Chapter 2

Recruitment and Hiring

1 Employer Recruitment and Hiring in California

1.1 Chapter Overview.

This chapter covers California and federal laws governing recruitment and hiring. The California Fair Employment and Housing Act (FEHA), the California Labor Code, and other state laws provide protections to job applicants that generally exceed those provided under federal law and the laws of most states. California and federal laws governing the following practices are covered in the sections that follow:

- Recruitment practices (Section 2);
- Job applications and interviews (Section 3);
- Background checks and employment references (Section 4);
- Specific questions employers can and cannot ask (Section 5);
- Medical and disability-related questions employers can and cannot ask (Section 6);
- Pre-employment testing and medical examinations (Section 7);
- Hiring practices and selection criteria (Section 8);
- New hire documentation (Section 9);
- The employer's affirmative duty to recruit and hire (Section 10);
- Protection of employer trade secrets, inventions, and other proprietary or confidential information (Section 11); and,
- Hiring and the use of arbitration agreements (Section 12).

Each of these topics is discussed in detail in the sections that follow.

1.2 Checklist for New Hire Documentation.

California employers are required to provide new employees with a variety of forms, notices and publications at the time of hire. Some of the documentation is required by law, other documentation is optional but considered to be "best practice." Some documentation items are purely informational, while others must be completed, signed and returned to the employer for purposes of legally required recordkeeping. These forms, notices and other publications are discussed in detail throughout this publication.

The following is a summary of new hire documentation, including the chapters and sections of this publication where they are discussed:

- California Form DE 34: Report of New Employee(s) to State (Chapter 1, Section 4.1.2);
- California Form DE 35: Notice to Employees — Excessive Withholdings (Chapter 1, Section 4.1.2);
- California Form DE 4: Employee Withholding Allowance (Chapter 1, Section 4.1.2);
- Federal IRS Form W-4: Federal Employee Withholding Allowance (Chapter 1, Section 4.1.2);
- California Form DE 542: Independent Contractors Report (Chapter 1, Section 4.8);
- Employment application (Chapter 2, Sections 3, 4, 5);
- INS Form I-9: Authorization to Work in United States (Chapter 2, Section 3.3);
- Background check authorization and notice (Chapter 2, Section 4);
- Job offer letter (Chapter 2, Section 9.2);
- California Form DLSE-NTE — Wage notice to employee (Chapter 2, Section 9.3);
- Written sales commission agreement (Chapter 2, Section 9.4);
- Invention assignment agreement (Chapter 2, Section 11.3.3);
- Non-disclosure agreement (Chapter 2, Section 11.4);
- Arbitration agreement (Chapter 2, Section 12);
- California Publication DFEH 185: Sexual Harassment Information Sheet (Chapter 3, Section 9);
- California Publication DWC 9783.1: Time of Hire Workers' Compensation Pamphlet, including Personal Physician Designation Form and Personal Chiropractor or Acupuncturist Form (Chapter 5, Section 9.2.2);
- California Publication DE 2515: Disability Insurance Provisions (Chapter 5, Section 19.1);
- California Publication DE 2511: Paid Family Leave (Chapter 5, Section 19.2);
- California Publication DE 2320: For Your Benefit — California's Programs for the Unemployed (Chapter 7, Section 10.20.2);
- Employee handbook acknowledgement form (with handbook).

Best Practice. In order to ensure uniformity in the process of recruitment and hiring, California employers are advised to establish a "checklist" of documentation provided to the new employee. The checklist, containing the date each document is provided to the new hire and initials or signature of the hiring official providing the documentation, should be maintained in the employee's personnel file. California employers should note that the foregoing list of documentation is simply a starting place for employers and not an exclusive list. Every employer is unique and the information provided to new employees will necessarily vary from employer to employer, and industry by industry.

9 New Hire Documentation

9.1 New Hire Documentation.

California employers are required to provide new employees with a variety of forms, notices and publications at the time of hire. Some of the documentation is required by law, other documentation is optional but considered to be "best practice."

For a checklist of new hire documentation, see Section 1.2 ("Checklist for New Hire Documentation"), above.

9.2 Employer Use of Job Offer Letters.

California employers have no obligation to confirm terms and conditions of employment in a job offer letter. Nevertheless, a properly drafted job offer letter can help minimize risk in the event of wrongful termination and other employment claims. California employers electing to use offer letters may wish to cover some or all of the following topics:

- Position, including job title, first day of work, where job duties will be performed, and whether position is regular or temporary, full time or part-time, exempt or non-exempt, *etc.*;
- Job duties and responsibilities, including a description of key duties, the supervisor to whom employee will report, a copy of the position description, if any, and any required licensing or certification;
- Duty to follow company personnel policies;
- Description of the employment relationship (*e.g.*, employment at-will);
- Hourly rate or salary, including incentive compensation such as bonuses;
- Duty of loyalty and obligation to perform duties conscientiously;
- Description of benefits and expense reimbursement policy;
- Duty follow rules of conduct, including anti-discrimination and harassment policies;
- Non-disclosure agreements, employee handbooks, I-9s and other new hire documentation requiring employee verification and signature;
- No conflict with prior employers, including disclosure of agreements signed with former employers precluding or inhibiting performance of job duties; and,
- Merger or integration clause stating that offer letter supersedes all prior agreements related to employment with company.

Best Practice. Employers may be required to tailor their offer letters to address terms and conditions of employment unique to the position. Sample long and short form job offer letters are included at Appendices F ("Sample Job Offer Letter (Short Form)") and G ("Job Offer Letter (Long Form)").

9.3 Wage Notice Required for Non-Exempt Employees at Time of Hire.

The California Wage Theft Protection Act requires California employers to provide notice of certain wage information to non-exempt, newly hired employees. California Labor Code Section 2810.5 requires that at the time of hire, an employer must provide each non-exempt employee with a written notice containing certain information related to payment of wages.[580]

The following information must be contained in the notice:[581]

- The rate or rates of pay (all applicable rates must be listed), including rates for overtime, and the basis thereof (*e.g.*, pay by the hour, shift, day, week, salary, piece, commission, or otherwise);
- Allowances claimed by the employer, if any, as part of the minimum (*e.g.*, meal or lodging allowances);
- The regular pay day designated by the employer in accordance with the requirements of the California Labor Code;
- The name of the employer, including any "doing business as" names used by the employer;
- The physical address of the employer's main office or principal place of business, and a mailing address, if different;
- The telephone number of the employer;
- The name, address, and telephone number of the employer's workers' compensation insurance carrier; and,
- Any other information the Labor Commissioner deems material and necessary.

If the employer is a "temporary services employer," the notice must also include the name, physical address of the main office, and telephone number for the legal entity for whom the employee will perform work.[582]

If the employee has multiple pay rates (*e.g.*, regular and overtime hourly or piece rates), they may be either listed on the notice, or attached as a separate sheet to the notice with a clear reference to the attachment in the space on the notice form for rates of pay.[583] The notice requirement cannot be waived.[584]

Best Practice. The California Labor Commissioner has prepared a notice template that purports to satisfy the requirements of the Act, in addition to a Frequently Asked Questions (FAQ) publication addressing the requirements of the Act.[585] The template includes all information the agency deems material and necessary for purposes of the notice.[586] A copy of this template is included at Appendix O ("Notice to Employee (Labor Code Section 2810.5)"). The template is also available in Spanish, Chinese, Vietnamese, Tagalog and Korean.[587]

9.3.1 Notice May Be Given Electronically.

California employers are permitted to give the required notice electronically. Where notice is given electronically, the employer is required to have a system in place permitting the employee to acknowledge receipt of the notice, and to print a copy.[588]

9.3.2 Notice Must Be in Language Used to Communicate with Employee.

The notice must be in the language the employer normally uses to communicate employment-related information to the employee.[589] The template is currently available in English, Spanish, Chinese, Vietnamese, Tagalog and Korean.[590]

9.3.3 Employer Need Not Use Government Notice Form.

Employers are not required to use the Labor Commissioner's notice template, provided that the notice requirements of the Act are otherwise met.[591] However, employers

using documents other than the template to provide notice are required to use a stand-alone document, and may not require employees to piece together the required wage information from job offer letters, new hire documentation, personnel manuals, and other documentation.[592] Accordingly, the information can be contained in a job offer letter or an employment agreement.[593]

9.3.4 Employer Duties When Employee Refuses to Sign Notice Form.

The California Labor Commissioner takes the position that if the employee refuses to sign the notice form, the employer should provide the notice to the employee anyway and record the fact that the employee refused to sign.[594] The employer bears the responsibility for ensuring that the employment and wage information on the form is accurate and complete.

9.3.5 Employee Signature Does Not Constitute Agreement to Wage or Other Employment Terms.

The Labor Commissioner takes the position that the signature required on the agency's notice form constitutes only an acknowledgment of receipt of the information.[595] Accordingly, the employee's signature does not constitute the employee's agreement to the contents of the notice, including an agreement to credit employer-provided meals or lodging toward minimum wage.[596] Such minimum wage agreements must be agreed upon in a separate document.

9.3.6 Employer Must Notify Employees in Writing Within Seven Days of Changes to Information.

Employers must notify employees in writing of any changes to the information set forth in the notice described above within seven calendar days after the time of the changes.[597] The employer need not give notice of the change if one of the following applies:[598]

- All changes are reflected on a timely wage statement furnished in accordance with California Labor Code Section 226; or,
- Notice of all changes is provided in another writing required by law within seven days of the changes.

For a discussion of California rules governing wage statements, including categories of information required by California Labor Code Section 226, see Chapter 6 ("Wages, Hours and Working Conditions").

9.3.7 New Hire Notice Requirements Do Not Apply to Security Service Companies.

The requirements of California Labor Code Section 2810.5 do not apply to security service companies that solely provide security services and are licensed by the California Department of Consumer Affairs.[599]

9.3.8 New Hire Notice Requirements Do Not Apply to Exempt, Union or Public Sector Employees.

Employers need only provide the notice described above to each newly hired "employee," as that term is defined in California Labor Code Section 2810.5. The term "employee" does not include any of the following:[600]

- An employee who is exempt from the payment of overtime wages by statute or the California Wage Orders;

- An employee who is covered by a valid collective bargaining agreement, if the agreement expressly provides for: (1) the wages, hours of work, and working conditions of employees; (2) premium wage rates for all overtime hours worked; and, (3) a regular hourly rate of pay of not less than 30 percent more than the state minimum wage;
- An employee directly employed by the state or any political subdivision of the state, including any city, county, city and county, or special district.

California's Division of Labor Standards Enforcement (DLSE) takes the position that although not required, it is considered a "best practice" for employers to provide notice to current employees.

Best Practice. Since the notice may be used as evidence to support a violation of California law, employers are advised to carefully review and complete each section of the form. California's Division of Labor Standards Enforcement has prepared a publication entitled, *Frequently Asked Questions (FAQ) — Wage Theft Protection Act of 2011*, which employers may wish to review before preparing the required notice. Where more complex forms of pay are involved (*e.g.*, piece rates, multiple regular rates of pay, lodging and meal credits, *etc.*), employers may wish to have California employment counsel prepare an initial completed form before distributing to employees.

9.4 Sales Commission Agreements Must Be in Writing After January 1, 2013.

After January 1, 2013, whenever an employer enters into a contract of employment for services to be rendered in California, and the employee will be paid in commissions, the contract must be in writing and set forth the method by which the commissions will be computed and paid.[601] The employer must provide a signed copy of the contract to every employee who is a party to the agreement, and must obtain a signed receipt for the contract from each employee.[602] The requirement applies to all employers, including those with permanent and fixed places of businesses in California.

If the contract expires, but the employer and employee continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded, or the employment relationship is terminated by either party.[603]

For purposes of meeting these requirements, the term "commissions" does not include the following:[604]

- Short-term productivity bonuses (*e.g.*, those paid to retail clerks);
- Bonus plans;
- Profit-sharing plans; and,
- Temporary, variable incentive agreements that increase, but do not decrease payment under the contract.

"Temporary, variable incentives" are intended to capture non-bonus incentives that are temporary and occur frequently. Bonus or profit sharing plans paying a fixed percentage of sales or profits as compensation for work to be performed fall within the written contract requirement.[605]

Best Practice. California's requirement that commission sales agreements be in writing can expose employers to significant risk if the agreement does not scrupulously follow

In addition to the prevention requirements of Government Code Section 12940(k), employers with 50 or more employees must provide mandatory supervisor training as required by California's Fair Employment and Housing Act (FEHA).[638] For a detailed discussion of these training requirements, see Section 10 ("California's Legal Duty to Train Supervisory Employees"), below.

8.1.1 Comparison with Federal Title VII Standard.

Federal Title VII regulations emphasize prevention in more limited ways than the California Fair Employment and Housing Act (FEHA). The regulations emphasize that employers "should take all steps necessary to prevent sexual harassment from occurring."[639] However, unlike California law, the regulations address sexual harassment only, and do not specifically establish Title VII violations for failure to prevent harassment from occurring.

The federal regulations provide the following specific examples of acceptable prevention efforts:[640]

- Affirmatively raising the subject of prevention with employees;
- Expressing strong disapproval of sexual harassment;
- Developing appropriate sanctions for sexual harassment;
- Informing employees of their right to raise the issue of harassment;
- Informing employees how to raise the issue of harassment; and,
- Developing methods to sensitize concerned individuals to the issue of harassment.

9 California's Legal Duty to Disseminate Harassment Prevention Materials

9.1 Overview of California's Harassment Pamphlet Law.

California's Fair Employment and Housing Act (FEHA) provides that "every employer shall act to ensure a workplace free of sexual harassment" by distributing an information sheet to employees on sexual harassment prepared by the California Department of Fair Employment and Housing (DFEH).[641]

Employers can obtain the required information sheet from DFEH.[642] The employer is required to distribute the information sheet to its employees by delivering it "in a manner that ensures distribution to each employee."[643] By way of example, the statute provides that delivery may be done by including the information sheet with the employee's pay.[644]

The pamphlet distribution requirement applies to all employers, regardless of size. The requirement is in addition to any other prevention efforts taken under California Government Code Section 12940(k), which requires employers to take all reasonable steps necessary to prevent discrimination and harassment from occurring.[645]

9.2 Duty of Department of Fair Employment and Housing (DFEH) to Provide Copies of Pamphlet.

The obligation is on California employers to request the required information sheet from California's Department of Fair Employment and Housing (DFEH). However upon request, DFEH is required to provide the employer with at least one copy of the information sheet,

and must maintain the sheets in each DFEH office.[646] DFEH is required to mail the sheet to the employer if the employer provides a self-addressed envelope with postage affixed.[647]

Employers seeking multiple copies of the information sheet must obtain them through the California Office of Documents and Publications of the Department of General Services.[648]

Best Practice. A copy of the California Department of Fair Employment and Housing (DFEH) Publication 185, "Sexual Harassment: The Facts About Sexual Harassment," is included at Appendix Q.[649]

9.3 California Employers with Effective Harassment Policies Exempt from Pamphlet Law.

California's Fair Employment and Housing Act (FEHA) provides that employers need not distribute the required information sheet to each of its employees if the employer provides "equivalent information" that contains, at a minimum, components on the following seven categories of information:[650]

- The illegality of sexual harassment;
- The definition of sexual harassment under applicable state and federal law;
- A description of sexual harassment, utilizing examples;
- The internal complaint process of the employer available to the employee;
- The legal remedies and complaint process available through the California Department of Fair Employment and Housing (DFEH) and the California Fair Employment and Housing Commission (FEHC);
- Directions on how to contact the DFEH and FEHC; and,
- The protection against retaliation set forth in regulations[651] implementing California's FEHA. This includes retaliation against individuals for opposing practices prohibited by FEHA (*e.g.*, sexual harassment), or filing a complaint with, or otherwise participating in an investigation, proceeding or hearing conducted by the DFEH or FEHC.

Best Practice. Sample anti-harassment and equal employment opportunity policies are included at Appendices R ("Equal Employment Opportunity Policy") and S ("Policy Against Harassment").

9.4 Employer Liability for Failure to Distribute Required Information.

California's Fair Employment and Housing Act (FEHA) provides that a claim that the information sheet or other required information did not reach a particular individual or individuals will not, in and of itself, result in employer liability for sexual harassment.[652] Conversely, employer compliance with the distribution requirement will not insulate an employer from liability for sexual harassment.[653] The California Fair Employment and Housing Commission (FEHC) is empowered to issue orders requiring employer compliance with the above information distribution requirements.[654]

Best Practice. Although failure to distribute the required information sheet under California Government Code Section 12950 does not establish liability against employers, employers with effective complaint procedures can invoke significant defenses to damages in harassment litigation under both state and federal law.[655] Accordingly, California employers

are advised to make the information sheet a required component of employee new hire packets, employee handbooks, employee paycheck or wage statement mailings, in addition to ongoing discrimination and harassment training.

10 California's Legal Duty to Train Supervisory Employees

10.1 Overview of California's Supervisor Training Requirement.

California's Fair Employment and Housing Act (FEHA) requires employers with 50 or more employees to "provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees."[656] Covered employers must provide such training to supervisory employees at least once every two years, and to "all new supervisory employees within six months of their assumption of a supervisory position."[657]

The regulations provide that the learning objectives of the training are twofold:[658]

- To assist California employers in changing or modifying workplace behaviors that create or contribute to "sexual harassment" as that term is defined under California and federal law; and,
- To develop, foster, and encourage a set of values in supervisory employees who complete mandated training that will assist them in preventing and effectively responding to incidents of sexual harassment.

The following topics are covered in the sections that follow:

- Employers subject to the California training requirements;
- Individuals counted toward the 50 employee coverage requirement;
- Supervisory employees who must be trained;
- Frequency, timing and duration of required training;
- Exemptions for supervisors trained by prior employers;
- Persons who may conduct training;
- Classroom and other effective interactive training required;
- Required content of training;
- Employers required to exceed training minimum;
- Required two year recordkeeping obligation; and,
- Employer liability for failure to train.

10.1.1 State Employee 80 Hour Training Requirement May Include Harassment Training.

The California Fair Employment and Housing Act's (FEHA) anti-harassment training may be included in the 80 hours of training for new supervisors employed by the State of California and required by statute.[659]

10.2 "Employers" Subject to California Training Law Requirement.

California's mandatory training requirements apply to employers employing 50 or more employees.[660] California's Fair Employment and Housing Act (FEHA) defines the term "employer" for purposes of the training requirement as:[661]

- Any person regularly employing 50 or more persons;
- Any person regularly receiving the services of 50 or more persons pursuant to contract;
- Any person acting as an agent of an employer, whether directly or indirectly;
- The State of California;
- Any political or civil subdivision of the State of California; and,
- Cities.

The State of California, counties, and any political or civil subdivisions of the state, and cities, are considered "employers" for purposes of the training requirement regardless of the number of employees.[662]

10.3 Individuals Counted Toward 50 Employee Requirement.

California Fair Employment and Housing Act (FEHA) regulations provide that only employees performing services for a wage or salary are counted toward the 50 employee requirement.[663]

10.3.1 Independent Contractors Counted Toward Requirement.

According to California Fair Employment and Housing Act (FEHA) regulations, "independent contractors" who meet the definition of that term as set forth in California Government Code Section 12940(j)(5), are counted toward the 50 employee requirement.[664] The definition requires that independent contractors meet each of the following three criteria:[665]

- The person has the right to control the performance of the contract for services and discretion as to the manner of performance;
- The person is customarily engaged in an independently established business; and,
- The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

10.3.2 Requirement of 50 Employees Measured Using 20 Week Period.

California Fair Employment and Housing Act (FEHA) regulations provide that "having 50 or more employees" means employing or engaging 50 or more employees or contractors for each working day in 20 consecutive weeks in the current or preceding calendar year.[666]

10.3.3 Individuals Counted May Work or Reside Outside California.

California Fair Employment and Housing Act (FEHA) regulations provide that in determining whether the employer has met the 50 employee requirement, there is no requirement that the 50 employees or contractors work at the same location, or all work or reside in California.[667]

10.4 "Supervisory Employees" Who Must Be Trained.

"Supervisors" and "supervisory employees" who must attend training are individuals:[668]

- Having the authority, on behalf of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees; or,
- The responsibility to direct other employees; or,
- The responsibility to adjust the grievances of other employees, or effectively to recommend that action.

Sending an individual to training cannot later be used against the employer to infer that an employee is a "supervisor," or that an independent contractor is an "employee."[669]

10.4.1 Supervisors Located Outside of California Exempt from Training Law.

California's mandatory training law covers only supervisors or supervisory employees located in the state of California.[670]

10.5 Frequency, Timing, and Duration of Training.

Employers must provide two hours of required training at least once every two years.[671] Employers must also provide training to all new supervisory employees within six months of their assumption of a supervisory position, whether as a result of hiring or promotion.[672]

10.5.1 Tracking Methods Required to Determine Compliance.

Employers must use one of the following two forms of tracking to determine compliance:

- *Individual supervisor tracking method*. Under this method, the employer may determine compliance for individual supervisors within the two-year period from the date of completion of the last training.[673]
- *Training year tracking method*. Under this method, the employer may designate a "training year" in which it trains some or all of its supervisory employees. The employer would be required to retrain these supervisors by the end of the next training year, two years later. Thus, supervisors trained in training year 2012 must be retrained again in 2014.[674]

Employers may include new supervisors trained within six months of hire or promotion in the next training year, even if it results in training occurring sooner than two years. Employers using the "training year" tracking method may not extend training for newly hired or promoted supervisors beyond the next regularly schedule training year. Accordingly, such supervisors must be scheduled for training in the next regularly scheduled training year.[675]

10.5.2 Timing of Initial Training for Newly Hired or Promoted Supervisors.

Employers must provide required training to "all new supervisory employees within six months of their assumption of a supervisory position."[676] This means that employees newly hired, or promoted into supervisory positions must receive the required training within six months of their hiring or promotion. Thereafter, the supervisor must be trained at least once every two years, as measured by the "individual" or "training year" tracking methods described above.[677]

Under California's FEHA, when a non-supervisory employee engages in harassment, the employer's liability is predicated not on the conduct itself, but on the employer's response once it learns of the conduct.[723] The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified.[724] Thus, the employer's investigation can be an important step in shielding it from liability in such situations.

Even where the employer is strictly liable under California's FEHA for harassment by a supervisor, effective investigation procedures are relevant to establishing the defense of "avoidable consequences," under which a complaining party's damages may be cut off from the point at which an unreasonable failure to make use of effective preventive and corrective measures occurs.[725] The California Supreme Court has recognized the avoidable consequences defense where the employer can show that:[726]

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

The defense will allow the employer to avoid liability for those damages "that the employee more likely than not could have prevented with reasonable effort and without undue risk, expense, or humiliation, by taking advantage of the employer's internal complaint procedures."[727] However, where the employee can prove that the employer previously failed to investigate harassment complaints, or other defects exist in the employer's complaint resolution process, alleged victims will have a "strong argument" that the employer's procedures do not provide a reasonable avenue for complaints.[728]

11.2.3 Workplace Investigation as Defense to Punitive Damage Claims.

California's Fair Employment and Housing Act (FEHA) provides for both compensatory and punitive damages for violations of the Act. Punitive damages are available where the employee can prove by clear and convincing evidence that the employer is guilty of "fraud, oppression, or malice."[729] In employment cases, the reprehensibility of the employer's conduct, including the degree to which wrongdoing is repeated, are key factors in assessing punitive damages.[730] Accordingly, the employer's efforts to prevent harassment of its employees is an important factor in negating the required malice.

An employer's investigation will therefore be relevant to show that it properly and in good faith investigated the employee's allegations, neutrally considered the facts, and took the appropriate action to prevent a reoccurrence of any verifiable misconduct.[731] If the employer takes corrective action by terminating the accused, it may also rely on its investigation to demonstrate that it acted in good faith, and without the requisite fraud, oppression, or malice necessary to justify punitive damages.

11.3 Characteristics of Defensible Workplace Investigations.

The California Supreme Court has attempted to define the parameters of an adequate workplace investigation. In *Cotran v. Rollins Hudig Hall International, Inc.*, the Court held that investigative fairness contemplates a "reasoned conclusion … supported by substantial

evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."[732] The Court emphasized that, "the requirement that an employee receive notice and an opportunity to be heard is not fulfilled by a charade of due process by an employer that has already made up its mind … fair procedure requires that the employee have a truly meaningful opportunity to tell his or her side of the story and to influence the employer's decision."[733]

Other cases have addressed in greater detail what constitutes an appropriate investigation. These cases suggest that an adequate investigation will have some or all of the following characteristics:[734]

- The investigation commences promptly once the employer learns of the conduct at issue;
- A neutral, experienced, and trained investigator is identified and assigned;
- The investigator identifies persons involved, witnesses to be interviewed, and relevant documentation to be obtained and reviewed;
- The accused and the complaining party are interviewed;
- The accused and the complaining party are provided with the position of the other party and given a fair opportunity to present their sides;
- The investigator interviews other persons involved, including additional witnesses identified by the parties;
- The accused and complaining party are given the opportunity to clarify, correct or challenge evidence contrary to their position provided by other witnesses;
- The investigator asks relevant, open-ended, non-leading questions;
- Facts are elicited from witnesses, not opinions or conclusions;
- Motives of the complaining party, the accused, and key witnesses are explored;
- The employer and investigator treat the matter confidentially, disclosing information on a need to know basis;
- Interviews are conducted in a private area (*e.g.*, in a private room, off company premises, or by telephone);
- Witnesses are given contact information for the investigator to provide additional information that may have been forgotten in an interview;
- The investigator takes notes of interviews conducted, and obtains signed statements from key witnesses;
- The investigator makes credibility determinations when necessary (*e.g.*, where no corroborating evidence is available);
- The accused, complaining party, and key witnesses are provided a final opportunity to clarify, correct or challenge contrary evidence;
- The investigator otherwise adheres to any written policy the employer may have specifying how misconduct allegations are to be investigated, or procedures the employer has followed in the past in comparable situations;

6.4 Employer Duties When Engaging in California's Interactive Process.

California Fair Employment and Housing Act (FEHA) regulations require an employer or other covered entity to engage in a timely, good faith, interactive process, upon notice of the need to provide reasonable accommodation. The regulations require the employer to engage in the interactive process using the ten basic guidelines described below:[295]

1. *Employer rejection of requested accommodation and duty to discuss alternatives*. The employer must either grant the applicant's or employee's requested accommodation, or reject it after due consideration. If rejected, the employer must initiate discussion with the individual regarding alternative accommodations.

2. *Non-obvious disabilities and employer right to request "reasonable medical documentation."* When the disability or need for reasonable accommodation is not obvious, and the applicant or employee has not already provided the employer with reasonable medical documentation to confirm the *existence of the disability* and *need for accommodation*, the employer may require the individual to provide such reasonable medical documentation. Medical information obtained during the interactive process must be maintained by employers on forms and in medical files separate from the employee's personnel file. For a discussion of the employer's duty to maintain medical information confidential, see Section 11 ("California's Legal Duty to Keep Medical Information Private"), below.

3. *Discussion of "diagnosis" or underlying "medical cause" of disability prohibited*. When the employer has received reasonable medical documentation, it shall not ask the applicant or employee about the underlying medical cause of the disability. However, the employer may require medical information and second opinions from other health care providers to the extent authorized by law. For a detailed discussion of medical inquiries and examinations permissible to determine the existence of a disability and need for accommodation, see Section 7 ("The Employer's Right to Medical Information to Determine Need for Accommodation"), below.

4. *Employer duty to follow required procedure for clarifying employee or applicant information provided.* If information provided by the applicant or employee needs clarification, the employer must identify the issues that need clarification, specify what further information is needed, and allow the individual reasonable time to produce the supplemental information.

5. *Employer duty to analyze "particular" job and essential functions to determine reasonable accommodation.* When needed to assess a requested accommodation or to advance the interactive process, the employer must analyze the *particular* job involved, and the essential functions of the job. For a detailed discussion of essential job functions, including factors and evidence used to determine essential job functions, see Section 5.4 ("Employer Has No Duty to Eliminate Essential Job Functions"), above.

6. *Employer may consult experts.* When needed to assess a requested accommodation or to advance the interactive process, the employer may consult with experts.

7. *Employer duty to consult with employee or applicant to identify potential accommodations and assess effectiveness of each.* In consultation with the applicant or employee to be accommodated, the employer must identify potential accommodations and assess the effectiveness each would have as follows: (a) for an applicant, to enable him or her to have

an equal opportunity to participate in the application process and to be considered for the job; and, (b) for an employee, to enable him or her to perform the essential functions of the position held or desired or to enjoy equivalent benefits and privileges of employment compared to non-disabled employees.

8. *Employer duty to "consider" accommodation preference of employee or applicant—employer right to implement any "effective" accommodation.* The employer must consider the accommodation preference of the applicant or employee to be accommodated. Nevertheless, the employer retains the *right to implement an accommodation that is effective* in allowing the applicant or employee to perform the essential functions of the job.

9. *Employer right to information about employee's qualifications and experience if accommodation involves reassignment*. If reassignment to an alternate position is considered as an accommodation, the employer may ask the employee to provide information about his or her educational qualifications and work experience that may help the employer find a suitable alternative position for the employee. The employer must follow applicable FEHA regulations governing reassignment to a vacant position. For a detailed discussion of the employer's duty to reassign an employee to an alternate vacant position, including FEHA regulations governing reassignment, see Section 8.7 ("Employer Duty to Reassign Employee to Vacant Position"), below.

10. *Employer right to annual documentation substantiating need for accommodations exceeding one year.* For reasonable accommodations extending beyond one year, the employer may ask for medical documentation substantiating the need for continued reasonable accommodation on a yearly basis.[296]

6.4.1 Comparision with Federal Four Step Approach for Interactive Process.

Federal regulations offer guidance to employers involved in the interactive process.[297] The regulations provide that the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the employee.[298]

The regulations emphasize that the purpose of the interactive process is to assist the parties where neither can readily identify the appropriate accommodation. For example, a disabled applicant or employee may not know enough about an employer's equipment or its worksite to suggest an appropriate accommodation. Likewise, the employer may not know enough about the employee's disability, or the limitations the disability might impose on performance of the job, to suggest an appropriate accommodation. [299]

In order to determine an appropriate accommodation, federal regulations suggest a basic, four step problem solving process: [300]

1. Analyze the particular job involved and determine its purpose and essential functions;

2. Consult the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

3. In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and,

4. Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

The four step approach may be relaxed or eliminated where the accommodation is so obvious to the employer and employee that a detailed interactive discussion is not needed.[301]

Example: Erica works for Evergreen Produce Co. as a box handler. The position requires Erica to pick up produce crates weighing up to 50 pounds and carry them from the loading dock to a storage area. Erica, who has developed a disabling back condition as a result of a recent car accident, requests an accommodation from her supervisor that would not require her to lift and carry the produce boxes. The company has notice of both Erica's disability and her need for accommodation, and must therefore engage in the interactive process. The various steps of the process outlined in EEOC regulations are as follows:

- *First step*. Under the first step of the interactive process described above, the company would analyze the job duties of the box handler position to determine the essential functions of the job. In this example, the employer's analysis reveals that the purpose of the job is not to require the box handler to *physically lift and carry* 50 pound boxes, but to *move the boxes* from the loading dock to the storage room.
- *Second step.* The company then meets with Erica. In the second step of the process, Evergreen would use the meeting to determine the precise barrier posed by Erica's disability to relocating the boxes, an essential job function. At this point, the company discovers that Erica can lift the boxes up to waist level, but is prevented from carrying the boxes from the loading dock to the storage room. Both the company and Erica agree that an accommodation might enable Erica to transport the boxes she has lifted.
- *Third step.* Under the third step, the company and Erica would identify potential accommodations, and examine their effectiveness in allowing Erica to perform the essential functions of her job. In their discussions, the company and Erica determine that because Erica can lift boxes to waist level, a hand truck, a dolly, and a cart, each with different capabilities and limitations, might enable Erica to transport the boxes to the storage area. Upon further consideration, a cart would not be a feasible alternative. No carts are currently available at the company, and those that can be purchased are the wrong configuration to hold the irregularly shaped boxes that must be moved and stored. However, both the dolly and the hand truck are available, and both can move the required boxes.
- *Fourth step.* Under the fourth step of the accommodation process, the company would select the most appropriate accommodation for both the employer and the employee, with consideration given to the preference of the employee. In this case, Erica's stated preference is the dolly. From the employer's perspective, the dolly would allow her to move more sacks at a time and therefore be more efficient than a hand truck. Accordingly, the company provides Erica with a dolly to meet its reasonable accommodation obligation.

6.5 Employee Duties When Engaging in California's Interactive Process.

California Fair Employment and Housing Act (FEHA) regulations impose a duty on applicants and employees to cooperate in good faith with the employer during the interactive process. The regulations require applicants and employees to engage in the interactive process using the following ten basic guidelines:[302]

1. *Employee duty to provide reasonable medical documentation for non-obvious disabilities.* The employee has a duty to provide reasonable medical documentation where the disability or the need for accommodation is not obvious, and such documentation is requested by the employer. Where necessary to advance the interactive process, reasonable medical documentation can include a description of physical or mental limitations that affect a major life activity that must be met to accommodate the employee. Disclosure of the nature of the disability is not required. For a discussion of the employer's right to reasonable medical documentation, see Section 7 ("The Employer's Right to Medical Information to Determine Need for Accommodation"), below.
2. *Employee duty to provide information about qualifications and experience if accommodation involves reassignment.* If reassignment to an alternative position is considered as an accommodation, the employee must provide the employer with information about his or her educational qualifications and work experience to assist the employer to find a suitable alternative position for which the employee is qualified and can perform essential functions. For a discussion of reassignment as reasonable accommodation, including the employee's duty to provide information regarding experience and qualifications, see Section 8.7 ("Employer Duty to Reassign Employee to Vacant Position"), below.
3. *Employee inability to engage in interactive process is not breach of duty.* The employee's physical or mental inability to engage in the interactive process does not constitute a breach of either the employer's or employee's duty to engage in a good faith, interactive process.
4. *Employee may communicate indirectly with employer through third party.* Direct communications between the employer and the applicant or employee rather than through third parties is preferred, but not required. For a detailed discussion of these requirements, see Section 6.3.2 ("Employee Accommodation Can Be Requested By Third Parties Such as Doctors, Spouses and Friends"), below.
5. *Employee duty to provide only "reasonable medical documentation" when disability is not obvious.* In the case of a disability or need for accommodation that is not obvious, the employee can be required to obtain and provide only "reasonable medical documentation" from his or her health care provider. Medical documentation must be limited to the disability and accommodation at issue, and generally may not include the employee's entire medical file. For a detailed discussion of employer limitations on obtaining medical information, see Section 7.2 ("Employer Limited to 'Reasonable Medical Documentation' to Support Accommodation Request"), below.
6. *Employee not entitled accommodation unsupported by reasonable medical documentation.* In the case of a disability and/or need for accommodation that is not obvious, if an employee provides insufficient medical documentation, the employer must still provide reasonable accommodation but only to the extent the accommodation is supported by the medical documentation provided by the employee to date. If the medical documentation provided does not support any reasonable accommodation, no reasonable accommodation is required to be provided. If supplemental medical documentation supports a further or additional reasonable accommodation, then such accommodation must be provided. For further discussion of the "reasonable medical documentation" requirement, see Section 7 ("The Employer's Right to Medical Information to Determine Need for Accommodation"), below.

10 Wage Statements and Time Records

10.1 Required Contents of Wage Statements.

The California Labor Code requires employers, at the time wages are paid, to furnish the employee with an itemized wage statement that contains nine categories of information. These categories of information, which must be precisely identified in the wage statement, are as follows:[496]

- Gross wages earned;
- Total hours worked by the employee, except for employees exempt from overtime laws;
- The number of piece-rate units earned and any applicable piece rate (for employees paid on a piece-rate only);
- All deductions (deductions made on written orders of the employee may be aggregated and shown as one item);
- Net wages earned;
- The inclusive dates of the period for which the employee is paid;[497]
- The name of the employee and his or her social security number (however, as of January 1, 2008, only the last four digits of the employee's Social Security number, or an employee identification number other than a Social Security number may be shown);
- The name and address of the legal entity that is the employer. If the employer is a farm labor contractor, as defined in California Labor Code Section 1682(b), the name and address of the legal entity that secured the services of the employer during the pay period must be provided; and,
- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each rate.[498] Beginning July 1, 2013 a temporary services employer, as defined in California Labor Code Section 201.3, must identify the rate of pay for each temporary services assignment and the total hours worked for each legal entity (*i.e.*, assignment).

The listing by an employer of the name and address of the legal entity that secured the services of the employer does not create liability on the part of the legal entity.[499]

Courts have found violations of California Labor Code Section 226 for wage statements issued with fixed (not actual) work hours, and statements issued without hourly rates of pay.[500] Statements issued with inaccurate hours worked and statements without the employer's full name and address have also been held to violate Section 226.[501]

For a detailed discussion of employer defenses to liability for issuance of improper wage statements, see Sections 10.8.2 ("Determining When Employee 'Suffers Injury' Sufficient to Recover Penalties"), and 10.8.3 ("Determining When Employer Conduct is Sufficiently 'Knowing and Intentional' to Recover Penalties"), below.

10.1.1 Additional Wage Statement Contents Required for Temporary Services Employers.

Effective July 1, 2013, in addition to the nine required categories of wage statement information described above, a "temporary services employer" must additionally include the following:[502]

- The rate of pay for each temporary services assignment; and,
- Total hours worked for each legal entity (*i.e.*, for each employer assignment).

For the California Labor Code definition of "temporary services employer," see Section 4.6.8 ("Exception for Wage Payments to Employees of Temporary Services Employers"), above.

10.2 Required Timing for Issuance of Wage Statements.

California employers must furnish wage statements to employees at either of the following times, whichever occurs first:[503]

- At the time of payment of wages; or,
- Semimonthly.

10.3 "Detachable" Format for Wage Statements Required.

Employers must furnish wage statements to employees as a *detachable* part of their paycheck. However, if the employer is paying in cash or by personal check, the employer may simply provide an itemized statement in writing.[504]

10.4 Electronic Wage Statements Permissible.

California's Division of Labor Standards Enforcement (DLSE) takes the position that employers may provide wage statements in electronic format to satisfy their wage statement obligations under California Labor Code Section 226(a).[505] According to the DLSE, an electronically stored wage statement, accessible by the employee, that can be read on a screen or printed and read as a hard copy, will generally meet the requirements of Labor Code Section 226(a).[506]

If employers elect to use an electronic format, DLSE will require that the following requirements be met:[507]

- The employee must retain the right to receive a written paper stub or record if he or she elects to do so;
- An employee provided an electronic wage statement must have the ability to easily access the wage statement;
- An employee provided an electronic wage statement must have the ability to easily convert the electronic statement into a hard copy at no expense to the employee;
- The electronic wage statement system must incorporate proper safeguards that ensure the confidentiality of the employee's confidential information; and,
- The employer must adhere to the recordkeeping requirements of Labor Code Sections 226 and 1174.

Best Practice. Because of the complexities of California's wage statement requirements, employers are advised to exercise caution in developing and implementing electronic wage statement systems. In a July, 2006 Opinion Letter, California's Division of Labor Standards Enforcement (DLSE) approved one such system with the following features: [508]

- The employee could elect to receive paper wage statements at any time;
- The wage statements contained all of the information required by Labor Code Section 226(a);
- The wage statements were available no later than the day employees were paid;
- The wage statements were available on a secure website, protected by a firewall, which was expected to be available at all times (with the exception of downtime caused by system errors or maintenance requirements);
- Access to the website was controlled by unique employee identification numbers and confidential personal identification numbers (PINs);
- Employees were able to access their records through their own personal computers or by company provided computers;
- Computer terminals were made available to all employees for accessing wage statements at work;
- Employees were able to print copies of their wage statements at work on printers that were in close proximity to a computer or computer terminal;
- There were no charges to employees for accessing their records or printing them out at work;
- Employees were able to access their records over the internet, save them electronically, and/or print them on their own printer;
- Electronic wage statements were maintained electronically for at least three years, and are available to active employees for the entire three year period; and,
- Former employees were provided hard copies of wage statements at no charge upon request.

10.5 Three-Year Recordkeeping Requirement for Wage Statements and Deduction Records.

Effective January 1, 2012, California Labor Code 226(a) requires California employers to keep *both* the record of deductions from wages *and* a "copy" of the wage statement for a period of three years. Before that date, employers were required to keep *either* a record of deductions *or* the wage statement. The required wage statement "copy" can include a duplicate of the itemized statement given to the employee, or a computer generated record (*i.e.,* a record other than the wage statement itself) that accurately shows all of the required information. [509]

Labor Code Section 226(a) also requires that deductions from wages shown on the wage statement be recorded in ink or other indelible form. Deduction entries must show the month, day and year of the deduction. [510]

Records subject to retention under California Labor Code Section 226 must be kept on file at either at the employee's place of employment, or a central location within the State of California.[511]

Best Practice. California employers are required to keep "wage statements" and deduction records for a period of three years. Employers using third-party pay check services to prepare wage statements are advised to make appropriate arrangements with these services to meet the new recordkeeping requirements.

In addition, California law requires employers to keep required records "on file" at the employee's place of employment or at a central location within the state. Whether the employer's ability to access wage statement information in California from servers located outside of California satisfies this recordkeeping requirement is unclear. Employers faced with this situation are advised to consider backing up such information to a server located in California or to a flash drive or CD for storage in California.

10.6 Employee Right to Inspect or Copy Wage Statement Information Within 21 Days of Request.

California Labor Code Section 226(b) requires employers to afford current and former employees the right to inspect or copy "the records pertaining to that current or former employee," *not later than 21 days* from the date of a request from an employee.[512] The employee's request can be either written or oral.[513] If the employer fails to permit a current or former employee to inspect or copy records as provided for by Section 226(b), the current or former employee, or the California Labor Commissioner, may recover a $750 penalty from the employer.[514]

Section 226(b) does not expressly define what records must be made available for inspection and copying. Effective January 1, 2012, Labor Code Section 226(a) requires employers to retain both "wage statements" and deduction records. It is unclear whether the underlying information summarized in the wage statement is also subject to the inspection and copying requirement.

Employers have the following rights and responsibilities when responding to employee requests for payroll information:[515]

- The employee's request for inspection or copying must be reasonable (*e.g.*, where inspection of records is authorized, the employer may require an appointment and impose reasonable limitations on such appointments);
- Before making records available, the employer may take reasonable steps to assure the identity of the current or former employee;
- If the employer provides copies of records requested, the *actual cost* of reproduction may be charged to the current or former employee;
- The employer must comply with the request as soon as practicable, but no later than 21 calendar days from the *date of the request*;
- The employer may designate a person to whom requests will be made.

Violations of the above inspection and copying requirements are considered infractions of California Labor Code Section 226. Employers may defend against violations based on

impossibility of performance, provided that impossibility of performance is not caused by or is the result of a violation of law.[516]

Best Practice. Employers receiving a request for inspection or copying of wage information under California Labor Code Section 226(b) should anticipate that any information produced could form the basis for a challenge to the employer's payroll practices. In planning its response, employers may wish to consider the following:

- Consider the burden placed on operations by inspection. Employees permitted inspection rights may consume significant amounts of time copying payroll information. In addition, it may not be in the employer's best interest to invite former employees, particularly those terminated involuntarily, to return to the premises for inspection;
- Carefully consider what information will be produced. Effective January 1, 2012, Labor Code Section 226(a) requires employers to retain both "wage statements" and deduction records. It is unclear whether the underlying categories of information required by Section 226(a) must also be made available for inspection or copying. All documentation should be carefully reviewed for compliance with California law before production;
- Employers authorizing an inspection of records should require an appointment, with reasonable advance notice, at a reasonable time and location. Employers may place reasonable limitations on the amount of time allowed for inspection;
- Employers are advised to verify the identity of the current or former employee requesting inspection or copying. If the request is from an attorney or other third party purporting to represent the employee, written authorization to produce private wage information to the third party should be obtained from the employee;
- Employers should prepare a statement of costs for any copying required, as authorized by Section 226(b), and consider making payment a condition of production;
- Employers are advised to designate a point person to whom the employee will be required to make their request, as authorized by Section 226(c).

10.7 Public Sector Employers, Residence Owners, and Other Employers Not Subject to Wage Statement Requirements.

California Labor Code Section 226 does not apply to public sector employers, including the state, or any city, county, city and county, district, or other governmental entity. However, the section prohibits public sector employers from including anything other than the last four digits of the employee's social security number, or an employee identification number on a wage statement.[517]

In addition, California Labor Code Section 226 requirements do not apply to "any employer of any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling."[518] This includes employees responsible for the care and supervision of children. It also includes employees whose duties are personal in nature, and not provided in the course of the trade, business, profession or occupation of the owner.[519]

It is presently unclear whether California's wage statement requirements would apply to employees performing work for an out-of-state employer, in California, on a short term basis.[520] For further discussion of the applicability of the California Labor Code and California Wage

range from, "attending roll call, writing up and completing tickets or reports, and washing and re-racking fire hoses,"[734] to donning and doffing protective work clothing.[735]

Best Practice. It is often the case that employers will adopt work rules prohibiting employees from incurring overtime or other hours of work without prior management approval. Should the employee elect to work overtime, or otherwise perform work without being requested to do so, employers are advised to avoid denying compensation for the work performed. Whether or not the employee can prove the employer knew or should have known that the work was performed, the employer's acceptance of the benefit of the work performed may nevertheless present risks for the employer. In most cases, the employer will be better served by paying the employee and taking disciplinary action in order to enforce such a work rule.

13.2.1 The Federal "Continuous Workday" Rule.

The United States Department of Labor (DOL) generally follows a test for compensating hours worked known as the "continuous workday" rule.[736] Under the rule, the workday is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities."[737] Accordingly, once the employee begins a principal activity of his or her job, the workday commences (for which the employee must be paid) and continues until the employee completes the principal activity or activities, is relieved of all duties, or the duties performed are *de minimis* (described below).

"Principal activities" have been liberally construed by the Ninth Circuit Court of Appeals to include "any work of consequence performed for an employer, no matter when the work is performed."[738] Important factors in determining whether the employee is engaged in a principal activity will be:[739]

- Whether the activity is part of the regular work of the employee in the ordinary course of business; and,
- The extent to which the activity impacts the employee's freedom to engage in other activities.

A "continuous workday" may be interrupted by periods during which an employee is completely relieved from duty, and which are long enough to enable the employee to use the time effectively for his or her own purposes. Such periods are not considered "hours worked."[740] In one case, an employee who completed his shift at work, but who several hours later was required to complete and transmit sales documentation from home (a principal work activity), was not allowed to run the workday continuously through the completion of that activity.[741] The intervening period of non-work time had to be excluded from the employee's compensable work hours.

13.3 Employee "Off-The-Clock" Work May Be Compensable.

It is sometimes the case that non-exempt employees will perform work "off-the-clock" that has not been compensated by the employer. Generally "off-the-clock" work consists of work performed before the employee has clocked in for a shift ("pre-shift activities"), or work performed after the employee has clocked out at the end of the shift ("post-shift activities"), but it can also include time worked during legally required meal and rest periods.

Examples of off-the-clock activities that can be compensable include time spent performing activities such as the following:

- Commuting in company vehicles where freedom to engage in personal activities is restricted;
- Assembling and waiting for bus transport to remote work locations;
- Traveling or transport from the employer's primary location to remote work sites;
- Assembling and waiting for transport back to employer's primary location from remote worksites;
- Transporting tools or supplies;
- Setting up tools or equipment to begin work;
- "Booting up" a computer that is required to begin work;
- "Donning" of required protective clothing or gear;
- "Doffing" of required protective clothing or gear;
- Waiting for and receiving job assignments;
- Mapping of routes to customer locations;
- Prioritizing customer jobs;
- Answering telephone calls;
- Checking voicemail and email;
- Responding to voicemail and email;
- Accessing of company computer systems to obtain job assignments;
- Accessing of company computer systems to upload or transmit data;
- Completing required paperwork;
- Preparing or modifying employee work schedules;
- Conducting vehicle safety inspections; and,
- Remaining "on call" for emergencies.

Apart from work performed in connection with pre-shift and post-shift activities, "off-the-clock" claims can also result from the following:

- Work performed during unpaid meal periods that is not compensated;
- The "rounding" of clock-in and clock-out times by employer timekeeping systems or practices such that employee hours of work over time are not fully compensated;
- Supervisor adjustments to hours of work recorded by the employee such that the employee's hours of work are not fully recorded or paid; and,

Any other work performed by the employee that is not recorded as hours worked in the employer's timekeeping system and therefore not compensated.

Whether such "off-the-clock" work is considered compensable time under California law has been the subject of significant litigation. Off-the-clock work may or may not be compensable,

depending on whether the activity is subject to the *control of the employer*, or the employee has been *suffered or permitted to work* regardless of whether the employee has been required to do so.[742]

In many cases, whether "off-the-clock" work is compensable will be determined by whether the employee has been *suffered or permitted to work*, regardless of whether he or she has been required to do so.[743] Under the "suffer or permit" standard, only where the employer *knew or should have known that work has been performed* is the employer required to compensate the employee for time worked.[744]

Where the employer has exercised *control* over the activity is at issue, the level of the employer's control of employee time spent in the activity, not the fact that an activity is required, will be determinative on the issue of hours worked requiring compensation.[745]

For a discussion of California and federal tests for determining whether time worked is compensable, see Sections 13.1 ("California Definition of 'Hours Worked' Requiring Compensation") and 13.2 ("Federal Definition of 'Hours Worked' Requiring Compensation"), above.

13.3.1 Federal Law Excludes from Compensation Activities Before or After "Principal Activities" of Employment.

The federal Portal-to-Portal Act amended the federal Fair Labor Standards Act (FLSA) to provide, among other things, that an employer need not compensate an employee for activities that are preliminary or postliminary to the employee's *principal activity or activities of employment.*[746] The federal Portal-to-Portal Act is most frequently used to support the general proposition that an employee's commute time to and from work is not compensable hours worked.

Activities are compensable if they are an "integral and indispensable part of the principal activities" for which the worker is employed.[747] "Principal activities" have been construed by the Ninth Circuit Court of Appeals to include, "any work of consequence performed for an employer, no matter when the work is performed."[748] Important factors in determining whether the employee is engaged in a principal activity will be:[749]

- Whether the activity is part of the regular work of the employee in the ordinary course of business; and,
- The extent to which the activity impacts the employee's freedom to engage in other activities.

Under federal law, employers are therefore not required to compensate employees for activities before the start of or after the end of an employee's work day unless such activities are compensable by contract, custom or practice, or the activities "are an integral and indispensable part of the principal activities" that an employee is hired to perform.[750]

Best Practice. The federal standard described above potentially conflicts with California law, which requires compensation for all activities subject to the *control of the employer*, or that the employee has been *suffered or permitted to work* whether or not they are "principal" activities. Accordingly, whether any particular pre- or post-shift activity is compensable must be determined by application of both California and federal tests.

13.3.2 *De Minimis* Work Time Not Compensable.

California's Division of Labor Standards Enforcement (DLSE) has adopted the federal rule by which employees may not recover for otherwise compensable work time where the time is *de minimis*.[751] *De minimis* work time does not relate exclusively to the amount of time worked by the employee. The following factors will ordinarily be considered to determine whether time worked is *de minimis*:[752]

- The practical administrative difficulty of recording the additional time;
- The aggregate amount of compensable time; and,
- The regularity of the additional work.

For a detailed discussion of the *de minimis* test, including *de minimis* work time that need not be compensated or recorded, see Section 13.20 ("*De Minimus* Work Time Not Compensable"), below.

13.4 Commute Time Between Home and Work Ordinarily Not Compensable.

An employee's unrestricted travel time from home to work to begin the workday, and the employee's return from work to home at the end of the workday, is not considered hours worked and need not be compensated. However, if an employee is required to first report to the employer's place of business before proceeding to an off-premises work site, the time from the moment of reporting until the employee reaches the worksite is considered hours worked.[753] Thereafter, the employee must be paid for all time worked until released to proceed directly to his or her home at the end of the workday.

Example: Maria works for ABC Construction Company as a bricklayer. She is required to report to ABC's central office in San Francisco each morning at 6:00 a.m. There, she receives her assignment location, and then drives to her worksite. Worksites can be located anywhere from fifteen minutes to an hour and a half away. Once Maria initially checks in at the central office, her travel time to the job site is considered hours worked.

13.4.1 Commute Time in Employer Vehicle Used for "Ridesharing" Not Compensable.

California Labor Code Section 510 provides that time spent commuting to and from the first place at which an employee's presence is required by the employer will not be considered to be part of the day's work, provided that:[754]

- The employee commutes in a vehicle that is owned, leased, or subsidized by the employer; and,
- The vehicle is used for the purpose of "ridesharing," as that term is defined by the California Vehicle Code.

The California Vehicle Code defines "ridesharing" as "two or more persons traveling by any mode including, but not limited to, carpooling, vanpooling, bus pooling, taxi pooling, jitney, and public transit."[755]

17.14.1 Certain Offshore Oil, Gas, Drilling, and Servicing Employees May Adopt 12-hour Alternative Workweek Schedules.

Employees working in offshore oil and gas production, drilling, and servicing occupations, and separation occupations directly servicing offshore operations, may adopt alternative workweek schedules (AWS's) of up to 12 work hours in a workday. [1550]

17.15 State Investigation and Enforcement of Alternative Workweek Schedule Election Rules.

The California Wage Orders provide that upon complaint by an affected employee, and investigation by the Labor Commissioner, the Labor Commissioner may require the employer to select a neutral third party to conduct the election. [1551] California's Division of Labor Standards Enforcement (DLSE) takes the position that such a complaint may take place before or after an election. Where the DLSE finds that the procedure surrounding the election did not meet the requirements of law, the DLSE will notify the employer and the employees of its findings, void the election, and require that any new election proposed by the employer be conducted by a neutral third party. [1552] The DLSE may not remedy elections other than as expressly provided for by the Wage Orders. [1553]

17.16 Recordkeeping Requirements for AWS Election Materials.

There are no express recordkeeping requirements for alternative workweek schedule (AWS) election materials.

Best Practice. Although employers are not expressly required to maintain documentation supporting a proper alternative workweek schedule (AWS) election, employees seeking to challenge the validity of the election will argue that the burden of proof for the overtime exemption provided by the AWS, like other overtime exemptions, falls on the employer. Employers are therefore advised to maintain all records related to the adoption of the AWS, including election ballots, voting results, documentation of written notice given to employees, agendas and dates for all meetings held with employees, reports of election results to the state, and any other election related materials. Employers who do not maintain such records may find themselves years later defending against challenges to the validity of elections and unable to meet their burden of proof.

18 Meal Periods

Among the most heavily litigated and costly claims for California employers are those involving meal periods. The basic requirements for meal periods under California law are set forth below.

18.1 Basic California Meal Period Requirements.

California Labor Code Section 512(a), and Section 11 of most of the California Wage Orders, set forth basic requirements for meal periods. The requirements are as follows:

- 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 at least 30 minutes; [1554]
- The first meal period provided by the employer must commence by the end of the fifth hour of work (*i.e.*, 4 hours and 59 minutes into the shift), unless otherwise expressly permitted by an applicable Wage Order; [1555]

- The meal period must include an uninterrupted 30 minute period during which the employee is relieved of all duty.[1556] Employees may not be required to work during the meal period, or otherwise impeded in their ability to take the required meal break. Unless the employee is relieved of all duty during the 30 minute meal period, the meal period will be considered an "on duty" meal period, and must be compensated by the employer as time worked;[1557]
- An employer does not satisfy the meal period requirement if its policies, practices, or the conduct of its supervisors prevent or discourage employees from taking their meal periods;[1558]
- If the total work period per day of an employee is no more than six hours, the initial meal period may be waived by mutual consent of both the employer and the employee.[1559] Consent can, but need not be in writing;
- An employer must provide a second duty free meal period of at least 30 minutes for any employee employed for a work period of more than ten hours. An employer is not required to provide a second meal period within five hours after the end of the first meal period (*i.e.*, "rolling" five hour meal periods are not required);[1560]
- If the employee's 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, but only if the first meal period has not been waived.[1561] Consent can but need not be in writing;[1562]
- If an employer fails to provide an employee a meal period as required by the applicable Wage Order, the employer must pay the employee one additional hour of pay at the employee's regular rate of compensation (*i.e.*, a "wage premium" or "premium pay") for each work day that one or more meal periods is not provided;[1563]
- An "on-duty" meal period will be permitted only in limited situations when: (1) the *nature of the work* prevents an employee from being relieved of all duty; and, (2) by *written agreement* between the parties an on-the-job paid meal period is agreed to;[1564]
- If a meal period occurs on a shift beginning or ending at, or between the hours of 10:00 p.m. and 6:00 a.m., employers must make facilities available for securing hot food and drink or for heating food or drink, and a suitable sheltered place must be provided where employees can eat and drink;[1565]
- Employers must generally keep accurate time records showing when employees take their meal periods.[1566]

18.2 Employer Duty to Pay "Wage Premium" for Failure to Provide Meal Periods Required by Law.

California Labor Code Section 226.7 requires that if an employer fails to provide an employee with a meal period in accordance with the applicable Wage Order, the employer must pay the employee *one additional hour of pay*, at the employee's regular rate of pay, for each work day that the meal period is not provided.[1567]

Thus, if the employer fails to provide the required meal period, fails to provide at least 30 minutes for the meal period, fails to provide a "duty free" meal period, fails to provide the meal period within the first five hours of work or other required timeframe, or otherwise fails to meet the requirements of an applicable Wage Order, the wage premium may be imposed.

The premium is considered a "wage," and if not paid timely upon the termination or resignation of the employee may result in so-called "waiting time" penalties.[1568] For a detailed discussion of "waiting time penalties," including defenses to such penalties, see Section 5.6 ("Employer Penalties for Late Payment of Final Wages"), above.

18.2.1 No Wage Premium Owed if Employee Continues to Work After Relieved of Duty for Meal Period.

In *Brinker Restaurant Group v. Superior Court*, the California Supreme Court addressed the employer's duty to make available legally required meal and rest periods under California law.[1569] Among the issues addressed by the Court was the extent to which employers are subject to payment of the wage premium once the employee is relieved of all duty to take legally required meal breaks. The Court held that once an employer relieves the employee of duty for the meal period, what follows becomes an "off-duty meal period," whether or not the employee continues to perform work.[1570] Thus, even if the employee continues to work once all required elements of the meal period have been provided, the employer will not be liable for payment of the "wage premium."[1571]

18.2.2 Employee Limited to One "Wage Premium" Per Day Regardless of Number of Meal Period Violations.

California Labor Code Section 226.7 has been interpreted to limit the number of wage premiums the employer must pay for meal period violations to *one per day,* regardless of the number of meal periods missed.[1572]

Example: Sheila, who is employed as an administrative assistant by ABC Widget Company, is scheduled to work a Monday through Friday shift, for eight hours a day. ABC normally provides Sheila with one duty free, 30 minute meal period, each day. On Monday, Sheila's boss gets an unexpected rush project that requires Sheila and others to work 13 hours that day. To complete the project, employees must take a "working lunch" instead of their usual 30 minute first meal break. They also have to skip their second meal break altogether, which ABC normally provides when employees work more than ten hours in a day. Under California law, Sheila should have been provided two 30 minute meal breaks in a 13 hour day. Although two meal period violations have occurred, ABC would only be required to pay Sheila only one wage premium, regardless of the number of missed meal periods in a day.

18.2.3 Employees Limited to One Meal Period Premium and One Rest Break Premium Per Day Regardless of Number of Violations.

Where the employee is not provided one or more required meal periods, in addition to one or more required rest periods in the day, the employee is limited to two wage premiums in the workday — one for all meal periods missed, and one for all rest periods missed.[1573]

Example: Same facts as in the previous example, except that Sheila is also unable to take any of her legally required ten-minute rest breaks. Under California law, Sheila would have been entitled to three ten-minute rest breaks in a 13 hour day, in addition to her two 30-minute meal breaks. Although three rest break and two meal break violations have occurred, Sheila would be entitled to a maximum of one wage premium per day for all rest break violations, and one wage premium per day for all meal period violations, for a total of two wage premiums.

21 Expense Reimbursement

21.1 Employer Duty to Reimburse Employee for All Necessary Expenses or Losses.

California Labor Code Section 2802 requires employers to "indemnify" employees for all "necessary expenditures or losses" incurred by the employee as a direct consequence of the discharge of his or her duties.[1676] Accordingly, Labor Code Section 2802 requires employers to reimburse employees for necessary business expenses they must incur when performing their duties.[1677] California Labor Code Section 2804 prohibits agreements waiving the rights of employees to indemnity.

The employer's duty to reimburse the employee also applies to expenditures or losses incurred by the employee in obeying the directions of the employer, even if such directions are unlawful.[1678] No reimbursement is required, however, where the employee, at the time of obeying the directions, believed the employer's directions to be unlawful.[1679]

The term "necessary expenditures or losses" includes all reasonable costs, including attorneys' fees incurred by the employee enforcing their indemnity rights under Labor Code Section 2802.[1680]

> **Example:** Tom works for ABC Data Company as a software programmer. ABC requires employees to open and maintain a bank account in order to receive reimbursement for their business expenses. Reimbursements are made by direct deposit. The bank charges employees a fee to open and maintain an account. Where the employer requires an employee to open and maintain a bank account to receive his or her expense reimbursement by direct deposit, the employer would be responsible for these costs.[1681]

21.2 Employee Must Be Acting Within "Course and Scope" of Employment to Recover for Expenses or Losses.

In order to recover expenses or losses incurred, the employee must be acting within the "course and scope" of his or her employment. In determining whether an employee's acts were performed within the course and scope of employment, California courts have looked to the doctrine of *respondeat superior.*[1682] That doctrine provides that an employer is liable for an employee's conduct that, in the context of the employer's business, is "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[1683]

Best Practice. Whether an employee incurs expenses or losses in the "course and scope" of employment frequently involves complex issues of fact and law. California's Division of Labor Standards Enforcement (DLSE) applies a broad test to determine whether the employee acts within the course and scope of their employment. According to the DLSE, an employee's conduct may fall within the scope of employment even if the act does not benefit the employer, is willful or malicious, or the act may violate the employer's direct orders or policies.[1684] Employers are therefore advised to exercise caution when denying reimbursement because an expense or loss is not business related.

21.3 Employer Duty to Reimburse Employee for Required Use of Personal Vehicle.

California Labor Code Section 2802 covers a broad range of business expenses associated with the employee's use of a personal vehicle. Examples of costs the employer is required to reimburse for use of a personal vehicle include the following:[1685]

- The actual cost to the employee of using a personal automobile in service of the employer, including fuel, maintenance, repairs, registration, and depreciation;[1686]
- The cost to the employee of insurance required by the employer in using a personal automobile in service of the employer;[1687]
- The cost to the employee of damage or loss due to accident in using a personal automobile in service of the employer (unless caused by the negligence of the employer);[1688] and,
- The cost to the employee of damage or loss due to theft in using a personal automobile in service of the employer (unless caused by the negligence of the employer).[1689]

California's Division of Labor Standards Enforcement (DLSE) takes the position that the employer's payment of a "reasonable mileage reimbursement" covers "all reasonable operating costs" incurred by the employee in the use of a personal vehicle.[1690] However, in the absence of an agreement to pay a reasonable mileage reimbursement rate, the employer would be obligated to reimburse the employee for all *actual costs* of operating the vehicle while used in the service of the employer.[1691]

21.3.1 Three Methods Permitted for Computing Vehicle Expense Reimbursement.

The California Supreme Court has recognized three methods for reimbursing employees for vehicle expenses incurred in service of the employer.[1692] These three methods are discussed below.

First method: reimbursement based on "actual expenses." The first, the actual expense method, is the most accurate, but also the most burdensome for the employer and employee. Under this method, the employer calculates and reimburses the employee for actual expenses incurred in operating the vehicle. Such expenses must include fuel, maintenance, repairs, insurance, depreciation, and registration.[1693] The employer may require the employee to keep accurate and detailed records of amounts spent in each of these categories.[1694] The California Supreme Court notes that calculating depreciation will require information about the vehicle's purchase price and resale value or lease cost.[1695] In addition, the employee may be required to keep records to apportion those expenses between business and personal use, including tracking miles driven for the benefit of the employer and those for personal use.

In computing amounts due under the actual expense method, the employer may consider whether the actual expenses incurred by the employee were *necessary*.[1696] For example, the employee's choice of vehicle may significantly affect the costs incurred, including brand and grade of fuel and tires, cost of insurance, the shop performing maintenance and repairs, and so forth. In addition to computing actual expense costs, employers will therefore be required to exercise judgment as to whether such expenses were necessary.[1697]

Second method: reimbursement based on mileage. The *second* permissible method for vehicle expense reimbursement recognized by the California Supreme Court is the "mileage

In addition, procedural steps should be addressed as part of planning for the termination. These can include the following:

- Preparation of a termination letter, as described in Section 10.12 ("Preparing Termination Letters to Reduce Risk"), below;
- Scheduling of the termination meeting, as described in Section 10.13 ("Conducting Termination Meetings to Reduce Risk"), below;
- Issuing required notices, as described in Sections 10.14 ("Employer Duty to Issue Notice of Change in Relationship") and 10.19 ("COBRA Notice Requirements for Continuation of Health Insurance Benefits at Group Rate"), below;
- Payment of final wages within deadlines required by California law, as described in Section 10.15 ("Employer Duty to Pay Final Wages Timely"), below;
- Scheduling an exit interview, where circumstances permit, as described in Section 10.16 ("Conducting Exit Interviews to Reduce Risk"), below;
- Preparation of a severance agreement if severance will be offered, as described in Section 10.17 ("Use of Severance Agreements and Releases to Reduce Risk"), below; and,
- Steps for minimizing the risk of post termination liability, including a protocol for communicating the termination to coworkers, responding to reference requests, etc., as described in Section 10.18 ("Avoiding Post Termination Liability"), below.

Best Practice. The decision to terminate an employee, and the process by which the termination is carried out, can present substantial risk for the employer. Employers are advised to exercise caution in discussing the risks of termination, whether verbally or by way of email, in that such communications will likely be discoverable in the event the matter proceeds to litigation. Employers seeking to protect conversations, correspondence and other communications from disclosure are advised to consult experienced employment counsel. Conversations and correspondence with counsel, including communications in which counsel participates, may be protected from disclosure by the attorney client and attorney work product privileges.

10.9 Planning for Termination: Checklist of Key Issues to Reduce Risk.

Employers can substantially minimize the risk of wrongful termination claims by ensuring that certain common missteps are avoided in the termination process. These include the following:

- Providing the employee with a reason for the termination that later proves to be misleading or false;
- Terminating the employee for reasons that are inconsistent with the past practice of the company;
- Terminating the employee for a reason that is trivial or unrelated to the legitimate needs or goals of the business;
- Terminating the employee in violation of company policy or procedures; and,
- Terminating the employee in violation of a state or federal statute or public policy.

- Where a complaint of misconduct or violation of company policy is the basis for termination, has a thorough, neutral investigation been completed to determine whether the complaint has merit?
- Has the employee's explanation of events leading to the termination been considered? Is there sufficient, credible evidence for rejecting the employee's explanation, or does the evidence support the employee's explanation of events?
- Is the employment relationship likely to be deemed "at-will," or is there evidence of an agreement to terminate only for "good cause"?
- Do company forms and policies issued to and signed by the employee contain at-will language (*e.g.*, a job application form, job offer letter, employee handbook, etc.)? Has such signed documentation been retained?
- Is the company aware of any policies, practices, or representations by management that expressly or implicitly promise employment for a specific duration, or as long as performance is satisfactory?
- Have any oral assurances been given to the employee promising employment for a specified period of time?
- Has human resources, in-house counsel, or outside counsel been consulted regarding the termination?

10.10 Identifying the "High Risk" Termination.

Certain categories of terminations present special risks for employers. These include termination situations that include one or more of the following:

- *Employee with significant length of service*. Employees with significant length of service can present special risks for employers. Studies of jury verdicts reflect a high correlation between substantial length of service for the employer and the size of a verdict;
- *Employee is in a protected group.* Protected status can carry a heightened risk of litigation for employers because state and federal anti-discrimination statutes provide for attorney's fees to the prevailing party. Attorney's fees provisions can act as an incentive for plaintiff's lawyers to pursue difficult discrimination cases that does not exist in other types of litigation. Accordingly, such cases can present a heightened risk of litigation for employers;
- *Employee has a history of claims or lawsuits.* Some employees have a history of litigating against prior employers. Employees with such a history can increase the likelihood of litigation;
- *Decision maker has a history of claims or lawsuits.* Some managers and supervisors have a history of being the target of litigation based on certain patterns of conduct. Where such individuals have acted as decision makers, they can present a heightened risk of litigation for employers;
- *Employee has recently complained about unlawful practices or engaged in other protected activity.* An increased risk of litigation exists where the employee has recently complained about an unfair, unsafe, or unlawful activity, either to the employer, or a government agency. Such cases can heighten the risk of litigation because of the difficulty

Endnotes

1 *See*, Cal. Lab. Code § 2929(b), limiting employer's right to discharge employee due to wage garnishments, and California's Wage Garnishment Law, Cal. Code Civ. P. §§ 706.010-706.154.

2 *See*, Cal. Lab. Code §§ 517, 1173, and 1182.

3 *See*, Cal. Lab. Code §§ 517, 1173, and 1182.

4 California Department of Industrial Relations (DIR), Division of Labor Standards Enforcement (DLSE), *Wage Orders 1-2001 through 17-2001*, available at **www.dir.ca.gov**.

5 *See*, *Which IWC Order?,* California Division of Labor Standards Enforcement (DLSE), January, 2003, reprinted at Appendix A to this chapter.

6 *See*, *Which IWC Order?,* California Division of Labor Standards Enforcement (DLSE), January, 2003, reprinted at Appendix A to this chapter.

7 *See*, *Which IWC Order?,* California Division of Labor Standards Enforcement (DLSE), January, 2003, reprinted at Appendix A to this chapter.

8 *Martinez v. Combs*, 40 Cal. 4th 35, 61 (2010).

9 Cal. Lab. Code § 2699.5. *See, e.g., Bright v. 99¢ Only Stores, Inc.*, 189 Cal. App. 4th 1472, 1478 (2010); *and, Home Depot U.S.A. v. Superior Court,* 191 Cal. App. 4th 210, 217-218 (2010).

10 Cal. Lab. Code § 2699.5.

11 *Bright v. 99¢ Only Stores, Inc.*, 189 Cal. App. 4th 1472 (2010); *Home Depot U.S.A. v. Superior Court,* 191 Cal. App. 4th 210 (2010). The cases appear to contradict a Labor Commissioner opinion letter holding that the section of the Wage Orders requiring the employer to provide suitable seating when required by the "nature of the work" was "established to cover situations where the work is usually performed in a sitting position with machinery, tools or other equipment," but not "those positions where the duties require employees to be on their feet, such as sales persons in the mercantile (retail) industry." Op. Ltr. 1986.12.05 (December 5, 1986), California Division of Labor Standards Enforcement (DLSE). The section of the Wage Orders requiring seating when the nature of the work requires standing (*e.g.*, sales work), and the employee is not engaged in active duties, is limited to provided seating "for use during rest periods." Op. Ltr. 1987.01.13 (January 13, 1987), California Division of Labor Standards Enforcement (DLSE).

12 *See,* Cal. Lab. Code § 2699.5; *Bright v. 99¢ Only Stores, Inc.*, 189 Cal. App. 4th 1472, 1478 (2010); *and, Home Depot U.S.A. v. Superior Court,* 191 Cal. App. 4th 210, 217-218 (2010). Because Labor Code Section 1198 does not make unlawful violations of the *wage* requirements of the Wage Orders, such claims would arguably not be available under PAGA.

13 Cal. Lab. Code § 2699.5.

14 Cal. Lab. Code § 2699(f).

15 Cal. Lab. Code § 2699(i).

16 Cal. Lab. Code § 2699(g)(1).

17 Cal. Lab. Code § 2699(g)(1).

18 29 U.S.C. §§ 201-219.

19 29 U.S.C. §§ 251-262.

20 41 U.S.C. §§ 35-45.

21 40 U.S.C. §§ 3141-3148.

22 *See,* 41 U.S.C. §§ 35-45.

23 *See,* 40 U.S.C. §§ 3141-3142.

24 *See,* 41 U.S.C. §§ 351-358. The federal Service Contract Act provides that employers with federal service contracts valued in excess of $2500 must pay employees who perform contract work at least the wages and fringe benefits found by the Secretary of Labor to be prevailing locally for similar work, but in any event not less than minimum wage set by the FLSA. The Act excludes certain contracts, including those covered by the Walsh-Healey Act.

25 18 U.S.C. § 874. The Copeland Act, in effect, mandates employer compliance with the Davis-Bacon Act's requirement that mechanics and laborers on public works projects receive prevailing wages without subsequent deduction or rebate. The Act provides for fine or imprisonment up to five years, or both, for violations. The Act extends beyond Davis-Bacon covered mechanics and laborers. The Act covers all employees on public works rather than just mechanics and laborers, and it applies to all contracts regardless of amount.

26 *See,* 40 U.S.C. §§ 3701-3708. The Contract Work Hours and Safety Standards Act sets overtime standards for mechanics and laborers employed on certain federal construction projects. The projects must be: (1) contracted for by the federal government or its agencies; and, (2) wholly or partially financed by federal loans or grants; or, (3) wholly or partially financed by federally guaranteed loans. Under the Act, laborers and mechanics are entitled to 150 percent of their basic rate of pay for all hours worked in excess of 40 hours in the workweek. Penalties, fines and imprisonment may be imposed for violations.

27 The website for the United States Department of Labor (DOL), Wage and Hour Division, can be found at **www.dol.gov/whd**. The Wage and Hour Division's website contains employer compliance materials for the Fair Labor Standards Act (FLSA), including "FAQ" sheets for many common wage and hour issues, forms, posters, and other publications. Because compliance with federal law may result in violations of California wage and hour laws, employers are advised to consult with experienced California employment counsel before implementing federal wage and hour rules.

28 *See*, 29 U.S.C. § 218(a); 29 C.F.R. § 778.5; *and, Aguilar v. Association for Retarded Citizens,* 234 Cal. App. 3d 21 (1991).

29 *See, Tidewater Marine Western, Inc. v. Bradshaw,* 14 Cal. 4th 557, 567 (1996).

30 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011).

31 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011). *See also*, *Tidewater Marine Western, Inc., v. Bradshaw,* 14 Cal. 4th 557, 565 (1996)("California employment laws implicitly extend to employment occurring with California's state law boundaries").

32 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011).

33 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011).

34 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011).

35 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011). The Court applied a three step conflicts analysis to determine whether California would apply: (1) whether the law of each jurisdiction as to the particular issue in question is the same or different; (2) if there is a difference, each jurisdiction's interest in the application of its own law to determine if a true conflict exists; and, (3) if a true conflict exists, the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy would be subordinated to the policy of the other state.

36 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011). *See also, Tidewater Marine Western, Inc., v. Bradshaw,* 14 Cal. 4th 557, 577-78 (1996)(where the legislature intends a portion of the Labor Code to have extraterritorial application, the legislature has made its preference clear).

37 Cal. Lab. Code §§ 3600.5, and 5305.

38 *See, Sarviss v. General Dynamics Info. Tech., Inc.,* 663 F. Supp. 2d 883, 897-901 (C.D. Cal. 2009) (Wage Orders governing overtime pay did not apply to California resident helicopter pilot where pilot performed between 80 percent and 90 percent of his employment outside of California). Citing *Tidewater Marine Western, Inc., v. Bradshaw,* 14 Cal. 4th 557, the *Sarviss* Court emphasized that, "[a]

Although California will still have an interest in the working conditions of its residents, that interest is perhaps weaker where the individual neither 'works exclusively, [nor] principally, in California.'"

39 *Sullivan v. Oracle Corporation*, 5 Cal. 4th 1191 (2011); *Tidewater Marine Western, Inc., v. Bradshaw,* 14 Cal. 4th 557, 577-78 (1996).

40 *See*, Cal. Lab. Code §§ 200-272 for statutes governing payment of wages; Cal. Lab. Code §§ 500-856 and 1171-1205 for statutes governing hours of work; *and*, 8 Cal. Code Regs. §§ 11010-11170, for California's 17 Wage Orders governing employee wages, hours, and conditions of employment.

41 *See, e.g.,* Wage Order 4-2001 (Professional, Technical, Clerical, Mechanical and Similar Occupations), Section 1, addressing applicability of the Order; *and*, Cal. Lab. Code § 1171, addressing applicability of chapter of Labor Code addressing wages, hours, and working conditions.

42 *See,* Cal. Lab. Code § 3357; *S.G. Borello & Sons v. Department of Industrial Relations*, 48 Cal. 3d 341, 349, 354 (1989); *and, Enforcement Policies and Interpretations Manual*, § 28.2, California Division of Labor Standards Enforcement (DLSE), June, 2002.

43 *See*, *Enforcement Policies and Interpretations Manual*, § 28, California Division of Labor Standards Enforcement (DLSE), June, 2002, citing Lab. Code § 3357; *and*, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989).

44 *See, Martinez v. Combs*, 49 Cal. 4th 35 (2010).

45 *See*, 29 U.S.C. § 203(r)(1), providing that enterprises covered by the FLSA do not include independent contractors.

46 29 U.S.C. § 203(r)(1).

47 29 U.S.C. §§ 206(a), 207(a).

48 29 U.S.C. §§ 203(b).

49 *See, e.g., Real v. Driscoll Strawberry,* 603 F.2d 748, 754 (9th Cir. 1979); *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979); *and*, *Mitchell v. Frank R. Howard Memorial Hospital,* 853 F.2d 762, 766 (9th Cir. 1988). *See also, Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 33 (1961)(economic reality test used to determine employment relationship under federal FLSA).

50 *See,* United States Department of Labor, Wage & Hour Division, *Field Operations Handbook,* §§ 10b05-10b09, October 20, 1993, affirming that a "determination of the relationship cannot be based upon 'isolated factors' or upon a single characteristic 'but rather upon the circumstances of the whole activity.'"

51 29 U.S.C. §§ 206(a), 207(a).

52 29 U.S.C. § 203(b).

53 29 C.F.R. § 776.3.

54 29 C.F.R. § 776.3.

55 29 C.F.R. § 776.3.

56 29 C.F.R. § 776.4.

57 *See,* 29 C.F.R. §§ 776.10 -776.11.

58 29 C.F.R. § 776.15(b).

59 29 C.F.R. § 776.15(b).

60 29 C.F.R. § 776.18.

61 29 C.F.R. § 776.20(b).

62 29 C.F.R. § 776.20(b).

63 29 C.F.R. § 776.2.

64 29 C.F.R. § 776.2.

65 29 U.S.C. § 203(s).