a piece rate basis or pursuant to a commission plan.

DEALER SPOTLIGHT: SHOULD YOU MAINTAIN RECORDS OF FLAG HOURS/PRODUCTION UNITS?

Many dealers pay their mechanics pursuant to an hourly plus a production bonus based on labor hours produced under which service technicians earn an hourly wage plus a production bonus relative to the volume of work they complete in a given pay period, many times based on efficiency or proficiency standards. If the pay plan pays directly based on labor hours produced (flag hours), California law similarly requires that dealers maintain copies of the records on which these flag hour units are based. The number of flag hours (piece rate) produced and the corresponding rate must also appear on the pay stub each payday. Accordingly, dealers are advised to maintain copies of reports detailing repair orders and the time involved for completing each (and, if possible, the underlying Repair Orders themselves).⁷³

Disclosing Wages

Employers are prohibited from requiring an employee to refrain from discussing or disclosing the amount of his or her wages.⁷⁴

DEALER TIP: BE AWARE OF CALIFORNIA'S FAIR PAY ACT

California law prohibits employers from paying employees a lower wage rate than that paid to employees of the opposite sex or different race/ethnicity when the employees are working in substantially similar jobs, under similar working conditions, that require equal skill, effort, and responsibility.⁷⁵ However, a wage differential may be permitted where the employer can demonstrate that:

⁷³ See Cal. Wage Order Nos. 1-15, § 7.

⁷⁴ See Cal. Lab. Code §§ 232, 232.5.

⁷⁵ See Cal. Lab. Code §§ 1197.5, 1199.5. An employer that violates California Labor Code Section 1197.5 (as amended) by paying an employee a wage less than the rate paid to an employee of another sex or different race/ethnicity is subject to a fine of not more than \$10,000, or imprisonment for not more than six months, or both.

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

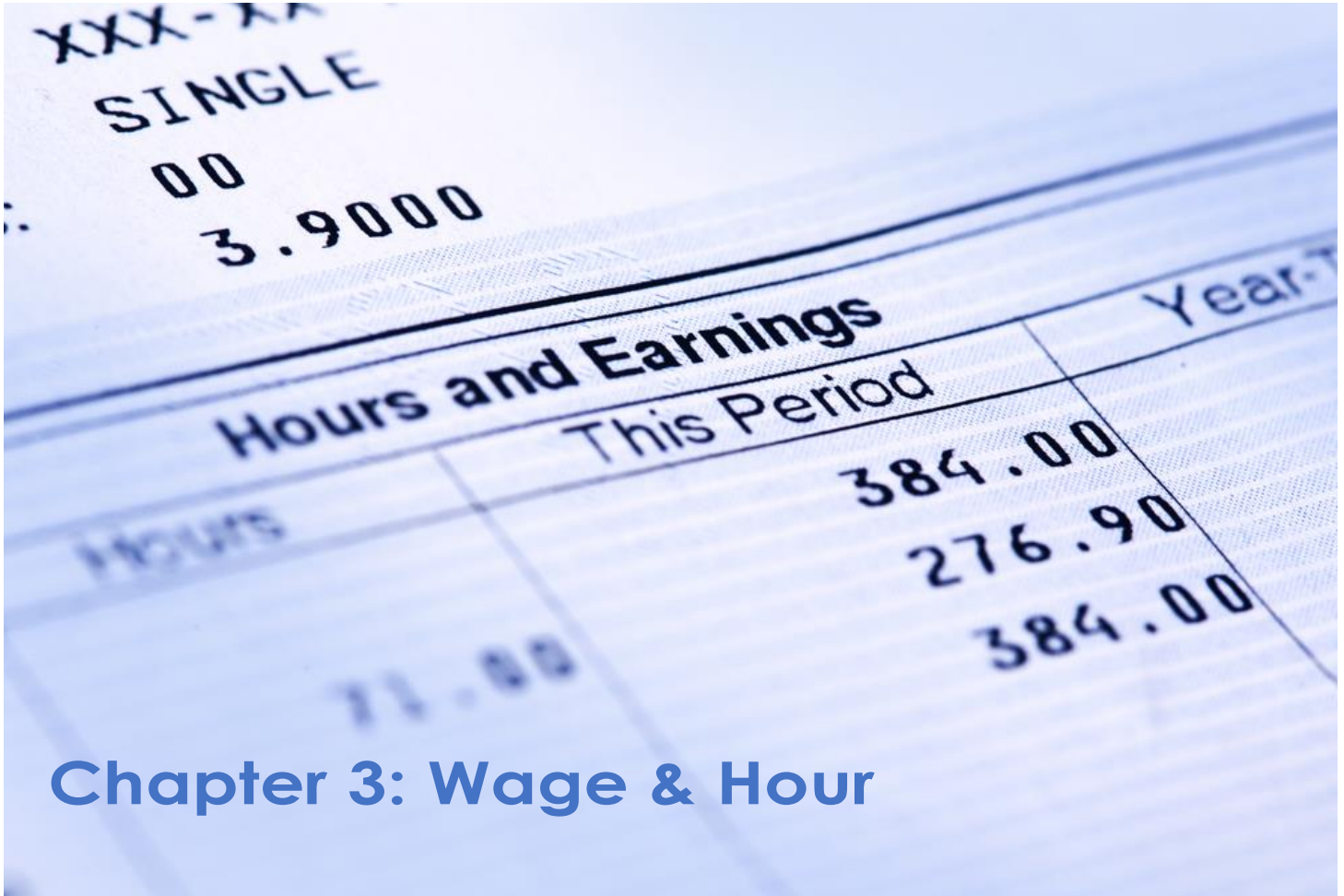
“Business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. However, this defense is inapplicable if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. It is recommended that dealers (1) ensure that compensation of all employees is reviewed for consistency; (2) be able to articulate the reasons why certain positions are compensated at certain rates; and (3) maintain internal avenues for employee complaints so that concerns about potential gender, race, and ethnicity disparities can be addressed by the dealer rather than through the courts.

Required Postings

Federal, state, and local laws require dealers to post various notices in a visible place where notices can be seen by all employees. Many vendors make “all-in-one” employee notice posters available which capture these requirements. Immediately below is a representative (but not exhaustive) list of notices which must be posted in the workplace.

Form/Pamphlet	Form Links
Industrial Welfare Commission (“IWC”) wage orders	https://www.dir.ca.gov/iwc/wageorderindustries.htm
Minimum wage (state)	https://www.dir.ca.gov/iwc/wageorderindustries.htm
Paid sick leave	https://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Post_er_Template_(11_2014).pdf
Payday notice	http://www.dir.ca.gov/dlse/PaydayNotice.pdf
Safety and health protection on the job	http://www.dir.ca.gov/dosh/dosh_publications/shpstreng012000.pdf
Emergency phone numbers	http://www.dir.ca.gov/dosh/dosh_publications/s500pstr.pdf
Notice to employees -- injuries caused by work	http://www.dir.ca.gov/dwc/NoticePoster.pdf

Notice of workers' compensation carrier and coverage	Obtained from the employer's workers' compensation insurance carrier.
Whistleblower protections	http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf
No smoking signage	Proprietary
Log and summary of occupational injuries and illnesses	http://www.dir.ca.gov/dosh/PubOrder.asp
Discrimination and harassment in employment are prohibited by law	https://civildrights.ca.gov/wp-content/uploads/sites/32/2023/01/Workplace-Discrimination-Poster_ENG.pdf
Pregnancy disability leave	https://civildrights.ca.gov/wp-content/uploads/sites/32/2023/01/Your-Rights-and-Obligations-as-a-Pregnant-Employee_ENG.pdf
Family care and medical leave (CFRA leave) and pregnancy disability leave	https://civildrights.ca.gov/wp-content/uploads/sites/32/2023/01/CFRA-and-Pregnancy-Leave_ENG.pdf
Transgender Rights in the Workplace poster	https://civildrights.ca.gov/wp-content/uploads/sites/32/2022/11/The-Rights-of-Employees-who-are-Transgender-or-Gender-Nonconforming-Poster_ENG.pdf
Notice to Employees – DE 1857A	http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf
Notice to employees: unemployment insurance benefits – DE 1857D	http://www.edd.ca.gov/pdf_pub_ctr/de1857d.pdf
Notice to employees: time off to vote	http://www.sos.ca.gov/elections/time-vote-notices/
Equal employment opportunity is the law	https://www.eeoc.gov/poster
Minimum wage (federal Fair Labor Standards Act)	http://www.dol.gov/whd/regs/compliance/posters/flsa.htm
Notice: Employee Polygraph Protection Act	http://www.dol.gov/whd/regs/compliance/posters/eppabw.pdf
Family and Medical Leave Act (Federal FMLA)	http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf



Chapter 3: Wage & Hour

Wage & hour continues to be by far the most hotly litigated area of employment law in California. Dealers throughout the state have faced individual lawsuits from former employees, as well as class and representative actions on behalf of large groups of current and former employees for employment-related claims. Properly navigating California's nebulous web of wage & hour laws is critical and, where appropriate, should be done with employment law counsel's assistance.

In this chapter, we summarize key aspects of California's wage & hour laws as they apply to automotive dealerships, such as:

- Independent contractors;
- White collar exemptions;
- Minimum wage and overtime;
- Piece rate compensation plans and related payroll obligations;
- Commission pay plans and corresponding challenges under California law;
- Meal and rest breaks;
- Wage statements;

- Labor Commissioner hearings; and
- The Private Attorneys General Act and class action lawsuits.

We also provide practical guidelines for how dealers can maintain compliance, thereby minimizing the risk of exposure in lawsuits and audits.

General Overview

Where Does Wage & Hour Law Come from? California regulates employer wage and hour obligations via the Labor Code and also through Wage Orders issued by the Industrial Welfare Commission ("IWC"). The state's labor laws are enforced by the Division of Labor Standards Enforcement ("DLSE"), which is headed by the Labor Commissioner. The Labor Commissioner, appointed by the Governor, has the authority to issue regulations that interpret these laws.

Which Wage Order Applies to Dealerships? Wage Order 7-2001, which applies to the operation of an automotive dealership, regulates wages, hours, and working conditions. Thus, it is one of the primary reference points for dealers with respect to wage and hour obligations. The current version of Wage Order 7-2001 is available online.⁷⁶

Does Federal or State Law Control? The basic federal wage & hour law applicable to employers in California is the Fair Labor Standards Act of 1938 ("FLSA"). However, California's wage & hour laws – primarily encapsulated by the California Labor Code and IWC Wage Orders – historically have been more protective of employees than federal law (and thus more onerous for employers). When there is a variation between state and federal law, the law containing more protections, benefits, and/or compensation for employees generally applies.

Is There an Employment Relationship? California's compensation laws apply only to employees and do not apply to independent contractors. The difference between an employee and an independent contractor is one of substance; a worker cannot become an independent contractor merely by agreeing to be considered as such.

Employee or Independent Contractor?

Basic Overview

In California, one who provides services to another for payment can be either an employee or an independent contractor. The principal-independent contractor relationship differs in both nature and consequences from an employer-employee relationship. An employer has certain rights of control and a multitude of obligations regarding an employee that are not part of the principal-independent contractor relationship.

⁷⁶ Available at <https://www.dir.ca.gov/IWC/WageOrders2005/IWCArticle7.html>.

What Are the Advantages of Having Independent Contractors?

There are advantages to both parties in the establishment of an independent contractor relationship. A principal using an independent contractor is not required to provide statutory employment benefits, such as unemployment insurance and workers' compensation coverage, nor does it need to comply with minimum wage, overtime, and income tax withholding obligations. The rapidly-proliferating body of employment discrimination law does not generally apply to independent contractor relationships and, except in special circumstances, there is no tort liability for principals for injuries to third parties caused by independent contractors. For the independent contractor, the relationship provides the freedom, flexible working conditions, tax advantages, and financial rewards of self-employment.

What Is the Legal Test for Determining if Someone Is an Independent Contractor?

There are a variety of legal tests for determining whether someone is an independent contractor, depending on the forum in which an action is pending or the agency (e.g., EDD, DLSE) conducting an audit. California courts and state agencies (such as the DSLE) had long applied what is known as the *Borello* test for determining whether a worker was an independent contractor under the Industrial Welfare Commission Wage Orders (e.g., claims for minimum wage, overtime, meal periods, and rest periods).⁷⁷ This flexible, multi-factor approach looked primarily at whether the hiring entity had a "right to control" the manner in which the worker performed the contracted service, along with eight other "secondary" factors, such as whether the worker was engaged in a distinct occupation or business, the skill required in the particular occupation, and whether the worker or the hiring entity supplied the tools used to perform the work and the place where the work was performed.

On April 30, 2018, the California Supreme Court clarified the test to determine if an individual is an employee or independent contractor under California's Wage Orders. The Court overturned decades of precedent, rejecting the long-standing, multi-factor approach and adopted a modified "ABC" test.⁷⁸ Under this new test, a person will be considered an independent contractor *only if* the hiring entity can prove *all three* of the following:

- A. That the worker is 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;
- B. That the worker performs work that is outside the usual course of the hiring entity's business; and
- C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The California Supreme Court offered little guidance on these three prongs. It noted that the "A" prong (freedom from control and direction) is similar to the common-law test used in *Borello*, asking whether the person is free from the "type and degree of control a business typically exercises over employees." The "B" prong (outside the usual course of the business) focuses on whether the person is "providing

⁷⁷ *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations*, 48 Cal. 3d 341 (1989).

⁷⁸ *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018).

services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor.” And the “C” prong (independent trade, occupation, or business) asks whether the person “independently has made the decision to go into business for himself or herself,” evidenced by things such as “incorporation, licensure, advertisements, [or] routine offerings to provide the services of the independent business to the public or to a number of potential customers.” While presenting limited substantive guidance, the court did make clear that it intended this new ABC test to be stricter than the previous *Borello* test, and identified “plumbers” and “electricians” as appropriate independent contractors. As a practical matter, the ABC test broadens the definition of employment, applying it to many workers who were previously classified as independent contractors.⁷⁹

California then enacted AB 5, effective January 1, 2020, which codifies the ABC test and applies it to the Labor Code, workers’ compensation, and unemployment benefits.⁸⁰ Drafted to be prospective, AB 5 settled the question of retroactivity of the test for those purposes, but the question of retroactivity as applied to the wage order remained.⁸¹

Then, on January 14, 2021, The California Supreme Court held in *Vazquez v. Jan-Pro Franchising Int’l, Inc.*,⁸² that the ABC test for determining worker classification applies retroactively.⁸³

Dealers are advised to evaluate their independent contractor relationships to ensure they would satisfy the three prongs of this new “ABC” test.

DEALER TIP: INDEPENDENT CONTRACTOR OR EMPLOYEE?

Example 1: A dealer engages a sales representative and classifies her as an independent contractor. The sales representative sells third-party automotive products to customers and works a regular shift at the dealership.

The dealer should reconsider classifying this person as an employee because it will be difficult to prove that the services the sales representative provides are outside the usual course of the dealership’s business.

Example 2: A dealer hires a janitorial company to send a janitor to clean the dealership three times a week. The dealership does not oversee the hiring of the janitorial agency’s janitors and does not instruct the janitors on how to perform their cleaning services. Furthermore, the janitorial agency was in existence prior to entering into a contract with the dealership, and provides services to various clients.

⁷⁹ See Mel Cole, Bruce Sarchet, and Michael Lotito, *California Supreme Court Reaffirms that ABC Test is Retroactive*, Littler ASAP (Jan. 19, 2021).

⁸⁰ AB 5 excepts certain occupations and relationships from its coverage. If an exception applies, AB 5 then specifies what standard, other than the ABC test, will govern. (See Cal. Lab. Code § 2778.) A discussion of these exceptions is outside the scope of this publication.

⁸¹ See Mel Cole, Bruce Sarchet, and Michael Lotito, *California Supreme Court Reaffirms that ABC Test is Retroactive*, Littler ASAP (Jan. 19, 2021).

⁸² 10 Cal. 5th 944 (2021).

⁸³ See Mel Cole, Bruce Sarchet, and Michael Lotito, *California Supreme Court Reaffirms that ABC Test is Retroactive*, Littler ASAP (Jan. 19, 2021).

The dealer will likely be able to satisfy the “A” prong because the dealer does not exert much control over the performance of the janitor’s work. The dealer will likely be able to satisfy the “B” prong because the janitor is providing cleaning services and the Dealership is not in the janitorial business. Finally, the dealer will likely be able to satisfy the “C” prong because the janitorial agency began its business before contracting with the dealer and contracts with other dealers or businesses.

What Are the Consequences for Independent Contractor Misclassification?

Misclassifying an individual as an independent contractor may result in a lawsuit, an audit, or both.

Lawsuits: Dealers can face lawsuits for unpaid wages, failure to provide meal and rest periods, and associated penalties. These lawsuits, which are increasingly prevalent, may be asserted on behalf of an individual worker or a putative class or group of current and former employees.

Audits: Government agencies, such as the EDD, IRS, or DLSE, may conduct an audit seeking unpaid payroll taxes and/or unpaid wages. These audits can be highly intrusive, time-consuming, and potentially costly.

Willful Misclassification: Additionally, an entity which “willfully misclassifies” an “employee” as an independent contractor could face harsh penalties of up to \$15,000 per violation. If the dealer is found to have a “pattern or practice” of misclassification, the fines can be increased to a minimum of \$10,000 with a cap of \$25,000 per violation. The law defines *willful misclassification* of an individual as “voluntarily and knowingly misclassifying that individual as an independent contractor” in order to avoid employee status for the individual.⁸⁴ AB 5 also provides that in addition to other remedies available, the Attorney General or other public officials may prosecute civil actions for injunctive relief to prevent employee misclassification. This provision is applicable to work performed on or after January 1, 2020.⁸⁵ Additionally, AB 594, which was signed by Governor Newsom on October 10, 2023, authorizes the Labor Commissioner or public prosecutors to enforce these willful misclassification provisions through specified methods, including by investigating an alleged violation, ordering temporary relief, issuance of a citation, and filing of a civil action. The new law also, until January 1, 2029, authorizes a public prosecutor to bring civil or criminal actions for a violation of specified provisions of the Labor Code. Any recovered wages go to employees, and recovered penalties to the general fund of the state.

DEALER TIP: AVOIDING MISCLASSIFICATION CLAIMS AND AUDITS

- 1) Consult legal counsel before engaging independent contractors;
- 2) Prepare a comprehensive independent contractor agreement vetted by counsel;
- 3) Engage with individuals/entities who run *bona fide* businesses (e.g., which are incorporated, have their own operations, and/or perform services for multiple clients), thereby dispelling the appearance of an employment relationship between you and the independent contractor worker; and
- 4) Ensure that midlevel managers understand the nuances that distinguish contractors from employees.

⁸⁴ Cal. Lab. Code §§ 226.8, 2753.

⁸⁵ Cal. Lab. Code § 2786.

Applicable Exemptions

Basic Overview on Exemptions

State and federal wage & hour laws provide for exemptions from certain aspects of wage and hour law. Unless an employee qualifies as “exempt” under one of the listed exemptions under California or federal law, it should be assumed that the employee is “non-exempt” and thus entitled to hourly pay, overtime, meal periods (unpaid), rest periods (paid), and other allowances under California law.

Dealers in California are frequently sued on the grounds that employees were improperly classified as exempt because, based on their actual job duties or compensation, they do not actually qualify as exempt under one of the statutory exemptions. Thus, dealers should enlist legal counsel to assist in analyzing all positions the dealership has classified as “exempt” in order to assess whether they face any potential liability for employee misclassification.

A finding that employees are misclassified can result in significant liability, ranging from unpaid straight time and overtime to penalties for missed meal and rest periods.

Relevant Exemptions under California Law

There are many different exemptions under California law. Common exemptions applicable to automotive dealers are the executive, administrative, and commissioned employee exemptions.

Executive Exemption: A person employed in an executive capacity means any employee who meets all of the following criteria:

1. Whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof;
2. Who customarily and regularly directs the work of two or more other employees therein;
3. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;
4. Who customarily and regularly exercises discretion and independent judgment; and
5. Who is primarily engaged in duties which meet the test of the exemption.

Note: An executive employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c).

DEALER SPOTLIGHT: IS THIS EMPLOYEE PROPERLY CLASSIFIED AS EXEMPT?

Scenario #1 –The Service Manager

At XYZ Auto, a service manager has been classified as exempt under the executive exemption. He has managerial authority insofar as he can direct his subordinates, independently establish sales goals, and discipline employees. However, he spends a majority of his time performing administrative work, such as reviewing invoices and interfacing with customers.

Exempt or Non-Exempt? In this particular scenario, the XYZ Auto service manager is misclassified as exempt. Although he possesses managerial duties, he does not spend a majority of his work time on exempt activities.

Scenario #2 – The Service Technician

XYZ Auto has classified all of its service technicians as exempt under the commissioned employee exemption. Thus, the dealer does not pay overtime to its techs or provide meal and rest periods.

Exempt or Non-Exempt? Non-exempt. The California Court of Appeal in *Keyes Motors, Inc. v. Division of Labor Standards Enforcement* held that service technicians paid on a flat rate basis do not fall within the commissioned employee exemption. Service technicians are generally not principally involved in selling a product or service, as required by the exemption. Instead, techs were found to be engaged in rendering a service.⁸⁶

Scenario #3 – The Parts Representative

XYZ Auto employs a parts representative who works behind the parts counter and has significant face-to-face contact each day with customers. The parts representative recommends and sells parts and products, and primarily seeks to maximize sales.

Exempt or Non-Exempt? Possibly exempt. The parts representative could potentially qualify under the commissioned employees exemption if at least 50% of his or her pay comes from commissions for sales made directly by him or her (as a salesperson) to the dealership's customers. Integral to the analysis is the extent to which direct sales activity comprises the parts representative's day.

Administrative Exemption: A person employed in an administrative capacity means any employee:

- (1) Whose duties and responsibilities involve either:
 - a) The performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer's customers; or
 - b) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and
- (2) Who customarily and regularly exercises discretion and independent judgment; and
- (3) Who either:
 - a) Regularly and directly assists a proprietor, or an employee employed in a *bona fide* executive or administrative capacity; or

⁸⁶ See *Keyes Motors, Inc. v. Division of Labor Standards Enforcement*, 197 Cal. App. 3d 557 (1988).

- b) Performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge; or
- c) Executes, under only general supervision, special assignments and tasks; and
- (4) Who is primarily engaged in duties which meet the test for the exemption.

Caution: The “Note” above with respect to the executive exemption (i.e., salary must be two times the minimum wage) applies with equal force to the administrative exemption.

Commissioned Employee Exemption: Both California’s Wage Order 7-2001 and Section 207 of the FLSA set forth commissioned employee exemptions.

- *California’s Commissioned Employee Exemption:* Section 3(d) of Wage Order 7-2001 provides that overtime requirements do not apply to certain employees primarily engaged in sales whose earnings exceed one and one-half times the minimum wage for every hour worked, if more than half of the employee’s earnings represent sales commissions.
- *Federal Law’s Commissioned Employee Exemption:* Section 207 of the FLSA excludes commission-paid employees in “retail and service establishments” from overtime pay if the employee’s regular rate of pay exceeds one and one-half times the applicable minimum wage for every hour worked in a workweek and more than half of the total earnings of the employee consists of commissions.

DEALER SPOTLIGHT: COMMISSIONED EXEMPT SALESPERSONS

An employee worked for a dealer as a sales consultant (with primary duties of selling used cars, warranty plans, and accessories), and was classified as a commissioned exempt salesperson. She was paid \$154 per car sold, regardless of the price of the vehicle. The employee filed a class action lawsuit, claiming that the dealer’s pay plan was a *de facto* piece rate pay scheme, not a commission, and thus she was entitled to overtime. The court focused on Labor Code Section 204.1, which defines commission wages as “compensation paid to any person for services rendered in the sale of such employer’s property or services and based proportionately upon the amount or value thereof.” The court ruled that, although previous cases examining the definition of “commissions” under IWC Wage Order 7 had found that commissions must be derived from a percentage of the actual product price, the plain language of Section 204.1 allows commissions to be based on either the amount sold *or* the value of the product or services. The employee’s overtime claims were dismissed.⁸⁷

Exemptions and Car Dealers

Which Positions May Not Meet the Exemptions? Employers have increasingly faced legal challenges to their classifications of managerial employees as exempt. In particular, mid-level managers are particularly susceptible to a finding of non-exempt status. Car dealers have traditionally been hard-pressed to meet the exemptions for the following positions:

- Assistant Managers of any type

⁸⁷ See *Areso v. Carmax, Inc.*, 195 Cal. App. 4th 996 (2011).

- Warranty Administrators
- Customer Relations Managers
- Dispatchers

Most often, employees in these positions cannot meet the exemptions because they do not spend at least 51% of their time on exempt activities. For instance, a Parts Manager may seemingly qualify as exempt if he or she supervises a number of parts counter employees and earns the requisite salary. However, the exemption is not met if more than 50% of the employee's time is spent actually working at the counter or stocking parts.

DEALER SPOTLIGHT: SERVICE ADVISORS AND THE NAVARRO CASE

In April 2018, the U.S. Supreme Court overturned the Ninth Circuit Court of Appeals' decision in *Encino Motorcars, LLC v. Navarro*.⁸⁸ The U.S. Supreme Court ruled that service advisors *are* exempt from overtime requirements under the FLSA. Specifically, the court assessed the application of the exemption under 29 U.S.C. Section 213(b)(10)(A), which excludes "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" from overtime pay requirements.

While this decision is a big win for employers nationwide, the U.S. Supreme Court's opinion only exempts service advisors from overtime requirements under the FLSA. Service advisors working in California must also be exempt from overtime requirements under California law, which provides no definitive guidance regarding any blanket exemption for service advisors. As such, car dealers in California should continue to rely on the commissioned employee exemption in connection with exempting service advisors. Accordingly, *Navarro* has *little practical impact on car dealers in California*. Service Advisors can be exempt from overtime under the commission exemption if the pay plan and the actual compensation meet the legal exemption requirements. Therefore, dealers are advised to consult legal counsel to review their pay plans to ensure that they are compliant with California law.

Exemption Compliance Checklist

Job Descriptions: Job descriptions for exempt positions should be appropriately tailored to highlight the abundance of exempt activities which comprise that position's duties. A poorly-drafted job description can be used as evidence against an employer in litigation.

Pay Plans: Exempt employees who are compensated with commissions or bonuses should be provided with a written pay plan, vetted by legal counsel, outlining the parameters of their duties and compensation.

Training: Managers should receive training on how they should carry out their job duties. Managers who take it upon themselves to perform the work of their subordinates could potentially compromise their exempt status, and thus should be aware of the implications of their conduct.

Review with Counsel: All exempt classifications should be reviewed with legal counsel to ensure that they are defensible under this fast-evolving area of the law.

⁸⁸ 138 S.Ct. 1134 (April 2, 2018).

Minimum Wage and Overtime Obligations

What Constitutes Work Time?

Compliance with the state's wage payment obligations is computed based on a workweek that consists of seven consecutive 24-hour workdays. An employer can use a 24-hour period other than the calendar day as a workday (e.g., 4:00 p.m. to 3:59 p.m., rather than 12:00 a.m. to 11:59 p.m.). An employer can have the same workdays for all employees, or have different workdays for different groups of employees.

However, once a workday is established for an employee, it is expected to be of indefinite duration and rarely changed. Dealers should specifically advise employees of the workweek that will be used to calculate overtime. An employer cannot establish an arbitrary workday, or workweek, to avoid overtime premiums that would otherwise be due.⁸⁹ If an employer does not designate when a workweek begins and ends, then the default workweek beginning on Sunday and ending on Saturday will apply.

Work Time Defined — California law broadly defines “work time” to include all time which an employer suffers, permits, or “controls” employee activity. This definition of “work time” has been broadly construed to make extended commute time on company buses compensable hours of work where the employer requires employees to ride the buses.⁹⁰ Similarly, the state Labor Commissioner has concluded that meal periods are not compensable only if they are at least 30 minutes in length, if the employee is relieved of all duty, and if the employee is free to leave the premises.⁹¹

DEALER TIP: AVOIDING CLAIMS FOR “OFF THE CLOCK WORK”

Lawsuits alleging that employees were not paid for all of their work time are among the most common in today's legal landscape. Accordingly, your managers should be trained to oversee potential issues:

- Ensure that non-exempt employees clock in as soon as they arrive to the work site and clock out immediately before they leave;
- Do *not* assign any work to an employee while she is off the clock;
- Regularly audit time records to ensure accuracy and identify any discrepancies;
- Provide employees with regular (e.g., weekly, bi-weekly) reports summarizing their time entries so any necessary corrections can be made;
- Request that employees acknowledge the accuracy of their time records for each pay period; and

⁸⁹ See *Seymour v. Metson Marine, Inc.*, 194 Cal. App. 4th 361 (2011), *disapproved on other grounds by Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015).

⁹⁰ See *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000); see also *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038 (2020) (time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience compensable as “hours worked” with the meaning of Wage Order 7).

⁹¹ See *Bono Enters., Inc. v. Bradshaw*, 32 Cal. App. 4th 968 (1995), *disapproved by Tidewater Marine Western v. Bradshaw*, 14 Cal. 4th 557 (1996).

- Supervise use of time-keeping systems to ensure their proper use.

Minimum Wage

As of January 1, 2024, the minimum wage in California increased to \$16 per hour for most non-exempt employees regardless of the size of the employer.⁹² California law permits local governments to regulate employees' compensation. Some California cities have passed ordinances that surpass the state's minimum wage schedule. For instance, the minimum wage in San Francisco increased to \$18.07 per hour on July 1, 2023. As such, employers must look to their local minimum wage when computing proper rates of pay for employees.

Every employer in California is required to pay each employee, on the established payday for the period involved, at least the applicable minimum wage for all hours worked in the payroll period.

SERVICE TECHNICIAN TOOLS...

California law generally requires all employers (including dealers) to reimburse their employees for any necessary expenses (*e.g.*, tools) needed for their work.⁹³ However, the Wage Order governing dealers provides an exception to this general rule when the dealer (1) pays double the minimum wage and (2) requires the employee to provide and maintain hand tools and equipment customarily required by the trade or craft.⁹⁴

In practice, most dealers elect to pay their service technicians double the minimum wage while concurrently requiring the techs to bring their own tools. However, there are some instances where this structure may not make business sense. For instance, less skilled or entry-level techs may not regularly deal with complex tools or equipment since they primarily spend their time on simpler tasks, such as oil changes. For these techs, dealers can pay a base rate equivalent to the minimum wage. However, in this case, dealers must provide and maintain the necessary tools and equipment for these techs.⁹⁵ It is also recommended that (a) all techs sign an acknowledgment form stating that they will not bring their own tools; and (b) dealers purchase sufficient tools so that no tech's productivity is impacted by a lack of tools at a dealership. As the California minimum wage continues to climb, these issues will become more complicated.

Learners: Minimum wage requirements for "learners" differ from minimum wage requirements as they apply to other workers.⁹⁶ Learner employees, during their first 160 hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than 85% of the minimum wage rounded to the nearest nickel.

Split Shifts: When an employee works a split shift (defined in the Wage Order as a work schedule which is interrupted by non-paid, non-working periods established by the employer, other than *bona fide* rest or meal periods), the employee must be paid one hour's pay at the minimum wage in addition to the minimum wage for that workday. However, if the employee's actual earnings are the equivalent of minimum wage for every hour worked with an additional hour of minimum wages added on, an

⁹² On each subsequent January 1, the state will adjust the minimum wage rate based on changes to the consumer price index.

⁹³ See Cal. Lab. Code § 2802.

⁹⁴ See Wage Order 7, § 9(B).

⁹⁵ See Wage Order 7, § 9(B).

⁹⁶ See Wage Order 7, § 4(A).

additional hour of pay is not required. For instance, if an employee works an eight-hour split shift, the employee's minimum earnings must be at least \$114.00 (9 hours x \$16.00).

Overtime

Overtime and Double-Time: Employers must pay time and one-half for all hours worked over eight in one day, 40 in a single workweek, and for the first eight hours on the seventh day of work in a single workweek. Double-time compensation is generally required for all hours worked over 12 in one day and over eight hours on the seventh consecutive day of work in a single workweek.⁹⁷

DEALER TIP: INCORPORATE OTHER FORMS OF REMUNERATION INTO OVERTIME CALCULATIONS

The “regular rate” upon which overtime calculations are based does not solely consist of the employee’s hourly rate (e.g., \$20.00/hour). In other words, it cannot be assumed that an employee who earns \$20 per hour will be entitled to an overtime rate of \$30 per hour. Instead, the regular rate should also incorporate other forms of compensation, such as bonus payments, commissions, and shift differentials. In such cases, the dealer needs to compute the total compensation (including commissions, bonuses, and other forms of remuneration) during a workweek in order to derive the correct hourly rate to apply for any overtime hours worked. For example, this means that employees who earn production bonuses will earn overtime at an hourly rate that is higher than 1.5 times their basic hourly rate, as illustrated by the example below:

Regular hourly rate of pay	\$ 20.00
Total hours worked in workweek = 52	
Total overtime hours at time and one-half = 12	
Overtime due on regular hourly rate = 12 x \$30.00	\$360.00
Bonus attributable to the workweek	\$138.00
Regular bonus rate = \$138.00 ÷ 52 = \$2.6538 ÷ 2 = \$1.33 x 12 Overtime Hours	\$ 15.92
Total earnings due for the workweek:	
Straight time: 40 hours @ \$20.00	\$800.00
Overtime: 12 hours @ \$30.00	\$360.00
Bonus	\$138.00
Overtime on bonus	<u>\$ 15.92</u>
Total	\$1,313.92

CAUTION: ALVARADO MODIFIED OVERTIME CALCULATIONS ON FLAT SUM BONUSES

In March 2018, the California Supreme Court departed from the above method when it decided the question of how an employee’s overtime pay rate should be calculated when the employee has earned a *flat sum bonus* during a single pay period.⁹⁸ The only guidance the Court provided as to the definition of a “flat sum bonus” was limiting its decision “to flat sum bonuses comparable to the attendance bonus at issue [in *Alvarado*]. Other types of non-hourly compensation, such as a production or piecework bonus or a commission, may increase in size in rough proportion to the number of hours worked, including overtime hours, and therefore a different analysis may be warranted.”

⁹⁷ See Cal. Lab. Code § 510.

⁹⁸ *Alvarado v. Dart Container Corp.*, 4 Cal. 5th 542 (2018).

With regard to calculating overtime on flat sum bonuses, the court first decided that the divisor for purposes of calculating the per-hour value of the bonus should be the number of non-overtime hours the employee worked during the pay period. Second, the Court required that overtime on the bonus be paid at 1.5 times the regular rate derived from the bonus, not 0.5 times the regular rate as permitted by the FLSA.

The practical effect of this change in calculations is that employees will receive a higher regular rate and, in turn, a higher amount of trued up overtime during the same period the flat sum bonus was paid. In the example above, if the employee received a flat sum bonus of \$138, *Alvarado* dictates that the “Regular bonus rate” would be calculated as follows: $\$138.00$ [total bonus] / 40 [non-overtime hours worked in the workweek] = $\$3.45 \times 1.5 \times 12$ [overtime hours] = $\$62.10$. As can be seen, this “overtime on the bonus” amount is significantly higher than the $\$15.92$ which was originally calculated in the example above.

In light of *Alvarado*, dealers are encouraged to review their pay practices, including the calculation of overtime when non-exempt employees receive bonuses and other compensation. While *Alvarado* applies retroactively, consult with counsel to determine what appropriate action should be taken if overtime on flat sum bonuses has not been paid according to the calculation set forth in *Alvarado*. Practically speaking, some dealers may decide to calculate overtime on all bonuses, including production bonuses, in accordance with *Alvarado*. Other dealers may decide to calculate overtime on bonuses most likely to be considered a flat sum bonus (e.g., a CSI bonus) in accordance with *Alvarado*, but continue to pay overtime on other bonuses as they currently do.

Alternative Workweeks: An alternative work schedule is any schedule of more than eight hours in a day which does not include payment of daily overtime.⁹⁹ Alternative work schedules are possible to implement, but can be tricky from a compliance standpoint. The requirements for implementing an alternative workweek include defining a work unit, voting by secret ballot after a waiting period, reporting to the Division of Labor Statistics and Research, and providing a vote to revoke the option. Employers are also not allowed to reduce an employee's regular rate of pay as a result of the adoption, repeal, or nullification of an alternative workweek schedule.¹⁰⁰

Compensatory Time Off v. Makeup Time: Comp time, in lieu of paying overtime compensation, is not available to private sector employers in California because it violates the FLSA (the FLSA only permits the use of comp time for state and local government employees).¹⁰¹ California Labor Code Section 204.3, which also governs the use of comp time, is unavailable to employers subject to the FLSA.

Makeup time provides a limited exception to the daily overtime requirement when an employee submits a written request to “make up” time lost due to a personal obligation.¹⁰² The following conditions must be satisfied for this exception to apply:

- (1) The employee must submit a written request to make up time lost due to a personal obligation;
- (2) The makeup time must be used in the workweek in which the time was lost; and
- (3) The makeup time, when added to the employee's other hours of work, may not exceed 11 hours in any workday or 40 hours in the workweek.

⁹⁹ See Cal. Lab. Code § 500(c).

¹⁰⁰ See Cal. Lab. Code § 511.

¹⁰¹ See 29 U.S.C. § 207(o); 29 C.F.R. § 553.22.

¹⁰² See Cal. Lab. Code § 513.

Note: Although employers may inform employees of their ability to utilize makeup time, employers are prohibited from soliciting or encouraging employees to request makeup hours.¹⁰³

Employees Covered By A Collective Bargaining Agreement: Hours of work and overtime requirements do not apply to any employee covered by a collective bargaining agreement if the agreement provides: (1) premium wage rates for overtime work; and (2) a cash wage rate of at least 30% more than the minimum wage.

Day of Rest

California Labor Code Sections 551 and 552 require that employers give their employees “one day’s rest” in seven, and prohibit employers from “causing” their employees to work more than six days in seven. This requirement applies on a workweek basis, meaning that California employers may not cause an employee to work all seven days of a workweek. Thus, periods of more than six consecutive days that stretch across more than one workweek are not *per se* prohibited.

Labor Code Section 556 provides an exception to these “day of rest” requirements “when the total hours of employment do not exceed 30 hours in any week or six hours in any day thereof.” In other words, an employee must work (1) 30 or fewer hours in the workweek and (2) six or fewer hours every day of the workweek in order for the employer to be able to cause the employee to work all seven days of the week.

Lastly, an employer “causes” an employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, to independently choose not to take a day of rest. However, the employer must also maintain “absolute neutrality” as to the exercise of an employee’s right to a day of rest.¹⁰⁴

Reporting Time Pay

General Rule: Employees that report to work on a scheduled workday but are not put to work or are given less than half their usual or scheduled day’s work are subject to “reporting time pay” rules. These rules limit a dealer’s ability to unilaterally and suddenly compensate employees less due to a downturn in work for the day. Specifically, employees who report to work must be paid for at least half the usual or scheduled day’s work, but cannot be paid for less than two hours at their regular rate of pay. If employees are required to report to work a second time in a scheduled workday and work for less than two hours, they must be paid for two hours at their regular rate of pay.

Exceptions: The reporting time pay requirements do not apply:

- When a dealer’s operations cannot begin or continue due to threats to employees or property, or when civil authorities recommend that work not begin or continue;
- When public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system;

¹⁰³ See Cal. Lab. Code § 513.

¹⁰⁴ See *Mendoza v. Nordstrom, Inc.*, 2 Cal. 5th 1074 (2017).

- When the interruption of work is caused by an Act of God or other cause not within the employer's control;
- If an employee is not fit to work;
- If an employee has not reported to work on time and is fired or sent home as a disciplinary action;
- If an unexpected or unusual occurrence during off hours makes it impossible for an employer to open for business and it has made every reasonable effort to notify employees not to report to work;
- To an employee who is called to report to work at a time other than the employee's scheduled time while on paid standby; or
- When an employee has a regularly-scheduled shift of less than two hours.

DEALER TIP: CONSIDER THE REPORTING TIME RULES WHEN SENDING YOUR SERVICE TECHS HOME EARLY

During slow periods, some dealers decide to send their techs home early or allow them to take a few hours off. There is nothing unlawful about this practice. However, dealers should closely review California's reporting time rules. A tech who clocks out shortly after his arrival due to a lack of work must be paid the legally-mandated minimum amount of pay under California law.

"Reporting for work" may mean telephoning the employer two hours prior to the start of a shift to determine if an employee should physically come to work. Employees will be owed reporting time pay for this on-call time.¹⁰⁵

On-Call Pay

If employees are on call, and the restrictions on the employees prevent them from effectively engaging in private pursuits, the time spent on call is considered hours worked and must be *paid*. However, a rate other than the employee's regular base rate of pay may be used when paying for on-call work, so long as it is not less than the state minimum wage.

Whether on-call waiting time is spent predominantly for the employer's benefit depends on two considerations: (1) the parties' agreement; and (2) the degree to which the employee is free to engage in personal activities.¹⁰⁶ Factors courts will examine when determining whether employees are free to engage in personal activities include, but are not limited to:

- Whether there was an on-premises living requirement;
- Whether there were excessive geographic restrictions on employee movement;

¹⁰⁵ See *Wards v. Tilly's, Inc.*, 31 Cal. App. 5th 1167 (2019).

¹⁰⁶ See *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508 (2009).

- Whether the frequency of calls was unduly restrictive;
- Whether the employee could easily trade on-call responsibilities with another employee;
- Whether the use of pagers could ease restrictions; or
- Whether the employee has actually engaged in personal activities during on-call time.

Note: All time spent at an assigned worksite while on call is compensable.

DEALER TIP: ON-CALL ARRANGEMENTS CAN BE RISKY

Due to fluctuating business needs, some dealers have traditionally kept certain employees (e.g., service technicians) on call during specified days. These arrangements are subject to intense scrutiny, as there have been many lawsuits alleging that on-call time should be compensable because the employee is under the employer's control and thus not free to engage in personal activities. Any on-call arrangements should be reviewed with counsel to ensure they are legally defensible.

Pay Plans

Gonzalez v. Downtown LA Motors and its Impact on Piece Rate Pay

What Is Piece Rate Pay? Piece rate or piece work is work paid for according to the number of units turned out. In the car dealer context, piece rate pay plans arise most commonly in connection with service technicians who are paid according to the number of "flag hours" they complete based on their repairs, regardless of the number of actual hours worked. Until recently, compensating service techs in this manner was commonplace in the industry.

Why Are Dealers Moving Away from "Flat Rate" Plans? The traditional piece rate model for compensating service technicians was dealt a severe blow in 2013 by *Gonzalez v. Downtown LA Motors, LP*.¹⁰⁷ The court reasoned that "flag hours" only compensate mechanics for time actually spent on repair orders. Thus, any "non-productive time" under a traditional piece rate system (e.g., waiting between jobs, attending staff meetings, etc.) is technically unpaid *regardless of how much the mechanics earn that day*. The court held that instead, service technicians are entitled to *separate* hourly compensation for any time *not* spent performing auto repairs. The *Gonzalez* ruling prompted plaintiffs' attorneys to file dozens of class action lawsuits against car dealerships throughout the state claiming that techs were entitled to back pay to make up for all of the "non-productive time" that they alleged was unpaid.

Rest Periods and Piece Rate Plans: Shortly after the *Gonzalez* decision, the Court of Appeal issued its decision in *Bluford v. Safeway Stores, Inc.*,¹⁰⁸ holding that an employer must separately pay employees for rest periods under piece rate pay plans.

¹⁰⁷ 215 Cal. App. 4th 36 (2013).

¹⁰⁸ 216 Cal. App. 4th 864 (2013).

HOW ARE DEALERS ADAPTING TO THIS LEGAL LANDSCAPE?

In light of *Gonzalez* and *Bluford*, dealers should implement pay plans structured to meet the requirement of those cases. Dealers are strongly advised against continuing to compensate service technicians based on traditional “flat rate” plans whereby techs are only compensated based on the number of flag hours they complete in a given pay period. These pay plans are highly susceptible to legal challenges that techs are not paid for “non-productive time” or for time spent during rest periods.

Many dealers have adapted to these changes by compensating techs on an hourly basis for all time on the clock (including rest periods and time spent waiting between repairs). By compensating techs with a base hourly wage, dealers are much better equipped to defend against claims that techs are not paid for all hours on the clock. Many dealers additionally opt to pay bonuses to techs based on the volume of repairs they complete, which enables them to earn wages similar or identical to those they previously earned under the old pay plans.

With respect to rest periods, the rules (described immediately below) require employers to pay for “rest and recovery breaks” at an average hourly rate that takes into account all earnings. Accordingly, if a technician is paid a base rate of double the minimum wage, his pay for the portion of his shift during which he takes rest breaks (*e.g.*, two 10-minute breaks during a typical eight-hour shift) will be paid at a higher rate if the technician earned other forms of pay (*e.g.*, production bonuses), which increases his average hourly rate.

The rules governing these types of pay plans are highly complex. Plaintiffs’ attorneys, many of whom have directed their attention to dealers following *Gonzalez*, scrutinize these pay plans in order to find technical deficiencies under California law. Accordingly, dealers should consider consulting with legal counsel before implementing their pay plans.

AB 1513: California’s Piece Rate Requirements

In October 2015, Governor Brown signed new legislation that re-wrote the definition and rules governing piece rate compensation in California. This law, Assembly Bill 1513, is the culmination of *Gonzalez* and *Bluford*, as well as many federal district court cases expanding on those holdings. In relevant part, AB 1513 codifies the following basic statutory requirements for the payment of employees on a piece rate basis.

1. Employees must be *separately* compensated for their rest and recovery breaks. These breaks must be paid at an hourly rate no less than the greater of either the applicable minimum wage or the employee’s average hourly pay, taking into account all earnings, for all time worked (exclusive of break time) during the workweek.
2. Employees must be *separately* compensated for “other nonproductive time,” which is defined as “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece rate basis.”¹⁰⁹ Notably, the statute does not define “activity,” and thus does not resolve the practical difficulty created by *Gonzalez* and related cases holding that a piece rate must provide separate compensation for each duty performed.

¹⁰⁹ See Cal. Lab. Code § 226.2.

- a. Employers will still face challenges defining what “activity” is compensated by a piece rate and what closely-related activities are not considered compensated by the piece rate. Employers will have the additional complication of determining what work time is spent in activities that are not “directly related” to the piece rate compensation plan.
- b. That said, this provision does not apply to dealers who pay their employees at least the minimum wage for all hours worked. This provision applies only to dealers using traditional “flat rate” pay plans under which technicians are solely paid based on the number of flag hours/production units completed, regardless of actual time spent on the job. For this reason, many dealers have moved away from traditional “flat rate” plans, as the requirement for tracking “non-productive” time is convoluted and onerous.

Labor Code Section 226.2 provides that this “other nonproductive time” must be compensated at an hourly rate no less than the applicable minimum wage. The statute provides that the amount of “other nonproductive time” to be paid may be determined either by actual records or by the employer’s “reasonable estimate,” but the statute provides no further direction on what differences may exist between the “actual records” or the employer’s “reasonable estimate.” *Note:* Employee wage statements will be required to include the following information, besides that which is already required under existing Labor Code Section 226(a):

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

Salesperson Compensation

How Frequently Can Sales Staff Be Paid Commissions? Commission wages paid to employees of a licensed vehicle dealer can be paid once per month.¹¹⁰

Draws Against Commissions: Traditionally, dealers paid an advance against commissions every week, two weeks, or semi-monthly, followed by a “wash check” at the beginning of the following month paying out any commissions from the prior month to the extent they exceeded the advances or draws. As explained in more detail below, in 2017, the California Court of Appeal decided that workers paid on a commission basis must be separately compensated for legally required rest periods.¹¹¹ While *Vaquero* dealt with the requirement to pay rest breaks in the commission context, the court’s critical analysis of draws against commission is indicative of the stance California courts have taken against these types of pay plans. As such, dealers should consult with counsel regarding the implementation and/or revision of their commission pay plans that rely on draws.

Commission Agreements Must Be in Writing: California law requires that any compensation agreement providing for the payment of commissions must be in writing. They should be provided at the time of hiring, and reissued or updated when there are changes to the commission agreement. In addition, the law requires the written plan to include the method used for calculating commissions and a description of when commissions are earned and how the commissions will be paid. Dealers are advised to collect

¹¹⁰ See Cal. Lab. Code § 204.1.

¹¹¹ *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98 (2017).

a receipt signed by both the employee and the employer indicating that the employee received a copy of the compensation agreement.

Recommended Changes to Commission Agreements: In *Balasanyan v. Nordstrom, Inc.*,¹¹² a California federal district court followed much of the logic in *Gonzalez* with respect to a sales associate commission plan, finding that Nordstrom's commissioned salespeople did not receive minimum wage for time spent in the stockroom or for pre-opening and post-closing activities. Thus, this decision raised similar issues to those asserted in *Gonzalez*, namely that a pay plan based purely on commissions or piece rates may not compensate employees for all hours worked if they perform some activities for which the commissions/piece rate are not intended to pay them. A similar decision was reached in *Vaquero v. Stoneledge Furniture*.¹¹³

The consequences for failing to pay employees for all hours worked, including rest breaks, non-productive time, and overtime (if applicable), can be substantial. In addition to the amounts owed for all rest break and non-productive time for each salesperson over the past four years, a dealer could also be subject to liquidated damages, wage statement penalties, waiting time penalties, and penalties under the PAGA — in addition to any legal defense costs if a current or former employee filed a lawsuit.

Most dealers have revised their pay plans to pay a base hourly rate plus productivity bonus in order to ensure that employees are paid for all hours on the clock. All dealers should consult legal counsel to ensure their pay plans are appropriately crafted to minimize the risk of claims that commissions are only attributable to a portion of duties performed by the dealer's employees and to ensure that rest breaks are being properly paid. To the extent salespersons do not meet the exemption for overtime, all hours worked should be tracked by the dealer and all overtime paid at the appropriate "regular rate."

Meal and Rest Breaks

Meal Periods

Basic Meal Period Obligations: An employer may not employ a non-exempt employee for more than five hours without providing an unpaid, uninterrupted off-duty meal period of at least 30 minutes. A second 30-minute unpaid, off-duty meal period is required for employees who work more than 10 hours in a day.¹¹⁴

Meal Periods Can Be Waived: California law permits employees to waive their right to a meal period. If the total workday does not exceed six hours, the employer and the employee can mutually agree to waive the meal periods. Similarly, if the total workday is less than 12 hours and the employee has not waived his or her first meal period, the employer and employee can mutually agree to waive the second meal period.¹¹⁵

¹¹² 294 F.R.D. 550 (S.D. Cal. 2013).

¹¹³ *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98 (2017).

¹¹⁴ Cal. Lab. Code §§ 226.7, 512; California Wage Order Nos. 1-15, § 11, No. 16, § 10, No. 17, § 9.

¹¹⁵ Cal. Lab. Code § 512.

DEALER TIP: MEAL WAIVERS

California's DLSE advises that waivers need not be in writing, but it is a recommended practice to do so.

What Is the Dealer's Duty? In *Brinker v. Superior Court*,¹¹⁶ it was established that an employer's duty with respect to non-exempt employees is to "provide" a meal period, not to "ensure" a meal period is taken: "[A]n employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." An employer cannot coerce, create incentives for, or encourage employees to skip meal periods. Employees must be allowed to leave the work site, if they desire, during their meal periods.

If an employer permits an employee to work for five hours it must either:

- Provide an off-duty meal period;
- Agree to a mutually agreed upon waiver if the employee will work six or fewer hours; or
- Obtain the employee's written agreement to an on-duty meal period if circumstances permit.

When Should Meal Periods Be Provided? As established in *Brinker*, the first meal period must be provided no later than the end of the fifth hour of work, and a second meal period must be provided no later than the end of the tenth hour of work. These requirements for non-exempt employees are summarized below:

Duration of Shift In Hours	# of Meal Periods	Comments and Dealer Examples
0 to ≤ 5.0	0	An employee who does not work more than five hours in a workday is not provided with a meal period. <i>Example:</i> A service technician works a "half day" from 8:00 a.m. to 12:00 p.m. The dealer is not obligated to provide a meal period.
> 5.0 to ≤ 10.0	1	An employee who works more than five hours in a workday, but who does not work more than ten hours in a workday, is provided with a 30-minute meal period. Employees must take their meal break no later than the end of their fifth hour of work. <i>Example:</i> A dispatcher's lunch lasts only 25 minutes because he is needed back due to an influx of customers at XYZ Auto. Here, there is likely a meal period violation

¹¹⁶ *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

		because the dealer did not provide a full 30-minute meal period.
> 10.0	2	An employee who works more than ten hours in a workday is provided with a second 30-minute meal period. Non-exempt employees must take their second meal period no later than the end of their tenth hour of work. Any meal period waiver will be invalidated if the employee works more than 12 hours. <i>Example:</i> A payroll administrator at XYZ Auto typically works 11 hours on the first day of each month due to the heavy volume of payroll-related tasks. She waives her first meal period, because she prefers to get her work done sooner. She and the dealer also agreed that she would waive her second meal period. In California, this arrangement is unlawful. The second meal period <i>cannot</i> be waived if the first meal period has already been waived.

DEALER TIP: MEAL PERIOD TIMING IS IMPORTANT!

A dealer does not fulfill legal requirements simply by providing an uninterrupted meal period during an employee's shift. That break must be at least 30 minutes long and it must be provided starting before the end of the fifth hour. For instance, an employee who clocks in for work at 8:00 a.m. must be provided a meal period beginning before 1:00 p.m. An untimely or insufficiently long meal period may trigger a meal period violation. Thus, managers should be mindful of when employees started their shifts – particularly where there are staggered schedules – to ensure that meal periods are provided in accordance with California law. This concern is particularly acute for dealerships with service departments open in the evenings. Staggering technicians' shifts is inevitable and the service managers should have a good handle on when each tech should be taking his or her break(s).

Consequences for Failing to Provide Meal Periods: An employer which fails to provide a meal period in accordance with California law is required to pay an additional hour of pay at the employee's regular rate for each workday that the meal period is not provided.¹¹⁷ Employees can pursue remedies for meal period violations by filing a wage claim with the DLSE or retaining an attorney to file a lawsuit in state or federal court.

On-Duty Meal Periods: An "on-duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty (e.g., a security guard stationed alone at a remote site, sole worker in a kiosk). Additionally, a written agreement between an employer and employee is

¹¹⁷ Cal. Lab. Code §§ 226.7, 512; California Wage Orders. In *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858 (2021), the California Supreme Court clarified that the hour of premium pay to be provided for missed meal, rest, and recovery breaks must be calculated using the employee's regular rate of pay, which is also used for calculating overtime pay.

required for on-duty meal periods, and such agreement must state that the employee can revoke the agreement at any time. Any such revocation must be in writing.

Generally speaking, few (if any) positions at automotive dealerships qualify for on-duty meal periods.

Rest Breaks

General Rules: An employer must authorize and permit employees to take an uninterrupted 10-minute paid rest break for each four hours (or major fraction thereof) worked. A rest period is *not* required when the employee's total daily work time is less than three and one-half hours. Breaks should be located in the middle of each work period insofar as practicable. Breaks are counted as hours worked, and so they should not be deducted from employees' wages. Rest periods required by state law also count as hours worked, so employees must be paid for these breaks as well.¹¹⁸ As with required meal periods, an employer cannot require an employee to work during a rest break required by state law. Further, an employee must be relieved of all duties and employers must relinquish control over how employees spend their time during rest breaks.¹¹⁹ The issue of whether employees must be permitted to leave, or can be required to stay on, an employer's premises during rest periods has not been definitively resolved, so it is recommended employees be allowed to leave.

How Many Rest Breaks Should Employees Be Permitted? The California Supreme Court held that employers must "authorize and permit" employees to take rest breaks. The number of rest breaks to which an employee is entitled depends on how many hours he or she works:

Shift Length	Number of 10-Minute Rest Periods
Less than 3.5 Hours	0
3.5 to 6 Hours	1
6+ to 10 Hours	2
10+ to 14 Hours	3

DEALER TIP: KEEPING TRACK OF REST BREAKS?

While employees should clock in and out for unpaid meal periods, the same is not true for rest breaks, which are paid. As long as the dealer's policies clearly explain the rest breaks to which non-exempt employees are entitled and the dealer emphasizes that employees are expected to take these breaks, there should be no need to keep track of exactly when the breaks are taken.

Piece Rate Employees: Piece rate employees must be paid for rest and recovery periods separately from any piece rate compensation. They must be paid the higher of: (1) their average hourly rate

¹¹⁸ See California Wage Order Nos. 1-15, § 12, No. 16, § 11; Cal. Lab. Code § 226.7.

¹¹⁹ *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 269 (2016).

(divide workweek pay, excluding rest and recovery period pay and any overtime premium, by total hours worked during the workweek, excluding rest and recovery periods); or (2) the minimum wage.

Commissioned Employees: In *Vaquero*, the plaintiffs were commission-paid salespersons who earned commissions or a guaranteed draw against those commissions. The draw was designed to compensate them to satisfy California's salesperson exemption. Any draws paid were recouped from future commissions. The court found that the commission agreement did not compensate the salespersons separately for any "non-selling time, such as time spent in meetings, on certain types of training, and during rest periods,"¹²⁰ even though they were paid a guaranteed draw which was intended to compensate them for each hour worked. The court based its reasoning, in part, on the fact that the salespersons were essentially getting paid solely on their commissions whenever they sold more than the amount of their draw, meaning they were only being compensated for time spent on the floor trying to sell and earn commissions, but not other activities such as attending group meetings. As such, the court found that the employer violated California law because it did not compensate the salespersons separately for their rest breaks.

DEALER SPOTLIGHT: REST BREAKS AND COMMISSIONS

Example 1: A sales associate is compensated at \$20/hour for every hour worked and commissions in addition to her hourly wages at a rate of 4% of gross sales. Is she required to receive a separate amount for her rest breaks?

Answer: Under *Vaquero*, it would appear the sales associate already receives compensation for every hour worked, including rest breaks. The issue in *Vaquero* was that the salesperson would essentially only receive their commissioned amounts if they exceeded their draw. The employee would receive the same pay regardless of whether he took a rest break. Here, however, the sales associate is getting paid an hourly amount regardless of what she sells. However, you should consult legal counsel regarding whether the employee needs to be paid a separate amount in addition to her current compensation for rest breaks based on a modified Regular Rate of Pay analysis.

Example 2: A sales associate is compensated at \$20/hour for every hour worked and commissions to the extent they exceed the sales associate's hourly wages. Is she required to receive a separate amount for her rest breaks?

Answer: The sales associate is essentially being paid straight commissions when the commissions exceed her hourly wages. As such, the sales associate would receive the same amount of pay regardless of whether she took a rest break. Thus, under *Vaquero*, the sales associate is entitled to separate compensation for rest breaks. However, you should consult legal counsel regarding whether the employee needs to be paid a separate amount in addition to her current compensation for rest breaks based on a modified Regular Rate of Pay analysis.

Going forward, dealers should re-evaluate their commission plans and consult with counsel to ensure salespersons are being compensated at the minimum wage (or agreed-upon higher rate of pay) for their rest breaks, separate and in addition to their commissions. Dealers have several options available to them to ensure that salespersons are properly compensated for their rest breaks and non-productive time (i.e., time spent attending meetings or trainings), including switching to an hourly plus commissions model.

¹²⁰ See *Vaquero*, 9 Cal. App. 5th 98, 103.

Consequences for Failing to Provide Rest Break: If an employer fails to provide a required rest break, the employee is entitled to one additional hour of pay at the employee's regular rate for each workday that the rest break is not provided.¹²¹

The duty to pay an employee an additional hour of pay for failure to provide required breaks arises immediately and, therefore, should be paid on the paycheck for the pay period when the failure to provide, or authorize and permit the break occurred. Further, the California Supreme Court in *Naranjo v. Spectrum Sec. Servs., Inc.*, held that extra pay for missed breaks constitutes wages that must be reported on statutorily required wage statements during employment, and paid within the statutory deadlines when an employee leaves the job.¹²²

DEALER TIP: HOW DO I COMPLY WITH VAQUERO WITHOUT DRAWING UNNECESSARY ATTENTION TO POTENTIAL PAST LIABILITY?

To ensure compliance with California law, a dealer should reevaluate its draw commission pay plans. If it is determined that rest breaks are not properly paid, it may be difficult to simply pay an additional amount for rest breaks, for example, without causing employees to question whether they should have been paid that extra amount all along. Given this decision's potential impact on your bottom line, dealers may be able to make substantive alterations to their commission pay plans such that any explanation to employees can focus on the dealers' business decision to restructure the commission pay plans as a whole rather than any obligation to begin paying for rest breaks. Dealers are encouraged to seek legal advice if they have concerns about the classification or possible reclassification of one or more employees.

Note: Be careful! In an effort to obtain new clients in the wake of Vaquero, certain plaintiffs' attorneys have attempted to solicit commissioned employees with ads on Facebook or other forms of social media claiming that the employees may not be properly compensated for their rest breaks and recommending that employees contact attorneys to enforce their legal rights. Before taking any remedial action, dealers are advised to consult with counsel regarding potential ways to combat such aggressive solicitation tactics.

Wage Statements

Methods of Payment

The wages of employees may be paid by check, in cash, or by direct deposit in a financial institution of the employee's own choice with a place of business in California. Payment by direct deposit is permitted only if voluntarily agreed to by the employee.¹²³ Payment by scrip, coupon, or in merchandise is prohibited.¹²⁴ If paychecks are used, they must be payable in cash, upon demand, without discount, at an established place of business in California, the name and address of which must be written on

¹²¹ Cal. Lab. Code § 226.7.

¹²² 13 Cal. 5th 93 (2022).

¹²³ See Cal. Lab. Code § 213(d).

¹²⁴ See Cal. Lab. Code § 212(a)(2).

the check. At the time of issuance and for at least 30 days, the funds must be fully available and accessible to the employee.¹²⁵

Basic Requirements

Semi-monthly or when wages are paid, employers must provide each employee with an accurate itemized wage statement, dated and in writing¹²⁶, showing:

- Gross wages earned;
- Total hours worked by the employee (except for any employee whose compensation is solely based on a salary and who is exempt from the payment of overtime);
- The number of piece rate units earned and any applicable piece rate (if the employee is paid on a traditional or modified piece rate basis);
- All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- Net wages earned;
- The inclusive dates of the period for which the employee is paid;
- The name of the employee and the last four digits of his or her Social Security number, or an existing employee identification number other than the full Social Security number;
- The legal entity name and address of the employer (e.g., if the employer is registered with the Secretary of State as "XYZ Auto Dealership, Incorporated," the wage statement cannot say "XYZ Dealer"). The language must be exactly as it is on the Secretary of State website or a valid DBA;
- All applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate by the employee; and
- Amount of paid sick leave available to the employee, or paid time off an employer provides in lieu of sick leave. (Note: This item may be provided in a separate writing provided on the designated pay date with the employee's wage payment.) If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer may indicate "unlimited" on the employee's itemized wage statement.

Note: If an employee worked in excess of his or her normal work period (*i.e.*, overtime), an employer may list the actual hours worked on the next pay stub as itemized corrections. Any corrections set out in a subsequently issued pay stub must state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

Below is a copy of a sample paystub made available by the DLSE for hourly employees:

¹²⁵ See Cal. Lab. Code § 212(a).

¹²⁶ See Cal. Lab. Code § 226.

Pay stub for an employee paid an hourly wage

The name and address of the legal entity that is the employer

Last 4 digits of the employee's social security number or an employee ID number

All applicable hourly rates

The inclusive dates of the period for which the employee is paid

Name of the employee

SMITH AND COMPANY, INC.
123 West Street Smalltown, CA 98765

EMPLOYEE Johnson, Bob

SOCIAL SECURITY NO. XXX-XX-6789

PAY RATE 18.00 regular 2/11/02 to 2/17/02
27.00 overtime

Total hours worked

EARNINGS

	HOURS	AMOUNT
Regular	40.00	720.00
Overtime	2.00	54.00

Gross wages earned

DEDUCTIONS

	AMOUNT
Federal W/H	60.45
FICA	49.67
Medicare	12.36
CA State W/H	10.04
CA State DI	7.12
401k	77.40

All deductions

NET EARNINGS: 556.96

Net wages earned

This pay stub is not applicable to an employee whose compensation is solely based on a salary and who is exempt from payment of overtime under Labor Code section 515(a) or any applicable IWC order.

Additional Pay Stub Requirements for Employees Paid on a Piece Rate Basis

In addition to the wage statement requirements listed above (that apply to all hourly employees), the wage statements of employees paid on a piece rate basis must also contain the following information:

- The total hours of compensable rest and recovery periods, the rate of compensation for those periods, and the gross wages paid for those periods during the pay period; and
- The total hours of other nonproductive time, the rate of compensation for that time, and the gross wages paid for that time during the pay period.¹²⁷

Below is a sample pay stub made available by the DLSE for an employee paid on a piece rate basis.

¹²⁷ See Cal. Lab. Code §§ 226(a), 226.2.

Pay stub for an employee paid on a piece rate basis

The diagram shows a pay stub for **SMITH AND COMPANY, INC.** at 123 West Street Smalltown, CA 98765. The pay period is 2/11/02 to 2/17/02. The employee is **Johnson, Bob** with Social Security No. **XXX-XX-6789**. The pay rate is **PAY RATE**. The piece rate earnings are shown in a table:

PIECE RATE	NO. OF PIECES	AMOUNT
\$0.50	720	\$360.00
\$0.25	864	\$216.00
\$0.10	1,440	\$144.00

The deductions are shown in a table:

DEDUCTIONS	AMOUNT
Federal W/H	60.45
FICA	49.67
Medicare	12.36
CA State W/H	10.04
CA State DI	7.12
401k	77.40

The earnings section shows:

EARNINGS	HOURS
Regular	40.00

The summary section shows:

GROSS EARNINGS:	720.00
TOTAL DEDUCTIONS:	217.04
NET EARNINGS:	502.96

Callouts explain: The name and address of the legal entity that is the employer; Last 4 digits of the employee's social security number or an employee ID number; Inclusive dates of the period for which the employee is paid; Name of the employee; PAY PERIOD; All applicable hourly rates; Piece rate earnings; All deductions; Number of units earned; SOCIAL SECURITY NO.; PAY RATE; Piece rate; EARNINGS; HOURS; Total hours worked; Gross wages earned; Net wages earned.

Electronic Delivery of Wage Statements

The California Labor Commissioner has taken the position that electronically-stored statements that employees can read on screen or print and read as a hard copy satisfy the requirement under California law that wage statements be “in writing”. Moreover, electronic delivery is permissible if:

- Each employee retains the right to elect to receive a written paper stub or record;
- Employees who are provided with electronic wage statements are able to easily access the information and convert the electronic statements into hard copies at no expense;
- The employer complies with state wage and hour recordkeeping requirements (e.g., maintaining wage and personnel records for four years following termination);
- The employer retains pay records for at least four years, and the records are accessible by employees and former employees; and
- The electronic wage statement system incorporates proper safeguards to ensure the confidentiality of the employee's personal information.¹²⁸

Advanced Earnings

Paying “advances” on commissions and bonuses, such that a dealer reserves the right to “charge back” the salespersons if a sale does not ultimately close, has always been a common practice in the

¹²⁸ See California Division of Labor Standards Enforcement, Op. Ltr. 2006.07.06 (2006); Cal. Gov’t. Code § 12946.

industry. However, with the recent changes in the way that California courts interpret commission plans, the use of chargebacks against future commissions has not yet been tested legally. Plaintiffs' lawyers have argued that wage statement violations exist as a result of a failure to accurately report all earned income. That argument is based on the premise that, because advances on commissions and bonuses are not reported on the salespersons' later wage statements (after they become fully "earned"), those later wage statements are inaccurate and thus subject the employer to a penalty. This clearly would place employers between a rock and a hard place. On one hand, dealers risk incurring later wage statement penalties by advancing commissions and bonuses. On the other hand, plaintiffs' attorneys would undoubtedly argue that a dealer was unlawfully withholding wages for 90 days if an employer decided only to pay commissions once they become earned (*i.e.*, after the chargeback period had expired). Dealers are recommended to talk to counsel to discuss potential ways to address this issue.

Consequences of Failing to Furnish Accurate Itemized Wage Statements

An employee is presumed to have suffered injury, and so the employer has the burden of showing no injury resulted, if the employer provided a wage statement that did not fully comply with all of the requirements of Labor Code Section 226(a) listed above on page 65 and the employee cannot promptly and easily determine certain information from the wage statement alone (*e.g.*, the amount of gross or net wages paid during the pay periods, among other items).¹²⁹ Employees who are injured by a knowing and intentional failure to comply with the record-keeping provisions shall recover the greater of their actual damages or \$50 per employee for the first pay period where the employer does not provide all necessary information, and \$100 per employee for any subsequent pay period where the necessary information is lacking, not to exceed an aggregate penalty of \$4,000. An employee may also recover attorneys' fees and costs. Failure to comply with this requirement may also result in a penalty payable to the State of California of up to \$1,000 per employee for each violation.

Timing of Payment

California requires most employees who are not exempt from the receipt of overtime to be paid at least twice monthly. Wages for the 1st through the 15th day of the month must be paid between the 16th and the 26th day of the month, and wages for the 16th through the last day of the month must be paid between the 1st and the 10th day of the following month. Wages for weekly, bi-weekly, and other semi-monthly pay periods must be paid within seven days of the close of the pay period. Payment for overtime hours earned in one payroll period is to be provided no later than the payday for the next regular payroll period, but keep in mind that such payments must be accompanied by an additional explanation of the nature of the payment.¹³⁰

The failure of a California employer to pay all wages that are due every pay period may result in the imposition of a penalty of up to \$200 per employee per pay period plus 25% of the wages not paid to each employee each pay period.¹³¹ A failure to pay the minimum wage is subject to a separate penalty of \$100 per employee per pay period for an initial violation, and \$250 per employee per pay

¹²⁹ See Cal. Lab. Code § 226(e)(2).

¹³⁰ See Cal. Lab. Code § 204(b).

¹³¹ See Cal. Lab. Code § 210. Effective January 1, 2020, AB 673 amended section 210 to authorize employees seeking wages owed to bring an action either to recover statutory penalties against the employer or to seek to enforce civil penalties under the PAGA, but not both.

period for any subsequent violation.¹³² Other provisions of the Labor Code are subject to penalties in the same amount, with lower penalties for initial violations and higher penalties for subsequent violations.¹³³ Vehicle salespeople may be paid commissions once per month, such as a monthly reconciliation.

Payment upon Separation/Termination

Basic Rule: An employee who is terminated or laid off must be paid all wages, including accrued vacation/PTO, due on the day of discharge. An employee who resigns must be paid within 72 hours of ceasing work, unless the employee has given 72 hours' advance notice of quitting, in which case the final wages must be paid when the employee ceases work. An employee who resigns with less than 72 hours' notice is entitled to have his or her final paycheck mailed if requested by the employee. The obligation to pay "discharged" employees immediately upon cessation of employment applies equally to employment relationships that end as a result of the completion of a specific assignment or term of employment.¹³⁴

Waiting Time Penalties: The willful failure to pay a terminated employee in a timely fashion usually subjects a dealer to a penalty, consisting of the continuation of the employee's wages on a day-by-day basis until the final paycheck is ready, or until a maximum time limit of 30 days is reached. The waiting time penalty is generally subject to the same three-year statute of limitations as for the recovery of the unpaid wages.¹³⁵ A willful failure to pay is considered to be a conscious failure to pay, and no proof of "evil" intent is required.

Note: An employer cannot condition the payment of final wages on an employee's execution of a release.¹³⁶

The waiting time penalty may be excused if there is a good faith dispute regarding whether or not additional wages are due, or if there are strong equitable considerations, such as where the obligation to pay turns upon a previously unresolved legal issue.

The waiting time penalty is calculated by dividing an employee's weekly pay by five and paying the resulting amount for each day that a penalty is due.¹³⁷ The maximum penalty of 30 days' pay may, as a result, exceed what an employee would earn in a month.

CAUTION!

The consequences of failing to pay every penny due to an employee upon termination can be draconian. For instance, if the final paycheck is miscalculated by less than ten dollars, that mistake could cost the employer more than ten thousand dollars in waiting time penalties. Don't skimp on calculation of the final paycheck; cutting corners could come back to bite the dealer.

¹³² See Cal. Lab. Code § 1197.1. Effective January 1, 2020, SB 688 amended section 1197.1 to allow the Labor Commissioner to cite an employer's failure to pay minimum wages under a contract.

¹³³ See Cal. Lab. Code § 225.5; see also *Amaral v. Cintas Corp.*, 2, 163 Cal. App. 4th 1157 (2008).

¹³⁴ See *Smith v. Superior Court (L'Oreal USA, Inc.)*, 39 Cal. 4th 77 (2006).

¹³⁵ See Cal. Lab. Code § 203; see also *Pineda v. Bank of America, N.A.*, 50 Cal. 4th 1389 (2010).

¹³⁶ *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338 (2010).

¹³⁷ *Mamika v. Barca*, 68 Cal. App. 4th 487 (1998).

Other Wage & Hour Issues

Business Expenses

General Obligation: A dealer must reimburse an employee for all “necessary expenditures and losses” incurred in the performance of the employee’s duties. A dealer may meet its obligation in this regard by designating a portion of an employee’s regular compensation payments as an expense reimbursement, if: (1) the designation is appropriately documented, (2) the amount is sufficient to reimburse the employee’s expenses, and (3) the employee can challenge the amount of the reimbursement.¹³⁸ If a dispute arises out of a disagreement about expenses due, and expenses are awarded to the employee, the employee may also recover prejudgment interest, costs, and attorneys’ fees.¹³⁹ The obligation to reimburse expenses cannot be waived.

Note: An employee is not entitled to the reimbursement of legal fees incurred when the employee is sued by his or her employer for breach of contract and the diversion of corporate opportunities (e.g., a corporate officer breaches her duty of loyalty by redirecting a business opportunity rightfully belonging to the dealer to herself instead).

Cell Phone Service

In *Cochran v. Schwan’s Home Service*, the California Court of Appeal held that, if employees must make work-related calls on a personal cell phone, California Labor Code Section 2802 requires an employer to reimburse them a reasonable percentage of their phone bill. Because of the differences in phone plans and work-related scenarios, calculating reimbursement is left to the trial court and parties in each particular case.¹⁴⁰

DEALER TIP: EMPLOYEE CELL PHONE USAGE

Dealers who require their employees to use cell phones as part of their job should consider providing them with company cell phones, eliminating the need to reimburse them for their personal phones. If cell phone usage is not required, the employer can spell that out in writing to head off any future claims by the employee that they had to use their phones for work. If usage of personal cell phones for business purposes is unavoidable, dealers should determine a fair way to compensate the employees for their monthly coverage. Courts will not necessarily second-guess an employer’s reasonable calculations; paying *something* for cell phone reimbursement is infinitely better than paying *nothing*.

Uniforms

What Are Dealers’ Obligations? When a California employer requires an employee to wear a uniform, the state Wage Orders oblige the employer to provide (and usually to launder) the uniform, regardless of how much the employee is paid. An employer need not clean a uniform where the uniform needs no more than simple wash and wear care. A uniform is defined as wearing apparel and accessories of

¹³⁸ *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007).

¹³⁹ See Cal. Lab. Code § 2802.

¹⁴⁰ 22 Cal. App. 4th 1137 (2014).

distinctive design or color. For instance, if the dealer requires technicians to wear customized uniforms (e.g., name and dealership logo emblazoned on the same uniform for every technician), there will be an obligation to provide such uniforms to employees. Conversely, a simple requirement that technicians wear a solid-colored shirt and jeans would likely not warrant a requirement that the dealer pay for employees' outfits.

Generally speaking, under the regulations of California's Occupational Safety and Health Administration, an employer is responsible for providing all necessary safety equipment for employees, such as gloves and safety shoes.

Travel Time

Travel Between Job Sites: Generally, travel to and from work is not compensable. However, if employees are required to report to the dealership premises prior to traveling to an off-site work location, such as a training, time spent traveling from the premises to the off-site location is compensable.

Out-Of-Town Travel: All time spent on out-of-town travel is compensable, regardless of whether it occurs during or outside normal working hours. Time spent driving, flying, or otherwise traveling to and from the out-of-town location is compensable, including time spent waiting to purchase a ticket, waiting for luggage, waiting for a plane to take off, and other like circumstances. However, when an employee takes a break from travel to eat, sleep, or participate in other personal activities, such time is *not* compensable.

Travel in Employer-Provided Vehicles: When use of company vehicles to travel to and from work is compulsory, such travel time is compensable as "hours worked" because the employee is subject to the control of the employer.

Vacation Compensation

Accrued Vacation Must Be Paid Out Upon Termination: California law requires all accrued and unused vacation compensation to be paid to an employee upon termination, unless otherwise provided in a collective bargaining agreement. There is no statutory definition of vacation, but it is generally considered as the right to take time off from work without the condition of being ill or a certain holiday occurring.

Vacation Accrual: Vacation compensation accrues in increments on a daily basis, and an employer cannot defer the accrual of vacation compensation to the end of a month or the end of a year to avoid the pro rata accrual of vacation benefits. Subject to these limitations, an employer can generally determine the rate at which employees accrue vacation compensation, and are free to decide whether employees accrue any vacation compensation at all. The amount of vacation time that an employee can use at any one time, and the dates vacation time can be used, are also subject to the employer's approval.

"Use It or Lose It" Provisions: Because all unused vacation compensation must be paid out on termination, a dealer cannot enforce a "use it or lose it" provision in a vacation plan. However, an employer can enforce a reasonable cap on the accrual of vacation compensation that would allow an employee to retain all previously-earned vacation compensation, but that would not allow the employee to earn any additional vacation compensation until some of the previously-earned amount

had been used. An employer can also cash out an employee at the end of each year by paying the employee the cash value of all earned and unused vacation.

CAUTION!

Some dealers' vacation policies are challenged because they contain unlawful "use it or lose it" provisions, typically drafted for employers in states where such provisions are permitted.

A California-compliant vacation policy ensures that an employee is not divested of vacation time already accrued, and instead implements a "reasonable cap" (usually two times the annual vacation accrual).

For instance, assume a dealer allows its employees to accrue 10 vacation days per year and places an annual accrual cap of 20 vacation days. Once an employee reaches 20 days of accrued vacation, he or she will no longer continue to accrue more vacation days. Accrual will recommence only after some vacation is used, thereby bringing the employee's accrual under the 20-day cap.

Enforcement of Wage & Hour Laws

Administrative Procedures before the Labor Commissioner

Claims Need Not Be Filed with the Labor Commissioner: The Division of Labor Standards Enforcement ("DLSE") may also commence an investigation without having first received an employee complaint. It may proceed without a complaint:

- If suspected retaliation has occurred while adjudicating a wage claim;
- During a field inspection; or
- In the case of suspected immigration-related threats.

The DLSE may petition a county Superior Court for injunctive relief, if it finds reasonable cause. If, after an investigation, it determines that a violation has occurred, it must issue a written citation to the person responsible for the violation. The citation must describe the nature of the violation and the wages and penalties due, including all appropriate relief, such as directing the person cited to cease and desist from the violation and take any action necessary to remedy the violation, including:

- Rehiring or reinstatement;
- Reimbursement of lost wages with interest; or
- Posting notices to employees.

There is a review process by which a person may obtain review of a citation by the DLSE and the Superior Court. An employer that willfully refuses to comply with a final order to hire, promote, or otherwise restore an employee or former employee or who otherwise refuses to comply with an order, is subject to a penalty of \$100 per day for each day the employer is in noncompliance, up to a maximum of \$20,000. Any penalty will be paid to the affected employee. Employers in California are prohibited from making rules, regulations, or policies that would prevent an employee from disclosing information to a

government or law enforcement agency, to a person with authority over the employee, or to another employee with the authority to investigate a violation or noncompliance, among other things.

Claims Filed with the Labor Commissioner: California gives employees the choice of either using a specialized administrative procedure to resolve wage claims, or filing their claims directly in court. An employee can pursue wage claims that are based on an alleged violation of the law (such as violation of minimum wage or overtime laws) or on an alleged violation of a contract (such as violation of bonus and commission agreements) through either process.

The Labor Commissioner may take assignments of claims for wages lost as the result of demotion, suspension, or discharge for lawful conduct during non-working hours away from the employer's premises.¹⁴¹ It is not clear whether this provision exists to provide broad protections for off-duty conduct, or just serves as a further mechanism to enforce existing laws.

What Happens During a Wage Claim Hearing?

- A wage claim is filed by completing a relatively simple form. A notice that the claim was filed and a summary description of the claim are mailed to the dealer, along with an invitation to reply.
- Usually a voluntary conference is scheduled, at which time the facts underlying the claim will be reviewed and the possibility of settling the matter will be investigated. If the claim is not settled, then the Labor Commissioner may set the matter for a hearing or dismiss the claim so that the employee can pursue it in court.
- If the employee pursues the matter in court, he or she must file a civil lawsuit and the litigation process typically takes at least one year.
- If the Labor Commissioner sets the matter for a hearing, a notice of a formal hearing and complaint will be mailed to the employer. An answer to the complaint should be filed by the employer within ten days.
- The hearing itself is conducted informally. However, a record of the hearing is maintained by the Labor Commissioner, and an employer must have all relevant documents and witnesses available at the hearing. The Labor Commissioner typically takes the matter under submission and will issue a written ruling a few weeks after the hearing.

What Happens If a Dealer Loses the Hearing? A party that loses before the Labor Commissioner can go to court by appealing the adverse decision, posting a bond with the court in the amount awarded by the Labor Commissioner, and obtaining a trial date. The appeal is heard *de novo*, meaning no weight is attributed to the Labor Commissioner's decision and either side can add or remove claims or defenses on appeal. The appealing party must pay the other party's costs and attorneys' fees if it does not prevail in court. An employee will be considered to prevail on appeal if the employee is awarded any amount. For these reasons, appealing a Labor Commissioner award can be costly and risky.

¹⁴¹ See Cal. Lab. Code § 96(k).

LABOR COMMISSIONER CLAIMS: FREQUENTLY ASKED QUESTIONS

Do I need an attorney to represent me? No. Although you are free to have counsel represent you, counsel is not required. The Labor Commissioner provides an avenue by which employees can file wage-related claims without an attorney, if desired.

Who conducts the hearing? The Labor Commissioner's office assigns a hearing officer, who has sole authority and discretion for the conduct of a hearing. The hearing officer is not a judge.

What happens if the dealer does not respond to a complaint or attend a hearing? The hearing officer will decide the matter based on the evidence he or she received from the claimant.

Can the dealer present witnesses or evidence? Yes. Although the hearing officer is not bound by formal rules of evidence, it will accept and evaluate evidence and testimony.

What are the drawbacks of appealing an adverse Labor Commissioner award? The dealer will need to post a bond for the full amount awarded by the Labor Commissioner. Thereafter, the dealer will need to retain counsel and be ready to pay litigation defense fees. Finally, if the dealer does not prevail on appeal, it will also need to pay the employee's attorneys' fees.

California's Private Attorneys General Act

Overview of PAGA

The California Labor Code Private Attorneys General Act of 2004 ("PAGA") allows private litigants to pursue claims for penalties under the Labor Code "on behalf of" the state.¹⁴² PAGA, sometimes referred to as the "bounty hunter's law," specifically authorizes the pursuit of such penalties through representative actions on behalf of purportedly "aggrieved employees." For example, a disgruntled service technician can file a representative action for penalties under PAGA on behalf of himself or herself and all current and former service techs employed by the dealer within a year of the complaint's filing.

PAGA representative claims¹⁴³ are increasingly common because they cannot be compelled to arbitration¹⁴⁴ and serve as a vehicle to obtain penalties on behalf of a large group of current and former employees, even if only one plaintiff has initiated legal action. However (at least as of publication time), there is a good argument that the PAGA claim should be stayed (put on hold) where individual claims address the same issues.

California courts have continuously affirmed an expansive construction of PAGA. For example, the California Supreme Court permitted broad early discovery in actions brought under PAGA.¹⁴⁵ Specifically, the court held that the contact information of the individuals a PAGA plaintiff purports to

¹⁴² See Cal. Lab. Code §§ 2698 *et seq.*

¹⁴³ See Chapter 7 below for discussion on class waivers and arbitration regarding compelling arbitration of claims under PAGA on an individual basis.

¹⁴⁴ See *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348 (2014).

¹⁴⁵ See *Williams v. Superior Court*, 3 Cal. 5th 531 (July 13, 2017).

represent is generally discoverable without the plaintiff making any showing on the merits of his or her claims. While the employer has a substantial burden of proof to establish any defenses to producing contact information, such as those based on undue burden and the need to protect employee privacy rights, the California Supreme Court reaffirmed that employers can still proffer these defenses to limit such discovery.

The California Supreme Court has also rejected any suggestion that PAGA required an “injury” to pursue claims for civil penalties in court on behalf of others. The only requirements for standing under PAGA are: (1) the plaintiff is or was an employee; and (2) the employee “sustain[ed] a Labor Code violation committed by his or her employer.”¹⁴⁶

Prerequisites for a PAGA Claim

Generally speaking, PAGA actions for violations of many Labor Code provisions may only be commenced if:

- The aggrieved employee gives notice to the Labor and Workforce Development Agency (“Agency”) and the employer; and either
 - The Agency declares that it will not take action, or takes no action in the following 65 days; or
 - After assuming responsibility for pursuing the alleged violation within the first 65 days, the Agency either takes no further action in the 158 days following the employee’s notice, or decides that no citation shall be issued.

No action may be commenced if the Agency issues a citation within the 158-day period. Section 2699.5 contains most of the Labor Code’s basic minimum wage, overtime, meal period, and timing of wage payment provisions, as well as some occupational safety and health provisions.

Remedies under PAGA

Penalties under PAGA vary depending on the underlying violation. If the Labor Code provision on which the PAGA claim rests provides for a civil penalty, then an employee can seek that penalty on behalf of himself or herself as well as on behalf of other aggrieved employees. If the predicate Labor Code section does not already provide a stated civil penalty, the PAGA penalty is equal to \$100 per employee per pay period for the initial violation, and \$200 per employee per pay period for each subsequent violation. The California Court of Appeal has found that PAGA penalties can be awarded without establishing the elements for the underlying violation.¹⁴⁷ PAGA also provides the trial court with discretion to reduce the amount of civil penalties if, “based on the facts and circumstances of a particular case, to do otherwise would result in an award that is unjust, arbitrary, or oppressive or confiscatory.”

¹⁴⁶ See *Adolph v. Uber Technologies, Inc.*, 14 Cal. 5th 1104 (2023); *Kim v. Reins Int’l California, Inc.*, 9 Cal. 5th 73 (2020).

¹⁴⁷ See *Lopez v. Friant & Associates, LLC*, 15 Cal. App. 5th 773 (2017). Specifically, the court found that where a plaintiff sought PAGA penalties for a Labor Code Section 226 violation, the plaintiff need not show that the violation caused “injury” or resulted from “knowing and intentional” conduct, as required for a penalty award under Labor Code Section 226. See also *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal. App. 5th 667 (2018) (finding it was error to dismiss a PAGA claim predicated on a violation of Section 226 because injury is not a requirement for civil penalties).

DEALER SPOTLIGHT: THE GROWING NUMBER OF PAGA CLAIMS AGAINST DEALERS

In light of *Gonzalez* and other recent case law adverse to dealers, PAGA claims against dealers are becoming much more prevalent. Although claims under PAGA are representative in nature, litigants do not need to satisfy some of the onerous procedural requirements associated with class action lawsuits. In particular, litigation against dealers has largely targeted those who implement traditional “flat rate” pay plans which compensate service technicians based solely on flag hours completed. The one-year statute of limitations under PAGA means that the period of potential liability begins only one year prior to a complaint’s filing. Accordingly, dealers are advised to revise their pay plans as soon as possible. By doing so, they can minimize the amount of time that any non-compliant policies or practices fall within the liability period of a lawsuit (*e.g.*, if a pay plan is revised six months from now and a lawsuit is filed 12 months from now, the old, non-compliant pay plan will only overlap with the liability period for six months).

Chapter 4: Laws Prohibiting Discrimination, Harassment, Retaliation



California's "at-will" employment doctrine, as described in Chapter One, does not provide dealers with a full defense against wrongful termination claims. Federal, state, and local laws prohibit terminations and other "adverse actions" based on a variety of protected criteria. This chapter reviews this expansive patchwork of anti-discrimination, harassment, and retaliation laws applicable to California car dealerships. Specifically, this chapter discusses:

- Protected categories under Title VII and the Fair Employment and Housing Act;
- Anti-discrimination provisions in the Labor Code, National Labor Relations Act, and other state and federal statutes; and
- Anti-harassment and anti-bullying training.

Statutory Restrictions on Discrimination

Title VII and the Fair Employment and Housing Act

Interplay of Federal and State Law: Title VII of the Civil Rights Act of 1964 ("Title VII") is the federal anti-discrimination law. Title VII provides that it is unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to the terms and conditions of his employment because of certain protected criteria. Title VII encompasses the following protected criteria: race, color, religion, sex, and national origin.¹⁴⁸

Note: Title VII applies to employers only if they have 15 or more employees.

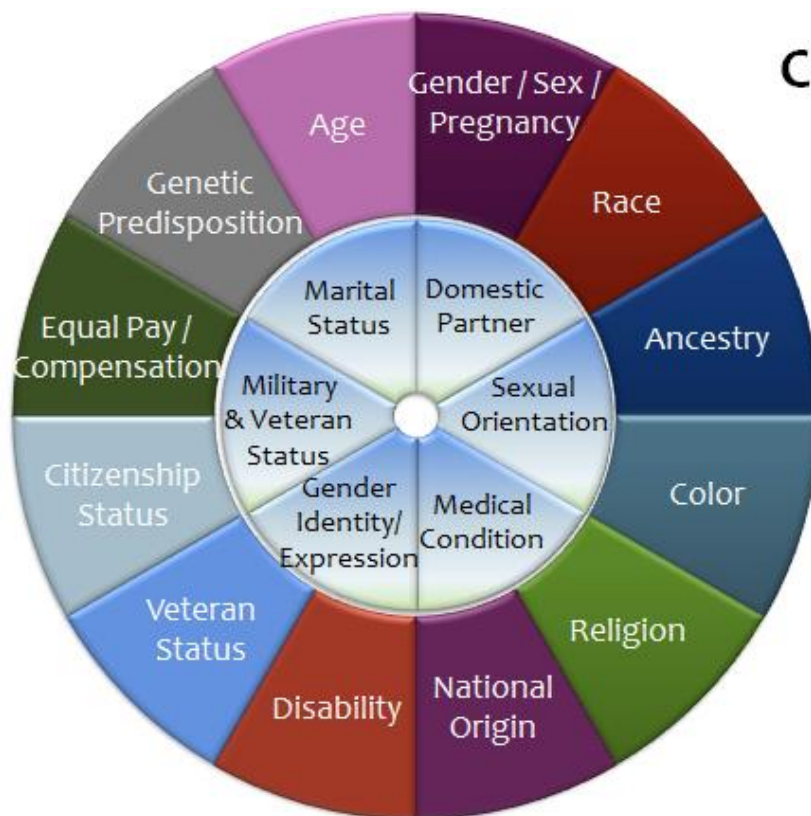
The Fair Employment and Housing Act ("FEHA"), California's anti-discrimination law, is far more protective of employees. In contrast to Title VII, its protections extend to employers with five or more employees. It also contemplates many more protected criteria, such as sexual orientation. The diagram below illustrates FEHA's broad reach in comparison with federal law.

In *Raines v. U.S. Heathworks Medical Group*,¹⁵ Cal. App. 5th 268 (2023), the California Supreme Court issued a ruling that expands the definition of employer under FEHA. On March 16, 2022, the U.S. Court of Appeals for the Ninth Circuit certified to the Supreme Court of California the following question: Does California's Fair Employment and Housing Act, which defines "employer" to include "any person acting as an agent of an employer," permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination? The California Supreme Court limited its ruling to the question posed and answered in the affirmative, concluding that an employer's business entity "agents" may be considered "employers" for purposes of the statute, and then holding that such an agent may be held directly liable for employment discrimination in violation of the FEHA when it has at least five employees and "when it carries out FEHA-regulated activities on behalf of an employer." The California Supreme Court noted it was not deciding the significance, if any, of an employer's control over an agent's acts that gave rise to a FEHA violation, nor did the court decide whether its conclusion

¹⁴⁸ See 42 U.S.C. § 2000e2(a)(1).

extends to business-entity agents that have fewer than five employees. It also did not address the scope of a business agent's potential liability pursuant to FEHA's adding-and-abetting provision.¹⁴⁹

Federal



California



Protected Categories under FEHA: FEHA provides protection from harassment or discrimination because of:

- Age (40 and over);
- Ancestry;
- Color;
- Religious Creed (including religious dress and grooming practices and all aspects of religious belief, observance, and practice);
- Denial of Family and Medical Care Leave;
- Disability (mental and physical), including HIV and AIDS, and being regarded as disabled;
- Marital Status, including domestic partnership;
- Medical Condition, including cancer and genetic characteristics;
- Genetic Information (including information known about an employee's family members)¹⁵⁰;

¹⁴⁹ See Michelle Barrett Falconer, Marko Mrkonich, Niloy Ray, Alice Wang, and Cristina Piechocki, *California Supreme Court's Expansion of "Employer" under FEHA Could Have Implications for AI Regulation*, Littler ASAP (Aug. 25, 2023).

¹⁵⁰ Discrimination in employment based on genetic information is also banned by the Unruh Civil Rights Act, Cal. Civ. Code § 51.

- Military and Veteran Status;
- National Origin, includes a variety of prohibited conduct including language use restrictions, discrimination based on an individual's possession of a driver's license);
- Race;
- Reproductive health decisionmaking;
- Sex, including pregnancy, childbirth, breastfeeding, and medical conditions related to pregnancy, childbirth, or breastfeeding;
- Gender, Gender Identity, and Gender Expression, including Transgender status; and
- Sexual Orientation.

The FEHA also prohibits discrimination on the grounds that an individual is perceived to belong to one of these protected classes or is associated with someone who falls under a protected class.¹⁵¹ Additionally, the FEHA makes it an unlawful employment practice for an employer to discharge, harass, or otherwise discriminate against any person because the person has opposed any practices prohibited under the FEHA or because the person has filed a complaint, testified, or assisted in any proceeding under the FEHA.¹⁵²

Under amended regulations promulgated by the Fair Employment and Housing Council, pre-employment inquiries regarding an applicant's availability for work on certain days and times (including scheduling) shall not be used to ascertain the applicant's religious creed, disability, or medical condition. Further, the regulations also provide that there is a presumption of age discrimination whenever a facially neutral practice has an adverse impact on an applicant(s) or employee(s) age 40 or older, unless the practice is job-related and consistent with business necessity.¹⁵³

Remedies for Unlawful Discrimination: The remedies available to a current or former employee who successfully proves a case of employment discrimination are many and varied. For example, Title VII gives courts broad authority to remedy employment practices that have violated that Act, and courts have ordered injunctive relief, back pay, and affirmative relief including promotions and reinstatement; issued orders directing employers to change or abolish employment practices; and awarded reasonable attorneys' fees and costs to prevailing plaintiffs. The Civil Rights Act of 1991 amended Title VII, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act to allow compensatory and punitive damages up to certain limits based on the size of the employer. Under the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act ("EPA"), an individual may recover unpaid wages and liquidated damages in an equal amount, plus reasonable attorneys' fees and costs. California's FEHA allows not only the relief provided by Title VII and other federal laws, but also *unlimited* compensatory and punitive damages.

¹⁵¹ See Cal. Gov't Code § 12926(o).

¹⁵² See Cal. Gov't Code § 12926(h).

¹⁵³ See Cal. Code Regs. tit. 2 §§ 11016, 11063, 11075, 11076, 11078, 11079.

California Labor Code

Various provisions in the California Labor Code prohibit discrimination in employment based on a number of public policy grounds. For example, the Labor Code prohibits:

- Discrimination against applicants and employees for engaging in lawful off-duty conduct;¹⁵⁴
- Discrimination against employees who file a claim with the Labor Commissioner;¹⁵⁵
- Retaliation against an employee who files for or receives workers' compensation benefits;¹⁵⁶
- Discrimination against employees for serving on a jury;¹⁵⁷
- Maintaining any policy that prevents employees from disclosing the amount of their wages to other persons, or from discharging, disciplining, or otherwise discriminating against employees who do disclose the amount of their wages;¹⁵⁸
- Adopting or enforcing rules, regulations, or policies forbidding or preventing employees from engaging or participating in politics or becoming candidates;¹⁵⁹
- Coercing or influencing employees to adopt or follow any particular political action or activity;¹⁶⁰
- Retaliation against an employee who discloses information to a government or law enforcement agency;¹⁶¹ and
- Discrimination against employees who file an Occupational Safety and Health Administration complaint.¹⁶²

Under California's Senate Bill 497, signed by the Governor in October 2023, retaliation is now presumed unless rebutted. SB 497 creates a rebuttable presumption of retaliation in favor of the employee's claim if adverse action is taken against an employee within 90 days of filing or participating in a Labor Commissioner claim, filing or participating in a Fair Pay Act claim, engaging in lawful, off duty conduct, or other actions protected by the Labor Code. Notably, the employee has no burden of proof at the outset; they only need show protected activity, and a subsequent adverse action. The employer then has the burden of rebutting the presumption.¹⁶³

Health & Safety Code

California's Health & Safety Code provides that the results of a blood test detecting whether an individual has been exposed to the HIV virus shall not be used to determine insurability or suitability for

¹⁵⁴ See Cal. Lab. Code § 96(k).

¹⁵⁵ See Cal. Lab. Code § 98.6.

¹⁵⁶ See Cal. Lab. Code § 132(a).

¹⁵⁷ See Cal. Lab. Code § 230.

¹⁵⁸ See Cal. Lab. Code § 232.

¹⁵⁹ See Cal. Lab. Code § 1101.

¹⁶⁰ See Cal. Lab. Code § 1102.

¹⁶¹ See Cal. Lab. Code § 1102.5. As discussed herein, SB 497 amends Sections 98.6, 1102.5, and 1197.5 to create a rebuttable presumption of retaliation if an employee is disciplined or discharged within 90 days of certain protected activity.

¹⁶² See Cal. Lab. Code § 6310.

¹⁶³ See Bruce Sarchet and Joy Rosenquist, *Calling all California Employers! The latest Employment Laws from the Golden State*, Littler Insight (Oct. 26, 2023).

employment.¹⁶⁴ Under this statute, employers may neither reject nor terminate from employment individuals whose blood tests reflect that they have been exposed to the HIV virus or suffer from AIDS, nor deny them coverage under an insurance policy. The statute also provides civil and criminal penalties for willful disclosure of the test results.

Union Activity or Sympathies

Under the National Labor Relations Act, it is unlawful to discourage (or encourage) union activities or sympathies by discrimination in regard to hire, tenure, or any term or condition of employment. For instance, dealers may not discharge, lay off, refuse to hire, or discipline employees because they are pro-union.

Sex Discrimination

Scope: As a general rule, California law prohibits any discrimination based upon sex or gender in the employment context.

DEALER TIP: GENDER IDENTITY AND EXPRESSION PROTECTED

The California Legislature has expanded protections against sex or gender discrimination to transgendered applicants and employees, as well as those whose gender identity or expression is different from their birth gender.¹⁶⁵ Therefore, dealers should use caution before imposing any restrictions tied to gender identity, expression, or transgendered employees (for example, with respect to dress and appearance standards and restroom usage).

Burden: The courts have made clear that to establish discrimination, employees must show that they were treated differently based on sex. For example, in 2001 a California court rejected a woman's gender discrimination claim where a male supervisor issued warnings to the employee about her failure to meet performance standards, placed her on administrative leave when she refused to appear for a short-notice performance meeting, and then terminated her for insubordination the day after the cancelled meeting.¹⁶⁶ Although the female employee was subsequently replaced by a male, the court found that undisputed evidence demonstrated she was discharged for poor performance and insubordination, not gender. Because the former employee failed to show that her supervisor treated male branch managers less harshly, her claims failed.

Similarly, in *Hughes v. Alameda Hospital*, a data processor at a hospital claimed that she was subject to sex discrimination because her supervisor required her to work a rotating shift.¹⁶⁷ The court found that there was no evidence of discrimination because she was treated no differently than her male predecessor or her female successor.

¹⁶⁴ See Cal. Health & Safety Code § 120980(f).

¹⁶⁵ See Cal. Gov't Code §§ 12926(r), 12940(a), 12949.

¹⁶⁶ See *Strohn v. Associates Fin. Servs. Co.*, 2001 U.S. Dist. LEXIS 14706 (N.D. Cal. 2001).

¹⁶⁷ 2001 U.S. Dist. LEXIS 6053 (N.D. Cal. 2001).

CAUTION!

Federal agencies frequently target the auto industry with gender-related rhetoric.

“Sexual discrimination and harassment against women in traditionally male-dominated industries, such as the auto industry, are still unfortunate realities,” according to acting EEOC Chairman Stuart Shimaru (2009-2010).

Dealers should make sure that all supervisory employees know the consequences that can attach due to claims of gender discrimination.

Dealer Tip: Beware of “Boys’ Club” Atmosphere...

Two male employees of a Northern California car dealer were terminated in 2011 and filed a lawsuit for wrongful termination, sexual harassment, retaliation, and related claims, asserting that their employer and certain managers “participated in and/or fostered a sexually charged and drug and alcohol infused environment where management would force [plaintiff] and other employees to go to strip bars and brothels and would try to get [plaintiff] and others to receive sexual acts.” The complaint alleged that the employees were subjected to homophobic slurs and fired because they would not participate in the alleged “boys’ club” activities. Particularly in an industry where men hold many management positions, these kinds of claims can easily gain traction. Dealers need to be extra cautious to treat all employees with dignity and respect, and insure that a high degree of professionalism is maintained at work and at after-hours work events.

Age Discrimination

Under federal and state law, dealers cannot discriminate against an applicant or employee on the basis of age (40 years or older). Although many Baby Boomers have retired, there are still millions of older employees in the workforce, and dealers must pay particular attention to make sure that their policies and practices do not unfairly favor younger employees. A Fair Employment & Housing Counsel interpretive regulation, effective July 1, 2020, provides guidance on unlawful age-based conduct in recruiting. Examples of unlawful recruitment tactics include a maximum experience limitation; a requirement that candidates be “digital natives” (individuals who grew up using technology from an early age); or a requirement that candidates maintain a college-affiliated email address. Prohibited pre-employment inquiries include requests for age, date of birth, or graduation dates. Online job applications that contain age-based cut-off dates and automated selection criteria algorithms that have the effect of screening out applicants age 40 and older are prohibited.¹⁶⁸

Race Discrimination

Federal and state law also protect applicants and employees from discrimination based on their race. Alleged “customer preference” (e.g., “customers in this area don’t expect to buy cars from people of color”) cannot justify disparate treatment based on race.

Under the CROWN Act, the definition of race under the FEHA includes traits historically associated with race, including hair texture and “protective hairstyles.” The term “protective hairstyles includes, but is

¹⁶⁸ See Cal. Code Regs, tit. 2, §§ 11076, 11078, 11079.

not limited to, styles such as braids, locks, and twists.” While there are narrow exceptions, employers should not maintain or enforce grooming, hiring, or other policies that discriminate against individuals based on such traits.¹⁶⁹

For example, if XYZ Auto hires an ethnically diverse employee and soon thereafter decides to terminate the employee due to poor performance, and the dealer is sued by the terminated employee for discrimination, the dealer can make a number of arguments. The dealer may try to argue that the person would not have been hired in the first place if race was a factor (e.g., “we have nothing against African Americans, which is obvious because the sales manager’s race hasn’t changed since his date of hire”), but although this argument may have some common sense appeal, it is not a legally significant defense to a claim of race discrimination.

DEALER TIP: MAINTAIN DOCUMENTATION OF POOR PERFORMANCE

Dealers would be wise to always keep documentation of poor performance in employee files so that those records can be used as a defense for the dealership in the case of any claims of discriminatory termination practices.

In *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), the U.S. Supreme Court found that race-conscious admissions practices at Harvard and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Harvard/UNC decision does not directly impact employment law, or extend to the implementation of voluntary Inclusion, Equity & Diversity (“IE&D”) initiatives by private employers. But it may impact the way the public, employees, the judiciary, government agencies, and the plaintiffs’ bar evaluate such programs. In recent years, employers have faced challenges to their hiring, promotion, or termination practices under the lens of “reverse racism” and “reverse discrimination.” In light of the impact of the Harvard/UNC decision on college admissions, similar challenges to race-based decisions — or perceived employment practices based on any protected category — may impact employers as well. Dealers, therefore, should be careful to speak with legal counsel about existing or proposed IE&D initiatives to ensure they comply with the evolving federal and state anti-discrimination laws.¹⁷⁰

¹⁶⁹ See Cal. Gov’t Code § 12926(w).

¹⁷⁰ See Jim Thelen, Alysha Asghar Dotson, Kelli Fuqua, and Lysette Roman, *U.S. Supreme Court Strikes Down Race-Conscious Admission – What Does it Mean for Employers?*, Littler Insight (June 30, 2023).

DEALER SPOTLIGHT: “UNTHINKING DISCRIMINATION” IS UNACCEPTABLE

In the 1990s, the owner of several dealerships in the Central Valley was sued by the EEOC on behalf of a former manager who claimed he was demoted and discharged for opposing discriminatory hiring practices, and several African American applicants who claimed they were not hired because of their race. The court examined qualitative and quantitative employment data, including not only historical hiring figures at the dealerships, but also what types of positions African Americans were usually hired into (*e.g.*, managerial, sales, clerical, maintenance, etc.). The EEOC’s suit against the dealer prevailed, with the court holding that an aggregation of similar data from each of the dealerships showed a pattern and practice of discrimination. The court rejected the owner’s argument that he was unaware of any discrimination because each of the dealerships was under the operational control of its respective general manager. The court noted: “Unthinking discriminatory treatment can meet the threshold of intentional discrimination, because an employer has some obligation under Title VII to think.”¹⁷¹

National Origin Discrimination and “English Only” Rules

FEHA prohibits employers from establishing and maintaining English-only policies that limit or prohibit the use of any language in the workplace, unless two conditions exist:

- The language restriction is justified by a “business necessity;” and
- The employer has notified its employees of the circumstances and time when the language restriction must be observed as well as the consequences of violating the policy.

Business necessity means an overriding legitimate business purpose so that the language restriction is necessary to the safe and efficient operation of the business. The language restriction must effectively fulfill the business purpose, and no less discriminatory alternative must be available.

Disability Discrimination

FEHA prohibits California employers from discriminating against applicants or employees on the basis of physical or mental disability, whether actual or perceived. Specifically, FEHA provides that a disability is a mental or physical condition “which in any way limits” one or more major life activities (in contrast to the federal ADA provision, which states that a disability must “substantially” limit a major life activity).¹⁷² A condition will sufficiently limit a major life activity if it makes the achievement of the activity “difficult.” “Major life activities” are to be construed broadly, and include working, as well as physical, mental, and social activities.

Definition of Disability: FEHA specifically names certain chronic or episodic conditions as disabilities: HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.¹⁷³ This list is not meant to be all-inclusive; rather, it is illustrative.

¹⁷¹ *EEOC v. Rodriguez*, Civil Action No. CV-F093-5049-OWW-SSH (E.D. Cal. 1994).

¹⁷² *Colmenares v. Braemer Country Club, Inc.*, 29 Cal. 4th 1019 (2003).

¹⁷³ See Cal. Gov’t Code § 12926.1(c).

FEHA explicitly excludes certain conditions from coverage under the law: sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.¹⁷⁴

Reasonable Accommodations and the Interactive Process: Under state law, like federal law, employers are required to make reasonable accommodations for disabled individuals. However, only qualified disabled persons need be accommodated (i.e., those disabled persons who are able to perform the essential functions of the job with reasonable accommodation).¹⁷⁵ In 2006, a California appellate court held that an employer who “regards” a worker as “disabled,” even when that worker is not actually disabled, has the duty to engage in an interactive process and to provide reasonable accommodations.¹⁷⁶ Soon thereafter, the California Supreme Court ruled that plaintiffs claiming disability discrimination under FEHA have the burden of proving that they are able to perform the essential functions of the job with or without reasonable accommodation.¹⁷⁷

The types of accommodations that federal and state law require fall into two categories: (1) alterations that make facilities readily accessible to the disabled (e.g., installation of a ramp to enable wheelchair access); and (2) a restructuring of the job by reassignment, transfer, modification of equipment, or an alteration of duties; unpaid leave time may also be a reasonable accommodation.¹⁷⁸

Interactive Process: Employers are under a statutory obligation to engage in a “timely, good faith, interactive process” with an employee or applicant to determine if effective reasonable accommodations may be made.¹⁷⁹ This process is to be undertaken in response to a request for accommodation by an employee or applicant with a “known physical or mental disability or known medical condition.”¹⁸⁰ The employee need not use any “magic words” to make the request (e.g., he or she does not have to use the term “accommodation”); virtually any indication by the employee of a possible need for an accommodation can trigger the interactive process. When considering reasonable accommodations, the focus should be on the essential functions of the job and whether the employee can perform them, rather than on the nature and extent of the employee’s disability or symptoms. Employers can require pertinent data from medical providers, but again these inquiries should be narrowly tailored to the requirements of the job rather than a broader diagnosis of the employee’s disability.

It is important to note that accommodations need only be reasonable; an employer is not required to undergo undue hardship in making an accommodation. In determining whether an accommodation would create undue hardship, the nature and cost of the accommodation, along with the size and nature of the employer’s operations, must be evaluated. For example, a dealer could be required to accommodate a visually impaired office worker with appropriate assistive devices and other reasonable measures (e.g., software to convert written text into audio messages), but the same employee likely could not be reasonably accommodated to perform the essential functions of a driver or service technician.

¹⁷⁴ See Cal. Gov’t Code § 12926(l)(6).

¹⁷⁵ See Cal. Gov’t Code §§ 12940(a)(1), (2); *Hastings v. Department of Corr.*, 110 Cal. App. 4th 963 (2003).

¹⁷⁶ See *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34 (2006).

¹⁷⁷ See *Green v. State of California*, 42 Cal. 4th 254 (2007).

¹⁷⁸ See Cal. Gov’t Code § 12926(p).

¹⁷⁹ See Cal. Gov’t Code § 12940(n).

¹⁸⁰ See Cal. Gov’t Code § 12940(n).

DEALER TIP: EMPLOYER'S SPECULATIVE CONCERNS DO NOT AMOUNT TO UNDUE HARDSHIP

The long-time finance director of a luxury car manufacturer in Washington state was diagnosed with throat cancer. He underwent a successful surgical procedure known as a laryngectomy, where his vocal cords were removed and he was then able to speak using a prosthetic voice box. Although the employee was released to return to work with no restrictions, the owner of the company terminated his employment. The owner claimed that reinstatement would present an “undue hardship,” speculating that the employee would not be able to do his job as well as he had before the surgery, and the company’s business could be impacted because customers would find the voice box “unappealing.” The finance director filed a lawsuit in federal court for disability discrimination and wrongful termination, and in 2018 won a jury award of \$5 million.

Unlike other protected categories (e.g., age, sex, race, etc.), which an employer generally can defend by demonstrating that it treats every employee the same as every other employee, claims of disability discrimination and failure to accommodate may not be susceptible to the same defense. For example, company rules might require all employees to start work at 8:00 a.m. and prohibit the consumption of any beverages at the employees’ work stations; but a disabled employee taking medication for a mental illness may require reasonable accommodations that conflict with the rules, such as a later start time and the ability to have a glass of water available at all times because of side-effects from the medication.

DEALER SPOTLIGHT: ADA PROTECTS “PERCEIVED” DISABILITIES

A California dealership was sued by the EEOC in Sacramento in 2020 on behalf of a title clerk who was terminated while she was being tested for cancer. The clerk missed several days of work due to a sudden illness, and then advised management that she had been in the hospital undergoing various tests for cancer. When she returned to work – with a full medical release – her employer told her she was fired, advising her to “focus on her health.” The EEOC’s lawsuit against the dealership alleged that the clerk was terminated because the employer “perceived” her to have cancer. Pursuant to a consent decree, the clerk was awarded \$150,000 for lost wages and emotional distress. According to the EEOC’s District Director, “Federal law prohibits employers from terminating individuals purely out of fear that those individuals may have a disability.”

Lactation Accommodation

A reasonable amount of break time that may run concurrently with mandated paid rest breaks must be provided for lactating mothers. Additional required time may be necessary to accommodate lactating mothers, and this additional time is unpaid. Employers must make reasonable efforts to provide appropriate, private space for mothers to express milk, other than the company bathroom.¹⁸¹

Religious Discrimination

Scope of Protection: FEHA provides that an employer may not refuse to hire or otherwise discriminate in the terms, conditions, or privileges of employment because of an employee or applicant’s religious

¹⁸¹ See Cal. Lab. Code §§ 1030-1033.

creed.¹⁸² Religious creed includes all aspects of religious belief, observance, and practice.¹⁸³ Since January 1, 2013, this includes "religious dress practice" and "religious grooming practice." *Religious dress practice* includes "the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." *Religious grooming practice* includes "all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed."¹⁸⁴ Religious creed discrimination may be found to occur where:

- The plaintiff employee had a *bona fide* religious belief;
- The employer was aware of that belief; and
- The belief conflicted with an employment requirement.¹⁸⁵

Accommodation: If an employee can demonstrate the elements of a religious creed discrimination claim, the burden is then on the employer to initiate good faith efforts to accommodate the religious belief or observance, or to show that it is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of its business. For instance, in *California Fair Employment & Housing Commission v. Gemini Aluminum Corp.*, the plaintiff requested time off to attend a Jehovah's Witness convention. The employer denied the plaintiff's request for time off, and, according to the court, the employer made no attempt to accommodate him. The court found the employer liable for religious creed discrimination as well as for retaliation because the employer terminated the plaintiff's employment after he complained about the denial of his request for time off.

BEWARE!

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015), the retailer refused to hire an otherwise qualified applicant because her Islamic headscarf would violate the retailer's dress code. The U.S. Supreme Court rejected the retailer's argument that an applicant cannot establish disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for a religious accommodation. Rather, the court held that the applicant need only show that her need for an accommodation was a motivating factor in the employer's decision. As such, dealers should ensure hiring policies are in line with this decision.

In a more recent decision, the U.S. Supreme Court clarified the undue hardship standard governing religious accommodation claims under Title VII. *Groff v. DeJoy*, 600 U.S. 447 (2023). The *Groff* decision created a new and much higher standard than the previous de minimis standard set forth in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). "[T]he Supreme Court held that showing 'more than a de minimis cost,' as the phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII of the Civil Rights Act of 1964. Under Title VII, an employer that denies a religious accommodation must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. Courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular

¹⁸² See Cal. Gov't Code § 12940(a).

¹⁸³ See Cal. Gov't Code § 12926(q).

¹⁸⁴ Cal. Gov't Code § 12926(q).

¹⁸⁵ See *California Fair Emp't & Hous. Comm'n v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004 (2004).

accommodations at issue and their practical impact in light of the nature, size and operating cost for an employer.”¹⁸⁶

Military Discrimination

The federal Uniformed Services Employment and Reemployment Rights Act (“USERRA”) prohibits discrimination in the terms, conditions, or privileges of employment against a person on the basis of past military service, current military obligations, or intent to serve. The California Military and Veterans Code was recently amended to add the language “terms, conditions, or privileges of employment” to conform with USERRA. Thus, under the amended law, employers are prohibited from:

- Discharging or otherwise discriminating against an employee in the terms, privileges, and conditions of employment because he/she is a member of the state or U.S. military or is ordered to duty or training; or
- Dissuading, preventing, or stopping any person from enlistment or from accepting a warrant or commission in the state military forces by threat or injury to the person with respect to the terms, conditions, or privileges of employment because of enlistment or acceptance of a warrant or commission.

Harassment in the Workplace

Prohibition of Harassment: Just as Title VII and FEHA prohibit discrimination on a number of bases, as mentioned earlier in this chapter, they also prohibit harassment on those bases. Harassment is defined as:

- Verbal harassment (such as epithets, derogatory comments, or slurs);
- Physical harassment (such as assault or physical interference with movement or work);
- Visual harassment (such as derogatory cartoons, drawings, or posters); and
- Sexual favors (such as unwanted sexual advances that condition an employment benefit upon an exchange of a sexual favor).¹⁸⁷

The FEHA’s ban on all forms of harassment also covers unpaid interns, volunteers, and independent contractors.¹⁸⁸

Employer Liability for Harassment by Managers and Supervisors: Under California law, employers are strictly liable for all acts of sexual harassment by a supervisor. In other words, employers can be liable to the same degree to which supervisors are for acts of sexual harassment committed by supervisors, even if the employer was not on notice of the supervisor’s misconduct. While an employer cannot avoid liability for sexual harassment by a supervisor, an employer can nonetheless limit the amount of damages awarded to an employee based on the doctrine of avoidable consequences. This defense allows an employer to plead and prove that it took appropriate steps to prevent and address

¹⁸⁶ 600 U.S. 477; see Dionysia Johnson-Massie, Laura Saracina, N. Brenda Adimora, and Jim Paretti, *Nearly 50 Years Later, the Supreme Court “Clarifies” the Undue Hardship Standard in Religious Accommodation Claims*, Littler Insight (June 30, 2023).

¹⁸⁷ See Cal. Code Regs. tit. 2, § 11019(b).

¹⁸⁸ See Cal. Gov’t Code § 12940(j).

harassment, but that the employee unreasonably failed to take advantage of those protections. To prevail on this defense, the employer must prove three elements:

- 1) The employer took reasonable steps to prevent and correct workplace sexual harassment;
- 2) The employee unreasonably failed to use the preventive and corrective measures that the employer provided; and
- 3) The reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.¹⁸⁹

In order to take advantage of the avoidable consequences doctrine, the employer should be prepared to show that it adopted appropriate anti-harassment policies and communicated essential information to its employees concerning the policies and implementing procedures.

Revisit Sexual Harassment Policies in the Wake of the #MeToo Movement

Unlawful sexual harassment, long a problem in the workplace, has become one of the most visible employment issues in corporate America. Victims of sexual harassment are emboldened to speak up, as they should. In turn — and in remarkable numbers — business leaders in many industries are being called out for alleged bad behavior and forced to step down. The resulting emotional turmoil, business disruption, and injury to personal reputations are causing significant damage to businesses, internally and externally, and to many individuals involved. Businesses face huge legal and reputational risks if they turn a blind eye to perpetrators at any level of the organization, but especially at the top. In today's climate, the wisest business practice will be to proactively ferret out inappropriate behavior and end it swiftly and decisively. Dealers should consult with counsel to craft a plan to address these issues head-on by, *inter alia*: (1) reviewing the existing anti-harassment policy and auditing the effectiveness of complaint reporting mechanisms and anti-retaliation precautions; (2) identifying vulnerabilities by harnessing complaint data, both historical and current, to see if there are particular locations or units that have a higher rate of complaints; (3) conducting an anonymous employee survey; and/or 4) focusing on anti-harassment training for all employees.

Note: Cal. Gov't Code Section 12923(a), which was codified by SB 1300, enacted January 1, 2019, declared the Legislature's intent regarding the standard of review to be used for evaluating sexual harassment claims. Under Section 12923(a), a "plaintiff need not prove his or her tangible productivity has declined as a result of harassment. It is sufficient to show that the harassment so altered the working conditions to make it more difficult to do the job."

Liability for Harassment by Coworkers, Clients, or Customers: An employer is responsible for acts of harassment by nonsupervisory coworkers where the employer knows, or should have known, of the harassment and failed to take immediate and appropriate remedial action.¹⁹⁰

Mandatory Harassment Training: Under the FEHA, employers of five or more employees are obligated to provide:

- At least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees; and

¹⁸⁹ See *State Dept. of Health Svc. v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003).

¹⁹⁰ See Cal. Gov't Code § 12940(j)(1).

- At least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within six months of their assumption of a position.

Each employee must thereafter receive training and education once every two years.¹⁹¹ For seasonal and temporary employees, or any employee that is hired to work for less than six months, an employer must provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. In the case of a temporary employee employed by a temporary services employer to perform services for clients, the temporary services employer must provide the training, not the client.¹⁹²

The training and education required by this law must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment. It must also address the remedies available to victims of sexual harassment in employment. The training and education must include practical examples aimed at instructing supervisors in the prevention of harassment and must be presented by trainers or educators with knowledge and expertise in the prevention of harassment. The required training and education program must also contain a component on harassment based on gender identity, gender expression, and sexual orientation. The program must include practical examples of harassment based on gender identity, gender expression, and sexual orientation, and must be presented by trainers or educators with knowledge and expertise in those areas.¹⁹³

The FEHA administrative regulations establish extensive requirements for the content of the training, the qualifications of the trainer, the level of interactivity, and the manner in which length of training is measured. Employers are required to track employee compliance by keeping records of any harassment training, and the regulations include specific requirements for the contents of the employer's training records.¹⁹⁴

DEALER TIP: ANTI-HARASSMENT TRAINING

Dealers should utilize the “training year” to reiterate their complete anti-harassment, anti-discrimination, and anti-retaliation policies. It is also important for dealers to reinforce that all forms of discrimination and harassment are unlawful and impermissible under company policies. Such training will support a defense that an employer took “all reasonable steps necessary” to prevent harassment, discrimination, and retaliation. These trainings are particularly critical in the dealership setting, where many midlevel managers do not have prior management experience or meaningful exposure to human resources protocols and practices.

Anti-Bullying Training: Covered employers are also required to include prevention of abusive conduct as a component of the two-hour minimum required harassment training. Supervisors must receive ongoing abusive conduct prevention training every two years.¹⁹⁵ The FEHA regulations set forth extensive and specific requirements for the content of the abusive conduct prevention training component. While there is not a specific amount of time or ratio of the training that needs to be

¹⁹¹ See Cal. Gov’t Code § 12950.1(a).

¹⁹² See Cal. Gov’t Code § 12950.1(h)(1); Cal. SB 1343 (2018).

¹⁹³ See Cal. Gov’t Code § 12950.1(c).

¹⁹⁴ See Cal. Code of Regs. tit. 2, § 11024(b), (c).

¹⁹⁵ See Cal. Gov’t. Code § 12950.1(b).

dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.¹⁹⁶ The CRD will develop and publish separate online training courses for supervisory and nonsupervisory employees. An employer may develop its own training module or may direct employees to view the CRD online training courses, and this will comply with and satisfy the employer's obligations as set forth in Sections 12950 and 12950.1.¹⁹⁷

Anti-Discrimination & Harassment Policy Requirements

In addition to the mandatory training and education requirements, the FEHA requires all employers to take "reasonable steps to prevent discrimination and harassment from occurring."¹⁹⁸ Employers must ensure a workplace free of sexual harassment by:

1. Posting the CRD's workplace discrimination and harassment poster in a prominent and accessible location in the workplace;¹⁹⁹
2. Posting a poster developed by the CRD regarding transgender rights in a prominent and accessible location in the workplace;²⁰⁰
3. Distributing a copy of the CRD-185 brochure on sexual harassment to all employees;²⁰¹ and
4. Developing and implementing a written harassment, discrimination, and retaliation prevention policy.²⁰²

The FEHA regulations set forth extensive requirements for the content of the written prevention policy.²⁰³ A claim that mandated information did not reach a particular individual or individuals does not, in and of itself, result in the liability of any employer to any present or former employee or applicant in a sexual harassment action. Conversely, an employer's compliance with these requirements does not insulate the employer from liability from claims asserted by any current or former employee or applicant.²⁰⁴

Employers must disseminate the harassment, discrimination, and retaliation prevention policy using one or more of the following methods:

- Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;
- Sending the policy via email with an acknowledgment return form;
- Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;
- Discussing policies upon hire and/or during a new hire orientation session; and/or

¹⁹⁶ See Cal. Code of Regs. tit. 2, § 11024(c)(2)(M).

¹⁹⁷ See Cal. Gov't. Code § 12950.1(j), (k); Cal. SB 1343 (2018).

¹⁹⁸ Cal. Gov't. Code § 12940(k); Cal Code Regs. tit. 2, § 11023(a).

¹⁹⁹ The poster is available from the CRD at <https://hrnt.jhu.edu/policies/Posters/California/ca%20disc.pdf>.

²⁰⁰ Cal. Gov't. Code § 12950(a)(2).

²⁰¹ The CRD-185 brochure is available at <https://calcivilrights.ca.gov/posters/>.

²⁰² Cal. Gov't. Code § 12950(b); Cal Code Regs. tit. 2, § 11023(b).

²⁰³ Cal Code Regs. tit. 2, § 11023(b), (c).

²⁰⁴ Cal. Gov't. Code § 12950(d).

- Any other way that ensures employees receive and understand the policies.²⁰⁵

Finally, the regulations require employers whose workforce includes 10% or more non-native-English-speaking employees to issue the anti-discrimination and harassment policies in each such language.²⁰⁶

Retaliation

FEHA and various other laws prohibit employers from retaliating against employees for filing employment discrimination charges, for assisting others in filing them, or for opposing unlawful employment practices. To prevail in a retaliation action, an employee must prove:

- 1) He or she engaged in a protected activity, such as filing a complaint of discrimination;
- 2) The employer subjected him or her to an adverse employment action, such as a demotion or termination; and
- 3) A causal link exists between the protected activity and the employer's action.²⁰⁷

CAUTION!

The validity of the underlying protected activity (*e.g.*, whether a complaint of discrimination or harassment is strong or weak) does not affect the merits of an ensuing claim of retaliation triggered by that activity. A dealer sued for sexual harassment and retaliation could prevail on the harassment claim, but lose on the retaliation claim if the judge or jury were to find that the employer took an adverse employment action in response to an employee's complaint of harassment, *even if the harassment complaint was meritless*.

Recent court decisions have gone so far as to advise that an employer's failure to act in response to an employee's complaints may constitute an adverse action by the employer. In *Birschtein v. New United Motor Manufacturing, Inc.*, a male forklift driver made sexual comments to a female assembly line worker, who complained to management.²⁰⁸ After she complained, the driver stopped making remarks and instead began to drive by and stare at the female. She complained again, and a supervisor investigated her complaint but did not take corrective action because he concluded that the actions did not warrant discipline. The court ruled that although the driver, a coworker, retaliated against the female assembly worker by his constant staring, the employer could also be liable for retaliation because it failed to take effective action to stop the coworker's conduct.

²⁰⁵ Cal Code Regs. tit. 2, § 11023(c).

²⁰⁶ Cal Code Regs. tit. 2, § 11023(d).

²⁰⁷ See *Flait v. North Am. Watch Corp.*, 3 Cal. App. 4th 467 (1992).

²⁰⁸ 92 Cal. App. 4th 994 (2001).

DEALER SPOTLIGHT: RETALIATION COMBINED WITH OTHER CLAIMS

In 2006, an auto dealership with an African American manager hired a white male employee to work in the finance department. As soon as the dealership hired him, the new employee filed an age discrimination complaint against his *prior* employer (another car dealer). The African American manager then fired the new employee for failing to get along with a co-worker. The new (and now former) employee turned around and sued the manager and the dealership, claiming that the proffered reason for his termination was a pretext for race discrimination, and that he had also been fired because the dealer sought to punish him for suing the other dealership where he had formerly been employed. The court rejected the claims of race discrimination, but found sufficient evidence to support the former employee's claims that he had been fired as punishment for his protected activities (*i.e.*, suing his prior employer).²⁰⁹

²⁰⁹ See *Rowan v. Stone Mountain Chrysler-Jeep, Inc.*, No. 1:04-CV-3568-JOF-CCH, 2006 U.S. Dist. LEXIS 55117 at *64 (N.D. Ga. Jun. 29, 2006).

Chapter 5: Leaves of Absence and Workplace Safety



Dealers are not immune from California's onerous array of leave and accommodation statutes, which are becoming more complicated with every year. This chapter summarizes many of the various leave laws that may apply to your operations on the federal, state, and local levels. Topics covered include:

- Family and medical leave;
- Pregnancy disability leave;
- Workers' compensation; and
- Safety.

Family and Medical Leave

Coverage and Eligibility

Employer Coverage: Unlike like the federal Family Medical Leave Act ("FMLA"), which covers all employers with 50 or more employees, the California Family Rights Act ("CFRA") is a state law, administered by the Civil Rights Department ("CRD"), and it applies to employers that directly employ

five or more people to perform services for a wage or salary. Full-time and part-time employees, and those on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.²¹⁰

Note: The employees need not all work in California to trigger coverage of an employer under CFRA.²¹¹

The CFRA requires covered employers to provide time off for personal illness, to attend to the illness of a family member, and in connection with the birth or adoption of a child. Eligible employees (as defined below) can take the equivalent of up to 12 weeks of leave per year.

Employee Eligibility: Under California law, Employees with 12 months of service, who worked 1,250 hours during the 12-month period prior to the commencement of the leave, are eligible.²¹² For purposes of calculating the 12-month length of service requirement, employment periods prior to a break in service of seven years or more do not have to be counted when determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary.²¹³ In addition, for an employee who takes CFRA for baby bonding following a pregnancy disability leave, the 1,250-hour eligibility is measured from the first day of pregnancy disability leave.

Note: An employee may become CFRA-eligible while out on a leave of absence.²¹⁴ If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave during which other benefits or compensation are provided by the employer, the week counts as a week of employment.²¹⁵

Kin Care: California also has a Kin Care law which allows employees who accrue sick leave to take half of their sick leave accrued annually to care for an ill close family member. Employees can take Kin Care to care for a spouse, registered domestic partner, parent, or child (includes biological adopted, foster, step, legal ward, or child of a registered domestic partner). Pursuant to an amendment adopted in 2020 (AB 177), the choice to designate the use of sick leave for kin care is in the employee's sole discretion. Employers may not have an absence control policy that counts authorized sick leave as time off under the policy. The Kin Care law does not extend the maximum period of leave to which an employee is entitled under the CFRA or FMLA.²¹⁶

Purposes and Length of Leave

Permissible Reasons for Leave: Permissible reasons for taking leave under CFRA include birth or placement of a child for adoption or foster care; serious health condition of the employee; or serious health condition of a child, parent, spouse, registered domestic partner, or registered domestic partner's child (effective January 1, 2021, this includes grandparent, grandchild, and sibling).²¹⁷

²¹⁰ Cal. Gov't Code § 12945.2(c)(2); Cal. Code of Regs. tit. 2, § 11087(d); 29 U.S.C. § 2611(4)(A)(i); 29 C.F.R. § 825.104; Cal. SB 1383 (2020).

²¹¹ See Cal. Gov't Code § 12945.2(a); see also Cal. Code of Regs. tit. 2, § 11087(d).

²¹² See Cal. Gov't Code § 12945.2(a), (b); see also Cal. Code of Regs. tit. 2, § 11087(g).

²¹³ See Cal. Code of Regs. tit. 2, § 11087(e)(2).

²¹⁴ See Cal. Code Regs. tit. 2, § 11087(e)(3).

²¹⁵ See Cal. Code Regs. tit. 2, § 11087(e)(5).

²¹⁶ See Cal. Lab. Code §§ 233-234.

²¹⁷ See Cal. Gov't Code § 12945.2; see also Cal. Fam. Code §§ 297, 297.5.

Length of Leave: Up to 12 workweeks in a 12-month period.²¹⁸ If an employee has a serious health condition that also constitutes a disability under FEHA and cannot return to work at the conclusion of his or her CFRA leave, the employer has an obligation to initiate the interactive process with the employee to determine whether an extension of leave would constitute a reasonable accommodation under FEHA.²¹⁹

Previously, parents employed by the same employer could be limited to a total of 12 workweeks of leave to bond with a newborn or newly-placed child. Effective January 1, 2021, the above-mentioned section was repealed. The employer may not limit two parents' entitlement to CFRA leave for any other qualifying purpose. For example, parents employed by the same employer each may take 12 weeks of CFRA leave if needed to care for a child with a serious health condition.²²⁰

Leave for the birth or placement of a child must be concluded within 12 months of the birth or placement.²²¹

Reduced Schedule and Intermittent Leave: Leave taken due to a serious health condition may be taken intermittently or on a reduced-schedule basis only when medically necessary.²²² When an employee requests intermittent or reduced-schedule leave based on planned medical treatment of the employee's own health condition or a family member's health condition, or when an employer agrees to permit intermittent or reduced-schedule leave for baby bonding, an employer may require that the employee be transferred temporarily to an available alternative position with equivalent pay and benefits that better accommodates the recurring periods of leave. The alternative position need not be one of equivalent duties.²²³ Leave taken for birth or placement of a child need not be taken in one continuous period. The minimum duration of leave taken for the birth or placement of a child is two weeks, but an employer must grant a request for a CFRA leave of less than two weeks on any two occasions.²²⁴

Employer Obligations

Designation of Leave: The employer must respond to an employee's leave request within five business days from the time the employer has enough information to determine whether the leave is being requested for a qualifying reason. It is the employer's responsibility to designate leave, paid or unpaid, as CFRA-qualifying, based on information provided by the employee. An employer may not retroactively designate leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee.²²⁵

Reinstatement: Upon return, the employee must be reinstated to the same or comparable position. "Comparable" generally means the position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. The job

²¹⁸ See Cal. Gov't Code § 12945.2(a); see also Cal. Code Regs. tit. 2, § 11087(g).

²¹⁹ See Cal. Code Regs. tit. 2, § 11093.

²²⁰ See Cal. Gov't Code § 12945.2(q); see also Cal. Code Regs. tit. 2, § 11088; Cal. SB 1383 (2020).

²²¹ See Cal. Code Regs. tit. 2, § 11090(d).

²²² See Cal. Code Regs. tit. 2, § 11090(e).

²²³ See Cal. Code Regs. tit. 2, § 11090(e)(1).

²²⁴ See Cal. Code Regs. tit. 2, § 11090(d).

²²⁵ See Cal. Code Regs. tit. 2, § 11091(a).

must be performed at the same or geographically proximate work site, and ordinarily means the same shift or same or equivalent work schedule.²²⁶ An employee must be reinstated with the same seniority as when the leave commenced for purposes of layoff, recall, promotion, job assignment, and other seniority-related benefits.²²⁷

Reinstatement is guaranteed even if the employee has been replaced during leave or his or her position has been restructured to accommodate the employee's absence. Further, if an employee somehow became unqualified for his or her former position while on leave, the employee must be afforded an opportunity to requalify for the position. For example, if an employee's job duties require a license that lapsed as a result of having to take leave, the employee must be allowed the opportunity to renew the license.²²⁸

Benefits: CFRA leave does not constitute a break in service for purposes of seniority or any employee benefit plan.²²⁹

An employer is required to maintain coverage under any group health plan for up to 12 workweeks per 12-month period, at the level and under the conditions of coverage as if the employee had not taken leave.²³⁰ The CFRA regulations and the pregnancy disability leave law regulations together create an obligation to continue group health coverage for up to a maximum of seven months for a woman who takes both a pregnancy disability leave and a leave protected by the CFRA. This computation results in a maximum of four months plus 12 weeks of benefits coverage, for a total of roughly 29.33 weeks of coverage.²³¹

While the employee is out on CFRA-related leave, employers must continue to pay health insurance premiums as though the employee had continued working. The employer may recover the premiums if the employee fails to return from leave for reasons other than continuation, recurrence, or onset of a serious health condition or because of "other circumstances beyond the control of the employee."²³²

Pregnancy Disability Leave

The requirement to provide pregnancy disability leave applies to employers with five or more employees, but there is no minimum service requirement on the part of the employee. Pregnancy disability leave provides for up to four months of unpaid leave and/or reasonable accommodation if the employee is disabled by pregnancy, childbirth, or related medical conditions.

Disabled by Pregnancy: These regulations expand the circumstances under which a woman may be viewed as "disabled by pregnancy." In essence, the regulations now list certain medical conditions related to pregnancy, even those that could be temporary in nature, as "disabilities" that may require employers to provide leave, a job transfer, or reasonable accommodations. These conditions include severe morning sickness, gestational diabetes, pregnancy-induced hypertension, preeclampsia, and post-partum depression. The regulations also clarify that a woman may be disabled by pregnancy if

²²⁶ See Cal. Code Regs. tit. 2, § 11089(g).

²²⁷ See Cal. Gov't Code § 12945.2(f).

²²⁸ See Cal. Code Regs. tit. 2, § 11089(a)(2)(A), (B).

²²⁹ See Cal. Gov't Code § 12945.2(f); see also Cal. Code of Regs. tit. 2, § 11092(f).

²³⁰ See Cal. Gov't Code § 12945.2(e)(1); see also Cal. Code of Regs. tit. 2, § 11092(c).

²³¹ See Cal. Gov't Code § 12945.2(e)(1); see also Cal. Code of Regs. tit. 2, § 11092(c).

²³² See Cal. Gov't Code § 12945.2(e)(1); see also Cal. Code Regs. tit. 2, § 11092(c).

she needs time off for prenatal or postnatal care, bed rest, childbirth, loss or end of pregnancy, or recovery from childbirth or loss or end of pregnancy.²³³

Benefits Continuation: California's pregnancy disability law requires an employer to continue an employee's group health coverage while the employee is on a pregnancy disability leave for up to four months. Specifically, the time an employer maintains and pays for group health coverage during a pregnancy disability leave cannot be used to meet an employer's obligation to continue and pay for 12 weeks of group health coverage under the FMLA and CFRA. Further, the regulations effectively create an obligation to continue group health coverage for up to a maximum of seven months for a woman who takes both a pregnancy disability leave and leave protected by the FMLA or CFRA.²³⁴

Reinstatement: Upon granting pregnancy disability leave, an employer must provide the employee with a written guarantee of reinstatement if requested. An employee must be returned to her original job, unless an employer can prove by a preponderance of the evidence that the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).

If the employee cannot be returned to the original position, the individual must be given a comparable position for which they are qualified on the scheduled reinstatement date or within 60 calendar days of that date. During this 60-day period, the employer has an affirmative obligation to provide notice to the employee of available positions in person, by letter, telephone, or email, or by links to posting on the employer's website if there is a section devoted to job openings.

Additionally, the FEHA does not afford an employee returning from pregnancy disability leave any greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. An employer must be able to show that it could not return the employee to the same or a comparable position by demonstrating that it would not have offered a comparable position to the employee if the employee had not gone on leave, or that there is no comparable position available.²³⁵

If pregnancy is involved, you should contact competent employment legal counsel for advice as the normal 12-week leave allotment is different from other qualifying leaves and may provide seven or more months of leave for pregnancy-related conditions and bonding with the new baby.

²³³ See Cal. Code Regs. tit. 2, § 110305.

²³⁴ See Gov't Code §§ 12945, 12945.2.

²³⁵ See Cal. Code Reg. tit. 2, § 11043(a), (c).

DEALER TIP: WHAT IF PERFORMANCE ISSUES AROSE BEFORE, OR ARE DISCOVERED DURING, A LEAVE?

Unfortunately, the following scenarios are not unusual: the dealer is in the process of investigating performance issues when an employee goes out on leave; or after the employee begins the leave, serious mistakes are uncovered by coworkers who are filling in for him or her. A related situation can occur where an employee takes several months off, and the dealer realizes the employee is not really missed, or, in some cases, things are better because the employee is gone. As tempting as it may be to tell the employee that he or she is no longer needed, the risks of failing to reinstate an employee after a pregnancy or other protected leave are significant.

While an employee does not acquire new, additional rights just because he or she is out on leave, employers need to be extremely careful when dealing with performance issues in these contexts. Because the timing of any adverse employment action will certainly trigger a claim of retaliation (among various other potential causes of action), dealers should seek legal counsel before taking steps to discipline or terminate an employee who has been out on a protected leave of absence.

Bereavement Leave and Leave for Reproductive Loss

Beginning January 1, 2023, California law requires employers to provide five days of bereavement leave upon the death of an employee's family member.²³⁶ In October 2023, Governor Newsom approved SB 848, which acts as a subset of California's Bereavement Leave law and increases an employee's leave entitlements for a "reproductive loss event," which is defined as "the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction." Effective January 1, 2024, SB 848 makes it an unlawful employment practice for an employer to refuse to grant an eligible employee's request to take up to five days of leave following a reproductive loss event. Employers with five or more employees are covered by this law. Only employees who have been employed for at least 30 days before the commencement of the leave are eligible. The new law requires that leave be taken within three months of the event pursuant to any existing leave policy of the employer. If an employee experiences more than one reproductive loss leave event within a 12-month period, the total amount of time taken shall not exceed 20 days within a 12-month period. The new law does not contain any provision permitting employers to request any documentation in connection with reproductive loss leave. Dealers should consult their labor and employment attorney about updating their employee handbooks and/or leave policies to incorporate these new leave entitlements, conduct training for management, supervisors, and human resources on these new leave laws, and determine whether reproductive loss will be handled pursuant to any existing employer provided leaves or policy(ies).²³⁷

Paid Family Leave

The requirement to provide paid family leave applies to employers of one or more persons whose employees participate in State Disability Insurance ("SDI"). There are no minimum service requirements

²³⁶ Cal. Gov't Code § 12945.7.

²³⁷ See Rick Reyes, Joy Rosenquist, and Adam Fiss, *California Establishes New Leave For Reproductive Loss*, Littler ASAP (October 11, 2023).

in this context. Paid family leave provides for up to eight weeks of paid leave to care for an employee's own sickness or injury, the birth, adoption, or foster care placement of a new child, or the sickness or injury of a child, spouse, parent, domestic partner or domestic partner's child, siblings, grandparents, grandchildren, and parents-in-law. The benefits are funded by employee contributions and administered by the state Employment Development Department. Employees may qualify for paid family leave benefits regardless of their length of service with the employer or the number of hours the employee worked in the year preceding the leave. Currently, the benefit amount is 60% of an employee's usual wages, and 70% of usual wages for employees with income under a certain level. SB 951, enacted in 2022, will increase the amount of benefits — up to 90% of wages for lower wage employees and up to 70% for other workers — for disabilities or covered incidents occurring on or after January 1, 2025.²³⁸

Sick Leave

Paid Sick Leave: Since July 1, 2015, with limited exceptions, under the Healthy Workplaces, Healthy Families Act ("HWHFA"), all employers of any size with one or more employees who work in California have been required to provide employees up to 24 hours of paid sick time per year.²³⁹ Under the law, all employees who work more than 30 days in a year in California are covered (including part-time and temporary employees), with minor exceptions (e.g., employees covered by a valid collective bargaining agreement that provides paid leave and has other required provisions).

CAUTION!

This is a very complex area of law that requires integration with other forms of leave and other types of benefits. Further, some cities have their own paid sick leave laws that are more expansive than California's paid sick leave law. For example, Los Angeles requires employers to provide at least 48 hours of paid sick leave per year to eligible employees. As discussed below, SB 616 creates a partial preemption of local standards. Accordingly, dealers should review your city's paid sick leave laws and consult with counsel to ensure compliance with the new state paid sick leave requirements, and local paid sick leave laws.

Under the existing law, employees accrue one hour of sick time for every 30 hours worked (including overtime hours). Employees who are exempt administrative, executive, or professional employees accrue sick time based on the employee's normal work week or a 40-hour work week, whichever is less.

Employers must post information about the sick leave policy, provide individual notice upon hire, and provide accrual information each time wages are paid. Employers can require employees to take the leave in increments of no less than two hours.

Although the law is silent on the issue of whether the employer can ask for a doctor's note before or after the leave, the Labor Commissioner has advised that no such note can be required, and the best practice is not to request a note.

²³⁸ See Unempl. Ins. Code §§ 2655, 3300 *et seq.*

²³⁹ See Cal. Lab. Code §§ 245-249.

In addition, the law provides that an employee “may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and has the right to file a complaint against an employer who retaliates.”²⁴⁰

In October 2023, Governor Newsom signed SB 616, which amends California’s HWHFA. The amendment, effective January 1, 2024, expands the number of job-protected paid leave hours employees can receive and use each year, extends some obligations and protection to employees covered by collective bargaining agreements, and creates a partial preemption of local ordinances.

Currently, when an employer implements an accrual policy, the employer under the accrual method may choose to provide paid sick leave at rate of no less than one hour for every 30 hours worked, or use a different accrual rate so long as employees earn leave time on a regular basis resulting in them having no less than 24 hours of accrued leave by the completion of their 120th day of employment, and having that same amount by the completion of the 120th day in each subsequent year. SB 616 changes this accrual exception to require that, additionally, employees will accrue no less than 40 hours of leave by their 200th day of employment, and that same amount by the 200th day in each subsequent year. Under existing law, an employee’s banked accrued paid sick and safe leave may be capped at 48 hours or six days, whichever is greater; SB 616 increases the cap to the greater of 80 hours or 10 days.

Employers may also frontload a specific amount of paid leave each year. California’s existing state law allows employers to provide no less than 24 hours or three days of paid leave for the employee to use by the time they complete their 120th day of employment. Essentially, this option allows employers to impose a lengthier waiting period for new hires (when frontloading is used) than what the HWHFA otherwise allows (an 89-day waiting period, per the state Labor Department) when accrual is used. As a result of SB 616, in addition to providing the frontloaded 24 hours/three days of paid leave by the 120-day mark, employers must also ensure that the employee has no less than a total of 40 hours or five days of paid leave (between the initial 120 day frontloading and the subsequent 200 day frontloading) for the employee to use by the time they complete their 200th day of employment. Currently, the HWHFA allows employers to limit employees’ paid leave use per year to 24 hours or three days, whichever is greater. SB 616 increases the permitted annual use cap to the greater of 40 hours or five days.

Currently, the HWHFA does not apply to employees covered by a valid collective bargaining agreement (“CBA”) if the CBA expressly provides for employees’ wages, hours of work, and working conditions; provides paid sick days, paid leave or paid time off; requires final and binding arbitration of disputes concerning paid leave; provides premium wage rates for all overtime hours worked; and establishes a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate. SB 616’s amendments, however, extend some of the HWHFA’s protections to these particular employees, e.g., covered uses, replacement worker prohibition, and anti-retaliation protections. SB 616 also provides a partial preemption of local standards by adding new subdivision r to California Labor Code Section 246, which provides that “Subdivisions (g), (h), (i), (l), (m), and (n) [of Section 246] shall

²⁴⁰ See Cal. Lab. Code § 2810.5.

preempt any local ordinance to the contrary.”²⁴¹ Dealers are encouraged to consult with counsel and should review and revise their paid sick leave policies to ensure they meet SB 616’s requirements.

DEALER TIP: DON’T INTERFERE WITH PAID SICK LEAVE RIGHTS

Under the law, an employee could take paid sick leave time off for two hours every Friday for up to 12 weeks (*e.g.*, three days of paid sick leave equals 24 hours, taken in two-hour increments), and the dealer would not be able to ask for a doctor’s note, and would not be able to discipline the employee for the recurring absences. In fact, the law establishes a rebuttable presumption of retaliation whenever an employer takes an adverse employment action against an employee who has taken paid sick leave within the last 30 days.

Victims of Crime and Domestic Violence

Employers who employ 25 or more employees may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work to attend to matters related to the crime, including judicial proceedings and to obtain medical attention or psychological counseling.²⁴² Additionally, an employee whose immediate family member (or registered domestic partner, or child of a registered domestic partner) is a victim of a crime may take time off work to attend judicial proceedings related to that crime.²⁴³ Pursuant to an amendment effective January 1, 2021 (AB 2992), this law also protects employees who are victims of any crime that caused physical injury, or caused mental injury with a threat of physical injury. Covered employers are required to provide written notice to employees at the time of hire (and other employees upon request) of their right to unpaid leave if they are victims of domestic violence, sexual assault, and stalking. The Labor Commissioner has developed a form to comply with the notice requirements, provided on its website. If an employer elects not to use the form developed by the Labor Commissioner, the notice provided by the employer to the employees must be substantially similar in content and clarity.

DEALER TIP: WORKPLACE SAFETY AND DOMESTIC VIOLENCE

While some may think that domestic violence is a private matter unrelated to the employment relationship, in reality workplace violence is all too often triggered by altercations between family members, spouses, former spouses, or girlfriends/boyfriends. Dealers should establish a zero-tolerance policy with respect to violence in the workplace, including training on how to identify risk factors (such as telltale signs of domestic violence) and how to report concerns or threats as soon as they arise. A good starting point is to remind employees: “If you see something, say something.” Dealers can also help their employees obtain a restraining order if they are subjected to credible threats of violence.²⁴⁴ Note that domestic violence is a two-way street; men are often victims as well as women.

²⁴¹ See Sebastian Chilco, Adam J. Fiss, and Michelle Barrett Falconer, *Governor Signs Amendment to Expand, and Better Align, Paid Sick Leave Requirements Throughout California*, Littler Insight (Oct. 5, 2023).

²⁴² See Cal. Lab. Code § 230.1.

²⁴³ See Cal. Lab. Code § 230.2.

²⁴⁴ See Cal. Code of Civ. Pro. § 527.8.

Civic/Jury Duty

All employers are obligated to provide jury duty and witness duty leaves. Employers are not required to provide paid leave. However, many employers implement written jury duty policies in which they voluntarily pay full or half wage for a period of time (e.g., one week).²⁴⁵

Drug or Alcohol Rehabilitation

Employers who employ 25 or more employees must make a reasonable accommodation for employees to participate in a drug or alcohol rehabilitation program.²⁴⁶

Election Leave

All employers must provide for two hours of paid leave to vote, as well as further unpaid reasonable time as needed.²⁴⁷ Employers may not discharge or suspend an employee for serving as an election officer.²⁴⁸

Literacy Leave

Employers who employ 25 or more employees must provide for reasonable accommodation and assistance for literacy leave, including unpaid time off.²⁴⁹ California's "literacy leave" provisions apply to any employee who reveals a literacy problem and requests employer assistance either in a literacy assistance program or in arranging visits of an instructor to the jobsite, provided such accommodation does not pose an undue hardship.²⁵⁰

Military Leave

All employees who are members of the Reserves, National Guard, or Naval Militia are entitled to an unpaid leave of absence for military duty or training, drills, encampment, naval cruises, special exercises, or similar activity. The acceptable leave period is 17 calendar days per year, including travel time to and from such duty. The law prohibits the discharge of any military person because he or she is required to perform military service. The law also prohibits hindering or preventing a military person from performing any ordered service.²⁵¹ (Note that under federal USERRA, the leave may be longer. 38 U.S.C. § 4312(a)(2), (c).) In addition, private employers must grant up to 15 days of unpaid temporary leave annually, including travel time, to employees in the state military reserve for training.²⁵²

Military Leave for Spouses

Employers who employ 25 or more employees must provide up to ten days of unpaid leave for a "qualified" employee (one who works an average of 20 hours per week) if the employee's military

²⁴⁵ See Cal. Lab. Code § 230.

²⁴⁶ See Cal. Lab. Code §§ 1025, 1026, 1028.

²⁴⁷ See Cal. Elec. Code §§ 14000-14002.

²⁴⁸ See Cal. Elec. Code §§ 320, 12312.

²⁴⁹ See Cal. Lab. Code §§ 1041-1044.

²⁵⁰ See Cal. Lab. Code. §§ 1040-1044.

²⁵¹ See Cal. Mil. & Vet. Code §§ 394.5, 395.

²⁵² See Mil. & Vet. Code §§ 394.5, 395. 395.9.

spouse or registered domestic partner is on leave from deployment in a combat zone with the active duty military, reserve military, or National Guard during a period of military conflict. The law also makes it unlawful for an employer to retaliate against a qualified employee for requesting or taking this leave.²⁵³

New Parent Leave

Effective January 1, 2021, the New Parent Leave Act, which entitled an eligible employee to take leave to bond with a new child within one year of the child's birth, adoption, or foster care placement, was repealed (as its provisions are now covered under the CFRA).²⁵⁴

Parents' Leave for Children in School

Employers who employ 25 or more employees at the same location must allow up to 40 hours of unpaid leave per year for parents to visit or volunteer in school or day care.²⁵⁵ All employers must provide leave for parents to attend to school disciplinary matters, and there is no limit to how frequently an employee must be provided leave for this purpose.²⁵⁶ Reminder: Local ordinances, such as the San Francisco Family Friendly Workplace Ordinance, may also require employers to accommodate the caregiving responsibilities of parents.

Volunteer Firefighters

Employers may not discharge or discriminate against employees who take time off to serve as volunteer emergency responders (e.g., firefighters, reserve peace officers, rescue personnel). Additionally, employers with 50 or more employees must grant such employees leave to take up to 14 days per calendar year off for training in fire, law enforcement, or emergency rescue.²⁵⁷

"Emergency Conditions"

Beginning in 2023, state law protects employees who leave work or refuse to report to work during an "emergency condition," defined as a situation creating a disaster or extreme peril to the safety at the workplace caused by natural forces or a crime, or an evacuation order due to a natural disaster or crime at the workplace, an employee's home, or their child's school. The law specifically excludes health pandemics. The law prohibits employers from taking adverse action against an employee for refusing to report to or leaving work during an emergency condition.²⁵⁸

Organ Donation/Bone Marrow

Employers with more than 15 employees must provide five days of paid leave to employees to donate bone marrow in any one year period. Employers must also provide a total of 30 business days of paid leave for an employee to donate an organ to a person in any one-year period, and this leave can be

²⁵³ See Mil. & Vet. Code § 395.10.

²⁵⁴ Cal. SB 1383 (2020).

²⁵⁵ See Cal. Lab. Code § 230.8.

²⁵⁶ See Cal. Lab. Code § 230.7.

²⁵⁷ See Cal. Lab. Code §§ 230.3, 230.4.

²⁵⁸ See Cal. Lab. Code § 1139; Cal. SB 1044.

intermittent. These leaves do not count against any FMLA or CFRA time, and benefits must be retained at the same level during the leave. Employees may use five days of vacation and/or sick time for bone marrow donation leave, and may use up to two weeks of vacation and/or sick time for organ donor leave.²⁵⁹

Workers' Compensation

Employees who are injured or unable to work due to an injury that arises out of and in the course of their employment are entitled to benefits and leave under the California Workers' Compensation Act. While leave is not expressly included in the compensation for an industrial injury, leave is required when an employee is temporarily totally disabled from performing his or her usual or customary work, though injured employees may be required to use sick and vacation time when away from the workplace seeking treatment for workplace injuries.²⁶⁰ An injury may be either a specific injury such as a fall, or a cumulative injury such as repetitive activities creating cumulative trauma over a period of time.²⁶¹

WORKERS' COMPENSATION: WHAT DEALERS SHOULD KNOW

California's workers' compensation rules are voluminous and complex. In addition to basic leave rules, dealers should be aware of some of the following issues which frequently arise:

What Should Dealers Do When Learning about an Employee's Injury? Within one working day of receiving notice or knowledge of injury or illness which results in lost time beyond the date of injury or illness, or which results in medical treatment beyond first aid, the dealer must provide, personally or by first-class mail, a claim form (DWC-1) and a notice of potential eligibility for benefits to the injured employee, or in the case of death, to his or her dependents. A completed form DWC-1 must be filed with the dealer by the injured employee, or, in the case of death, by a dependent of the injured employee, or by an agent of the employee or dependent.

Labor Code Section 132a Discrimination: Employers and insurers are prohibited from taking any action because of an industrial injury that works toward the detriment of the injured worker.²⁶² Such actions may range from outright termination to a reduction in responsibilities, or the discontinuance of severance pay.²⁶³ When the employee proves that the detriment occurred, the burden shifts to the employer to prove that the detriment was not related to the industrial injury and was necessitated by the realities of doing business.²⁶⁴

²⁵⁹ See Cal. Lab. Code §§ 1508-1512.

²⁶⁰ See *Department of Rehab. v. Workers' Comp. Appeals Bd. (Lauher)*, 30 Cal. 4th 1281 (2003).

²⁶¹ See Cal. Lab. Code §§ 3200 et seq.

²⁶² See Cal. Lab. Code § 132a; see also *Smith v. Workers' Comp. Appeals Bd.*, 152 Cal. App. 3d 1104 (1984).

²⁶³ See *Ditzler v. Loomis Armored Car, Inc.*, 16 Cal. Workers' Comp. Rep. (MB) 165 (1988).

²⁶⁴ See *Judson Steel Corp. v. Workers' Comp. Appeals Bd.*, 22 Cal. 3d 658 (1978).

Serious and Willful Misconduct: An employer's *serious and willful misconduct* occurs when the employer deliberately disregards a dangerous condition that is likely to cause serious injury to an employee, and an injury is proximately caused by the dangerous condition. Serious and willful misconduct is far more than mere negligence, and more than gross negligence.²⁶⁵ The penalty is a 50% increase in compensation for employees, with no upper limit, and the employer alone is responsible for payment of the award. No insurance company may insure against that risk.²⁶⁶ An insurer may provide the cost of a defense to a serious and willful misconduct claim, but that cost is rarely offered.

Workplace Safety

The California Occupational Safety and Health Act of 1973 authorizes the Division of Occupational Safety and Health to administer laws and enforce labor standards in order to protect the life and safety of employees. Under the law, violations that are specifically determined not to be of a serious nature may be assessed a civil penalty.²⁶⁷

Injury and Illness Prevention Program ("IIPP"): No discussion of workers' compensation would be complete without reference to the California law requiring employers to design a written, formalized safety program to achieve workplace safety.²⁶⁸ The following eight elements are required of any IIPP:

1. Responsibility;
2. Compliance;
3. Communication;
4. Hazard Assessment;
5. Accident/Exposure Investigation;
6. Hazard Correction;
7. Training and Instruction; and
8. Recordkeeping.

The Department of Industrial Relations also suggests that IIPPs:

- Fully involve all employees, supervisors, and management;
- Identify the specific workplace hazards employees are exposed to;
- Correct identified hazards in an appropriate and timely manner; and
- Provide effective training.

²⁶⁵ Cal. Lab. Code § 4553; see also *Johns-Manville Sales Corp. Private Carriage v. Workers' Comp. Appeals Bd.*, 96 Cal. App. 3d 923 (1979).

²⁶⁶ See Cal. Ins. Code § 11661.

²⁶⁷ New amendments have been passed which increase the civil penalty amounts to up to \$12,471 for each violation that is not of a serious nature and each violation of the posting, recordkeeping, or notice requirements, and up to \$124,709, but not less than \$8,908, for each willful or repeated violation of any of these occupational safety or health standards or orders. The amendments also permit an increase in the maximum penalty amounts on January 1, 2018, and each January 1 thereafter based on the percentage in the Consumer Price Index for All Consumers (CPI-U), as specified. See Cal. Lab. Code §§ 6310, 6427, 6429, and 6431.

²⁶⁸ See Cal. Code Regs. tit. 8, § 3203.

On February 3, 2023, California's Office of Administrative Law approved Cal/OSHA's COVID-19 Non-Emergency Regulations ("NER"). The NER is now the operative COVID-19 regulation for most California employers. Cal/OSHA also released FAQs. The new regulation is in effect until February 3, 2025. Dealers are encouraged to confer with counsel to navigate their compliance obligations.²⁶⁹

CAUTION: LINGERING IMPACTS OF COVID-19

While everyone would like to think that COVID-19 is a thing of the past, sadly it is not. In addition to dealing with potential HR issues under the NER, employers may also have to defend COVID-related lawsuits involving claims of discrimination, harassment, and retaliation under the FEHA, by virtue of its three-year statute of limitations. For instance, if an employee claims that he was treated unfairly in 2022 because he raised concerns about COVID exposure, workplace safety, etc., he would have until 2025 to file a complaint with the CRD. Assuming the complaint was tied up with the state for a year, and then dismissed with a right-to-sue letter with a further one-year statute of limitations, dealers could be responding to COVID-related claims in 2027 or even later. Yet another reason to keep good records of employment decisions and practices today.

Workplace Violence Prevention Plans and Employee TROs

In September 2023, the Governor signed SB 553 and SB 428 into law. SB 553 creates the first general industry workplace violence prevention safety requirements in the United States that will be applicable to nearly all California employers. Under the new law, covered employers are required to develop and implement a workplace violence prevention plan (as part of their Injury and Illness Prevention Plans) that meets the requirements of the new Labor Code Section 6401.9, by the law's July 1, 2024 effective date.

Requirements for such a plan include:

- Designating persons responsible for the plan;
- Effective procedures to obtain the active involvement of employees and authorized employee representatives in developing and implementing the plan;
- Methods the employer will use to coordinate the plan with employees, when applicable;
- Effective procedures for the employer to accept and respond to reports of workplace violence, and to prohibit retaliation against an employee who makes such a report;
- Effective procedures to communicate with employees regarding workplace violence, including how to report a violent incident, threat, or other workplace violence concern; effective means to alert employees to the presence of a workplace violence emergency; and how to obtain help from staff assigned to respond and/or law enforcement;
- Procedures to identify and evaluate workplace violence hazards, including scheduled periodic inspections, and to correct any identified hazards;

²⁶⁹ See Eric L. Compere, Melissa K. Peters, Alka Ramchandani-Raj, David A. Dixon, and P. Sean Kearney, *Cal/OSHA's Non-Emergency COVID-19 Regulation is Approved and in Effect for Next Two Years*, Littler ASAP (Feb. 6, 2023); see also https://www.dir.ca.gov/dosh/coronavirus/Non_Emergency_Regulations/.

- Procedures for post-incident response and investigation;
- Procedures to review and revise the plan as needed, including with the active involvement of employees and authorized employee representatives; and
- Initial training about the plan when first established, and annual training thereafter.

Under the new law, employers will be required to keep various records for a period of five years and produce them to Cal/OSHA upon request.

SB 428, along with SB 553, amends California Code of Civil Procedure Section 527.8, and makes four substantive changes to the law allowing employers to seek restraining orders on behalf of employees, effective January 1, 2025. They include:

- Expanding the law to permit an employer to seek a restraining order if an employee has suffered harassment, which in the past was only something the “harassed” individual could pursue on their own.
- Allowing a collective bargaining representative to petition for a restraining order on behalf of its employees, which in the past was only something the employer could do. To be eligible to petition for a restraining order, the collective bargaining representative must be the collective bargaining representative “in employment or labor matters at the employee’s workplace” for the particular employee for whom the restraining order is being sought.
- The new law refers to two specific laws that a court may take into account in determining if the restraining order would prohibit speech or other activities that are constitutionally or are otherwise legally protected. These protections will now include speech or conduct protected under the National Labor Relations Act and Government Code Sections 3555 through 3559 (which generally provide certain rights to unions to communicate with employees they represent and other protected activities including employees being able to seek union leave, etc.).
- Lastly, the new law provides that anyone seeking a restraining order must first provide the employee for whom the restraining order is sought the ability to not be named. If an employee declines to be named, the law expressly provides that an employer or collective bargaining representative may still seek a restraining order on behalf of other employees.

Dealers should consult their labor and employment attorney regarding preparation for compliance with SB 553, including preparing their workplace violence policy, on or before the law’s effective date of July 1, 2024.²⁷⁰

Outdoor Heat Illness Prevention Regulation

California law also requires employers to take affirmative steps to prevent heat illness. Specifically, dealers must provide:

- *Training:* Train all employees and supervisors about heat illness prevention.

²⁷⁰ See Adam Fiss, Alka Ramchandani-Raj, and David Dixon, *California Enacts Nation’s First General Industry Workplace Violence Prevention Safety Requirements for Employers*, Littler Insight (Oct. 2, 2023).

- *Water:* Provide enough fresh water so that each employee can drink at least one quart per hour, and encourage them to do so.
- *Shade:* Provide access to shade and encourage employees to take cool-down rest in the shade for at least five minutes at a time as needed.
- *Planning:* Develop and implement written procedures for complying with the Cal/OSHA Heat Illness Prevention Standard.

California law prohibits employers from discharging or discriminating against an employee for making a complaint to the Division of Occupational Safety and Health. The amendment adds a prohibition against retaliation. An employer may not discharge or discriminate against an employee for reporting a work-related fatality, injury, or illness.

Hazardous Materials

California employers are subject to the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65. Employers are required to warn any individual being exposed to listed chemicals and prohibited from discharging listed chemicals into any source of drinking water. California's Office of Environmental Health Hazard Assessment website (www.oehha.org) has detailed information about Proposition 65 and the listed chemicals requiring a warning. Common examples of chemical exposures include, but are not limited to, gasoline and diesel engine exhaust; the chemical makeup of vehicle components and replacement parts, vehicle fluids, touch-up paints, and materials used to service vehicles; tobacco smoke; office furnishings; First-Aid supplies; and certain foods or beverages. All manufacturer's instructions should also be followed to minimize exposure to the listed chemicals.

Under the existing Hazardous Substances Information and Training Act, employers must provide information to employees regarding the properties and potential hazards of hazardous substances in the workplace. Additionally, the Occupational Safety and Health Standards Board has adopted standards setting forth an employer's duties toward its employees consistent with specified guidelines, including, among other things, that the employer must make safety data sheets on substances in the workplace available to employees, collective bargaining representatives, or employee physicians.

Cleaning Product Right to Know Act

The Cleaning Product Right to Know Act,²⁷¹ which was enacted in January 2018, requires an employer to identify a cleaning product and list the ingredients and contaminants of concern on any container used in the workplace into which a cleaning product is transferred. It also mandates that any employer required to maintain and make safety data sheets readily accessible to employees pursuant to Occupational Safety and Health Standards Board standards also must make readily accessible, in the same manner and to the same persons, printable information for designated consumer cleaning products in the workplace relating to chemicals contained in those products.

²⁷¹ See Cal. Health & Safety Code, Ch. 13, Part 3, Div. 104; see also Cal. Lab. Code § 6398.5.

Chapter 6: Privacy Rights



Privacy in the employment context is a fast-developing area of the law with no clear boundaries. Today's Tik-Tok craze will give way to tomorrow's next social media sensation. Unlike the U.S. Constitution, the California Constitution expressly protects the right to privacy.²⁷² Employees who feel that their right to privacy has been invaded or infringed upon can pursue legal action against dealers. This chapter provides a snapshot of some of the typical privacy issues which arise in the workplace, such as:

- Privacy of employees' personal lives;
- Social media; and
- Workplace searches.

²⁷² See Cal. Constitution, Art. I, Sec. 1.

Privacy Rights in Personal Lifestyles

Personal Relationships and Marital Status

If a dealer intrudes into an employee's personal lifestyle, this may be a potential violation of the Fair Employment and Housing Act ("FEHA"). Any adverse actions taken against an employee (e.g., termination, demotion, etc.) are unlawful if they are based on the perception that the person has any of the characteristics protected by FEHA (e.g., age, sex, race, medical condition, etc.).

Marital Status: Although California dealers are prohibited from discriminating against employees on the basis of marital status, a dealer does have the right, when employing a married couple, to refuse to place both spouses in the same department or facility at a dealership if the work involves potential conflicts of interests or other hazards that are greater for married employees than for other persons. That being said, an employer is nonetheless obligated to make reasonable efforts to accommodate co-workers who are married by assigning job duties so as to minimize problems of supervision, safety, or morale.

Note: The definition of the word "spouse" under California law includes both same-sex marriages and domestic partnerships registered with the California Secretary of State. Thus, dealers are prohibited from discriminating on the basis of an individual's participation in a same-sex marriage or domestic partnership. As with married spouses, though, employers can "reasonably regulate" domestic partners working in the same department, division, or facility.

Political Affiliations

The California Labor Code prohibits employers from adopting or enforcing any policy that tends to control or direct the political activities or affiliations of employees.²⁷³ The law also prohibits employers from coercing or influencing employees to follow or refrain from following any particular line of political activity by threatening a loss of employment.

Employees' Off-Duty Conduct

California law prohibits discharging or taking adverse actions against an employee or applicant who is engaged in lawful off-duty conduct.²⁷⁴ While a plaintiff cannot pursue a lawsuit against a dealer on these grounds in court, the California Labor Code nonetheless empowers the Labor Commissioner with jurisdiction over claims for loss of wages as the result of demotion, suspension, or discharge from employment.²⁷⁵

²⁷³ See Cal. Lab. Code § 1101, 1102.

²⁷⁴ See Cal. Lab. Code § 96(k).

²⁷⁵ See Cal. Lab. Code § 96(k).

CAUTION!

With social media becoming ubiquitous in our society, comments made on social media websites may have repercussions on an employer, its employees, and/or its customers. For example, a Sacramento nurse was terminated in 2018 because of a comment she posted on her public Facebook page to the effect that Stephon Clark “deserved” to be shot and killed by the police.

While employees are free to engage in social networking while off duty, their First Amendment rights are not without limits, and generally do not extend to the workplace or protect conduct that spills over into the employment context. Even before social media, it was possible to create a hostile, harassing, or discriminatory situation with an action that occurred outside work hours and off company property. Employers can prohibit this type of conduct and discipline employees who violate company policy if the prohibited conduct adversely affects the employer’s legitimate business interests and/or subjects the employer to liability. Employers must still be careful not to craft policies that control or direct employee political activities or that infringe on employees’ rights under the National Labor Relations Act. See also earlier discussion on the recent developments and new Board standard arising out of *Stericycle, Inc.*, 372 NLRB No. 113 (2023) in Chapter 1 above in the section on handbooks and work rules.

Dealers are recommended to consult with counsel to update their social media policies with an eye towards the Board’s new work rules standard and seek guidance if employees engage in social media activity that the dealer believes adversely impacts its business and/or employees.

Social Media

California’s “Employer Use of Social Media” law prohibits dealers from asking prospective or current employees for usernames or passwords to their social media accounts, such as Facebook, Instagram, Snapchat, and Twitter.²⁷⁶ The law also prohibits employers from accessing applicants’ and employees’ personal social media content that is not publicly available.

Employers cannot request or require that applicants or employees: (1) disclose social media log-in credentials; (2) access personal social media in the employer’s presence, (e.g., allow the employer to “shoulder surf”); or (3) divulge any personal social media content (including an employer asking an employee to provide the personal social media content of a coworker who is a Facebook friend). Social media is defined to encompass social media services and accounts, as well as content, such as videos, photos, blogs, podcasts, text messages, email, and website profiles and locations.

Note: The law contains an exception that allows employers to ask an employee to divulge personal social media content that the employer “reasonably believe[s] to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations.”

California law also prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for refusing to comply with an employer’s request or demand for access to a personal social media account.

Employers should also be careful with company-wide bans on the use of social media at work. If engaging in social media activity is prohibited, certain limitations and disclaimers should be set forth in

²⁷⁶ See Cal. Lab. Code § 980.

the policy, such that the policy cannot be interpreted as restricting employees' rights to discuss with others the terms and conditions of employment under the National Labor Relations Act.

CAUTION!

Dealers should not ignore *all* social media postings. While most of the time it is a good idea for dealers not to get involved with their employees' social media activities, this is not a blanket rule. If an employee comes to a manager with social media evidence that he or she is being harassed or threatened by a co-worker, this is the kind of complaint that cannot be ignored by the employer. Failure to take reasonable steps to investigate and respond could subject the dealer to liability (and in the case of threatened violence, could lead to tragedy if not dealt with promptly).

Fingerprints and Photographs

The California Labor Code prohibits dealers from requiring applicants or employees to furnish photographs or fingerprints as a condition of employment if this is done for the purpose of providing information to a third party and if the information could be used to the applicant's or employee's detriment.²⁷⁷ The California Attorney General has interpreted this statute to permit employers to maintain photographs and fingerprints for their own use, but to prohibit employers from providing this information to third parties, including local police departments or other government agencies.²⁷⁸

If an employer chooses to require employees to provide photographs and/or fingerprints, they should be obtained only after a hiring decision has been made. Requiring applicants to submit fingerprints or photographs with employment applications can have risky implications due to their potential use in impermissibly screening out minority or older applicants.

Workplace Searches

Even in the workplace, California employees have a "reasonable expectation of privacy."²⁷⁹ This expectation varies depending on the circumstances. For instance, in the absence of an effective search policy, an employee who brings a purse to work likely has a reasonable expectation of privacy with respect to the purse's contents. By contrast, the same expectation is probably not as reasonable with respect to an employee's activity on employer-issued devices.

If a dealer wishes to search an employee's office, desk, or personal belongings, the dealer must establish that right through written policies clearly advising employees that they do *not* have a reasonable expectation of privacy with respect to these locations or belongings. In particular, issues may arise with respect to employee lockers. If locker space is made available for employees' use, the dealer should provide locks and remind the employees that management has the combinations (or duplicate keys) to the locks. If employees are allowed to set their own combinations or bring their own

²⁷⁷ See Cal. Lab. Code § 1051.

²⁷⁸ See 10 Op. Att'y Gen. 19 (1947).

²⁷⁹ See *Hill v. NCAA*, 7 Cal. 4th 1 (1994).

locks, the dealer's policy should state that the employer reserves the right to cut the locks and search the lockers.

Dealers should also have a comprehensive electronic communications policy covering employee use of the employer's IT system. Employees should be advised that they have no expectation of privacy with respect to any electronic communications on the dealer's IT system, and that the employer reserves the right to inspect and monitor all such communications or related activities. However, just because a dealer's IT expert can find a way to access an employee's personal email communications (e.g., on the employee's non-work Gmail account) through the employer's IT system, that does not mean that such access is appropriate or permissible. There may also be privileges protecting certain communications (e.g., the marital privilege, the patient/provider privilege, etc.). Dealers are encouraged to consult with counsel before taking steps that arguably could intrude upon their employees' rights to privacy.

Consumer Privacy Protection

California enacted a consumer privacy law (the "CCPA"), effective January 1, 2020, aimed at granting individuals more control over their personal information and more insight into how businesses use and disclose their personal data. Based on amendments to the law, the CCPA did not cover certain data collected and retained by employers, including basic HR data, emergency contact information, and third-party benefits information. Employers remain subject to the CCPA with respect to: (1) data security breaches; (2) mandatory notices regarding data collection; and (3) any collection of personal information outside the employment context. The operative date for these provisions was extended and took effect on January 1, 2023, along with the California Privacy Rights and Enforcement Act of 2020 (the "CPRA"), as discussed below.

On November 3, 2020, California voters approved a ballot measure (Proposition 24) – the CPRA – which expanded the privacy obligations that the CCPA imposed on employers. While the CCPA required employers only to distribute a Notice at Collection, the CPRA requires covered employers to comply with privacy policy, individual rights, and vendor management requirements. The CPRA also increases the consequences for data breaches.

The expansion of employers' data obligations went into effect on January 1, 2023, covering for-profit California employers with more than \$25 million in annual gross revenues, and required significant changes to existing policies, procedure, and practices for handling of personal data of employees, applicants, independent contractors, and members of a covered business' board of directors (HR Individuals). Enforcement was to commence on July 1, 2023, with enforcement to be prospective only. On June 30, 2023, a California court enjoined until March 29, 2024, enforcement of the final regulations implementing the CPRA as to a portion of the web of requirements imposed by this new privacy law. Dealers who are covered employers are encouraged to speak with counsel for more details on the CPRA.

Solicitation/Distribution of Literature

Dealers should also ensure that their non-solicitation/distribution of literature policies are not overbroad and unlawfully restrict employees' rights under the National Labor Relations Act. Dealers may maintain

and enforce non-discriminatory rules limiting solicitation and distribution during working time. Permissible restrictions include:

- Permitting employees to engage in solicitation activities only during non-working times, but not during his or her working time or during the working time of the employee or the employees at whom such activity is directed. But note that dealers must correctly define either worktime or non-worktime;
- Permitting employees to distribute or circulate any written or printed material only in non-work areas, during non-working times, but not in work areas at any time, or during his or her working time or during the working time of the employee or employees at whom such activity is directed;
- Prohibiting non-employees from soliciting or distributing written material for any purpose on company property at any time; and
- Prohibiting off-duty employees from entering into work areas for any reason.

“Working time” should include all time for which an employee is paid and/or is scheduled to be performing services for the dealer and not include break periods, meal periods, time before or after their shift, or periods when an employee is not “on the clock.”

Chapter 7: End of Employment



An employee's separation from the dealer is one of the most critical aspects of the employment relationship. This chapter reviews some of the key logistical issues facing dealers when employees are terminated, such as:

- Final paychecks;
- Notice obligations;
- Severance; and
- Mass layoffs.

This chapter does not address how the interplay of legal requirements discussed in the foregoing chapters must be carefully considered before making the final decision to terminate an employee; especially in California, the termination decision is almost always open to legal challenge. Dealers are encouraged to consult with counsel before deciding to fire an employee, rather than after they receive a demand letter from a plaintiffs' counsel representing the former employee.

Final Pay

A terminated employee must be paid final wages, including accrued vacation/PTO, immediately at the time of termination.²⁸⁰ If an employee resigns, his or her wages are due and payable no later than 72 hours after the resignation, unless the employee has given at least 72 hours' notice of his or her intention to resign. In that case, final payment is due on the employee's last scheduled workday.²⁸¹

Documentation to be Provided When Employment Ends

Unemployment

Notice Requirements: When an employer discharges, lays off, or places an employee on a leave of absence, it must provide the employee the following written notices:

- Regarding unemployment insurance benefit rights, contained in Pamphlet DE 2320 distributed by the EDD, entitled "For Your Benefit, California's Program for the Unemployed";²⁸²
- Regarding the change in the employee's status,²⁸³ which must, at minimum, contain the following:
 - Employer's name;
 - Employee's name;
 - Employee's Social Security number;
 - Whether the action was a discharge, a layoff, a leave of absence, or a change in status from employee to independent contractor; and
 - The date of the action.

Below is a sample document which can be used to provide written notice regarding the employee's change in status.

²⁸⁰ See Cal. Lab. Code § 201.

²⁸¹ See Cal. Lab. Code § 202.

²⁸² Pamphlet DE 2320 is available online at http://www.edd.ca.gov/unemployment/forms_and_publications.htm.

²⁸³ The EDD's sample notice of change in status is available at http://www.edd.ca.gov/Payroll_Taxes/Required_Notices_and_Pamphlets.htm.

SAMPLE
NOTICE TO EMPLOYEE AS TO CHANGE IN RELATIONSHIP
(Issued pursuant to provisions of Section 1089
of the California Unemployment Insurance Code)

Name _____ SSN# _____

1. You were/will be laid off/discharged on _____ 20_____
(date)

2. You were/will be on leave of absence starting _____ 20_____
(date)

3. On _____ employment status changed/will change as follows:
(date)

(Name of Employer)

(By)

Note: These notices must be provided no later than the effective date of the action.²⁸⁴

²⁸⁴ See Cal. Unempl. Ins. Code § 1089; see also Cal. Code Regs. tit. 22, § 1089-1.

COBRA

Notice Requirements: All employers must provide notification to former employees, along with the notification required by federal law pursuant to COBRA, of the availability of continued coverage for medical, surgical, or hospital benefits. This notice takes the form of a standardized written description of the Health Insurance Premium Program established by the State Department of Health Services.²⁸⁵ Employers must utilize the standardized written description prepared by the state Department of Health Services.²⁸⁶

It is the responsibility of all employers to provide all eligible employees an outline of coverage or similar explanation of all benefits provided under employer-sponsored health coverage, including, but not limited to, provider information for health maintenance organizations and preferred provider organizations. All employers must provide to employees, upon termination, notification of all continuation, disability extension, and conversion coverage options under any employer-sponsored coverage for which the employee may remain eligible after employment with that employer terminates.²⁸⁷

Reductions in Force

WARN and Mini-WARN Compliance

Federal WARN Act: When planning for any substantial downsizing, an employer must anticipate the requirements of the Worker Adjustment and Retraining Notification Act ("WARN Act").²⁸⁸ Reduced to its essentials, the WARN Act requires employers with 100 or more employees to give at least 60 days' notice prior to a "plant closing" involving the termination of 50 or more employees at a single site (or an operating unit within a single site), and the same 60 days' notice prior to a "mass layoff" involving either 500 employment terminations at a single site of employment, or, if fewer, 50 or more employment terminations that constitute 33% of those working at a single site of employment. Failure to abide by the Act's requirements may subject employers to serious penalties, including 60 days' back pay for employees.

Cal-WARN: Cal-WARN,²⁸⁹ California's own statute governing reductions in force, applies to employers with 75 or more employees within the preceding 12 months. Employees must have worked for the employer for at least six of the 12 months before the date on which notice is required. Employers must provide notice to employees, the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government in which the event occurs at least 60 days before a "mass layoff" (of 50 or more persons), relocation, or termination or substantial cessation of industrial or commercial operations.²⁹⁰

²⁸⁵ See Cal. Health & Safety Code § 120835; see also Cal. Welfare & Institutions Code § 14124.91.

²⁸⁶ See Cal. Lab. Code § 2807.

²⁸⁷ See Cal. Lab. Code § 2808.

²⁸⁸ See 29 U.S.C. §§ 2101-2109.

²⁸⁹ Note, even temporary furloughs trigger notice obligations under the Cal-WARN. See *The Int'l Brotherhood of Boilermakers v. NASSCO Holdings Inc.*, 17 Cal. App. 5th 1105 (2017).

²⁹⁰ See Cal. Lab. Code §§ 1400 *et seq.*

Older Workers' Benefit Protection Act

Individual Terminations: Any severance and release agreements which include waivers of age discrimination claims provided to employees who are 40 years old or older must comply with the Older Workers' Benefit Protection Act ("OWBPA"). The OWBPA requires:

- Reference to the OWBPA in the release agreement;
- That the employee be provided an opportunity of up to 21 days to "consider" the release agreement; and
- That the employee have up to seven days to revoke the release agreement after its execution.

DEALER TIP: SEVERANCE AGREEMENTS FOR OLDER WORKERS

The 21-day opportunity to "consider" the release may be waived by the employee, but the seven-day revocation period cannot be waived. Thus, no severance payment should be made until after the revocation has expired.

Group Layoffs: The OWBPA imposes additional requirements on employers who offer severance and release agreements to two or more employees who are 40 years old or older. Specifically, the releases must include additional requirements and allow impacted employees a 45-day review period. Moreover, the impacted employees must obtain a list of all employees in the impacted departments (called "decisional units") with their ages and whether these other employees were laid off.

The legal analysis under the OWBPA is highly nuanced. As such, it is strongly recommended that dealers consult with counsel to navigate through these issues.

Arbitration Agreements

Overview

Employers have long sought to avoid the lengthy and costly process of court litigation and jury trials by having employees enter into pre-dispute mandatory arbitration agreements. Although employers generally must pay for the arbitrator and the arbitration process, and arbitrators' decisions typically cannot be appealed (regardless of how incorrect they may be), most employers favor arbitration as opposed to the overall risks of the court system. With such agreements, employees could be compelled to submit any employment-related claims against the employer, such as discrimination or wrongful discharge claims, to arbitration in lieu of litigating those claims in court. Desiring their "day in court" (or, more precisely, a jury), many employees and plaintiffs' attorneys have resisted these efforts by challenging the enforceability of employment arbitration agreements on a variety of grounds. The resulting wave of state and federal litigation surrounding arbitration agreements has only spurred further litigation.

Requirements

The enforceability of arbitration agreements is often contested by plaintiffs' attorneys when dealers try to compel arbitration of an employment dispute rather than proceeding in state or federal court. The

law governing arbitration is constantly evolving and, as such, arbitration agreements should be continually reviewed to ensure they are compliant.

California courts, generally speaking, impose some of the following requirements on arbitration agreements in order for the agreements to be valid and enforceable²⁹¹:

- Damages otherwise recoverable in court, including punitive damages and attorneys' fees, are not limited;
- A neutral arbitrator issues a written decision;
- Adequate discovery is permitted;
- The employee is not required to pay unreasonable costs, or costs connected with the arbitration, that he or she would not have to pay were the action filed in court (including travel to a distant location to resolve the claim); and
- The arbitration obligation is mutual (i.e., both the employee and employer are subject to arbitration as an alternative means of resolution).

Many arbitration agreements also require the parties to engage in non-binding mediation as an initial step in the process. This may provide an opportunity for the dealer to reach an early, confidential settlement that may be a more desirable or at least more acceptable alternative to arbitration (which, although typically cheaper than court litigation, still may involve written discovery, depositions, and a lengthy hearing). Some dealers also elect to have an opt-out provision to further cement the enforceability of an arbitration agreement and weaken any argument that the agreement was essentially an adhesion contract imposed on employees.

Class Action and PAGA Waivers

Some arbitration agreements contain clauses which affirm the individual employee's agreement to bring any actions individually and thus waive his or her right to file a class action lawsuit. Although such agreements are heavily scrutinized by courts, California case law has affirmed their enforceability where the express terms of that agreement and the procedure underlying the employee's agreement to such terms are proper.²⁹² Until recently, federal courts had wrangled with the enforceability of class action waivers and the interaction between the National Labor Relations Act ("NLRA") and the Federal Arbitration Act ("FAA"). However, on May 21, 2018, the U.S. Supreme Court issued its much-anticipated decision and ended the dispute in favor employers by holding that the FAA requires arbitration agreements to be enforced on the same grounds as any other contract, and the NLRA contains no contrary congressional command excluding class action waivers from the FAA's mandate.²⁹³

On April 24, 2019, the U.S. Supreme Court held, in a case arising out of California, that ambiguous language in an arbitration agreement concerning whether class arbitration is permitted is not sufficient to show consent of the parties to submit to a classwide proceeding.²⁹⁴ In other words, if the language

²⁹¹ See *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal. 4th 83 (2000).

²⁹² See *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

²⁹³ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

²⁹⁴ See *Lamps Plus, Inc. v. Valarela*, 139 S. Ct. 1407 (2019).

of the contract does not specifically demonstrate intent to allow class proceedings, only individual arbitrations are authorized.

In *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), the U.S. Supreme Court found that an employee bound to individually arbitrate claims must prosecute claims for civil penalties under PAGA on an individual basis in arbitration. The Supreme Court concluded that the FAA preempts the portion of *Iskanian* that precludes the division of PAGA claims into individual and non-individual causes of action. The Supreme Court, however, agreed with the *Iskanian* court's prohibition on a categorical waiver of the right to bring a PAGA action, and it refused to disturb *Iskanian's* holding that representative action waivers are unenforceable.

In *Adolph v. Uber Technologies, Inc.*, 14 Cal. 5th 1104 (2023), the California Supreme Court affirmed the key holding in the U.S. Supreme Court's decision in *Viking River Cruises v. Moriana* the year before that the FAA requires PAGA plaintiffs to arbitrate their "individual" claims based on Labor Code violations they alleged to have personally suffered. But the California Supreme Court diverged from *Viking River Cruises* in a significant respect, holding that plaintiffs retain standing to pursue representative PAGA claims on behalf of other alleged aggrieved employees in court despite being bound to arbitrate their individual PAGA claims.²⁹⁵

As noted earlier, in October 2023, Governor Newsom signed AB 594. Under this new law, an arbitration agreement (other than a collective bargaining agreement) that limits representative actions or mandates arbitration shall have no effect on the authority of the public prosecutor or the Labor Commissioner in actions to enforce the Labor Code.

Further, California also enacted SB 365, which amends existing law by eliminating the automatic stay of trial court proceedings when the grant or denial of a petition to compel arbitration is appealed. SB 365 allows trial court proceedings to continue even as an appeal regarding the question of arbitration is under review. In light of contrary U.S. Supreme Court precedent, we are likely to see more developments and legal challenges to this law.²⁹⁶

Other Issues

Employment References

All members of management and Human Resources should be advised not to provide employment references. Any information provided by such a reference could prompt litigation from former employees for defamation. Employee handbooks should expressly memorialize that only an employee's dates of employment and position held will be provided in response to reference inquiries.

Forum Selection Clauses

California law regulates certain terms and conditions found in employment contracts. Effective January 1, 2017, California passed a law which adds conditions regarding the forum in which a California

²⁹⁵ See P. Dustin Bodaghi, Laura Devane, Rob Friedman, Julie McGoldrick, and Joseph Wientge, *California Supreme Court Holds Plaintiffs with Arbitration Agreements Retain Standing to Pursue Non-Individual PAGA Claims in Court*, Littler ASAP (July 18, 2023).

²⁹⁶ See Bruce Sarchet and Joy Rosenquist, *Calling all California Employers! The Latest Employment Laws from the Golden State*, Littler Insight (Oct. 26, 2023).

employee may pursue a claim against an employer to all contracts entered, modified, or extended after January 1, 2017.²⁹⁷

Under this law, when an employee primarily resides and works in California, an employer cannot require the employee, as a condition of employment, to agree to:

Adjudicate a claim that arose in California outside of the state, or

Waive the substantive protections of California law in an employment contract for claims that arise in California.

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

DEALER TIP:

In light of these rules of forum selection clauses, and the choice of law issues arising out of the new Business and Professions Code Section 16600.5, discussed in Chapter 1 above in connection Non-Compete Agreements and Proprietary Information, dealers are advised to review their confidentiality and non-solicitation agreements and consult with experienced counsel regarding the potential ramifications of these statutes for their contracts and business practices.

Severance Agreements

Any severance agreements should be closely reviewed by legal counsel. In recent years, these agreements have been heavily scrutinized by administrative agencies like the Equal Employment Opportunity Commission.

California law requires severance agreements to set forth certain clauses, whereas the OWBPA, as described above, imposes obligations for employees who are 40 years old and older.

Also, an agreement in California related to an employee's separation from employment must provide the employee five business days to consult with an attorney about the agreement, regardless of the employee's age. The time period given for consideration in California should therefore at a minimum be five business days.²⁹⁸

Further, any release should not include claims that may not be released by statute or regulation. These include:

- Claims under the Fair Labor Standards Act, which require supervision from the Department of Labor;
- Claims for vested benefits under the Employment Retirement Income Security Act ("ERISA");
- Workers' compensation claims; or
- Unemployment compensation claims.

²⁹⁷ See Cal. Lab. Code § 925.

²⁹⁸ See Government Code Section 12964.5(b)(4).

In *McLaren Macomb*, 372 NLRB No. 58 (2023), the NLRB overturned two decisions that permitted employers to include confidentiality and non-disparagement provisions in severance agreements. Under the Board's new rule, the "mere proffer" of a severance agreement that conditions receipt of benefits on the "forfeiture of statutory rights" (e.g., the acceptance of overbroad confidentiality and non-disparagement provisions) violates the NLRA. According to the Board, "a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." Under *McLaren*, offering the agreement with unlawful terms to an employee with Section 7 rights is enough to result in an unfair labor practice ("ULP"). Employers should review any non-disparagement and confidentiality provisions they are proffering to employees or potential employees, regardless of the document in which the provisions are incorporated. This includes other agreements that may be incorporated by reference in severance agreements, such as proprietary information and invention agreements. The door, however, remains open to the possibility of maintaining lawful confidentiality and non-disparagement provisions if they are carefully drafted and narrowly tailored to mitigate the concerns raised by the Board. Employers are encouraged to consult with labor counsel to determine what approach confidentiality, non-disparagement, and other provisions in separation and settlement agreements best fits their organization post-*McLaren*.²⁹⁹

CAUTION!

With respect to any non-required payment or benefit offered to an employee upon termination, the dealer should always consider linking any such offering to a severance agreement and binding release of claims. Employers who make a gratuitous "going away" bonus to a laid-off employee without obtaining a release may be in for a rude awakening when the employee turns around and sues for wrongful discharge. While a terminated employee might not "deserve" any additional payment at all, dealers may wish to consider offering a modest severance payment in order to secure a release and buy future peace.

Union Elections

In August 2023, the National Labor Relations Board (the "NLRB" or "Board") released its decision in *Cemex Construction Materials Pacific*, 372 NLRB No. 130 (2023). The decision represents a drastic shift in union election law and lays out a new standard for union recognition, upending over 50 years of precedent. *Cemex* has tremendous implications for employers, particularly non-unionized employers. Under this new standard, if either a union or an employee presents to an employer's supervisor a demand for union recognition, an employer must either (1) recognize the union as the bargaining representative or (2) promptly file a petition for an election (RM) with the Board. The Board defines "promptly" to mean within two weeks of the union's or employee's demand for recognition. If the employer fails to timely file an RM petition with the Board, it will have waived its ability to challenge the legitimacy of the claim and the bargaining unit sought, there will not be a democratic election, and the employer will have to recognize the union as the collective bargaining representative of its employees. This means the employer will lose the opportunity to campaign and persuade employees against union representation prior to the initiation of collective bargaining. Further, under *Cemex*, even if an employer files a timely RM petition, if it is found by the Board to have committed a ULP during the

²⁹⁹ See Jonathan Levine, Maura A. Mastrony, and Lindsay M. Rinehart, *NLRB Decision Addresses Interaction between Confidentiality and Nondisparagement Provisions in Severance Agreements and Section 7 Rights*, Littler Insight (Feb. 27, 2023).

“critical period” (the time between when a demand is made and when the election is held), the Board will issue a bargaining order mandating that the employer immediately recognize and bargain with the union. Dealers need to be aware of this new two-week timeline and procedure, train staff to be prepared for election efforts, review handbooks, policies, and work rules to ensure compliance, and are encouraged to contact counsel at the first sign of union activity.³⁰⁰

³⁰⁰ See Michael J. Lotito, Rachel Ring, and Michelle Devlin, *NLRB’s Cemex Decision – Not Exactly Card Check, but Awfully Close*, Littler Insight (Aug. 28, 2023).