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MEETING THE HUMAN RESOURCE CHALLENGE

Presented by the California Association of Food Banks

SUMMARY OF LABOR & EMPLOYMENT CLAIMS
AND PROCEDURES

LEAVES OF ABSENCE

SUMMARY OF PRINCIPLE WAGE HOUR OBLIGATIONS

FIVE ESSENTIAL EMPLOYMENT POLICIES

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PART ONE: SUMMARY OF EMPLOYMENT LAWS AND ENFORCEMENT AGENCIES

DISCRIMINATION CLAIMS

California Fair Employment and Housing Act ("FEHA")
5+ employees (discrimination claims, pregnancy disability leave, reasonable accommodations for disabilities); 50+ employees (CFRA leave, harassment training for supervisors)

Statute: California Government Code § 12900, et seq.

> Coverage: Claims of discrimination in the workplace because of race, religious creed, color, national origin, ancestry, mental or physical disability, medical condition, marital status, sex, age and/or sexual orientation. Also, the FEHA (and its sister laws) forbid pregnancy and pregnancy disability discrimination (a form of sex discrimination), harassment on any of the above bases, require reasonable accommodations of religious tenets and disabilities and require that larger employers grant family and medical leave.

Agency: California Department of Fair Employment and Housing ("DFEH").

Website: www.dfeh.gov.ca

> (Not relevant today, but the DFEH also investigates discrimination in housing, businesses and the provision of professional services.)
>
> (Also creates the Fair Employment and Housing Commission ("FEHC").)

* * *

DFEH Complaint Process:

(1) Employee/applicant fills in pre-complaint questionnaire.

- Now, pre-complaint processing can be completed on-line
- Allegations of discrimination generally must be filed with the DFEH within one year of last discriminatory act

(2) DFEH completes "Complaint of Discrimination"

A charge filed with the DFEH will automatically be filed with the EEOC.

(3) DFEH serves charge on employer and "investigates" charge.

(4) Employer files a response to the charge.

No required format – may be in a letter format, a pleading or any type of document you like. Does not need to be completed by counsel. **But, make sure it contains all of the reasons for the adverse action. If the employer changes its story or tries to add new bases later, the employee will argue the employer is fabricating excuses.

Employer's response should provide lots of facts about the company and the individual incidents involved in the charge. The DFEH routinely provides a list of documents it wants to have produced along with the response. If the employer position is strong, make it REALLY easy for the DFEH to see what happened and what documents are important – tabs, highlights on documents, etc.

- Extensions are routinely granted. Do NOT ignore the Agency. Ask for an extension and send something.

(5) DFEH makes a determination:

DFEH can decide it wants to REALLY investigate the matter and it can propound interrogatories, take depositions, etc. Procedures are identical to CCP discovery procedures and are enforceable by the Superior Courts (motions to quash, motions to compel, etc.).

DFEH can conclude there is evidence that a violation of the Act occurred and try to arrange a settlement.

> If unsuccessful, DFEH can file a lawsuit in Superior Court on behalf of the employee, or file an action before the Fair Employment and Housing Commission. (Commission proceedings do not afford all remedies.)

DFEH can conclude there is not sufficient evidence to determine a violation of the Act occurred. In that case the DFEH will issue a "Right to Sue" notice.

Increasingly common: Before undertaking any investigation, the DFEH will try to get the employer to agree to voluntary conciliation.

DFEH is suppose to complete its investigations within 150 days. But it doesn't.

(6) The Right to Sue Notice.

In a very large percentage of the cases the DFEH concludes that it does not have enough facts to determine that a violation occurred OR the Charging Party doesn't want to wait for the DFEH to finish its investigation and prefers just to sue the employer. In both of those situations, the DFEH issues a Right to Sue notice to the employee.

Employee has ONE year after the date (not the receipt, not the mailing, but the date) of the Right to Sue notice to file a lawsuit.

(7) Plaintiff files a Superior Court law suit.

The Complaint may contain statutory, i.e., FEHA causes of action, along with other types of employment-related claims (e.g., breach of employment contract, wrongful termination in violation of public policy, tortious interference with prospective economic advantage, wage claims under the California Labor Code or California Wage Orders, etc.)

All normal from now on.

Hint: Be sure to obtain a copy of the DFEH file. You can just ask for it as a FOIA request, or you can subpoena it under CCP § 1985.

Principal Federal Anti-discrimination Laws (15+ employees)

Principal Statutes:

42 U.S.C. § 2000e-7 (Civil Rights Act of 1964 ("Title VII") covering race, religion, national origin and sex (including harassment and pregnancy discrimination));

29 U.S.C. § 621 (Age Discrimination in Employment Act ("ADEA")); and

42 U.S.C. § 12101, et seq. (The Americans with Disabilities Act ("ADA")).

(There are others, including the Equal Pay Act, an older Rehabilitation Act, etc. but they follow the same process.)

Agency: United States Equal Employment Opportunity Commission ("EEOC")

Website: www.eeoc.gov

* * *

EEOC process:

Mirrors the process for filing a charge of discrimination with the DFEH: Employee files claim, employer responds, EEOC investigates, pushes mediation and ultimately makes a finding, files a law suit in federal court or issues a Right to Sue notice.

- To be safe, a complainant should file a charge with the EEOC within 180 days of the last discriminatory act. (They have a year, but with a work-share state like California, that might be lowered to 300 days, or even 240 days. It varies with whatever court is reviewing the particular claim.)

- EEOC Charge of Discrimination

A significant difference is that a Complainant has only 90 days after the date of an EEOC "right to sue" notice to file a law suit with the Title VII, ADA or ADEA claims.

Interplay Between the DFEH and EEOC

Although the substantive claims mirror one another, the rights under state law (the FEHA) are more generous to employees (the duty to accommodate various types of disabilities, pregnancy leave issues, etc.). Thus, in California, most plaintiffs elect to file discrimination claims under state law. But there is NO restriction against filing claims under both bodies of law.

- Unlike Title VII and federal claims, FEHA provides for unlimited emotional distress and punitive damages.

- Also, civil jury verdicts in Superior Court do not have to be unanimous; while federal verdicts – even in civil cases – must be unanimous.

Another Federal Anti-Discrimination Source: Executive Order 11246 (Pres. Johnson, 1965)

Requires most **federal contractors** to agree not to engage in discrimination on all of the bases above and to adopt affirmative action plans so that their workforces "reflect" the population in which they are selected.

Agency: Office of Federal Contract Compliance Programs.

Website: www.dol.gov/esa/OFCCP/

(Department of Labor/Employment Standards Administration)

Individual employees (or applicants) do not have a private right of action under the Executive Order. However, if the OFCCP concludes that discrimination occurred (or that the Contractor's AAP is not up to snuff), the OFCCP can "debar" the Contractor from future contracts with the government. This can be a HUGE stick.

Process: No required formal process. An employee complains to the OFCCP and the OFCCP notifies the Contractor and asks for a position paper. (Typically, if the complaint consists of an individual complaint of discrimination, the OFCCP will forward it to the EEOC for processing. Systematic claims will be investigated by the OFCCP.)

Other Laws that Give Rise to "Discrimination" Claims:

National Labor Relations Act ("NLRA")
(all employers in interstate "commerce")

Statute: 29 U.S.C. § 151, et seq. (Actually, it's a few different laws, including important provisions added with the Labor Management Relations Act, but usually people just say "NLRA.")

Coverage: Generally, applies in the union environment, or in non-union employers where one or more unions are active. BUT, THE NLRA APPLIES EVEN WHERE NO UNIONS ARE PRESENT – COLLECTIVE CONCERTED ACTIVITY (e.g., talking about wages/conditions of employment). Two principal provisions of the NLRA are (1) forbids discrimination against employees because of their "concerted" (usually meaning, pro-union) activity; and (2) the process by which a union applies for and is certified as the "collective bargaining representative" of a group of employees.

Agency: National Labor Relations Board ("NLRB" or "the Board.")

Website: www.nlrb.gov

NLRB Processes:

The NLRB has very formal (and somewhat archaic) processes. But also assign individual Board Agents to the claims who will actually talk to you on the telephone.

Because of the intricacies of Board practice and the scope of long-term liability and changes to an employer's basic operations, it is always best to engage the assistance of a lawyer or other advisor with experience in "traditional labor law."

Two common filings:

An Unfair Labor Practice Charge ("ULP")

(1) An employee (or group of employees) or a union claims that the employer has engaged in (or is continuing to engage in) something prohibited by the NLRA.

(2) The Board will investigate and determine if it believes the facts give rise to a claim.

(3) If, after getting the employer's position and evidence, the Region finds that a violation has occurred it will try to broker a settlement, and if not, will refer the matter to an NLRB "Administrative Law Judge" for a hearing.

(4) The ALJ finding is binding unless the losing party appeals to the NLRB in Washington.

(5) Ultimately, there can be appeals through the federal court system and to the US Supreme Court, but it's rather tortuous!

An Election Petition ("Petition" or "RC Petition")

(1) A union files a petition seeking recognition as the certified bargaining representative for a group of employees.

> The union has to make a "showing" to the Region that it has support of a majority of the employees in the "unit" – which can be submitting a petition signed by the employees or, more commonly these days, "authorization cards" signed by individual employees.

(2) If the employer receives this notice, contact experienced NLRB attorneys.

(3) Summary: the employer can demand an election; the election might occur very quickly (supposedly within 45 days of the Region getting the petition); but the election might be put off because there may need to be a pre-election hearing to determine issues like which employees should be in the unit, whether someone is a supervisor, etc.

Usually there is an election, but there might also be a number of ULPs thrown in for confusion, and multiple claims going on at various steps in the process between the Region the NLRB in Washington and state or federal courts, and objections to the election by whichever side lost. Phew!

Workers' Comp Discrimination ("Section 132a")

Statute: California Labor Code § 132a)

Coverage: Forbids discrimination against an employee for suffering an on-the-job injury or seeking and/or obtaining workers' compensation benefits.

Agency: California Workers' Compensation Appeals Board ("WCAB")

Website: www.dir.ca.gov/WCAB/

WCAB Processes:

> The WCAB also has a specialized bar, and in California, lawyers can be certified as Workers' Comp specialists.
>
> Most employers rely on their Workers' Compensation Insurers to arrange for their legal representation of their workers' compensation claims for benefits. BUT, Section 132a discrimination claims are not covered by the workers' compensation insurance policies and thus, employers often need to retain other counsel for defending those claims.
>
> Still . . . . the insurer (and the benefits defense attorney) and the employer usually work out an agreement where the benefits claim(s) and the discrimination claim(s) are handled by Comp counsel.

WAGE CLAIMS

California Wage Claims

Sources: California Labor Code § 200, et seq. & § 500, et seq.; California Wage Orders

Coverage: Claims for unpaid wages, unpaid overtime, unpaid commissions, missed meal and rest period penalties, and "waiting time" penalties.

Agency: www.dir.ca.gov/DLSE/

DLSE Processes:

(1) Employee goes to the local Labor Commissioner's Office and fills out an in-take form.

(2) Deputy LC interviews employee and fills out a claim; which the LC mails to the employer.

(3) Wage claims filed by the DLSE under its processes have a three-year statute of limitations, so the claim can be very stale. (If there is a law suit, the effective SOL is four years because of the Unfair Competition claims that plaintiffs' lawyers now file.)

(4) The initial wage claim (see above) is a Notification of Claim and Conference.

The employer does not need to respond to the Notice, but should show up to the Conference! (There is no default for failing to show up, but it is an opportunity to obtain a settlement.)

By certified mail (or Fed Ex so there is proof of delivery) or by hand delivery at the Conference, the Employer must provide a copy of its Workers' Compensation coverage.

(5) If the issues are not resolved at the Conference, the Deputy LC will set the claim for a hearing before a DLSE Administrative Law Judge. The hearing is semi-formal (testimony under oath) and counsel may represent either party; but there will not be a court reporter (it is taped) and the ALJs do not adhere always to the rules of evidence.

(6) Following the hearing, the ALJ will issue a Statement of Decision. Unless it is appealed WITHIN TEN (10) DAYS, the ALJ decision is final.

(7) Either party can "appeal" the ALJ decision by filing a claim in Superior Court. At the Court, the issues are considered "de novo" (meaning that the Court has to take all new evidence and is not bound in any way by the ALJ's decision). CCP § 98.

Federal Wage Claims

Federal Department of Labor

Statutes:

Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq.

The Davis-Bacon Act (requiring the payment of "prevailing wages" on federal contracts), 40 U.S.C. § 3141, et seq.

Agency: Wage and Hour Division of the United States Department of Labor

Website: www.dol.gov/esa/WHD

(Note, the Wage and Hour Division also enforces the Federal Family & Medical Leave Act, 29 U.S.C § 2601, et seq.; and the Employee Benefits Security Administration ("EBSA") of the U.S. DOL enforces the health care continuation coverage issues under COBRA. www.dol.gov/esa/EBSA)

WHD Processes:

The Federal Wage and Hour Division does not have a process for investigating or adjudicating individual wage claims similar to that of the DLSE. Instead, the WHD performs audits of employers to look at overall compliance with federal wage laws. (Usually, such audits result in finding some – often very minor – errors and the audit results with a small payment to the WHD, which then distributes the payment to affected employees.)

Audits are usually the result of complaints filed against the employer. The complaints can be filed by individual employees or groups of employees. Sometimes the complaints are filed by unions (and sometimes more for harassment than any evidence or belief the employer has paid its employees incorrectly).

Sometimes audits occur without a complaint, but rather part of a WHD plan to target particular classes of employers (e.g., the garment industry).

The WHD does not disclose the identity of a complaining employee; and in fact, the WHD will not tell generally tell the employer if there was any employee complaint.

Federal wage claims are adjudicated in the federal courts. The WHD can file a complaint on behalf of one or more individuals; an individual can file a claim on his/her own behalf; a group of employees can file a claim; and there are FLSA "representative" actions – like class actions, but the employees have to "opt in" to be part of the class.

Claims for Employment Benefits

Workers' Compensation Benefits

Statute: California Labor Code § 3300, et seq.

Agency: California Workers' Compensation Appeals Board

Website: www.dir.ca.gov/WCAB

Process for obtaining medical care and partial wage replacement benefits for on-the-job injuries.

Claims are handled by a specialist bar. The claims process and the defense of claims need to be handled by workers' compensation specialists!

State Disability Insurance

Statute: California Unemployment Insurance Code § 2626, et seq.

Agency: California Employment Development Department

Website: www.edd.ca.gov/

Claims for partial wage replacements because of injuries and illnesses that are not work-related and for pregnancy disabilities.

Claims are mostly handled by the EDD without significant employer involvement. If for some reason the employer believes fraud is involved it can become involved, but there is no "employer account" for SDI that the employer has any vested interest in protecting.

Paid Family Leave

Statute: California Unemployment Insurance Code § 3300, et seq.

Agency: California EDD

Website: www.edd.ca.gov/

Employees can receive partial wage replacements when they take leave to care for a family member. PFL is designed to enable more employees to take FMLA and CFRA leave.

Employees are eligible for up to six weeks of partial wage replacements.
Claim forms are on line. The Employer has very little involvement.

Unemployment Insurance

Statute: California Unemployment Insurance Code § 1251, et seq.

Agency: California EDD

Website: www.edd.ca.gov

Unemployment pays partial wage replacements for employees who are terminated for lack of work. It does not apply for employees who are terminated for good cause or who voluntarily leave employment without good cause.

UI Claims Process

(1) Employee files a claim in person or on-line with the EDD. The employee must state the reason for his/her termination.

(2) The EDD serves notice of the claim on the employer.

(3) The Employer has ten (10) days in which to respond. The employer is required to give any information it has indicating that the employee is not entitled to UI benefits. (It is in the employer's interest to object to unwarranted claims because the Employer's EDD account is charged for claims. If there are too many claims, the employer's UI contribution rate is affected.)

(4) The local EDD office makes a determination, and either side can appeal that determination within 20 days.

(5) The CUIAB will notify the parties that a Hearing before an Administration Law Judge will occur and specify the issues to be determined.

(6) Although the hearing procedures are officially "informal" testimony is presented under oath, there is a recording of the proceeding, and the parties can be represented by counsel. Oral briefing is the norm, but the parties can request written briefing if the matter raises unique questions of law. The ALJ issues a Decision with findings of fact and basis for the decision.

(6) The losing party can appeal the ALJ decision to the California Unemployment Insurance Appeal Board, but it must do so within 20 days. The CUIAB will notify the parties of the briefing schedule.

The CUIAB does not take additional evidence, but will permit briefs on the legal issues raised by the evidence. The decision of the CUIAB is final. (Well . . . there are writ procedures but . . . .)

PART TWO: LEAVES OF ABSENCE.

The Leave of Absence Process: Always follow the same ten steps.

(FMLA, CFRA, Pregnancy Disability Leave, Leaves as Reasonable Accommodation, Workers' Compensation Leaves)

(1) Is the employer obligated to provide leave?

(2) Is the employee eligible for the particular leave?

(3) How long is the leave?

(4) Is the employee guaranteed reinstatement?

(5) What documentation is necessary?

(6) Will the employee continue to receive benefits?

(7) Will the employee get paid any money?

(8) Upon reinstatement, what is the employee's seniority, etc.?

(9) HELP!! Too many laws overlap!

Which ASPECT of EACH law provides the best benefits to the employee?

(10) HELP!! What about intermittent leaves?

Miscellaneous Issues.

(1) Notifying employees of leave rights;

(2) Interfering with leave rights;

(3) Retaliation for exercising leave rights.

Attachment: Leave of Absence Chart (the cheat sheet)

The Leave of Absence Process.

Family Medical Leave Act, 29 U.S.C. § 2601, et seq. [www.dol.gov/whd/fmla (great website)]

(1) Is the employer obligated to provide FMLA leave?

FMLA applies to all public agencies, including state, local and federal employers, local education agencies (schools), and private-sector employers who employed **50 or more employees** in 20 or more workweeks in the current or preceding calendar year and who are engaged in commerce or in any industry or activity affecting commerce — including joint employers and successors of covered employers.

(2) Is the employee eligible for any particular type(s) of FMLA leave?

Employees are eligible if they have **worked at least 12 months** for a covered employer (but does NOT need to be continuously); and has worked at least **1,250 hours** in the prior 12 months. (*Military service LOA are included as hours worked.)

Reasons for FMLA leave are:

to care for the employee's child after birth, or placement for adoption or foster care (collectively "**baby bonding**");

to **care for a relative** of the employee (spouse, child or parent) with a serious health condition;

for the **employee's own serious health condition** that makes the employee unable to perform their job;

for a **"qualifying exigency"** arising from active military duty;

for an employee who is a spouse, son, daughter, parent or next of kin, to care for a **covered servicemember** with service-related condition.

Family members. Biological, adopted, step or *"responsibility"* relationships. (AI 2010-3)

What is a spouse? 2009 FMLA regs says "spouse" as defined by state law, but DOMA says federal definition of spouse means only opposite sex marriages; but . . . DOMA no longer enforced by feds. Generally, a registered domestic partner or a same sex legal spouse should be treated **at least as favorably as a spouse** for purposes of the federal law. But note, a same sex spouse/RDP could have **more leave benefits** because he/she could have 12 weeks care for partner leave under CFRA (but arguably that would not be counted as FMLA leave), and then take 12 weeks FMLA for own serious health condition). Rule: Only COVERED FMLA leaves use up FMLA entitlement!!!

Children are under 18 (or 18+ but incapable of self care because of disability); AND any age child triggers qualifying exigency / servicemember care leave.

Serious health condition. Mental or physical condition that requires inpatient care or on-going medical care. (Lots of details – make sure you have a good certification form tracking the federal definitions. FMLA website.)

Qualifying exigency. Disruption in life because the employee's spouse, child or parent is going to active military duty (e.g., sudden child care issues, counseling, arranging financial affairs, attending military informational events, being with relative on leave from duty, etc.

Servicemember care. The family member is active military with injuries from military service (or exacerbation of existing injuries because of military service).

(3) How long is an FMLA leave?

Typically, **12 weeks** of leave in a 12-month period.

BUT, if **servicemember care leave** is involved, **up to 26 weeks** of total FMLA leave.

E.g., 14 weeks servicemember care leave and 10 weeks baby bonding; or all 26 weeks servicemember care. But not 16 weeks baby bonding and 10 weeks servicemember care.

Definitions: What is a 12-month period?

Calendar year, Anniversary year, Look Forward or Rolling (Look back).

Employer needs to designate the method in advance!

NB: If servicemember care is involved, MUST use look forward rule.

(4) Is the employee guaranteed reinstatement after FMLA leave?

Pretty much YES: Under the FMLA, employee is entitled to reinstatement to same or equivalent (aka "virtually identical") position. Also note, in California, following pregnancy disability leave, woman is entitle to reinstatement to SAME position.

Limited exception for key employees (salaried and highest paid 10%) if reinstatement would cause substantial and grievous injury to employer. * The *reinstatement* causes the injury; not the leave.

Also, termination (or failure to reinstate) is okay IF termination is TOTALLY **unrelated to leave.**

Examples: Temporary replacement discovers that an accounting employee has not been paying the bills for the last year; Hospital closes particular unit (and no available positions AND no bumping rights).

(5) What documentation is necessary for FMLA leave?

Surprise: Depends on the type of the leave requested!

A) The employee's request: Does NOT need to be in writing;

B) The employer's initial response: Written and within five business days;

1. Needs to show approval, benefits status, reinstatement status.

C) Medical certification of employee's own serious medical condition necessitating leave;

C) Medical certification that employee is needed to care for a relative with a (certified) serious medical condition;

C) Medical certification of servicemember's condition necessitating employee's care; or

C) Employee's description of exigencies; and

If unsure, use the forms provided by the DOL (Wage Hour Division), which can be found at www.dol.gov/whd/fmla

Assuring complete certifications is one of the few areas where employer can "manage" leaves. Questions on certifications must be in writing, employee must be given opportunity to cure. Second and Third opinion process available.

D) Written requests for follow up, extensions, etc.

Recertification generally limited to once every 30 days (or duration of existing note); but can request recertification if objective evidence exists to question existing status.

E) Return to work certification: Okay IF applied uniformly.

(6) Will the employee continue to receive benefits while on FMLA leave?

Yes. During the FMLA leave (12 weeks or 26 weeks, or portion thereof), the employer must maintain benefits on the same basis as if the employee were working.

(7) Will the employee get paid any money while on FMLA leave?

Remember to keep separate the ENTITLEMENT TO THE LEAVE from the ENTITLEMENT TO / ELIGIBILITY FOR ANY PAY.

Also, do not make commitments for payment of benefits where you – as the employer – are not empowered to decide such as PFL, SDI, etc.

Eligibility (and amounts) of compensation depend on the type of FMLA leave and available accrued benefits. (Note: if the employer has no statement in its policies about the use of paid time off, then it's the employee's option!! RULE: have a written policy requiring use of PTO during leaves of absence.)

Use of accrued paid sick leave:

Only if the leave satisfies terms of sick leave policy, i.e., for employee's own "sickness" (unless modified by statute – see below, Lab. Code § 233); minimum duration; required notice, etc..

Use of accrued paid vacation (or PTO):

Employer may REQUIRE or employee may choose to use accrued PTO for any **unpaid** FMLA leave. *But see, Overlap, section 9, below: Pregnancy disability leaves treated differently in California – employee has option re use of vacation/PTO! **Also, where FMLA is PAID (through Workers' Compensation, SDI or even private disability policies), use of accrued PTO/Sick accounts must be by mutual agreement**. Coordination of benefits – by agreement only.

Eligibility for State Disability Insurance:

The employer does NOT make the determination. Generally speaking an employee taking FMLA leave for his/her own serious medical condition should also be eligible for SDI. Pregnant employees generally will "automatically" be eligible for seven weeks of SDI (but depends on the period of time the woman is "disabled" due to the pregnancy). SDI can last for up to one year.

Eligibility for California's Paid Family Leave:

The employer does NOT make the determination. PFL is NOT a leave entitlement – it's a partial pay replacement. Employees taking baby bonding leave or leave to care for a relative MAY be entitled to up to six weeks of partial pay supplements. Pregnancy leaves: disability leave portion will be covered by SDI, subsequent baby bonding leave may entitle employee to Paid Family Leave.

Eligibility for Unemployment Insurance:

The employer does NOT make the determination. Unclear, but appears that certain aspects of the exigency leaves could qualify the individual for unemployment benefits.

Eligibility for private short-term or long-term disability policies:

Completely dependent on the terms of the policy.

Integration of benefits:

Upon the AGREEMENT of the employer and the employee.

(8) Upon reinstatement from an FMLA leave, what is the employee's seniority, etc.?

FMLA leave is not treated as a break in service for purposes of salary adjustments, senority, etc. But, employee on leave does not accrue paid leave hours (unless agreement provides otherwise).

(9) HELP! Too many laws overlap!

What are the most benefits out of each law?

Quiet down. We've only covered one law so there is no overlap!

Well, actually . . . use of vacation and PTO during pregnancy disability leave (which is an FMLA employee's own serious medical condition, but which is NOT a CFRA "medical condition").

> California's Pregnancy Disability Leave act says the employee can elect, but the employer cannot require, the employee to use vacation/PTO during Pregnancy Disability Leave. Whereas the FMLA says that an employer can require use of paid leave during any of the FMLA leaves. As California's rule is MORE favorable to the employee (she has more options), California rule applies.

(10) HELP!! What about intermittent leaves?

The most difficult area of the FMLA:

> All of the FMLA leaves except baby bonding leave can be taken intermittently. That means the employee does not need to take all 12 weeks (or 26 weeks) of leave at one continuous time.
>
> Covered FMLA leave can be taken in increments as short as one hour!
>
> More commonly, FMLA leaves in increments of half days or full days is increasingly common.
>
> > E.g., family care shared by multiple relatives, your employee is only required to be the care giver one day per week; employee with back injury requires weekly physical therapy sessions.
>
> Employee must provide medical certification describing need for intermittent leave.
>
> Employee is obligated to attempt to minimize adverse impact on employer for intermittent leave.
>
> Baby bonding leave limitation on intermittent leaves:
>
> > Unless the employer agrees otherwise, baby bonding leave under the FMLA must be taken all at once.
> >
> > > But . . . California provides that baby bonding leave can be taken in two-week chunks AND on two occasions, the parent can take baby bonding leave for a period of less than two weeks.
> > >
> > > **READING THE LAWS TOGETHER**: Parent can request intermittent baby bonding leave, but generally in two-week increments, and twice, can take less than two weeks.
> > >
> > > CAREFUL: The limitation on intermittent baby BONDING leave is NOT applicable to care for a seriously ill family member. Thus, a new parent may seek (and obtain) intermittent FMLA leave to care for a sick child or for a sick spouse. (Think post-partum blues.)

California Family Rights Act ("CFRA"), California Government Code § 12945.1, et seq. [www.dfeh.ca.gov (not the easiest website)]

(1) Is the employer obligated to provide CFRA leave?

The same as FMLA: 50 employees for 20 weeks.

(2) Is the employee eligible for any particular type(s) of CFRA leave?

The same as the FMLA: Employees are eligible if they have **worked at least 12 months** for a covered employer, AND worked **1,250 hours** in the prior 12 months.

Reasons for CFRA leave are:

to care for the employee's child after birth, or placement for adoption or foster care;

to care for the employee's spouse (which includes Registered Domestic Partner and would not distinquish between a same sex or opposite sex married couple), son or daughter, or parent, who has a serious health condition;

for a serious health condition that makes the employee unable to perform their job;

But note: Pregnancy is NOT a serious health condition.

(3) How long is the CFRA leave?

12 weeks of leave in a 12-month period.

Again, the employer MUST specify its method for calculating the 12-month period (and it must use the same formula under the FMLA and the CFRA).

(4) Is the employee guaranteed reinstatement after CFRA leave?

Same as the FMLA. Presume the answer is yes, the employee is entitled to a comparable position upon expiration of leave.

Same exception for key employees. *Notify key employee if circumstances change.

Same exception if the termination is TOTALLY **unrelated to leave**.

(5) What documentation is necessary?

A) The employee's request: Does NOT need to be in writing;

B) The employer's initial response:

Written and within 10 business days (but remember, FMLA requires employer's response within FIVE business days – if the leave is both CFRA and FMLA, make sure to comply with the shorter response time).

C) Medical certification of employee's own serious medical condition necessitating leave or the medical certification that employee is needed to care for a relative with a (certified) serious medical condition

NOTE: CFRA regulations specify the employer CANNOT ask for diagnosis. Rather, employer is entitled only to the conclusions of the HCP – onset, expected duration, limitation. CFRA regs provide that California employers can use the FMLA certification forms, but need to specify that HCP is not to provide diagnosis.

D) Same FMLA rules regarding written requests for follow up, extensions, etc.

(6) Will the employee continue to receive benefits while on CFRA leave?

Yes. During the 12 weeks CFRA leave (which often – but not always) runs concurrently with FMLA, health benefits are maintained.

(7) Will the employee get paid any money while on CFRA leave?

In most respects, this is the same as FMLA:

As above: Remember to keep separate the ENTITLEMENT TO THE LEAVE from the ENTITLEMENT TO ANY PAY; and do not make commitments on benefits the employer does not control.

Use of accrued paid sick leave:

Only if the leave satisfies terms of sick leave policy, i.e., for employee's own "sickness" (unless modified by statute – see below, Lab. Code § 233); minimum duration; required notice, etc..

Use of accrued paid vacation (or PTO):

Employer may REQUIRE or employee may choose to use accrued PTO for any FMLA leave. *But see, Overlap, section 9, below: Pregnancy disability leaves treated differently in California – employee has option re use of vacation/PTO! ** And remember, if this is **paid** FMLA (SDI, workers' comp) leave, FMLA rules apply and use of accrued accounts is by agreement only!

Eligibility for State Disability Insurance:

The employer does NOT make the determination. Generally speaking an employee taking CFRA leave for his/her own serious medical condition should also be eligible for SDI. SDI can last for up to one year.

Eligibility for California's Paid Family Leave:

The employer does NOT make the determination. PFL is NOT a leave entitlement – it's a partial pay replacement. Employees taking baby bonding leave or leave to care for a relative MAY be entitled to up to six weeks of partial pay supplements. Pregnancy leaves: disability leave portion will be covered by SDI, subsequent baby bonding leave may entitle employee to Paid Family Leave.

Eligibility for private short-term or long-term disability policies:

Completely dependent on the terms of the policy.

Integration of benefits:

Upon the AGREEMENT of the employer and the employee.

(8) Upon reinstatement from an CFRA leave, what is the employee's seniority, etc.?

CFRA is not treated as a break in service for eligibility, but the hours on leaves are not "hours worked" for benefits based on such hours.

(9) HELP! Too many laws overlap!

What are the best benefits out of each law that applies?

Example:

Employee needs six weeks' leave to deal with exigencies arising out of spouse's deployment to Afghanistan.

(a) FMLA leave

The employee gets the time off; keeps benefits; can use vacation; employer can require employee to use vacation; entitled to reinstatement; employee has 6 weeks of FMLA remaining.

(b) CFRA leave.

This is not a qualifying CFRA leave. Thus, employee still has 12 weeks of CFRA leave available to be used for ANY CFRA reason (own serious illness, family care, baby bonding).

(c) Wage Replacements.

Paid Family Leave (maybe, BUT it is not for the employer to determine and the best advice is to tell the employee to check with the EDD and give the employee the "For Your Benefits" pamphlet); SDI (probably not, but not for employer to say); Unemployment (maybe, but not for employer to say) . . . .

(10) HELP!! What about intermittent CFRA leaves?

Same as the FMLA.

Employee must provide medical certification describing need for intermittent leave.

NOTE: Baby bonding leave limitation on intermittent leaves:

Unless **the employer agrees otherwise**, the employee taking baby bonding leave must take leave in two-week increments AND, on two occasions, the parent can take baby bonding leave for a period of less than two weeks.

SAME CAUTION: The limitation on intermittent baby BONDING leave is NOT applicable to care for a seriously ill family member. Thus, a new parent may seek (and obtain) intermittent CFRA leave to care for a sick child or for a sick spouse.

California Pregnancy Disability Leave of Absence (an aspect of the Fair Employment and Housing Act ("FEHA"), California Government Code § 12945 seq.

(1) Is the employer obligated to provide Pregnancy Disability leave?

If the employer has five or more employees.

(2) Is the employee eligible for Pregnancy Disability leave?

If the employee is disabled by pregnancy, childbirth, or related medical conditions.

> Note: So-called normal pregnancies will warrant seven weeks of disability (because that is what State Disability Insurance says)!

(3) How long is Pregnancy Disability leave?

Up to four months.

As noted, typically SDI will permit, uncontested, a disability certification of seven weeks. However, ALWAYS REMEMBER that the available leave is for up to four months as long as the employee is disabled by the pregnancy/childbirth/related medical conditions. (And, just because SDI might reject an MD's "continuing disability" certification, the employer needs to comply with the certification the woman's treating healthcare provider submits on her behalf.)

Additional obligations beyond granting leave:

> Provide a reasonable accommodation for conditions related to the pregnancy;
>
> Transfer the employee to a less strenuous position in accordance with the employer's existing policies for re-assignments for temporarily disabled employees; and
>
> Even if the employer does not have such a re-assignment policy, transfer the employee to a less strenuous position for the duration of the pregnancy upon a physician's advice where such transfer can be reasonably accommodated.

Seven months leave:

> As discussed below, through a combination of Pregnancy Disability leave AND CFRA leave, a pregnant woman can qualify for seven months leave.

(4) Is the employee guaranteed reinstatement following Pregnancy Disability leave?

Yes; she is entitled to be returned to the SAME position.

Also, an employer has the same ability to terminate/discipline if the action is TOTALLY **unrelated to leave**. [Discovery of serious misconduct, closure of business, etc. Exceptions to reinstatement are exceedingly narrow and employers should proceed with considerable care (and probably legal advice) before failing to reinstate an employee following pregnancy disability leave.]

(5) What documentation is necessary for Pregnancy Disability leave?

A) The same as for FMLA. (Although Pregnancy Disability Leave is NOT CFRA leave, it does qualify as FMLA leave.)

B) Employer should use FMLA response forms.

C) If not an FMLA-covered employer, any healthcare provider certification of disability will be enough to substantiate leave, but additional information (using a reasonable accommodation medical certification) may be required if transfer or other accommodations are requested. Leave, transfer and accommodations need only be "medically advisable." Common sense is also useful here.

(6) Will the employee continue to receive benefits while on Pregnancy Disability leave?

If the employer is covered by the FMLA, then the employer needs to maintain health benefits for the first 12 weeks of Pregnancy Disability leave. The remaining portion of the leave is without benefits (and the employee would be given COBRA notice) unless there is a policy or a practice of continuing benefits for more than 12 weeks for other temporary disabilities.

(7) Will the employee get paid any money while on Pregnancy Disability leave?

As with FMLA and CFRA leave, keep separate the ENTITLEMENT TO THE LEAVE from the ENTITLEMENT TO ANY PAY and do not make commitments about benefits that are decided by state agencies or insurers or others.

Use of accrued paid sick leave:

Employee can request to use accrued sick pay (and will be subject to normal sick pay policies) and employer can require its use

Use of accrued paid vacation (or PTO):

Totally up to the employee.

(In other leave situations, an employer may be able to require an employee to use accrued paid leave during the absences; but under the PDL law, the employee has the option on using or saving for later use, her accrued vacation pay or PTO.)

Eligibility for State Disability Insurance:

The employer does NOT make the determination. Generally speaking an employee taking PDL will be "automatically" eligible for seven weeks of SDI for the pregnancy/childbirth disability; but the period can be much longer depending on the employee's condition. SDI can last for up to one year.

Eligibility for California's Paid Family Leave:

The employer does NOT make the determination. But the rule is an employee is not eligible for Paid Family Leave for the period she is disabled (that's covered by SDI); but the employee is likely eligible for PFL for any baby bonding (or family member care) leave that she takes.

Eligibility for private short-term or long-term disability policies:

Completely dependent on the terms of the policy.

Integration of benefits:

Upon the AGREEMENT of the employer and the employee.

(8) Upon reinstatement from a Pregnancy Disability leave, what is the employee's seniority, etc.?

Remember, the 12 weeks of the PDL that is also FMLA is not treated as a break in service. However, the PDL is silent on the issue for purposes of PDL itself. The best course: treat any non-FMLA pregnancy disability leave in the same way that you treat any leave of absence for other temporary disabilities that are not FMLA leaves. In any event, like the FMLA and CFRA, even where a PDL absence is not treated as a break in service for seniority, etc., the hours on PDL are not "hours worked" for benefits accrued on such hours.

(9) HELP! Too many laws overlap!

What are the best benefits out of each law that applies?

PDL is one of the best examples for carefully examining the overlap of the various laws.

Assume an employee has a medically "difficult" pregnancy and is disabled for 14 weeks. What leave and benefits during leave can she get? Look at each of the laws independently, and take the most employee-favorable aspects of each:

(a) Pregnancy Disability Leave:

She gets the full 14 weeks off (maximum is four months); employee can elect to use any accrued sick leave she has; employer can require her to use accrued sick time; employee can elect to use some or all of any accrued vacation/PTO she has; employee is entitled to reinstatement in same position; and employee still has two weeks of PDL leave available if she has a recurrence of a covered disability (i.e., is again disabled because of the pregnancy, childbirth or related medical condition).

(a) FMLA leave

Gets 12 weeks time off; keeps benefits for those 12 "FMLA weeks;" employee can elect to use sick leave; employer can require her to use accrued sick time; employee can elect to use accrued vacation; ~~employer can require employee to use accrued vacation~~; employee is entitled to reinstatement in same ~~or equivalent~~ position; Employee has no more FMLA available for the 12-month period.

(b) CFRA leave.

This is not a qualifying CFRA leave. Thus, employee still has 12 weeks of CFRA leave available to be used for her own serious medical condition (a serious health condition NOT related to pregnancy or childbirth), OR to care for a family member (including this new baby) with a serious health condition, OR to bond with the new baby (or a combination of those leaves).

(c) Wage Replacements.

Probably, SDI will cover the first seven weeks; and if the EDD is satisfied with the physician's certification, the employee may receive SDI for the full 14 weeks. THIS IS NOT SOMETHING THE EMPLOYER DECIDES AND IT IS A TOPIC ON WHICH THE EMPLOYER CAN GUIDE, BUT MUST NOT ASSURE, THE EMPLOYEE!

Probably, the employee is still eligible for the six weeks of Paid Family Leave payments, but she has to take a leave that would qualify her for such payments (bonding leave, care for a relative). Again, this is not the employer's decision, so employers should never state that PFL will or will not be paid.

(10) HELP!! What about intermittent leave for Pregnancy Disability?

Absolutely. The regulations are very clear that an employee does not need to take her available PDL all at once. The leave can (and OFTEN) will be broken up for individual "sick" days, medical appointments, sporadic (or even lengthy) pre-delivery rest and post-delivery issues.

Moreover, just because the employee returns to work at some point, if she subsequently becomes disabled due to the pregnancy or childbirth, then any remaining amount of PDL is available and subject to all of the above rules. Employee must provide medical certification describing need for intermittent leave.

Leave of Absence as a Reasonable Accommodation

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101.

(1) Is the employer obligated to comply with the ADA's reasonable accommodation requirements?

If the employer has fifteen (15) or more employees, the ADA applies.

(2) Is the employee eligible for an ADA leave?

If the employee is physically or mentally "disabled" as defined by the ADA, the ADA's protections are available.

ADA "disability" requires that the employee suffer a substantial limitation in a major life activity.

Reasonable Accommodation Analysis:

Assuming the employee is disabled as defined by the ADA, what accommodations are **reasonable** that would permit the employee to perform the essential functions of the job? (The employer and employee are to engage in an interactive process to consider reasonable accommodations. A leave of absence is just ONE of the accommodations that should be considered.)

Inherent conflict: A leave of absence does NOT enable the employee to perform the essential functions of her job (rather, a leave results in the employee not performing ANY job duties). Ignore this; instead, employers need to view the situation a bit differently. Is it foreseeable that a **temporary** leave of absence is likely to result in the employee's ability to return to work and perform the essential functions of her position?

Reasonableness of any accommodation (including a leave of absence) depends on all the circumstances including: essential nature of the job (personal knowledge vs. fungibility of employees, importance to operations, number of incumbents, etc.); availability of continuing "production" with temporary employees; expected duration of leave; continuity of leave (intermittent leave – specifically unpredictability of employee's attendance – is much more disruptive than a single on-going leave); costs if any (overtime, temporary staffing agencies, etc.); impact on other employees (are the employees actually accommodating the leave rather than the employer?); the existence of other reasonable accommodations (telecommuting, part-time schedule).

No single answer, but clearly the courts are increasingly willing to find that a leave of absence can be a reasonable accommodation.

(3) How long is leave?

Open issue. The courts sometimes suggest that an indefinite LOA is not reasonable; but other courts suggest that if the employer is suffering no harm, then continued leave (rather than termination) is reasonable. Rules: Be clear on the impact to the operations; write out the parameters of the leave; and obtain mutual agreement with (or at least make the offer to) the affected employee.

(4) Is the employee guaranteed reinstatement following an ADA "reasonable accommodation leave"?

That depends. What are the circumstances of THIS specific situation and what were the terms of the accommodation?

Clearly, the portion of the leave that is covered by the FMLA / CFRA (or any other statute) provides the reinstatement rights available under the specific statute(s). Where a leave is extended (or where a FMLA/CFRA leave is not available) reinstatement guarantees are an aspect of the accommodation that is to be determined through the interactive process. Maybe, the employer can and will hold the job open for six weeks, or two months; maybe the employer cannot reasonably do so, and maybe preferential hiring is the reasonable alternative.

(5) Documentation for an ADA "reasonable accommodation leave"?

A) The **same** as for any other ADA disability accommodation inquiry.

A proper ADA-defined healthcare provider certification of limitations and capabilities and expected duration.

B) The same ability of the employer to seek second opinions and clarification.

(6) Will the employee continue to receive benefits while on ADA "reasonable accommodation leave" leave?

To the extent some of the leave is covered by the FMLA, yes; but once FMLA leave is exhausted, an ADA leave would be without benefits (and the employee provided COBRA notices).

Always remember, if OTHER leaves are treated more favorably by practice, policy or agreement, the employer cannot discriminate against this leave because it is an ADA leave.

(7) Will the employee get paid any money while on ADA "reasonable accommodation leave"?

As noted, to the extent the leave is governed by the FMLA/CFRA, those rules apply. Once FMLA/CFRA leave is exhausted, all issues are up for review as part of the reasonable accommodation interactive process.

Use of accrued paid sick, vacation and/or PTO leave:

Employer policies and practices control in the absence of some specific agreement otherwise. (Typically, it is in the employer's interest to require the use of accrued time off when possible.)

Eligibility for State Disability Insurance:

The mantra: The employer does NOT make the determination. However, if the employee has an ADA-covered disability, it is more likely than not (but NOT NECESSARILY certain) that the employee will be eligible for SDI.

Eligibility for California's Paid Family Leave:

The employer does NOT make the determination; but No. (Time off for one's own "disability" creates eligibility for SDI, not PFL.)

Eligibility for private short-term or long-term disability policies:

Eligibility is completely dependent on the terms of the policy; and the employer's role should be LIMITED to providing the employee with the application materials.

Integration of benefits:

Upon the AGREEMENT of the employer and the employee. A good issue for the interactive process.

(8) Upon reinstatement from a "reasonable accommodation leave," what is the employee's seniority, etc.?

The non-FMLA portion of the leave can be treated as a break in service; and the impact should be discussed in the interactive process and clarified in writing.

(9) HELP! Too many laws overlap!

What are the best benefits out of each law that applies?

Basically, a leave of absence as a reasonable accommodation follows when all other leave entitlements are exhausted. There generally is no "overlap" once the Employer has complied with each of the other, more specific, leave entitlements.

(10) HELP!! What about intermittent ADA leave?

Only if medically recommended, and another good issue for the interactive process. (Remember, the "scope" of the leave (including intermitten-ness) is an ESSENTIAL element to be evaluated to determine whether or not the leave will cause an undue hardship (i.e., to determine if a leave is or is not a reasonable accommodation).)

Leave of Absence as a Reasonable Accommodation Pursuant to the Disability Discrimination Provisions of the California Fair Employment and Housing Act ("FEHA"), California Gov't Code § 12940(m).

Use the same analysis as required under the ADA, with two notable cautions:

(1) The FEHA definition of "disability" is much broader than the ADA's definition and requires only that the employee's physical or mental condition "makes difficult" the performance of a major life activity. Thus, employers need to err on the side of assuming that any medical condition – even temporary – will trigger FEHA disability coverage.

(2) The FEHA contains a SEPARATE provision requiring the employer to engage in the interactive process, which can give rise to a separate violation of the statute. FEHA, section 12940(n). Be sure to engage in the conversations even if you believe the conversations are futile, **and document the process**.

Workers' Compensation Leaves of Absence.

(1) Is the employer obligated to comply with workers' compensation?

Yes. (Unless you have somehow figured out how to operate your ENTIRE business with independent contractors . . . and that is another topic.)

(2) Is the employee eligible for a workers' comp leave?

(A) The employee suffers an injury or illness that arises out of the course and scope of the employee's employment; and

(B) The healthcare provider certifies the employee's inability to perform his/her usual and customary duties.

Impact of modified work.

If modified work exists, the employer offers it, and the employee refuses it, the employee will be ineligible for temporary disability benefits.

(3) How long is workers' compensation leave?

What are your policies and practices for non-workers' comp leaves?

Under the 2003 Lauher decision, the issue should be one of DISCRIMINATION: an employer cannot treat employees with industrial disabilities worse than it treats employees with non-industrial injuries. Make a policy. (And check that your CBAs, existing personnel policies and "commitments" to employees do not constrain you.) Six months seems to okay.

Old rule: Until the employee is declared permanent and stationary; or where a business justification that is "necessary and directly related to business realities" warrants termination of the leave (and/or termination of employment). Arguably, there is never a "necessity" that would prevent the employer from placing the individual on "inactive status" rather than terminating the employment – where the employee could remain for YEARS.

(4) Is the employee guaranteed reinstatement following a workers' comp leave?

No.

Reinstatement depends on the condition of the employee when he or she exhausts the leave entitlement. If leave has been granted until the employee is P&S, then reinstatement depends on the abilities at that time.

(5) Documentation for a workers' comp leave?

A) The employer has the obligation to provide Notice of Injury to the employee; the comp carrier will do the rest when (and if) a claim is filed.

B) BUT, a very common situation where FMLA, CFRA, ADA and FEHA disability discrimination overlaps. ALWAYS seek appropriate medical documentation of return to work notices, certifications of limitations, and "recommendations" for accommodations.

(6) Will the employee continue to receive benefits while on workers' comp leave?

To the extent some of the leave is covered by the FMLA, yes; but once FMLA leave is exhausted, a workers' comp leave is without benefits (and the employee is to be provided COBRA notices).

Always remember, if OTHER leaves are treated more favorably by practice, policy or agreement, the employer cannot discriminate against this leave because it is a workers' comp leave.

(7) Will the employee get paid any money while on a workers' comp leave?

Why would you ask?

Comp payments – temporary partial or total disability and permanent partial/total disability payments are determined by the workers' comp schedules.

Other payments include:

Use of accrued paid sick, vacation and/or PTO leave:

Employer policies and practices control in the absence of some specific agreement otherwise. (Typically, it is in the employer's interest to require the use of accrued time off when possible.)

Eligibility for State Disability Insurance:

The mantra: The employer does NOT make the determination. However, if the employee's "condition" is the result of an industrial injury, SDI does not apply (that's what workers' comp insurance is for). In reality, SDI often pays benefits and then has a lien on comp awards.

Eligibility for California's Paid Family Leave:

The employer does NOT make the determination; but No. (Time off for one's own "medical incapcity" creates eligibility for workers' comp (or SDI); but not PFL.)

Eligibility for private short-term or long-term disability policies:

Eligibility is completely dependent on the terms of the policy; and the employer's role should be LIMITED to providing the employee with the application materials.

Integration of benefits:

Upon the AGREEMENT of the employer and the employee.

(8) Upon reinstatement from a workers' comp leave, what is the employee's seniority, etc.?

The non-FMLA portion of the leave can be treated as a break in service – but make sure not to treat a workers' comp leave any less favorably than other temporary disability leaves.

(9) HELP! Too many laws overlap!

What are the best benefits out of each law that applies?

EVERY LEAVE LAW MAY RAISE ITS HEAD HERE (except, presumably, PDL).

A far too frequent mistake is to assume that compliance with the workers' comp scheme will satisfy the employer's obligation. NOT SO. The employer must review each leave request (and each request for reinstatement, job modifications, other accommodations) without regard to the fact that the initiating cause of the "condition" is an industrial accident or illness.

Hint: Do not rely blindly on a stale QME or other certifications to preclude return to work requests.

Caution area: Work WITH your comp carrier to assure that follow up certifications are consistent with the provisions of the workers' comp act (as well as consistent with the 30-day (or other limitations) of the FMLA / CFRA.

Remember to engage in the interactive process!!!

(10) HELP!! What about intermittent leave for workers' comp leave?

Of course. (Weekly therapy, etc.) The employer can (and should) require the medical certification.

Remember, as the FMLA/CFRA may also apply to some or all of the leave (including requests for intermittent leave), a request for intermittent leave for a comp injury – follow up treatment – needs to be evaluated under those laws.

Remember, as the ADA/DFEH may also apply to this employee, requests for intermittent leave needs to be analyzed pursuant to the reasonable accommodation rubric and the employer must be sure to engage in an interactive process prior to denying the request or otherwise implementing an adverse employment decision.

But also remember, as long as the employer does not INTERFERE with the employee's ability to take the leave (which would include the ability to obtain follow up and/or continuing care services), it is fully appropriate to require the employee to work WITH the employer to schedule intermittent leave so as to minimize adverse impacts in the workplace.

Miscellaneous Issues.

(1) Notifying employees of leave rights:

Employers must post notices.

Your employer association, the California Chamber of Commerce, and commercial organizations have "combined" posters.

Check specifically Voters Rights – need to have posted 10 days prior to statewide election!

If you have published "employee policies" (e.g., an employee handbook), FMLA and CFRA details must be included (but summaries of all the leave benefits are worthwhile – you have to provide them, might as well obtain some positive publicity). If employer does not have employee handbook, summary of FMLA must be distributed.

Where triggering event occurs for FMLA/CFRA leave (the employee announces a need for a leave or submits a leave of request form), the employer is obligated to respond with summary of law and determination of eligibility.

(2) Interfering with leave rights:

Voicing frustration with leave requests, seeking delays, failure to provide information, failure to respond timely to requests can give rise to separate claims for interference with protected rights.

Supervisors, as well as HR professionals, need to know that interference with leave rights is BAD.

(3) Retaliation for exercising leave rights:

Please . . . do not assume that your at will policy protects you from leave law suits.

At will employment means that an employee may quit or an employer may discharge an employee at will: for a good reason, a bad reason, or no reason at all; **as long as it is not an illegal reason**. Termination (or

any other less drastic “adverse employment action”) that occurs in retaliation for exercising a protected right is an illegal reason. Bad bad bad.

Even if the employee is not otherwise a member of a protected class, once an employee:

asks for a protected leave;

makes it known that she/he will be asking for a protected leave;

is on a protected leave; and

returns to work from a protected leave

the employee is “protected.”

Moreover, once in a protected class, the employer effectively has the burden of justifying any adverse employment action suffered by the employee.

PART THREE: WAGE AND HOUR ISSUES

A. Overtime Pay Obligations in California

Under California law, employers must pay **time-and-one-half** the non-exempt employee's regular rate of pay for:

- All hours worked **beyond eight in a single workday**; and
- The **first eight hours worked on the seventh** consecutive day worked in a single workweek.
- All time worked in **excess of forty hours in one workweek.**

Employers must pay **double** the employee's regular rate of pay for:

- All hours worked **beyond 12** in a single workday; and
- The hours worked **beyond eight on the seventh** consecutive day worked in a single workweek.

* Under Federal law, employers must just pay **time-and-one-half** the employee's regular rate of pay for all hours over 40 in one workweek.

Alternative Workweeks

Employers and employees MAY agree to work alternative workweeks so that daily overtime is eliminated (or, at least, limited): e.g., a schedule of four 10-hour days. BUT, THE EMPLOYER MUST FOLLOW THE STRICT RULES TO IMPLEMENT ALTERNATIVE WORKWEEKS, WHICH INCLUDE WRITTEN NOTICES TO THE APPROPRIATE UNIT OF EMPLOYEES; MEETINGS TO DISCUSS THE IMPLICATIONS OF THE PROPOSALS; AND A SECRET BALLOT ELECTION.

Workday Defined

A workday means any consecutive 24-hour period starting at the same time each calendar day. The workday may begin at any hour of the day. Unless you specify another starting time the default is a workday of 12:01 a.m. to midnight. You can define different workdays for different groups of employees, however, once you define a workday, it must be consistent and unchanged for that employee until there is a legitimate business reason for a change (for example, the employee is promoted to a different location that has a different workday defined for that group of employees).

California daily overtime is based on the number of hours worked within a single workday. An employee on a traditional 12:01 a.m. to midnight workday could work 16 hours straight without being paid overtime, if he/she worked 3:30 p.m. until midnight and then continued working from midnight to 8:30 a.m. (assuming a one-half hour unpaid meal period in each "workday").

Workweek Defined

A workweek is any seven consecutive 24-hour periods, starting on the same calendar day each week. Unless specifically designated, the default is Sunday through Saturday (i.e., the workweek starts at 12:01 a.m. on Sunday morning). The workweek may be different for different groups of employees, but should remain consistent and unchanged unless there is a legitimate business reason for the change. The workweek designation becomes important when calculating overtime under the "seventh day" rule, because this rule applies only on the seventh day of your defined workweek, not simply any time an employee works seven days in a row.

Hours Worked

"Hours worked," means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, *and* all "time during which an employee is subject to the control of an employer." Restricting employees to the employer's premises, or worksite, means that the employee is subject to the employer's control so as to constitute "hours worked." See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, and *Bono Enterprises v. Labor Commissioner* (1995) 32 Cal.App.4th 9 68. Under such circumstances, the employees must be paid their regular rate of compensation (which cannot be less than the minimum wage), or any overtime rate, if applicable.

Rounding

The U.S. Department of Labor and the California DLSE generally allow "rounding" employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked. BUT NOTE: ROUNDING HAS TO GO BOTH WAYS. (Sometimes benefits employees sometimes the employer. E.g., Quarter-hour rounding, and the employee clocks in at 8:07, the employee is credited as starting at 8:00.

No "Pyramiding"

Hours paid on an overtime premium basis do not count toward another type of required overtime. For example, if an hour is paid as daily overtime, that hour does not count toward weekly overtime.

Regular Rate of Pay Defined

"Regular rate" means all remuneration for employment paid to, or on behalf of, the employee in a given workweek divided by the total hours worked in the work week. The regular rate includes the hourly rate of pay for the employee but may include kinds of compensation. Generally included in the definition of "regular rate" are:

- "On-call" pay
- Bonuses *promised* as an incentive for continued good work product, etc. (not including bonuses which are *purely* discretionary)
- Prizes and contest awards (if paid as remuneration of employment)
- Meal expenses paid by the employer
- Salaries
- Salary increases
- Shift differentials
- Travel expenses if paid by the employer
- Bonus payments made pursuant to collective bargaining agreements in consideration of meeting education or military service goals

Regardless of the method of compensation, if the employee is not exempt from overtime, the regular rate is always an hourly rate. As noted above, all includable compensation for a single work week is aggregated and divided by the total hours worked in that work week in order to calculate the regular rate. This means that the regular rate is a "weighted average" of all compensation.

Note: An employer may establish different rates of pay for different work (e.g., travel rates, on call rates, etc.) Under federal law, if established properly, an employer could use the "rate in effect" when calculating overtime compensation. However, California does not allow the use of the "rate in effect" -- and requires the weighted average method computation.

B. Recordkeeping Requirements

Employers are required to keep wage and hour records that show employee work time, compensation, etc. Retained Records are defined by law. Those records include, but are not limited to:

- Time and day of week when employee's workweek begins;
- Hours worked each day;
- Total hours worked each workweek;
- Basis on which employee's wages are paid;
- Employee's regular hourly rate of pay;
- Employee's total daily or straight time earnings;
- Employee's total overtime earnings for the workweek;

An employer will have a difficult time proving correct payment of wages without accurate records.

C. Avoiding Most Common Mistakes

1. Mischaracterizing Duties

Mischaracterizing employee duties is a common mistake, which defeats a claimed exemption. Employers will owe back pay and significant waiting-time penalties to employees with disqualified exemption statuses.

2. Improper Docking of Exempt Employees – Defeats Exemption

Making deductions from an exempt employee's salary for partial day absences, disciplinary suspensions (other than for certain safety-related reasons) or jury duty or military leave may destroy the employee's exempt status and may even destroy the exemption of any employee whose salary is subject to that deduction. As a result, the employer may owe back pay under Federal law for overtime for all hours worked over 40 in a workweek for two to three years to the employee.

3. Failure to Include Compensable Break Periods into "Hours Worked"

If nonexempt employees work three and one-half (3 ½) hours or more, they must take a ten minute break. If they work more than five hours, they must take one ten minute break and one unpaid meal break (30-60 minutes per arrangement with their supervisor). If they work more than six hours, they must take two ten minute breaks and one meal break (30-60 minutes per arrangement with their supervisor). Break periods may not be combined, added to a lunch hour, or taken at the end of the day. Breaks are compensable – meal periods are not.

4. Failure to Include Non-Commute Travel Time in "Hours Worked"

Ordinary travel between home and work is not compensable working time. However, if an employee who regularly works at a fixed location is required, for the convenience of the employer, to report to a location other than his/her regular work site, the employer must

compensate the employee for all travel time in excess of his/her ordinary travel time between home and work with allowance for associated travel expenses. Employers must pay employees it requires or directs to travel from one place to another after the beginning of or before the close of the work day for all travel time and must reimburse them for all transportation expenses. Where travel keeps an employee away from home overnight, the employer must pay the employee for all time spent away from home that occurs during the employee's normal working hours. Where the travel is done on corresponding hours during non-working days, the employer still is obligated to compensate the employee for this travel time.

5. Failure to Include Compensable "Donning and Doffing" of Specialty Clothing or Equipment into "Hours Worked"

Compensable time is any time during which the employer exercises control over the employee. Such time includes pre and postliminary time preparing for or cleaning up after work.

6. Failure to Pay Bona Fide "On-Call" Time

The test for the requirement of payment for "on call" hours under Federal law is whether the employee is "waiting to be engaged" or "engaged to wait." An employee "standing by" who is required to work when called may be on the clock. Likewise, employees required to have pagers and report when paged may be on the clock. However, employers do not have to pay employees who can do significant other things while on call or can choose not to respond.

7. Failure to Establish a Bona Fide Alternative Work Week

To use a fluctuating workweek, the employer must have an agreement with the category of workers, based on a secret ballot election that states the employee is entitled to a compensation for "all hours worked in a workweek" for hours worked in excess of 40 in a week. Typical arrangements include a category of worker working 4 ten hour-days or 3 twelve-hour days. Absent the ballot and agreement, the employer may not pay on a fluctuating or alternative workweek.

8. Failure to Keep Accurate Timekeeping Records

Employers are required to keep wage and hour records that show employee work time, compensation, etc. Retained Records are defined by law. Those records include, but are not limited to:

- Time and day of week when employee's workweek begins;
- Hours worked each day;
- Total hours worked each workweek;
- Basis on which employee's wages are paid;
- Employee's regular hourly rate of pay;
- Employee's total daily or straight time earnings;
- Employee's total overtime earnings for the workweek;

An employer will have a difficult time proving correct payment of wages without accurate records.

9. Failure to Pay For "Training" Time or Attending Mandatory Meetings

Under the FLSA, hours spent in training or attending mandatory meetings (under the control of the employer) are considered "hours worked" for purposes of wage and overtime pay.

10. Exchanging Overtime for "Comp Time"

Many employers believe that it is permissible to provide comp time rather than paying overtime. Not so. Only under very limited circumstances may an employer allow a worker to "make-up" time – even if the employer agrees to it. If an employee works more than 40 hours in a particular week, the employee has to be paid overtime for that week.

11. Using the "Rate in Effect" Overtime Computation Method

As noted above, under California enforcement policy, the rate in effect method of computing overtime cannot be used. Rather, the California employer must go to the trouble of making the weighted average calculation each workweek if there are multiple methods of compensation and if hours and compensation fluctuate weekly.

12. Failing to Include All Compensation Into Weighted Average Computation

If a non-exempt employee earns different kinds of compensation, for example, a base rate plus incentives and works overtime hours, all that compensation must be considered when calculating the weighted average regular rate for determining the overtime premium.

13. Including Anticipated Overtime in a Salary for a Non-Exempt Employee

It is possible to pay a non-exempt employee on a salaried basis. There are significant pitfalls associated with that wage-payment method, however. Mistakenly assuming that the salary of a non-exempt employee includes overtime can be a costly error. Even when all the parties agree, in advance, that the salary will include compensation for whatever overtime hours the job requires – that agreement may not be valid.

D. Avoiding Violations and Penalties

You can minimize your Organization's exposure by taking proactive measures now:

1. Regularly review the job descriptions and actual daily duties of employees you have classified as exempt, **and never presume** the title "manager" automatically makes an employee exempt. Compare those duties against the tests required for exempt status.

2. Annually audit the salary levels of exempt employees. The current minimum is $2,774.00 per month. Keep in mind that this is tied to the state minimum wage -- if minimum wage increases so will the minimum salary for exemption.

3. Don't assume that employees should be classified as exempt simply because others in the industry treat them as exempt. State and federal regulations do not take industry standards into account in determining exempt status.

4. Look carefully at managers who spend a great deal of time performing the same types of duties as their subordinates.

5. Consider the employees' expectations in making an exemption determination. If an employee considers him/herself to be non-exempt, it is much more difficult to support an exemption for that individual. He/she is likely to de-value the level of independent judgment and discretion used, etc.

E. Meal and Rest Breaks in California

Back to the Future:

- Meal and Rest Breaks have been included in the California Wage Orders for more than 30 years.
- AB 60, effective in 2000, restored the 8 hour workday and **codified** the meal break requirement.
- AB 2509, effective in 2001, added penalties for violation.

Labor Code Section 512:

(a) An employer *may not employ an employee for a work period of more than five hours* per day without *providing* the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

- An employer *may not employ an employee for a work period of more than 10 hours per day* without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order *permitting a meal period to commence after six hours* of work if the commission determines that the order is consistent with the health and welfare of the affected employees.

(c) Subdivision (a) does not apply to an employee in the *wholesale baking industry* …

(d) If an employee in the motion picture industry or the *broadcasting industry*…

Wage Orders Section 11 – Meal Periods

(a) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

(b) An employer may not employ an employee for a work period of more than ten (10) hours per day without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(c) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when *the nature of the work prevents* an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(d) [penalty]

(e) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

Wage Orders Section 12, Rest Periods

(a) Every employer shall ***authorize and permit*** all employees to take rest periods, which insofar as practicable shall be in the *middle of each work period*. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes ***net*** rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(b) If an employer fails to ***provide*** an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

Labor Code Section 226.7

(a) No employer shall ***require*** any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

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

California Food Fight: the Great Enforcement Debate

Murphy v. Kenneth Cole Productions

- The issue before the California Supreme Court was whether payments under Labor Code §226.7(awarding one hour of pay for each day a meal or rest period is not ***provided***) is a wage or a penalty. If a penalty – then a one-year statute of limitation applied. If a wage – then a three-year statute of limitations applied.

- In April 2007, the California Supreme Court held that payments under Labor Code §226.7 constitute wages subject to a three-year status of limitation.

Enforcement Questions Post Kenneth Cole (embodied in *Brinker Restaurant Corp.)*

- Definition of "provide"

- Definition of "authorize and permit"

- When missed meal and/or rest period

- Whether meal and/or rest period premium pay must be included in the calculation of the "regular rate"

- How employers should record payment on employee check stubs

- Timing of first and second meal periods (rolling 5 hour meal periods required

- *De minimus* violations (Meal periods close to 30 minutes? Meal periods started a few minutes late?)

- Do rounding rules apply to meal periods?
- Rest periods (the “net” ten minute requirement)
- Is there now a 4-year statute of limitations under the Business and Professions Code for missed meal and rest period?
- Can employers require employees to work on duty meal periods with the only “remedy” being the extra hour of pay?

Steven White v. Starbucks (and several other federal cases applying federal law):

- Federal courts applying California law hold consistently that:
    - Employer need only offer / provide the opportunity for breaks & meals – by having a proper policy and work rule granting such breaks and no ACTUAL impediments to taking the breaks – the employer does not need to guarantee that the breaks/meals are taken each day by each employee.

What to do?

- Draft a compliant policy.
- Evaluate systems to ensure that they do not hinder or impair employees taking rest and meal breaks.
- Appoint compliance manager.
- Schedule breaks and relief.
- Ensure that employees record the time out and time in for the meal period.
- Have a compliant written on duty meal period agreement on file (IF APPLICABLE).
- Program automated scheduling systems to trigger violations and show premium pay requirements.
- Establish system for employees to report violations.
- Educate managers.
- Track and discipline violations.

F. Major Exemptions To Overtime (and Meal / Rest break) Obligations "Exempt Employees"

WARNING WARNING: DO NOT OVER EXEMPT!!!

Executive, Administrative, Professional, Computer & Outside Sales Employee Exemption Under the Fair Labor Standards Act (FLSA) (Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541); **and** the **California** Code of Regulations §11040.

The FLSA and California law require that most employees be paid at least the federal or state minimum wage for all hours worked; and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek (and in *California* over 8 hours in a workday). However, Section 13(a)(1) of the FLSA and California Code of Regulations §11040 provide exemptions from overtime pay for employees employed as bona fide executive, administrative, professional, outside sales and certain computer professional employees.

To qualify for exemption, employees generally must meet certain tests regarding their job duties and must be paid on a salary basis at not less than $455.00 per week; however, in *California*, a monthly salary of not less than two (2) times the state minimum wage for full time employment of 40 hours per week, or $2,774.00 per month. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the respective state or federal regulations.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis of at least $2,774.00 per month.

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. "Primary duty" means the principal, main, major, or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. In *California*, "majority" of duties means that exempt duties comprise 50% of the employee's hours worked.

- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent. The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks. The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed between two, three, or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and

regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis of at least $2,774.00 per month.
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and,
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(In *California*, "majority" of duties means that exempt duties comprise 50% of the employee's hours worked.)

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis of at least $2,774.00 per month.
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and,
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(In *California*, "majority" of duties means that exempt duties comprise 50% of the employee's hours worked.)

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis of at least $2,774.00 per month.
- The employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

(In *California*, "majority" of duties means that exempt duties comprise 50% of the employee's hours worked.)

Computer Professional Employee Exemption

To qualify for the computer professional employee exemption in *California*, *all* the following tests must be met:

- The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment;
- The employee is primarily engaged in duties that consist of one or more of the following:
    - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

- The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(In *California*, "majority" of duties means that exempt duties comprise 50% of the employee's hours worked.)

- The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.
- The employee's hourly rate of pay is not less than $37.94 or paid on a salary basis of at least $79,050.

- The exemption does not apply to an employee if any of the following apply:

  - The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

  - The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

  - The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

  - The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

  - The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

  - The employee is engaged in any of the activities set forth herein for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

Make-up Payments and Prorating

There are special rules for prorating the annual compensation if employees work only part of the year, and which allow payment of a single lump sum, make-up amount to satisfy the required annual amount at the end of the year and similar make-up payments to employees who terminate before the year ends.

Blue Collar Workers

The exemptions provided by FLSA Section 13(a)(1) apply only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill, and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to

minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Salary Basis Requirement

To qualify for exemption, employees generally must be paid **on a salary basis**.

Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

Circumstances in Which the Employer May Make Deductions from Pay

Deductions from pay are permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. In addition, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

So long as no actual deduction is made from the salary, an employer may allow require exempt employees to use accrued sick leave and vacation in half-day increments (4 hours) for time missed. If the employee does not have sufficient time off accrued for such half-day absence, there can be no diminution of the salary except for full days out.

Effect of Improper Deductions from Salary

The employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.

RULE: The employer has the burden of proving that an exemption applies by establishing the actual duties performed by the employee AND that the employee was compensated appropriately (minimum amount, and usually paid on a "salary basis."

Exemptions are overused and hard to establish without a full trial!!!

PART FOUR: FIVE ESSENTIAL EMPLOYEE POLICIES

1. AT WILL.

The purpose is to foreclose claims for "breach of good cause employment agreement" but it does NOT really mean the Employer can fire an employee for no reason.

2. ANTI-DISCRIMINATION AND ANTI-HARASSMENT (WITH A THOROUGH – AND HONEST – COMPLAINT PROCEDURE.

The purposes are (a) to eliminate harassment and discrimination in the work place; and (b) to insulate the employer from co-worker harassment – if the employer does not know about the harassment by co-workers, it cannot prevent/correct it. Even the best policy will not insulate the employer if the harassment is by a supervisor.

3. ACCOMMODATION OF DISABILITIES, INCLUDING PREGNANCY DISABILITY.

The purpose is to ensure that the employees know that accommodations are available but that it is their responsibility to come forward with (a) the request; (b) the justification(s); and (c) interact with the employer to find a reasonable accommodation. A good policy will not protect the employer if it is not followed by supervisors!!!

4. MEAL AND REST BREAK POLICY (reflecting that the employees are ENTITLED to their rest and meal breaks).

The purpose is to ensure employees know of their rights, which can help insulate the employer from after-the-fact claims if the employee has never complained about missing a meal or rest break.

5. FMLA / CFRA LEAVE IF THEY APPLY. (If you have an Employee Handbook, it MUST include an accurate summary of the employees' FMLA and CFRA rights)

Note: The information in this handout is a necessarily BRIEF summary of many complex laws and does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other expert assistance is required, we recommend that you consult with qualified local counsel familiar with your specific situation before taking any action.