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Know Your Rights: A Guide to Employment Law for California Workers

Marci Seville
Golden Gate University School of Law, mseville@ggu.edu

Maria Blanco

Whitney Gabriel

Anne Yen

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Women's Employment Rights Clinic
Golden Gate University School of Law

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Editors: María Blanco, Whitney Gabriel,
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GOLDEN GATE UNIVERSITY

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María Blanco, Associate Director

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ABOUT THE WOMEN'S EMPLOYMENT RIGHTS CLINIC

The Women's Employment Rights Clinic (WERC) started in August 1993 as part of Golden Gate University School of Law. The Clinic advises, counsels and represents clients in a variety of issues related to employment. Our emphasis is on assisting low-income clients who could not otherwise afford legal assistance when they confront employment problems.

The Clinic is staffed both to provide day-to-day services and to handle ongoing cases and projects. Law students operate the Clinic under the direct supervision of attorneys. These supervising attorneys are Marci Seville and María Blanco, Associate Professors of Law at Golden Gate University. The Graduate Law Fellow, a new admittee to the California Bar, helps both the students and the attorneys with casework. The staff also includes the Clinic Administrative Assistant.

Marci Seville is Director of the Clinic. Previously, she practiced labor law for ten years as counsel for the California School Employees Association, worked for the California Department of Industrial Relations, and served as counsel to the California Industrial Welfare Commission. She also spent several years in private practice with an emphasis on employment discrimination litigation. Ms. Seville taught labor law as an adjunct professor at New College Law School (1979 to 1985). She is the author of "Family and Medical Leave Act of 1993" in *Employment Discrimination Law and Litigation* (Clark Boardman Callaghan, 1995 edition) and a contributing editor to *California Public Sector Labor Relations* (Matthew Bender, 1989 edition) and *Employee and Union Member Guide to Labor Law* (Clark Boardman, 1983 edition). A graduate of New York University (1971), Ms. Seville earned her Juris Doctor (1975) from Rutgers Law School.

María Blanco is Associate Director of the Clinic. Previously she was Staff Attorney at Equal Rights Advocates in San Francisco (1987 to 1994), where she litigated ground-breaking employment discrimination cases including *Castrejon v. Tortillería La Mejor* (E.D. Cal. 1991) (established that undocumented workers were covered by federal labor laws); *Davis v. City and County of San Francisco* (9th Cir. 1989) (represented women of

color seeking to integrate San Francisco Fire Department); *Pallas v. Pacific Bell* (9th Cir. 1991) (class action on behalf of employees whose pregnancy leave was not counted towards early retirement), and *Doe v. Petaluma* (N.D. Cal. 1993) (peer sexual harassment in public school). Ms. Blanco served as Staff Attorney for the United States Court of Appeals, Ninth Circuit (1984 to 1985) and for the San Francisco Lawyer's Committee for Urban Affairs (1985 to 1987). She has taught Gender and the Law as an adjunct professor at Hastings College of the Law (1994). A graduate of University of California, Berkeley (1981), Ms. Blanco earned her Juris Doctor (1984) from Boalt Hall, University of California, Berkeley.

TABLE OF CONTENTS

INTRODUCTION vii
A Note about Workers' Compensation and State Disability Insurance vii

CHAPTER 1 - THINGS YOU SHOULD KNOW 1-1
Risks 1-1
Practical Suggestions 1-1
Arbitration Agreements and Clauses 1-2
Union Contracts 1-3

CHAPTER 2 - WHEN YOU ARE APPLYING FOR A JOB 2-1
Remedies (Available Relief) 2-1
Consequences of Lying on a Job Application 2-2
Questions an Employer Should Not Ask 2-2
- Race and Color 2-2
- Sex 2-3
- Height and Weight 2-4
- Sexual Orientation 2-5
- National Origin 2-5
- Religion 2-6
- Age 2-7
- Disability and Medical Condition 2-8
- Financial Data 2-10

Generally Legal Questions 2-11
- Legal Questions in Limited Circumstances 2-11
- Education 2-12
- Citizenship 2-12

Pre-Employment Testing 2-13

CHAPTER 3 - YOUR RIGHT TO PRIVACY AND ACCESS TO INFORMATION 3-1
Your Personnel Records 3-2
Arrest Records 3-3
Conviction Records 3-6
Fingerprinting 3-7
Bankruptcy 3-9
Credit Records and Investigative Reports 3-10
Medical Records 3-15
Testing and Examinations 3-16
AIDS Testing 3-16
Drug and Alcohol Testing 3-17
Medical Inquiries and Examinations 3-19
Psychological Testing 3-22
Lie Detector Tests 3-23

CHAPTER 4 - WAGE AND HOUR LAWS 4-1
Note about Potential Change in Overtime Law 4-1
State Law and Who is Covered 4-2
Federal Law and Who is Covered 4-4
Enforcement Agencies and Time Limits for Filing Claims 4-4
Remedies 4-6
Independent Contractors 4-6
Salespersons 4-6
Government Employees 4-7
Employer Family Members 4-7
Executive, Administrative, and Professional Employees 4-7
Counting Hours Worked 4-8
Minimum Wage 4-9
Promises to Pay and Payment Schedules 4-11
Overtime 4-12
Deductions from or Withholding of Wages 4-14
Penalties for Late Payment of Wages 4-15
Equal Pay for Men and Women 4-15
Garnishment 4-16
Records Employers Must Keep 4-17
Breaks and Meal Periods 4-18
Tools and Equipment 4-18
Uniforms 4-19

CHAPTER 5 - EMPLOYMENT DISCRIMINATION 5-1
Employment Discrimination in General 5-1
Retaliation 5-2
State Laws 5-2
Federal Laws 5-3
Enforcement Agencies 5-4
Remedies (Available Relief) 5-5
Race Discrimination 5-5
National Origin Discrimination 5-7
Sex Discrimination 5-11
Sexual Harassment and Other Forms of Workplace Harassment 5-15
Forms of Sexual Harassment 5-16
Forms of Racial and National Origin Harassment 5-18
Company or Employer Responsibility for Harassment 5-19
Reporting Harassment 5-21
Quitting Because of Harassment 5-22
Pregnancy Discrimination 5-23
Marital Status Discrimination 5-29
Sexual Orientation Discrimination 5-31
Political Activity Discrimination 5-32
Religious Discrimination 5-33
Age Discrimination 5-36
Disability Discrimination 5-41

CHAPTER 6 - FAMILY AND MEDICAL LEAVE 6-1
Remedies (Available Relief) 6-1
Who is Protected 6-2
Coverage of State and Federal Law 6-2
Pregnancy Disability Leave Under the California Discrimination Law 6-3
General Questions 6-3
Taking Leave in Non-Consecutive Absences 6-4
The Difference Between Pregnancy Disability Leave And Parenting Leave . 6-4
Using Accrued Paid Leave 6-5
Health Benefits 6-5
State Disability Insurance 6-5
Giving Notice to the Employer 6-5
California Family Rights Act 6-6
Reasons for Taking Leave 6-6
Length of Leave 6-6
Reinstatement 6-7

Pay 6-8
Benefits and Seniority 6-8
Notice to the Employer 6-10
Certification by Health Care Provider 6-10
Retaliation 6-12
Leave Taken in Non-Consecutive Absences 6-12
Filing a Lawsuit 6-12
Federal Family and Medical Leave Act 6-13
Allowable Reasons 6-13
Benefits 6-14
Leave Taken in Non-Consecutive Absences 6-14
Length of Leave 6-15
Filing a Lawsuit 6-15

CHAPTER 7 - WORKPLACE LAWS AND IMMIGRANT EMPLOYEES 7-1
Effect of Immigration Status on Legal Protections 7-1
Wage and Hour Laws 7-2
Worker's Compensation 7-3
Unemployment Insurance 7-4
Discrimination Laws 7-4
Unions 7-5
Citizenship/Immigration Status Discrimination 7-6
Making a Complaint 7-8
Document Abuse Discrimination 7-9
I-9 Work Authorization Documents 7-10
Making a Complaint 7-11

CHAPTER 8 - RETALIATION 8-1
What Retaliation Is 8-1
Remedies (Available Relief) 8-2
Examples 8-2
What Employees Have to Show to Claim Employer Retaliation 8-3
Whistle-Blower Definition 8-4
Laws Against Retaliation for
Unionizing 8-4
Jury Duty or Serving as a Witness 8-4
Retaliation Claims: Agencies and Time Limits 8-5

CHAPTER 9 - WORKPLACE SAFETY 9-1

Hazardous Substances 9-1
Employees' Rights 9-2
- Refusal to Perform Hazardous Work 9-2
- Required Safety Measures 9-3
- Monitoring 9-3
- Free Examination and Testing 9-4
- Investigation by Cal/OSHA 9-4
- Filing Complaints 9-5
- Retaliation 9-6
- Consequences When an Employer Breaks the Law 9-6

Illness and Injury Prevention Programs 9-7

CHAPTER 10 - POST-EMPLOYMENT ISSUES 10-1

Unemployment Insurance 10-1
- Eligibility 10-1
- Amount 10-3
- How Long Benefits Last 10-4
- Opposition by Employers 10-5
- Appealing EDD's Denial of a Claim 10-5
- Hearings 10-5
- How You Left Your Last Job 10-7
- Overpayment 10-12
- False Statement 10-13

Wrongful Termination 10-13
Employer References 10-18
- Legal and Illegal Statements 10-18
- What to Do 10-19

APPENDICES

A. Enforcement Chart
B. Resources

INTRODUCTION

The Women's Employment Rights Clinic of Golden Gate University School of Law has written this handbook to help guide California employees who have legal questions regarding their employment. The chapters include broad overviews of different areas of the law. **The law changes frequently, and this book contains only basic information.** Employees should use this handbook as a starting place for further action and advice; it is not meant to be a substitute for legal counsel.

Appendix A, the Enforcement Chart, provides a quick reference about agencies or courts where complaints can be filed and the time limits to file complaints with each agency. Employees should verify filing deadlines with the appropriate court or agency.

A NOTE ABOUT WORKERS' COMPENSATION AND STATE DISABILITY INSURANCE:

Workers' Compensation

Workers' compensation benefits are payable to employees or their families suffering job-related injuries or job-related deaths. California employees (but not "independent contractors") may be eligible. Job-related injuries are injuries which occur in the course of employment and which arise out of the employment. Benefits can be collected regardless of who is to blame for the injury.

Workers' compensation is a specialized field which is outside the scope of this handbook. If an employee is injured on the job, that employee should contact a workers' compensation specialist or attorney for advice. Workers' compensation claims sometimes overlap with claims under family and medical leave laws (Chapter 6) or disability discrimination laws (Chapter 5). If an employee wishes to also file a discrimination claim, the employee should let his or her attorney know as soon as possible and ask the attorney whether the claims might conflict with each other.

State Disability

California employees may be eligible for state disability insurance. California created the state disability insurance program to protect disabled employees against loss of all income when they are unable to perform work because of any illness or injury, whether physical or mental. This system differs from workers' compensation in that the cause of the injury does not have to be work-related for the employee to collect benefits.

However, as with workers' compensation, the state disability system is specialized and outside the scope of this handbook. If an employee is having difficulty collecting state disability benefits, that employee should contact a specialist in this area for advice. If an employee wants to file a discrimination claim, he or she should consult a specialist or attorney about whether the claims for disability insurance and discrimination may conflict with each other.

Chapter 1
THINGS YOU SHOULD KNOW

Risks

Before employees decide to take legal action against their employers, they should be aware of the possible risks involved in enforcing their rights, from increased hostility in the work environment to termination of employment.

Before taking any legal action against an employer, employees should discuss their situation with a local enforcement agency, an employment law specialist, or a union representative. This will help ensure that they are taking the proper legal actions to enforce their rights, that they file with the correct government agency, and that time limits for filing claims are not missed.

Where there are other employees with similar complaints against the employer, employees often benefit by taking action together (for example, filing a complaint or taking some other step to protect their wages, hours, or working conditions). In addition, if there is an union, contact the union for help.

Practical Suggestions

Employees can help themselves, better their situations and often strengthen potential claims by doing the following things when applicable:

- Make an appointment to check your personnel file. This allows you to check for accuracy and become aware of what is in your file.

- Get copies of <u>everything</u> in your personnel file that you signed. It is your right. (Labor Code § 1198.5.)

- In cases of sexual or racial harassment, complain to a supervisor or manager promptly. Bring a witness with you if possible. Follow up with a written complaint. Keep a copy for yourself.

- Keep a journal at home of dates, times, and witnesses of any employer wrongdoing (for example, failure to pay overtime, harassment, discrimination,

etc.). Unless you keep a journal, it is very difficult months later to remember the details of what happened.

- If you are eligible to collect unemployment insurance benefits, make sure to apply.

- Know your union representative and contact this representative first whenever a problem arises.

- Keep copies of all letters and other documents that you send to and that you receive from the employer.

- If in doubt, do not sign anything without legal advice.

- Do not take any important action without getting legal advice.

- If fired, ask for your check immediately. If the employer does not give you your check immediately, you may file a claim with the state Labor Commissioner.

- In certain circumstances, co-workers can be helpful as witnesses. Write down names, phone numbers, and addresses of all co-workers who might have information important to your situation before you lose contact with them.

- Most cities and counties have public law libraries. Employees can better inform themselves by researching the laws that affect them. Consult the government pages of your local telephone directory to find the location of the closest public law library. Look under "Law Library" or "Libraries." If you have trouble finding any of the materials you need, remember to ask a librarian for help.

Arbitration Agreements and Clauses

Employers sometimes ask employees to sign arbitration agreements or include arbitration clauses in employment contracts. These are contracts which limit an employee's options if and when the employee wants to sue the employer. Usually, these agreements **waive** or give up the employee's right to present the case to a jury of his or her peers. Instead, the employee has to take the

case to a proceeding in which there is only an arbitration judge. There is usually no appeal of the arbitrator's decision.

Employers usually ask employees to sign these agreements upon hiring. Many employers will not hire someone who refuses to sign. At the time of the writing of this book, there is no law which protects the employee against this.

Employees should be aware of what these agreements mean and should ask for an explanation of the details of each clause in the agreements.

Union Contracts

Most unionized employees will be subject to arbitration clauses that cover any disputes concerning the terms of the collective bargaining agreement (or labor contract) between the union and the employer. Unionized employees often have more workplace rights than other workers because they fall under a union contract. However, there are some rights and remedies discussed in this book that may not apply to unionized workers, because their disputes must be resolved through the grievance arbitration procedure in the union contract. Workers should use that grievance procedure whenever possible and follow all necessary time limits to ensure that they do not give up any rights included in the union contract.

Chapter 2
WHEN YOU ARE APPLYING FOR A JOB

To prevent employers from illegally discriminating against job applicants, there are guidelines on what types of questions employers may ask applicants during the application and interview process.

Both federal and state laws dictate what kinds of questions can and cannot be asked of a job applicant. The federal laws prohibiting discrimination include Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and agency regulations in sections of the Code of Federal Regulations (CFR).

The California laws prohibiting discrimination are the Fair Employment and Housing Act (FEHA), certain provisions of the California Labor Code and California Civil Code. In addition, the Fair Employment and Housing Commission (FEHC) provides guidelines on pre-employment questions in sections of the California Code of Regulations (CCR).

Generally, the law in California prohibits pre-employment questions which identify personal characteristics which have been used to discriminate. This includes questions about race, sex, marital status, religion, national origin, ancestry, disability, age, arrest records, financial status, and military service and discharge. Employers should not ask these questions in personal or telephone interviews with job applicants or their references. Keep in mind that an employer has more freedom after hiring employees to ask them certain questions.

Remedies

If a job applicant is denied a job as a result of illegal questions, he or she can sue for the job or its equivalent, in addition to lost wages and benefits. Moreover, California law imposes civil and criminal penalties (such as fines) on employers for asking certain prohibited questions. However, a person who sues must prove that the employer did not hire him or her because of answers to illegal questions or refusal to answer such questions, not for some other reason.

Consequences of Lying on a Job Application

Lying on a job application form can be grounds for termination of the employee no matter how long the employee has worked for the employer. Employers can also bring up falsification of a job application if an employee later files a lawsuit for discrimination or wrongful termination.

QUESTIONS AN EMPLOYER SHOULD NOT ASK

California Law: 2 California Code of Regulations §§ 7287.3, 7287.4.

RACE AND COLOR

See also Chapter 5, Employment Discrimination, Race Discrimination.

California Law: Government Code §§ 11135, 12940, 12990, 19702-19704; Labor Code §§ 1735, 3095; 2 California Code of Regulations §§ 7287.3, 7287.4, 22 California Code of Regulations §§ 98000 to 98211, 98300 to 98413.

Federal Law: 42 U.S. Code §§ 2000e to 2000e-12; 41 Code of Federal Regulations §§ 60-1.1 to 60-1.4, 60-50.1 to 60-50.5.

Q: May an employer ask about an applicant's race or color?

A: No. Both Title VII and the FEHA prohibit employment discrimination based upon race and color. An employer may not ask questions concerning these personal characteristics because they have no bearing on job ability. For example, an employer may not ask an applicant to attach a photograph to a job application (this is permissible after hiring). Questions regarding the applicant's color or complexion of his or her skin, eyes, or hair are not allowed.

SEX

See also Chapter 5, Employment Discrimination, Sex Discrimination.

California Law: Government Code §§ 11135, 12940, 12945, 12990, 19702-19704; Labor Code §§ 1735, 3095; 2 California Code of Regulations §§ 7290.6 to 7292.6, 22 California Code of Regulations §§ 98000 to 98111, 98240 to 98244, 98300 to 98413.

Federal Law: 42 U.S. Code §§ 2000e to 2000e-12; 29 Code of Federal Regulations §1604.4; 41 Code of Federal Regulations §§ 60-1.1 to 60-1.4, 60-20.1 to 60-20.6.

Q: May an employer ask questions about the applicant's sex and/or marital status?

A: No. An employer may not require an applicant to state her sex (gender) unless it is a valid job-related necessity, such as the gender necessary for an acting role in a film. Questions regarding pregnancy, childbearing, birth control, or abortion are also prohibited.

An employer may not ask any questions about an applicant's marital status or family obligations. This includes questions about the applicant's maiden name, number and/or ages of children, and child care arrangements.

The prohibition against sex-related questions applies to men as well as women.

Q: If a job applicant is sexually harassed, what should she do?

A: A job applicant can file a complaint against the prospective employer with the DFEH or the EEOC. Although the law prohibits retaliation against people who file such charges, employers often refuse to hire complainants, so applicants need to bear in mind the risks. **See also Chapter 1, Things You Should Know.**

If a job applicant determines during the interview/hiring process that she does not want to work for the employer responsible for the sexual harassment, she may nonetheless want to document the alleged harassment and file an agency complaint to help prevent future incidents of sexual harassment of other job applicants or employees.

One way of doing this is to write a letter complaining of the sexual harassment to the President or CEO of the company. In the letter, make sure to describe accurately the sexually harassing conduct, the name of the harassing employee, and the date, time and location where the sexual harassment took place.

Make sure to note on the letter that copies are being sent to the DFEH or EEOC and, if applicable, to any agencies or organizations that referred the applicant to the job opening. Also, make sure to send the agencies or organizations the copies.

HEIGHT & WEIGHT REQUIREMENTS

California Law: 2 California Code of Regulations §§ 7287.4(d)(2)-(d)(3).

Q: May an employer ask about an applicant's height or weight?

A: In general, no. Employment questions concerning height and weight often have the effect of discriminating against protected groups (such as women and certain ethnic groups) and therefore must usually be accompanied by a reason that states why this specification is necessary to do the job. For example, if a prison guard position truly requires physical strength, the employer should adopt relevant tests directly measuring job applicants' strength instead of using weight as the basis for the selection. However, in one case, an airline was allowed to use a height standard in selecting pilots, because shorter pilots were unable to operate any of the company's aircraft.

SEXUAL ORIENTATION
See also Chapter 5, Employment Discrimination, Sexual Orientation Discrimination.

California Law: Labor Code §1102.1.

Q: May an employer ask questions which identify an applicant's sexual orientation?

A: No. The California Labor Code prohibits discrimination based on sexual orientation. Employers should not ask applicants questions exploring sexual orientation.

NATIONAL ORIGIN
See also Chapter 5, Employment Discrimination, National Origin Discrimination, and Chapter 7, Workplace Laws and Immigrant Employees.

California Law: See Race and Color. 2 California Code of Regulations § 7289.5.

Federal Law: See Race and Color.

Q: May an employer ask questions about an applicant's national origin?

A: No. Prohibited questions include those regarding an applicant's birthplace, race, or ancestry. Also, an employer should not request names and addresses of "relatives" to contact in case of an emergency (only "person to be notified" is permitted). An employer should not ask how an applicant acquired the ability to read, write or speak a foreign language. However, an employer is permitted and required to ask all employees for information to verify the employees' legal right to work in the United States for completion of the "I-9" employment eligibility form. **See pages 2-12 and 2-13 regarding questions about citizenship.**

RELIGION

See also Chapter 5, Employment Discrimination, Religious Discrimination.

California Law: Government Code §§ 11135, 12940, 12990, 19702 to 19704; Labor Code §§ 1735, 3095; 2 California Code of Regulations §§ 7293.0 to 7293.4; 22 California Code of Regulations §§ 98000 to 98111, 98220 to 98223, 98300 to 98413.

Federal Law: 42 U.S. Code §§ 2000e to 2000e-12; 41 Code of Federal Regulations §§ 60-1.1 to 60-1.4, 60-50.1 to 60-50.5.

Q: May an employer ask an applicant about his or her religion?

A: No. An employer may not ask an applicant questions about which days he or she is available for work if the reason is to identify the applicant's religion. Similarly, an employer may not ask such questions to avoid hiring an applicant whose religious observances would legally require the employer to accommodate the applicant's observances and practices.

However, one exception applies. Religious organizations do not need to comply with this rule and may discriminate based upon religion.

AGE

See also Chapter 5, Employment Discrimination, Age Discrimination.

California Law: Government Code §§ 11135, 12926, 12941, 12990, 18932, 19700; Labor Code § 3077.5; 2 California Code of Regulations §§ 7295-7296.2; 22 California Code of Regulations §§ 98000-98111, 98230-98238, 98300-98413.

Federal Law: 29 U.S. Code §§ 621 et seq.; 29 Code of Federal Regulations §§ 1625.1 et seq.

Q: May an employer ask an applicant's age?

A: Generally, no. Pre-employment questions asking an applicant's age are impermissible if they eliminate or are intended to eliminate people forty years old and over. Asking dates of attendance in elementary or high school is improper, for example.

However, an employer may ask an applicant if he or she is over eighteen years old to determine if the applicant is a minor who requires a work permit.

Also, according to federal law, if an application form clearly states that the Age Discrimination in Employment Act prohibits discrimination against individuals age 40 and over, then the employer may ask questions regarding age. This law applies to government employers and private employers with 20 or more employees.

DISABILITY & MEDICAL CONDITION

See also Chapter 5, Employment Discrimination, Disability Discrimination, and Chapter 3, Your Right to Privacy.

California Law: Government Code §§ 11135, 12926, 12940, 12990, 19702; Labor Code § 1735; 2 California Code of Regulations §§ 7293.5 to 7294.2, 22 California Code of Regulations §§ 98000 to 98111, 98250 to 98413.

Federal Law: 38 U.S. Code §§ 4211-4214; 28 Code of Federal Regulations §§ 41.31-41.58; 29 Code of Federal Regulations §§ 1630 et seq.; 41 Code of Federal Regulations §§ 60-741.1 - 60-741.25.

Questions about Disabilities

Q: May an employer ask an applicant general questions intended to find out if the applicant has a disability?

A: No. General questions about an applicant's disability are not allowed. For example, an employer may not ask an applicant, "do you have any particular disabilities?" or "have you ever been treated for any of the following diseases or conditions?"

The Fair Employment and Housing Commission has detailed guidelines spelling out what questions about disabilities an employer should not ask applicants. These guidelines are found at 2 California Code of Regulations § 7294.0. The Equal Employment Opportunity also has guidelines; these are found at 29 Code of Federal Regulations §§ 1630 et seq.

Q: May an employer ask an applicant questions about specific types of disabilities?

A: No. An employer should not ask questions intended to find out if an applicant has a particular disability. Instead, an employer may ask narrow questions about an applicant's ability to perform job-related functions, tasks, or duties, so long

as the questions are not phrased in terms of the disability. For example, an employer could explain the functions of the job and ask an applicant if the applicant could perform those functions with or without reasonable accommodation.

Q: May an employer refuse to hire an applicant because the employer thinks the applicant is disabled?

A: No. With a few exceptions, employers must consider applicants with disabilities on an equal basis with non-disabled applicants. Employers cannot discriminate against an individual with a disability who can do the essential functions of the job with or without reasonable job accommodations. Additionally, people who are thought to be disabled, even if they are not actually disabled, are protected by the disability discrimination laws. They may file charges against an employer who discriminates against them because they are regarded to be disabled.

Q: May an employer ask an applicant if the applicant has ever filed a workers' compensation claim?

A: No. Whether someone has filed a worker's compensation claim is not relevant to whether the person can perform the essential functions of a particular job. This type of question, used as a job requirement, tends to discriminate against individuals with disabilities. It is not job-related or consistent with what is necessary to run a business.

Q: May an employer ask about an applicant's illegal drug use?

A: Sometimes. Since neither the California Fair Employment and Housing Act, the Americans with Disabilities Act, nor the Rehabilitation Act protects applicants who are currently using illegal drugs, employers may ask questions about current use and base hiring decisions on such use. However, employers should not ask pre-employment questions to determine prior drug addiction.

CRIMINAL RECORDS

Regarding inquiries about the criminal records of job applicants, please see Chapter 3, Your Right to Privacy, Records, Arrest & Conviction Records.

FINANCIAL DATA
See also Chapter 3, Your Right to Privacy, Credit Records, Bankruptcy.

Federal Law: Federal Bankruptcy Act (11 U.S. Code § 525).

Q: May an employer ask about an applicant's financial status?

A: It depends. An employer may not inquire about or consider an applicant's financial status, including bankruptcy or garnishment, unless there is a legitimate business reason for doing so. This type of information has negatively affected protected groups, such as minorities; therefore, questions in this area may be prohibited unless a business necessity is demonstrated.

As discussed in Chapter 3, when an employer asks for credit information, specific procedures must be followed. **Regarding employer requests for credit reports of employees, see Chapter 3, Privacy, Credit Records and Investigative Reports.** Federal law protects job applicants against discrimination solely on the basis of bankruptcy or previous bankruptcy. **Regarding bankruptcy discrimination, see Chapter 3, Privacy, Bankruptcy.**

GENERALLY LEGAL QUESTIONS

Legal Questions in Limited Circumstances

Q: Are there any instances when potential employers may ask questions which are usually not permitted?

A: Yes, but only in limited circumstances.

(1) Potential employers may ask questions which are ordinarily not permitted when the questions are genuinely related to necessary job functions. For example, an employer may ask the age of an applicant for a bartender position, since one must be of age to serve liquor.

(2) Potential employers may ask questions which are ordinarily not permitted when the questions regard job requirements concerning authenticity or genuineness. For example, an employer is allowed to ask a question identifying the sex of an applicant when the job is a female acting role.

(3) Generally, after hiring or after an offer of employment has been made, an employer may then ask many of the previously impermissible questions. This is only true if the information is sought and used for nondiscriminatory purposes. However, most employers may not ask certain questions, such as questions about arrests, either before or after hiring. (See Chapter 3, Privacy, Arrest Records.)

(4) Most California employers must keep records which identify applicants' personal characteristics such as race and sex in order to monitor their equal employment hiring practices. This information must be separated from the application form before any hiring decisions are made.

EDUCATION

California Law: Government Code § 19702.2.

Q: May an employer ask an applicant about his or her educational background?

A: Yes. An employer may ask questions regarding an applicant's educational background as long as the information is job-related and does not negatively affect groups protected by discrimination laws. However, an employer cannot require pre-employment tests and high school diplomas unless the employer can demonstrate that they are necessary for the job.

CITIZENSHIP

See also Chapter 7, Workplace Laws and Immigrant Employees.

California Law: 2 California Code of Regulations § 7289.5(f).

Federal Law: 8 U.S. Code §§ 1101, 1324a, 1324b.

Q: May an employer ask an applicant about his or her citizenship?

A: It depends. Under the Immigration Reform and Control Act (IRCA), it is generally illegal for an employer to refuse to hire or recruit based on a person's citizenship or immigration status.

However, some exceptions apply. An employer may discriminate based on citizenship if:

(1) the citizen and the non-citizen are equally qualified; or

(2) under law, regulation or government contract, the employer is required to hire only citizens.

For example, under regulation, Postal Service employees may not be temporary resident aliens.

In addition, although the FEHA and Title VII do not specifically protect against citizenship discrimination, to the extent that any citizenship discrimination has the purpose or effect of causing national origin discrimination, a claim may be filed under these laws. For example, if an employer only asks applicants with Latino surnames for citizenship papers and does not ask other applicants, the Latino applicants could claim national origin discrimination under Title VII and FEHA.

PRE-EMPLOYMENT TESTING

California Law: Government Code §§ 11135, 12926, 12940, 12990, 19702; Labor Code § 1735; 2 California Code of Regulations §§ 7293.5 to 7294.2, 22 California Code of Regulations §§ 98000 to 98111, 98250 to 98413.

Federal Law: 38 U.S. Code §§ 4211-4214; 28 Code of Federal Regulations §§ 41.31-41.58; 29 Code of Federal Regulations §§ 1630 et seq.; 41 Code of Federal Regulations §§ 60-741.1 - 60-741.25.

Q: May an employer require that an applicant pass a test?

A: It depends. Subject to several limitations, employers may give tests to potential employees. However, any test must accurately reflect the specific job skills it is supposed to measure, not the applicant's disability. Also, before making a conditional offer of employment, an employer may not require applicants to take medical tests or many types of psychological tests.

Q: What are reasonable accommodations in the hiring process?

A: Reasonable accommodations for people with disabilities may include providing access to rooms or buildings, allowing a longer time period for test completion, providing a reader or interpreter, or allowing an applicant to complete a test verbally.

Q: May an employer require that an applicant take a timed test when a disability makes it hard to complete the test quickly?

A: No. Employers must make reasonable accommodations for applicants with disabilities throughout the hiring process unless the employer can show such accommodation would create an undue hardship on the employer's business. Allowing a longer time for test completion is sometimes a reasonable accommodation for an applicant with a disability. A disabled applicant who needs some type of testing accommodation should communicate this to the employer.

Medical and Psychological Examinations

See Chapter 3, Privacy, Testing and Examinations, Medical Inquiries and Examinations, Psychological Testing.

Drug Testing

See Chapter 3, Privacy, Drug and Alcohol Testing.

Chapter 3

YOUR RIGHTS TO PRIVACY AND ACCESS TO INFORMATION

Employees and job applicants have certain rights that protect them from unreasonable intrusions into their privacy by employers. These privacy rights are protected by the constitution and by various state and federal laws. Under the law, certain areas of an individual's life are private and employers may not take them into consideration when making employment decisions such as hiring, promoting, terminating, or training. Accordingly, employees also have the right to obtain the information contained in their own personnel records.

This manual covers the following issues regarding employee information: personnel records, arrest records, conviction records, fingerprints, bankruptcy, credit records, medical records, AIDS tests, drug and alcohol tests, medical inquiries and examinations, psychological tests, and lie detectors.

In addition to the specific laws discussed in this chapter concerning issues such as AIDS testing, disability discrimination, or arrest records, the California and United States Constitutions have been used in some cases to challenge employer intrusion into employee privacy. Article I § 1 of the California Constitution provides that all people have inalienable rights, including the right to pursue and obtain safety, happiness, and privacy. This provision has been used to challenge drug testing policies, application questions that violate privacy, and polygraph testing. The Fourth Amendment protection against unreasonable searches and seizures in the United States Constitution has been used by public employees to challenge certain drug testing policies.

EMPLOYEE ACCESS TO PERSONNEL RECORDS

California Law: Labor Code §§ 432, 1198.5, 1199

Q: Can an employee get access to his or her own personnel file?

A: Yes. An employee has the right to see or inspect any written documents, files, papers, or computer records which have been used to make decisions about the employee such as hiring, firing, promoting, transferring, or establishing salary or benefits. Additionally, upon an employee's request, an employer must give the employee copies of any documents that the employee has signed. The records must be made available at a reasonable time at the request of the employee.

Q: What is a reasonable time?

A: A reasonable time means during regular business hours of the business office where the personnel files are kept. The employer may require the employee to make an appointment for such inspections. The employer must also allow sufficient time for the employee to inspect the file.

Q: Are there items in personnel files that may not be inspected?

A: Yes. An employee does not have the right to see records of criminal offense investigations or letters of reference.

Q: Are there any exceptions to this right of inspection?

A: Yes. Labor Code Section 1198.5 does not apply to public employers. Public employees may have access to their personnel files under other state or local laws or under union contracts. California public education employees have personnel file access under California Education Code Sections 44031 and 87031 (community colleges). California county government employees have personnel file access under California Government Code Section 31011.

ARREST RECORDS

California Law: Labor Code § 432.7; Penal Code §§ 11105, 13320-13326; 2 California Code of Regulations § 7287.4.

Q: May an employer ask a job applicant about arrests or detentions that did not result in a conviction?

A: Generally, no. Employers may not ask applicants about arrests or detentions that did not result in convictions. Even if an employer learns about arrests or detentions in some other way, the employer should not consider it in making any employment decisions regarding current employees or job applicants. However, there are a few exceptions discussed below.

Q: What are the exceptions that allow an employer to ask a job applicant about arrests or detentions that did not result in a conviction?

A: Employers may ask about arrests or detentions when the job applicant is:

(1) applying for a job as a peace officer with a police department, jail, or other criminal justice agency;

(2) applying for a job with the Department of Justice or other criminal justice agency;

(3) applying for a job as a health care worker with possible access to drugs and medication (can ask about arrests for possession of narcotics);

(4) applying for a job as a health care worker with access to patients (can ask about arrests for sex offenses requiring registration as a sex offender).

Q: If an employee or job applicant is out on bail or on his or her own recognizance pending trial, may an employer ask about that arrest?

A: Yes. This is an exception to the general rule.

Q: May an employer ask about referrals to and participation in pre-trial or post-trial diversion programs?

A: No, an employer may not ask about referrals to and participation in pre-trial or post-trial diversion programs unless they are the result of a conviction (see Labor Code § 432.7).

Q: May an employer seek or use arrest or diversion program information from the police department or any other source when making employment decisions?

A: No.

Q: May a peace officer or anyone with access to criminal records (for example, employees of jails, police departments, or other criminal justice agencies), release arrest information in those records to affect someone's employment?

A: No. Those with access to criminal records may not give information about an arrest which did not result in a conviction to anyone not authorized by law to receive this information. The protected information in the records includes participation in diversion programs.

Q: What recourse does an employee or job applicant have if an employer improperly uses the applicant's arrest or diversion program records in making an employment decision?

A: If the employer's violation is unintentional, the job applicant can sue for actual damages or $200.00, whichever is greater, plus costs (certain expenses of the lawsuit) and reasonable attorney's fees. If the employer's violation is intentional, the job applicant can sue for treble (three times) actual damages or $500.00, whichever is greater, plus costs and reasonable attorney's fees. An employer can also be charged with a misdemeanor for an intentional violation.

However, the available awards are different for employees than for applicants. Employees may sue for actual damages plus costs only.

Q: What are actual damages?

A: Actual damages are the amount that would compensate the employee for the actual loss that was caused by the employer's wrongdoing. For example, actual damages might include the amount of a promotional pay raise denied the employee because of the employer's improper conduct. If an employer denies an applicant a job because of improper use of arrest or diversion records, actual damages reflect the harm that results. For instance, perhaps the applicant would have started work on January 1 if not for the employer's improper decision. The applicant then obtains a job with another employer and begins work on January 8. Actual damages include a week of pay. If the second job pays less, then the applicant could try to get the salary difference as part of actual damages.

CONVICTION RECORDS

California Law: Labor Code §§ 432.7, 432.8; 2 California Code of Regulations § 7287.4.

Q: What is the definition of a conviction?

A: Under California Labor Code § 432.7, a conviction is defined as a "plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court."

Q: May an employer ask an employee or job applicant about his or her conviction record?

A: Generally, yes.

However, state agencies take the position that an employer should not ask about or consider the following types of convictions when making employment decisions:

(1) any conviction for which the record is sealed, expunged, or statutorily eradicated by a court order; or

(2) any misdemeanor conviction for which probation has been successfully completed or discharged and the case has been dismissed by the court.

Assuming that a job applicant has no other convictions except these sealed or dismissed convictions, can he or she answer "no" if asked whether he or she has convictions? This is uncertain, because employers can fire employees for lying on job applications. Applicants should note that the law is uncertain and proceed with care.

Q: May an employer have a general policy excluding all applicants with convictions from working for the employer?

A: It depends. The policy may have the effect of disproportionately excluding people protected by anti-discrimination laws. If so, the employer may have such a policy only if the employer can show a legitimate business justification. Some employers may have legitimate reasons for excluding applicants who have been convicted of felonies; police agencies, for example, are allowed to use such policies. **See Chapter 5, Employment Discrimination, Disparate Treatment and Disparate Impact.**

Q: May an employer ask an employee or job applicant about marijuana-related convictions?

A: It depends. Employers may ask about marijuana-related convictions within the previous two years, not marijuana-related convictions more than two years old.

FINGERPRINTING

California Law: Labor Code §§ 1051, 1052, 1054, 1057; Financial Code §§ 261, 777.5, 6525, 8012, 14409.2.

Q: May an employer require that job applicants provide fingerprints to be hired?

A: Yes, an employer may require fingerprints as long as the employer intends to use the applicant's fingerprints only within the company. It is unlawful for an employer to give the fingerprints to another employer or a third party to get information that could be used against the applicant. However, there are a few exceptions discussed below.

Q: May an employer give a job applicant's fingerprints to the police department to get criminal history about the applicant?

A: Generally, no. However, there are some exceptions. A savings and loan and a commercial bank may give the fingerprints of a job applicant to local, state or federal law enforcement agencies to check the applicant's criminal record. When making employment decisions, savings and loan or bank employers may consider records of:

(1) convictions;

(2) arrests for which the person is currently out on bail or on his/her own recognizance pending trial;

(3) the following crimes and attempted crimes: robbery, burglary, theft, embezzlement, fraud, forgery, bookmaking, receiving stolen property, counterfeiting, crime involving checks or credit cards, or crime using computers.

After reviewing the criminal history information, the savings and loan or commercial bank may lawfully decide not to hire the applicant if they believe that employing the applicant would create an unreasonable risk.

Q: Must the employer tell the applicant that it plans to request the criminal history information?

A: Yes. The employer may not submit a request for records without the written consent of the person fingerprinted. The employer must keep any criminal history information obtained through this procedure confidential.

Q: Are there any applicants who must give their fingerprints to their prospective employers as a prerequisite to employment?

A: Yes. Every member of a national securities exchange, broker, dealer, and registered securities clearing agency must require each of its partners, directors, officers, and employees to be fingerprinted and must submit fingerprints to the U.S. Attorney General.

Note: the Securities and Exchange Commission (SEC) may excuse any class of partners, directors, officers, or employees from this requirement. However, this exemption may only apply if it does not conflict with the public interest or the protection of investors.

BANKRUPTCY

Federal Law: Federal Bankruptcy Act (11 U.S. Code § 525).

Q: May an employer ask about the bankruptcy status of an employee or job applicant?

A: It depends. An employer may not consider bankruptcy as a factor for employment purposes unless there is a legitimate business reason for doing so.

Federal bankruptcy law prohibits discrimination based solely upon bankruptcy or prior bankruptcy, as discussed below. Moreover, the practice of considering bankruptcy status as a factor in employment decisions sometimes affects minorities and other protected groups most heavily. When this happens, questions in this area may be prohibited unless a business necessity is demonstrated. **See also Chapter 5, Employment Discrimination, Disparate Treatment and Disparate Impact.**

Q: May an employer make any unfavorable employment decisions based solely on the bankruptcy status of an employee or job applicant?

A: No. Section 525 of the Federal Bankruptcy Act protects employees and job applicants in both the public sector and the private sector from discrimination on the basis of bankruptcy.

Q: What must the applicant show to establish discrimination on the basis of bankruptcy under the Federal Bankruptcy Act?

A: If the applicant believes that his or her rights have been violated and brings a claim against the employer, the applicant must show that the bankruptcy status was the sole reason that the employer refused to hire the applicant.

CREDIT RECORDS AND INVESTIGATIVE REPORTS

California Law: California Consumer Credit Reporting Agencies Act (Civil Code § 1785.1 et seq.); California Investigative Consumer Reporting Agencies Act (Civil Code §§ 1786 - 1786.56).

Federal Law: Fair Credit Reporting Act of 1970 (15 U.S. Code § 1681 et seq.).

In California, the Consumer Credit Reporting Agencies Act (CCRA) and the California Investigative Consumer Reporting Agencies Act (CICRAA) control the use of credit reports and investigative reports for employment purposes. The CCRA restricts the collection and release of credit information, including information from a creditor or credit agency.

The CICRAA covers investigative consumer reports. These are consumer agency reports having information about a person's character, general reputation, personal characteristics, or lifestyle. An agency prepares such reports by interviewing the person's friends or acquaintances.

Both of these laws are discussed below.

California Consumer Credit Reporting Agencies Act (CCRA)

Q: May an employer look at an employee's or applicant's credit records?

A: According to the CCRA, an employer who intends to use a credit report for employment purposes may get a consumer credit report. Before doing so, however, the employer must follow the following procedure by law:

1) the employer must give written notice to the employee or applicant that a credit report will be used;

2) the notice must name the credit reporting agency; and

3) the notice must have a box that the employee or applicant may check off in order to receive a free copy of the report.

Q: What is a consumer credit report under the CCRA?

A: A consumer credit report is any communication of any information by a consumer credit reporting agency regarding an individual's credit worthiness, credit standing, or credit capacity.

Q: How would this information be used in an employment context?

A: The report might be used to evaluate the applicant for employment, promotion, reassignment, or retention.

Q: May an employee or applicant find out if his or her employer has made an unfavorable decision regarding the person's employment because of information in the credit report?

A: Yes. In fact, when an employer decides to not hire, promote, or retain a person because of information in a credit report (even if the credit information is not the only reason), the employer must do the following:

(1) give the person written notice of the denial of the employment benefit. This should include a statement that the denial of the employment benefit was based to some extent on the information in the credit report;

(2) give the person the name, address, and telephone number of the consumer credit agency that supplied the report;

(3) give the person written notice of his or her right to get a free copy of the credit report; and

(4) notify the person of his or her right to dispute the information in the credit report.

The consumer credit reporting agency may not keep the employer from telling the person that he or she was not hired because of information in the person's credit report.

Q: May an employee or applicant inspect or receive a copy of his or her consumer credit file at a consumer credit reporting agency?

A: Yes. An employee or applicant may inspect or receive a copy of his or her report from the agency in person during normal business hours and on reasonable notice, or by mail. The employee or applicant may ask for a copy of his or her file in written form with explanations of any codes used. Additionally, information in a person's file may also be given to the person over the telephone if the person has made a written request with proper identification for telephone disclosure.

Also, as described in the above questions, an employee or applicant has a right to receive a free copy of a credit report regarding him or her if an employer uses it for employment purposes.

Q: Can a person find out who has requested his or her credit report from the consumer credit agency?

A: Yes. Individuals may request and receive a record of all inquiries into their file within the previous six months, as well as a list of recipients of any report furnished for employment purposes within the previous two years.

Q: May an employee or applicant have inaccurate information in his or her credit file changed?

A: Yes. The individual should inform the agency of any inaccuracies in his or her credit record. The agency must then reinvestigate and change (if necessary) the information. In reinvestigating, the agency must consider all information that the individual provides to the agency.

Q: What recourse does an employee or applicant have if an employer violates the Consumer Credit Reporting Agencies Act?

A: If an employer violates the CCRA by failing to notify the employee of an employment decision made on the basis of the report, by not telling the employee about his or her right to dispute the information, or by not telling the employee about how to get a copy of the report, an employee or applicant who is harmed may sue the employer. An individual has two years from the date the violation occurred to file a lawsuit. However, if the employer was required to give information to the individual and made a willful misrepresentation about it (meaning the employer willfully lied or refused to give that information), then the individual has two years from the date that he or she found out about the misrepresentation.

California Investigative Consumer Reporting Agencies Act (CICRAA)

Q: What kind of consumer report (that an employer might request) is covered under the CICRAA?

A: The CICRAA covers investigative consumer reports. These are consumer agency reports having information about a person's character, general reputation, personal characteristics, or lifestyle. An agency prepares such reports by interviewing the person's friends or acquaintances.

Q: What procedures must an employer follow if the employer wishes to use an investigative consumer report to make an employment decision?

A: Subject to some exceptions discussed below, an employer desiring an investigative report must notify the individual in writing that the employer intends to order such a report. This notice must be given to the individual within three days after the report is requested. With the notice, the employer must provide the name of the agency supplying the report. In addition, the employer must inform the individual of his or her rights under law concerning the report. For example, individuals have the right to inspect their own investigative report file.

Exceptions: Employers are not required to give the above notice to employees when reports are sought for issues of promotion, reassignment, or retention. The notice is also not required if an employer is trying to determine whether or not an employee is engaged in any criminal activity likely to result in a loss to the employer.

The CICRAA sets out specific rules on what information can and cannot be included in an investigative consumer report.

MEDICAL RECORDS

California Law: California Confidentiality of Medical Information Act (Civil Code § 56 et seq.).

Q: May an employer get access to an employee's medical records?

A: No. Under the California Confidentiality of Medical Information Act, an employer may not have access to an employee's medical records unless the employee or job applicant signs a document which authorizes the employer to do so. Protected medical information includes any information from a provider of health care regarding a patient's medical history, mental or physical condition or treatment. Employees should carefully read any documents the employer wants signed to see if medical authorization forms are included.

Q: May an employer release the contents of an employee's medical records?

A: No. An employer having medical information about an employee needs the employee's written authorization in order to use or to release the information. However, there are a few exceptions to this rule. Exceptions include:

(1) disclosure compelled by a court or administrative process or otherwise by law;

(2) when an employee makes her/his medical condition, medical history or treatment an issue in a legal proceeding between the employer and the employee;

(3) when the information is needed to maintain employee benefit plans or determine eligibility for medical leave; and

(4) when it is used to help a health care provider to treat the employee if the employee is unable to authorize disclosure.

Q: May an employer treat an employee or job applicant differently because the employee or applicant refused to sign an authorization to release protected medical information?

A: No. Employers should not discriminate against employees or job applicants because they refused to sign an authorization to release protected medical information.

However, some courts have decided that protected medical information does not include drug tests of job applicants with conditional offers of employment. Therefore, employers are allowed to disqualify applicants who refuse to sign an authorization releasing the results of such tests to the employer.

TESTING AND EXAMINATIONS

California Law: Fair Employment and Housing Act (Government Code §§ 12940 (a)-(j), 12926(d)); Civil Code § 45 et seq.; 2 California Code of Regulations §§ 7294.0; Government Code § 11135, Health and Safety Code §§ 120975, 120980, 120985, 120990.

Federal Law: Americans with Disabilities Act (42 U.S. Code § 12112); 29 Code of Federal Regulations § 1630.14 (b); Rehabilitation Act (29 U.S. Code §§ 701 et seq.).

AIDS TESTING

California Law: Health and Safety Code §§ 120975, 120980, 120985, 120990.

Q: May an employer require that an employee or applicant take an HIV or AIDS test?

A: No. Under the California Health and Safety Code, no person may test an individual's blood for HIV/AIDS without the individual's written consent. Additionally, the results of such tests may not be used to determine suitability for employment.

Q: May an employer ask whether an employee or applicant has HIV or AIDS?

A: No. Employers covered by the FEHA, the ADA, or the Rehabilitation Act may not ask questions to find out if employees or applicants have particular disabilities. Employers may ask questions regarding abilities to perform job-related functions, tasks, or duties, so long as the questions are not phrased in terms of any disability. For example, if it is an essential function of the job in question that the worker do word processing throughout the work day, the employer may ask the applicant if he or she is able to do this with or without reasonable accommodation.

Disability discrimination laws protect individuals infected with HIV whether or not the disease impairs their physical abilities to perform their duties.

See also Chapter 5, Employment Discrimination, Disability Discrimination.

DRUG AND ALCOHOL TESTING

California Law: Government Code § 8355; Labor Code § 1025.

Federal Law: 41 U.S. Code § 701.

Q: May an employer require that an applicant take a pre-employment drug test?

A: Yes. The courts have generally decided that an employer may require that an applicant take and pass a drug test as a condition of an offer of employment. Employers must give notice of the test to the applicant, the applicant must consent, and the employer must take steps to minimize the intrusiveness of the testing procedures.

Q: May an employer require that current employees take a drug test?

A: It depends upon several considerations. The United States Constitution protects public employees from unreasonable searches and seizures. Private employees are protected by the California Constitution, Article I § 1, which provides a right to privacy.

Whether testing is allowed depends upon several factors. The courts consider the employee's privacy interest, the employer's need for testing, and the public interest, such as a concern for public safety. In general, drug testing is permitted when the job in question is a safety position or a security position. Drug testing may also be allowed after accidents that affect safety.

This subject is a developing area of the law and depends upon current and future court decisions.

Q: What about alcohol testing?

A: Generally, alcohol testing raises the same issues described above; however, it may be easier for an employer to require this type of test. Usually, alcohol testing involves using a breathalyzer, which is a less intrusive procedure than other drug tests. A breathalyzer test involves blowing into a pipe, as opposed to a urinalysis, which requires giving a sample of urine.

Also, employers may be better able to link an alcohol test to on-the-job impairment. A breathalyzer measures current levels of blood-alcohol content, as opposed to a drug urinalysis, which does not measure current impairment due to drugs. This makes it easier for employers to connect alcohol testing with improving job performance, safety, and security.

MEDICAL INQUIRIES AND EXAMINATIONS

California Law: Fair Employment and Housing Act (Government Code § 12940 (a)-(j)); Civil Code § 56 et seq., 2 California Code of Regulations §§ 7293.5-7294.2.

Federal Law: Americans with Disabilities Act (42 U.S. Code §§ 12101 et seq.); Rehabilitation Act (29 U.S. Code §§ 701 et seq.), 28 Code of Federal Regulations §§ 41.31 to 41.58; 29 Code of Federal Regulations § 1630.14; 41 Code of Federal Regulations §§ 60-741.1 to 60-741.25.

Medical Inquiries

Q: May an employer ask a job applicant about any medical condition?

A: It depends. Under California law, general inquiries about an applicant's medical condition are usually not allowed.

However, California law does permit employers to ask questions about an applicant's current medical condition or ability to do the job if the question is directly related to the position the applicant is interviewing for. Questions are directly related if they allow the employer to find out if the applicant can or cannot perform specific tasks necessary to do the particular job for which the applicant has applied.

California law also permits employers to inquire about an applicant's current medical condition if it is directly related to whether the applicant would endanger his or her health or the health or safety of others.

Specifically, if the questions are directly related to the job for which the individual is applying, these inquiries may be about physical condition and medical history.

In addition to California law, the federal Americans with Disabilities Act (ADA) and the federal Rehabilitation Act of 1973 prohibit employers from making pre-employment medical inquiries or other inquiries about whether an applicant has a disability or about the nature or severity of a disability. **See also Chapter 5, Employment Discrimination, Disability Discrimination.**

Medical Examinations

Q: May an employer make an applicant take a medical examination?

A: It depends. California law does not allow an employer to use a medical examination to discriminate against an individual on the basis of disability; however, the law allows examinations under particular circumstances.

California does permit employers to have applicants take a medical examination if the examination is job-related (see definition of job-related, next question) and is required as part of a conditional offer of the job. A conditional offer means that an employer may condition an offer of a job if:

(1) the exam is conducted before the employee's first day of work;

(2) the exam is provided to determine fitness for the job in question;

(3) all entering employees in similar positions are subjected to such an examination;

(4) before any final decision against the applicant based upon the examination results, the applicant has an opportunity to submit other medical opinions to the employer; and

(5) the results are maintained on separate forms and are treated as confidential medical records.

The federal Americans with Disabilities Act also prohibits employers from conducting medical examinations to determine whether an applicant has a disability or the nature or severity of a disability. Medical standards that tend to exclude disabled persons must be job-related and consistent with business necessity.

Q: What does job-related mean?

A: Job-related means that the examination or test determines if the applicant can do the job, and the employer does not use the test as a method to discriminate against the applicant on the basis of disability.

Q: May the employer choose the examining doctor?

A: Yes, the employer may request that the individual go to a doctor of the employer's choosing. However, under California law, if the individual disagrees with the results of the exam, the individual may go to a doctor of his or her choosing and use the results of this second examination to refute the results of the first examination.

Q: May an employer obtain an applicant's or employee's medical records?

A: See Medical Records, this chapter, above.

PSYCHOLOGICAL TESTING

See also Chapter 5, Employment Discrimination, Disability Discrimination.

California Law: Fair Employment and Housing Act (Government Code §§ 12900 et seq.); Government Code § 11135.

Federal Law: Americans with Disabilities Act (42 U.S. Code §§ 12101 et seq.); Rehabilitation Act (29 U.S. Code §§ 701 et seq.).

Q: May an employer require that an applicant take a psychological test?

A: It depends. Both the state FEHA and the federal ADA laws prohibit discrimination against individuals with mental disabilities. Psychological testing as a pre-employment practice is regulated in the same manner as medical examinations or inquiries.

The California FEHA does not allow employers to use psychological tests to discriminate against people with disabilities. However, there are circumstances in which such tests are allowed. An employer may require a psychological test if the test is job-related and is required as part of a conditional offer of the job. A conditional offer means that an employer may condition an offer of the job to the applicant based on the results of a psychological test if:

(1) the exam is conducted before the employee's first day of work;

(2) the exam is provided to determine fitness for the job in question;

(3) all entering employees in similar positions are subjected to such an examination;

(4) the applicant is given an opportunity to submit independent medical opinions for consideration before a final determination to disqualify the applicant based upon the results of the examination; and

(5) the results are maintained on separate forms and are treated as confidential medical records.

The federal ADA also prohibits employers from conducting psychological tests to determine whether an applicant has a disability or the nature or severity of a disability. An employer may only use a psychological test if it is job-related or is a business necessity.

Additionally, the Rehabilitation Act of 1974 specifically regulates federal contractors, federal agencies, and employers who receive federal funds. Federal contractors are allowed to use comprehensive medical examinations before employment only if the results are used under certain federal requirements. Also, highly intrusive tests may violate an employee's right to privacy under California law.

LIE DETECTOR TESTS

California Law: Labor Code §§ 432.2, 433; Government Code § 3307; Penal Code § 637.3.

Federal Law: Employee Polygraph Protection Act of 1988 (29 U.S. Code § 2001, et seq.), 29 CFR § 801.40 et seq., § 801.50 et seq.

Q: What is a lie detector test?

A: A lie detector test is a test that attempts to measure whether a person's responses to questions are truthful by tracking the person's physical responses such as heart rate, blood pressure, perspiration, and voice stress level. Some of the more common types of tests are called polygraph tests, deceptograph tests, voice stress analyzers, and psychological stress evaluators.

Q: What are an employee's rights regarding lie detector tests?

A: State and federal laws govern an employer's use of lie detector tests. The federal law is called the Employee Polygraph Protection Act of 1988 (EPPA). The state laws are found under the California Labor Code, Government Code, and Penal Code. Because the federal law offers more protection for most employees than the state law, the federal EPPA is discussed first below.

As discussed below, some employees are not fully protected by the federal law. Employees who are not fully protected by the federal EPPA should read the discussion of California law at the end of this section to see if the state law provides better protection. Individuals may use the law which provides them the most protection.

Federal Law

Q: How does the federal EPPA work?

A: The federal EPPA has two levels of protection. For fully protected employees, the EPPA prohibits their employers from giving lie detector tests at all. For partially protected employees, the EPPA allows their employers to administer polygraph tests, not other types of lie detector tests. The employers must follow very specific guidelines in the manner of testing and in the use and disclosure of the results.

Q: Which employees does the federal EPPA protect from any use of lie detector tests?

A: With the exceptions discussed below, all employees and applicants of a covered employer are protected. A covered employer is any private employer whose business involves goods or services (even phone calls or mail) crossing state lines.

For these protected employees and applicants, no lie detector tests are allowed. An employer may not require, request, suggest or cause a prospective or current employee to take a lie detector test. Accordingly, an employer cannot threaten, fire or discipline employees for refusing to take such a test.

Q: May an employer who is fully covered by the EPPA use, accept, or inquire about the results of any lie detector test taken by any employee or job applicant?

A: No. The EPPA states employers may not do this.

Q: Who is not protected by the federal EPPA?

A: The federal EPPA does not protect employees of the federal, state, and local governments or government agencies.

Q: What groups of employees and applicants are only partially protected and may be given polygraph tests under the federal EPPA?

A: Several groups of employees may be given polygraph tests, but the employer must follow very specific guidelines to comply with the EPPA. These employees include:

(1) Employees of private employers conducting an ongoing investigation of economic loss or injury to the business such as theft or embezzlement. The employer must be investigating a specific incident, not simply trying to determine if any employees are stealing;

(2) Certain employees or applicants of security service companies (for example, certain armored car personnel, security alarm system personnel, or private security personnel);

(3) Employees or applicants of drug manufacturers and distributors (for example, employees who have direct access to controlled substances); and

(4) Certain employees of private defense and intelligence companies that have contracts with the government. This exemption allows the federal government to give the polygraph test, not the private employer.

An employee who falls into categories (1) to (4) should review the law to see what specific guidelines are placed on the employer giving a polygraph test.

Q: When a polygraph is permissible, what is the extent of the questions that may be asked?

A: The employee may not be asked questions that are degrading or needlessly intrusive. In addition, questions generally may not be asked about religious beliefs or affiliations; beliefs or opinions regarding racial matters; political beliefs or affiliations; any matter relating to sexual behavior; and beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

Q: May the examiner give the test if the employee has a medical or psychological condition that might cause abnormal responses during the test?

A: No; the examiner must not give the test if the employee has written evidence of such a condition from a doctor. Some examples of conditions that can cause abnormal responses in a polygraph test might include blood pressure problems, heart problems, or asthma. In addition, certain medications may cause abnormal responses.

Q: Does the employer have any responsibility regarding the examiner's qualifications?

A: Yes. Employers may only use polygraph examiners who have valid and current licenses and who are properly insured.

Q: May the polygraph examiner give anyone information from the polygraph test?

A: The polygraph examiner may only give test results to the following parties:

(1) the employee given the polygraph or someone he or she designates in writing;

(2) the employer that requested the test; or

(3) any court, governmental agency, arbitrator, or mediator in response to a court order.

Q: May an employer disclose information learned as a result of the polygraph test?

A: In general, no. The only information an employer may release is an examinee's admission of criminal conduct, and this information may only be given to a government agency.

Q: What recourse does an employee or applicant have if his or her rights under the federal EPPA are violated?

A: If an employee's or applicant's rights under the EPPA are violated, he or she may file a complaint against the employer with the U.S. Department of Labor's Wage and Hour Division. The employee or applicant may also sue the employer in court. These actions must be taken within three years after the employer violated the law. When such action is successful, the possible awards include reinstatement in the position, employment, promotion, lost wages, lost benefits, costs (certain expenses of the lawsuit), and reasonable attorney's fees.

California Law

Q: What California laws regulate lie detector tests, and what employees are protected by these laws?

A: The California laws that regulate lie detector tests include provisions of the California Labor Code, California Government Code, and the California Penal Code. These laws protect all private employees (except for railway workers) and certain public employees.

Q: Under California law, may a private employer require a job applicant or employee to take a lie detector test?

A: No. Under the California Labor Code, compulsory lie detector tests of private employees are not allowed. Private employers may not require that employees or applicants take a lie detector test as a condition of employment or continued employment.

Q: Under California law, may a government employer require an employee or applicant to take a lie detector test?

A: It depends. The sections of the California Labor Code that prohibit compulsory lie detector tests do not cover government employees. However, the California Government Code protects "public safety officers" (police officers, sheriffs, and enforcement personnel from many state agencies) from taking compulsory polygraph tests. In addition, the courts have held that the constitutional rights of public employees do not generally allow government employers to require polygraph tests.

Q: If an employer asks an employee or applicant to take a polygraph test and the applicant or employee consents, may the employer administer the test?

A: Yes. If the employee's consent is voluntary, the employer may administer the test. This means that taking the test must be truly optional, with no discipline or termination for refusing to take it.

Q: Under California law, what requirements must the employer meet when administering a lie detector test?

A: Before requesting that an employee or applicant take a lie detector test or actually give a lie detector test, the employer must inform the employee or applicant of his or her rights under the law. This information must be given to the employee or applicant in writing. Specifically, the employee or applicant must be informed that he or she may refuse to take the test and that the employer may not require the test.

Q: May an employer make an employment decision based solely on information learned from a polygraph test?

A: Yes. Under California law, if the employee or job applicant consented to the test voluntarily, the employer may legally decide not to hire the person or may make employment decisions which affect the employee based on results of the test.

Q: Under the California laws, where may an employee or applicant complain if his or her rights regarding lie detector tests have been violated?

A: An employee or job applicant whose rights have been violated under the California Labor Code (covering private employees) may file a claim with the state Labor Commissioner's Office at the Division of Labor Standards Enforcement. **See Appendix A, Enforcement Chart.** Some employees have also sued directly in court under constitutional provisions.

Q: What is a voice stress analyzer?

A: A voice stress analyzer measures the stress levels in a person's voice to determine the truth or falsity of a person's statement.

Q: Under the California laws, may an employer require that an employee or applicant take a voice stress analysis test?

A: No. Under the California Penal Code, no person or entity may give a voice stress analysis test to another person without the person's prior written consent. Employees whose rights are violated under this law may sue for actual damages (losses and harm that actually resulted) or $1,000, whichever is greater.

Chapter 4

WAGE AND HOUR LAWS - RIGHTS ON RECEIVING PAY

California Law: Labor Code §§ 98.1, 200 et seq., 400-410, 1171-1204, 2929; Industrial Wage Commission Wage Orders (California Code of Regulations, Title 8, Chapter 5, Group 2, Articles 1-15 or 8 California Code of Regulations §§ 11000 et seq.), Government Code §§ 19820 et seq., 19851 et seq.; California Equal Pay Act (Labor Code § 1197.5).

Federal Law: Fair Labor Standards Act (FLSA) (29 U.S. Code §§ 201 et seq.); 29 Code of Federal Regulations §§ 531.2(a), 531.32(a); Equal Pay Act (EPA) (29 U.S. Code 206(d)); 15 U.S. Code §§ 1671-1677; 11 U.S. Code § 525.

State and federal laws govern wages, hours, and working conditions for employees. Employees should review the discussion below about whom the various laws protect. Employers covered by both the state and federal laws discussed in this chapter must comply with the requirements of both laws. If, on a particular issue, one of the laws is stricter (more protective of the employee), the employer must comply with the stricter requirement.

For agricultural employees, additional laws and regulations apply besides those that appear in this chapter. Agricultural workers with further questions should seek the advice of a specialist, such as California Rural Legal Assistance (CRLA). A farmworkers' union may also provide helpful information.

NOTE: In April 1997, the California Industrial Welfare Commission (IWC) made significant changes in the overtime requirements for many industries and occupations. The IWC voted to eliminate "daily overtime" requirements (overtime after 8 hours of work per day) so that overtime pay is required only after 40 hours per week, which is the requirement under federal law. As of the publication date of this book, the IWC's action was being challenged in court. Before making any overtime claims under state law, employees should check the current status of daily overtime requirements.

State Law

The state laws regarding wages and hours appear in the California Labor Code and in a series of Wage Orders. The Industrial Welfare Commission (IWC) publishes the California Wage Orders, and they also appear in Title 8 of the California Code of Regulations.

There are fifteen Wage Orders relating to different industries or occupations and a Minimum Wage Order. The Wage Orders outline and provide the applicable laws. The following is a list of the fifteen Wage Orders:

*	IWC Order 1-89	Manufacturing Industry
*	IWC Order 2-80	Personal Service Industry
*	IWC Order 3-80	Canning, Freezing and Preserving Industry
*	IWC Order 4-89	Professional, Technical, Clerical, Mechanical and Similar Occupations
*	IWC Order 5-89	Public Housekeeping Industry
*	IWC Order 6-80	Laundry, Linen Supply, Dry Cleaning and Dyeing Industry
*	IWC Order 7-80	Mercantile Industry
*	IWC Order 8-80	Industries Handling Products After Harvest
*	IWC Order 9-90	Transportation Industry
*	IWC Order 10-89	Amusement and Recreation Industry
*	IWC Order 11-80	Broadcasting Industry
*	IWC Order 12-80	Motion Picture Industry

*	IWC Order 13-80	Industries Preparing Agricultural Products for Market on the Farm
*	IWC Order 14-80	Agricultural Occupations
*	IWC Order 15-86	Household Occupations

An employer covered by a California Wage Order must post the applicable order in an area accessible to employees or, if that is not possible, provide the Wage Order upon request. In addition, employees can get copies at the Labor Commissioner's Office. The Labor Commissioner has local offices throughout the state of California. The Wage Orders help employees to be aware of their rights to their wages, and this chapter also sometimes refers employees to the Wage Orders for details on the laws which apply to the different types of industries.

Who is covered

The California Labor Code and the IWC Wage Orders only apply to "employer-employee relationships." An "employer" can be an individual, partnership, association, organization, corporation, or business trust. An "employee" is an individual who is engaged, suffered or permitted to work by an employer; no formal recruitment is necessary. Independent contractors and volunteers are not "employees." **For the definition of "independent contractor," see this chapter, Independent Contractors, below. Other categories of people exempt from California wage and hour law are also discussed below.**

The California Labor Code covers private California employers. Some sections of the California Labor Code also apply to state and local government employees. Federal government employees are not covered by the state Labor Code. Federal government employees, with certain exceptions, are protected under the Fair Labor Standards Act's minimum wage, overtime pay, and record-keeping requirements (see below).

The California Wage Orders apply to private sector employees who work in the industries or occupations covered by the 15 Wage Orders. Employees should review the appropriate Wage Order to identify any categories of employees that are not protected by sections of the Wage Order. Wage Orders do not cover federal, state, and local government employees.

Federal Law

The federal law is the Fair Labor Standards Act (FLSA), enforced by the United States Department of Labor's Wage and Hour Division. The FLSA establishes standards concerning minimum wages, maximum hours, overtime pay, child labor, equal pay, and employers' record-keeping requirements.

Who is covered

The FLSA covers government employers. The FLSA also covers many private employers, depending on their gross sales.

In addition, an individual employee may be covered if the employee's job tasks involve goods or services (even phone calls) crossing state lines.

Enforcement Agencies and Time Limits for Filing Claims

Violations of State Law:

To enforce legal rights under the state laws, including the California Labor Code and the California Wage Orders, employees may file their claims with the state Labor Commissioner. The Labor Commissioner's Office is also called the Division of Labor Standards Enforcement (DLSE), which is part of the California Department of Industrial Relations. The Labor Commissioner has local offices throughout California.

Employees generally can also file wage claims in court. They can go to small claims, municipal, or superior court, depending upon the amount of the claim. The procedures in the Labor Commissioner's Office and in small claims court can be handled by the employee without an attorney. In municipal or superior court, employees usually find it difficult to handle a case without a lawyer.

Some of the Labor Commissioner's enforcement powers include investigating complaints, conducting settlement conferences, conducting hearings, compelling the presence of witnesses and documents, and questioning witnesses and parties under oath.

The time limit within which an employee may file a wage claim with the Labor Commissioner's Office or in court depends upon the type of claim. Wage claims based on an oral (spoken) contract or agreement must be filed within two years. Claims based on a written contract must be filed within four years. Claims for minimum wage or overtime based on state laws or the Wage Orders must be filed within three years.

If an employee wins a claim before the Labor Commissioner and the employer appeals to court, the Labor Commissioner will generally provide a lawyer to represent the worker in court.

The Labor Commissioner also hears claims for specific types of retaliation. These include termination or discipline for the following: filing a Cal/OSHA safety complaint, filing a Labor Commissioner wage claim, serving on jury duty, and "whistleblowing." These retaliation claims must be filed with the Labor Commissioner's Office within 30 days.

The Labor Commissioner also hears claims for sexual orientation discrimination. These claims must be filed within 30 days.

See also Appendix A, Enforcement Chart.

Violations of Federal Law

To enforce legal rights under the FLSA, employees may file their claims with the Wage and Hour Division of the United States Department of Labor. The Wage and Hour Division has local field offices throughout the state of California. Employees may also file FLSA suits directly in court.

The time limits for filing claims for violations of the federal wage and hour laws are two years for nonwillful violations (unintentional acts) and three years for willful violations. **See also Appendix A, Enforcement Chart.**

Remedies

Some of the possible remedies include back wages, state law "waiting time penalties," liquidated damages, attorney's fees, court costs, and interest. Injunctions (orders to do or not do something) may also sometimes be imposed. Moreover, for aggravated violations that are deliberate and willful, criminal prosecutions may be brought. In addition, civil penalties may be ordered for repeated or willful violations of the federal or state minimum wage or overtime requirements.

Independent Contractors

Q: Do wage and hour laws cover independent contractors?

A: No. The protections and requirements of wage and hour laws apply only when there is an employer-employee relationship. Individuals who are independent contractors are not considered "employees" for federal or state wage and hour purposes and therefore are not protected by wage and hour laws.

Note that California law presumes an individual performing services to be an employee. Therefore, a legal decisionmaker like the Labor Commissioner's Office will assume that a worker is an employee unless the employer proves independent contractor status. A statement or agreement that the worker signed which says that he or she is an independent contractor is not sufficient proof by itself. Instead, the nature of the relationship depends upon such factors as how much control the employer had over the worker.

Salespersons

Q: Are salespersons covered by wage and hour laws?

A: Outside salespersons who spend more than half of their time creating sales or taking sales orders outside of the employer's place of business are not covered by the California Wage Orders (see also IWC Wage Orders, Section 1(B)). **See also page 4-13 regarding overtime exemptions for salespersons.**

Government Employees

Q: Are federal, state, and local government employees covered by wage and hour laws?

A: The California Wage Orders do not cover federal, state, and local government employees. However, many state and local government employees' wages and hours are protected by certain sections of the California Government Code and California Labor Code.

The federal FLSA protects government employees.

Employer Family Members

Q: Are employers' family members covered by the IWC Wage Orders?

A: The California Wage Orders do not protect an employee who is the employer's parent, spouse, child, or legally adopted child (see IWC Wage Orders, Section 1(C)).

Executive, Administrative, and Professional Employees

Q: Are executive, administrative, or professional workers covered by wage and hour laws?

A: White-collar workers qualifying under the California Wage Orders as executive, administrative, or professional employees are only partially protected by the California Wage Orders. Among other things, the sections of the Wage Orders on minimum wage, overtime, and record-keeping do not cover these employees.

Executive or administrative employees are not completely covered by the California wage and hour laws if their work:

(1) is primarily (50+%) intellectual, managerial, or creative; and

(2) requires the exercise of discretion and independent judgment over matters of significance; and

(3) pays at least $1150 or $900 per month (depending upon which IWC Wage Order is involved).

Professional employees are not covered if they are:

(1) state licensed or certified in law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting; or

(2) as specified in some California Wage Orders, engaged in an occupation commonly recognized as a learned or artistic profession.

NOTE: Employees are not exempt from overtime simply because they are paid on a salary and called an "administrator" or "manager." The employee must meet the test outlined above to be exempt.

Counting Hours Worked

Q: Must an employer pay an employee for all hours worked?

A: Yes. Employees generally must be paid for all time they are "under the control" of their employer. In addition, if an employer allows an employee to continue working, although not specifically instructing or requesting that the employee do so, the time is considered hours worked and must be compensated. There are some exemptions for employees who are required to reside on the employer's premises.

Q: Must an employee always be paid when he or she reports to work?

A: If an employee reports for his or her regular shift and is given no work or less than one half the usual hours of work, the employer must pay the employee for at least one half of the regular shift (up to four hours) or for two hours, whichever is greater.

If an employee is called in at a time other than a regular shift and then is not given any work, the employer must pay the employee for at least two hours of work.

Some Exceptions:

Where the employer's lack of work is due to some unexpected or unusual occurrence or emergency, and the employer has made a reasonable attempt to notify the employee not to report to work, the employer may not have to pay the employee reporting time pay. In addition, if an employee is on paid "stand by" status the employer may not have to pay reporting time pay (see IWC Wage Orders, Section 5).

Minimum Wage

Q: What is the current minimum wage?

A: The federal minimum wage is $4.75 per hour at the time of this writing and goes up to $5.15 on September 1, 1997. Under the California Wage Orders, the minimum wage is $5.00 per hour at the time of this writing and increases to $5.15 on September 1, 1997 and $5.75 per hour on March 1, 1998. Every worker must receive wages that add up to at least minimum wage whether the worker is paid by time, piece, commission, or otherwise. California employees must be paid whichever minimum wage (federal or state) is higher.

Employees' tips are their own property. Under California law, employers may not pay lower than minimum wage to employees who also receive tips.

Under the federal Fair Labor Standards Act, employers may pay $4.25 per hour to employees who are less than 20 years old for the first 90 days of employment. The California Wage Orders are stricter (see the next question).

Agreements between an employer and an employee that the employee will work for less than minimum wage are illegal and cannot be enforced.

Q: Are minors entitled to receive minimum wage?

A: In very limited circumstances, employers are allowed to pay 85% of the minimum wage to "learners" or "minors." However, employers must meet very strict requirements to do this (see Section 4 of the IWC Wage Orders).

Q: May an employer pay an employee less than the minimum wage if the employer is providing the employee with meals or lodging?

A: Yes, but only if the employer meets very specific requirements. In general, the employer may only credit meals and lodging against the minimum wage paid to the employee if there is a voluntary written agreement between the employer and employee.

When the employer uses the credit to meet minimum wage obligations, the amounts credited may not be more than specific amounts set out in the California Wage Orders.

Meal credits may not be more than $1.50 for breakfast, $2.10 for lunch, and $2.80 for dinner. Lodging credits may not be more than $20.00 per week for a room occupied alone, $16.50 per week for a room shared, 2/3 of the ordinary rental value or in no event more than $240.00 per month for an apartment, or, when a couple is employed by the employer, 2/3 of the ordinary rental value and in no event more than $355.00 per month for an apartment.

Additionally, a "meal" is defined as an adequate, well-balanced serving of a variety of wholesome, nutritious foods. Meal schedules must be consistent with work shifts. "Lodging" is defined as living accommodations available to employees for full-time occupancy which are adequate, decent, and sanitary. Employees cannot be required to share a bed. Employers may not make deductions for meals not received or for unused lodging (see also IWC Wage Orders, Section 10).

The FLSA allows the employers that it covers to use meal, lodging, and "other facilities" credits against their minimum wage requirements except when union agreements do not allow these costs to be calculated as wages. The amount of the credit is either the reasonable cost (actual cost) to the employer or the fair value of the facilities. Remember, if an employer is covered by both state and federal laws, the employer must comply with the law most protective of the employee. Therefore, if the state and federal laws allow differing amounts of credit against the minimum wage for a meal or lodging, the employer may only use the lesser credit amount.

Promises to Pay and Payment Schedules

Q: Must an employer pay all wages it has promised to pay an employee?

A: Yes. Once an employer has agreed to pay an employee a certain amount of wages, the employer may not subsequently pay the employee a lesser amount. Also, under California law, wages are considered property. Once an employee earns his or her wages, he or she has a right to collect them in full. In addition, if an employer has agreed to compensate an employee with any other benefits, such as commissions, bonuses, fringe benefits, or paid time off, the employer may not withhold this compensation from the employee once it has been earned.

Q: Must an employer pay wages on a set schedule?

A: Yes. Employers must post a schedule of pay dates and must pay their employees on these set dates. With various exceptions, workers must be paid at least twice a month.

Some employees who receive board and lodging as part of their compensation are exempt. Employees may also be paid according to a schedule provided in a union contract. Salaried executive, administrative, and professional employees may be paid once a month.

Overtime

IMPORTANT: See this chapter, page 1 about recent changes in state overtime requirements.

Q: When is an employer required to pay overtime?

A: California law requires the employers that it covers to pay overtime to most non-exempt employees for work performed in excess of 8 hours in a day or 40 hours in a week, whichever is greater. Employees may not waive their right to receive overtime compensation.

Generally, an employer covered by California law should pay an employee a premium of 1 and 1/2 times ("time and one-half") the regular rate of pay:

(1) for work over 40 hours in a week;

(2) for work over 8 hours and up to 12 hours in a day; and

(3) for the first 8 hours of work on the 7th day in a week.

An employee should receive a premium of 2 times ("double time") the regular rate of pay:

(1) for work over 12 hours in a day; and

(2) for work over 8 hours on the 7th day in a week.

Generally, under the federal FLSA, employees only receive overtime pay for work in excess of 40 hours in a week.

Q: Are there any exceptions or exemptions that allow an employer to not pay an employee overtime pay?

A: Yes. The following exceptions allow an employer not to pay overtime:

(1) employees who meet the definition of executive, administrative, and professional employees are exempt from receiving overtime pay under the Wage Orders **(see Executive, Administrative, and Professional employees, above)**;

(2) when an employee works less than 30 hours per week and no more than 6 hours per day, no premium is required for the 7th day (see IWC Wage Orders Section 3);

(3) employee-approved "alternative work week" - Section 3(B) of some Wage Orders allows "alternative" work weeks, such as 4 days of work at 10 hours per day without overtime. There are strict requirements for approval by 2/3 of the affected employees and written agreements for the alternative schedule;

(4) employees covered by a union agreement are exempt from overtime laws if the agreement provides for overtime and also the employees' wage rate is at least $1.00 above minimum wage;

(5) Wage Orders 4 and 7 have overtime exemptions for salespersons if their earnings exceed one and one-half times the minimum wage and also more than half their compensation represents commissions;

(6) there are certain industry-specific exceptions to regular overtime rules for employees working in the following industries: public housekeeping (Order 5-89), private household (Order 15-86), health care workers (Order 4-89), agricultural (Order 14-80, 3-80, 13-80), transportation (Order 9-90), motion pictures (Order 12-80), and for certain types of employees in the mercantile industry (Order 7-80).

There are some circumstances when an employee might be exempt from state overtime laws but still have rights to FLSA overtime.

Withholding of Wages

Q: If an employer and employee have a disagreement about the amount of wages owed, may the employer withhold the wages until the dispute is settled?

A: No. In this situation, the employer must immediately pay all the wages due except the portion about which the employer and employee disagree. The employer may not refuse to pay wages until the dispute is settled. Also, the employer may not force the employee to sign anything stating that all wages are being paid in full in exchange for paying the employee the undisputed amount.

Q: Can employers keep part of employee wages to collect debts or pay for business losses?

A: An employer may not withhold any part of an employee's wages to collect debts allegedly owed the employer. The law generally prohibits deducting from an employee's wages to offset cash shortages, negligence, losses, errors, no-shows, breakages, spillages, thefts, or customer walkouts unless the employer can prove that the loss was caused by the employee's dishonesty, willful misconduct, or gross negligence. If an employer believes an employee owes the employer money, the employer may try reach a voluntary settlement with the employee or may sue the employee in court, but the employer may not simply deduct from the employee's wages.

Employers may deduct certain items from an employee's wages. Some of these include federal and state taxes, Social Security, Medicare, state disability insurance contributions, court-ordered wage garnishments or wage assignments for child support or family support, legal deductions for back taxes owed the government, and legitimate employee contributions to retirement plans, fringe benefit plans, and insurance plans.

Q: When must an employee who is terminated or quits work be paid?

A: When an employee is terminated, wages earned and unpaid at the time of termination are due and payable immediately. If an employee who does not have a written agreement for a definite period of employment quits without prior notice,

the employer must pay wages due within 72 hours. Employees are entitled to be paid by mail if they so request and designate a mailing address. If an employee gives at least 72 hours notice of intention to quit, wages must be paid at time of quitting.

Q: Is there a penalty if an employer does not pay all wages due on time?

A: When an employer willfully refuses to pay wages due to an employee who is terminated or has quit, the employee may recover "waiting-time penalties" of up to 30 days' wages. "Willful" has been defined by the courts as the intentional failure or refusal to pay wages due. The penalties applied are not necessarily proportionate to the amount of wages owed to an employee. An employer sometimes may be excused from paying penalties where the employer acted in "good faith" in not paying wages due. This usually means that the employer genuinely and reasonably believes that wages are not owed. Penalties may also result from the failure to pay vacation pay which is due. Even if employees accept a lesser amount than the sum owed to them, they can still file a claim or sue for the remainder of the wages.

Equal Pay

Q: May an employer pay female workers a lesser rate of pay than male workers who are doing the same job?

A: No. Employers may not pay employees of either sex less than workers of the other sex simply because of their gender.

California Labor Code Section 1197.5 and the federal Equal Pay Act (EPA) require that employees receive equal pay without regard to sex for equal work performed in the same establishment under similar working conditions on jobs requiring equal skill, effort, and responsibility. The EPA applies to employers who are covered by the FLSA. In addition, the EPA protects administrative, executive, and professional employees who are not protected by the minimum wage and overtime requirements of the FLSA or the California Wage Orders.

Furthermore, an employer should not lower a higher-paid worker's pay to comply with the equal pay laws. The employer should raise the lower-paid employee's salary to the higher-paid employee's pay rate.

In addition, Title VII and the FEHA prohibit wage discrimination based on an employee's sex because it is unlawful sex discrimination. **See Chapter 5, Employment Discrimination, Sex Discrimination.**

However, employers may pay higher wages to particular employees based on seniority, quantity or quality of production, actual differences in job tasks, or merit systems.

Garnishment

Q: What is the law regarding garnishment of wages?

A: The Labor Code defines "garnishment" as any court procedure through which the wages of an employee are withheld for the payment of any debt. This means that an employee's wages may only be garnished if someone has won a judgment in court against the employee, the employee owes back taxes, or the employee owes family support and has not paid these debts. Both federal and state laws limit the amount that may be garnished from each paycheck, and it usually may not be more than 25%. If the employee cannot live on this reduced amount of pay, the employee may fill out a form provided by the employer that tells the employee how to apply for special treatment.

An employer may not fire an employee because of a single wage garnishment or because a garnishment has been threatened. Accordingly, an employer may not give an employee a warning or suspension because of a garnishment, and any such warning or suspension may not later support a discharge.

Employees who file for bankruptcy or a federal wage-earner protection plan cannot be disciplined or discharged for the bankruptcy or debts. In addition, if an employee files for bankruptcy or a federal wage-earner protection plan, any wage garnishments attached to the employee's wages will stop.

Q: What can employees do if employers violate the laws regarding garnishments?

A: Employees can file claims with the California Labor Commissioner (DLSE) and the U.S. Department of Labor's Wage and Hour Division. Depending on how timely (promptly) the claim is filed, both agencies may require that the employer reinstate the employee and pay back wages. **See Appendix A, Enforcement Chart.**

Records Employers Must Keep

Q: What wage and hour records must an employer keep?

A: An employer must keep accurate time records that indicate when an employee covered by the law starts and completes each work period, meal period, and split-shift interval. An employer must also keep records of an employee's rate of pay and the total hours worked during each pay period. This material must be available to an employee upon reasonable request, and the employer must maintain the records for three years.

When an employer fails to keep complete and accurate records, an employee may sue for wages due based upon his or her own records of hours worked. Therefore, if an employee believes that his or her employer does not keep accurate records of hours worked, the employee should keep a written, daily record of all work periods, meals periods, breaks, and overtime.

Q: Must employers give employees itemized statements of their wages?

A: Yes. An employer must provide an itemized statement to each employee containing the following information: the name and address of the employer, the employee's name and social security number, gross wages, net wages, all deductions, total hours worked, and dates of pay periods. This is necessary even when an employer pays an employee in cash (see also IWC Wage Orders Section 7).

Meals and Breaks

Q: What is the law regarding an employee's right to breaks and meal periods?

A: Under the California Wage Orders, employees have a right to a ten-minute paid break for every four hours of work. Employers should allow employees to take this rest period in the middle of the four-hour work period, if possible.

When an employee works a shift over five hours, the employee then has a right to a thirty-minute unpaid meal period. However, this is not necessary if: (1) the employee's work period is less than six hours, and (2) the employee agrees to give up this meal period.

If the employer does not relieve the employee of all duties during the meal period, the meal period is considered an "on duty" meal period, and the employee must be paid. "On duty" meal periods are only allowed when the nature of the work prevents the employer from relieving the employee of all duties and the employer also has the employee's written consent to work during the meal period (see IWC Wage Orders Sections 11, 12).

Tools, Equipment, and Uniforms

Q: May an employer require that employees supply their own tools and equipment?

A: It depends. In general, if tools or equipment are required by the employer or are necessary to do the job, the employer must supply and maintain them. An employer may collect a security deposit from the employee in an amount up to the value of the tools or equipment and must give the employee a receipt. However, employees whose wages are at least twice the minimum wage may be required to provide and maintain hand tools and equipment that are customary in the trade.

If tools or equipment are not returned by an employee, an employer may not deduct the cost from the employee's paycheck unless the employee previously agreed to this in writing. Otherwise, the employer may make a voluntary settlement with the employee or may take legal action to recover any money owed.

Q: Must an employer supply employees with required uniforms?

A: Yes. If an employer requires its employees to wear specific uniforms, the employer must provide them. "Uniforms" are clothes and accessories of distinctive color or design. An employer may collect a security deposit from the employee in an amount up to the value of the uniform. As an alternative to requiring a security deposit for a uniform, an employer may lawfully ask an employee to sign an agreement that, in the event that the employee does not return the uniform within a reasonable time after the end of employment, the employer may deduct the uniform's cost from an employee's last paycheck.

In addition, the employer must pay for the uniform's maintenance (such as dry cleaning) or pay the employee a weekly maintenance allowance of at least minimum wage **(see this chapter, Minimum Wage, above)**. If the uniform only requires basic laundering, the employee may be responsible for that without a maintenance allowance from the employer. Employers must pay for repairing or replacing a worn or torn uniform.

This law exempts some uniforms. For example, some types of nurse's white uniforms which can be worn in any hospital do not need to be provided by the hospital or business. In addition, restaurants which simply require food servers to wear black and white clothing may require the employee to provide his or her own attire. However, if the restaurant has requirements regarding the style or type of fabric, the restaurant may have to supply the uniform.

Chapter 5
EMPLOYMENT DISCRIMINATION

Employment Discrimination in General

Illegal discrimination occurs when employers evaluate job applicants and employees based on assumptions about race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age 40 or over. Discrimination may be either intentional or unintentional.

Disparate treatment occurs when an employer intentionally treats people differently based on a protected characteristic (race, sex, national origin, religion, disability, etc.). For example, if an employer rejects an applicant for employment because the applicant is of a different national origin, the employer commits unlawful disparate treatment discrimination. Disparate treatment also includes such acts as paying lower wages to female employees or deciding not to promote certain employees because they are over 40.

Disparate impact is a form of discrimination which is sometimes intentional, but it can happen even when an employer does not want to discriminate. Disparate impact discrimination occurs when an employer's policy applies to all employees or applicants but has a negative impact upon a particular protected group. For example, an employer's minimum height requirement, applied equally to all applicants, may have a discriminatory impact on women and people of certain ethnicities that tend to be shorter. In these cases, the employer might not be trying to discriminate against people from a particular protected group, but the rule or device the employer uses to make employment decisions has the effect of doing so.

In some extremely limited circumstances, the law allows an employer to treat employees or job applicants differently based on a protected characteristic. The employer must be able to prove that the policy is necessary to essential functions of the job and also has a valid business reason. For example, when a character in a film is female, the law allows the employer to call for a woman to play the role. This narrow exception is known as a "bona fide occupational qualification."

Retaliation

Most anti-discrimination laws also prohibit retaliation. Retaliation occurs when an employer treats an employee unfairly because the employee has opposed the employer's illegal practices. Employers sometimes retaliate against employees for filing charges with agencies or for participating in investigations or court cases regarding the employer's unlawful practices. **See also Chapter 8, Retaliation.**

Job Applicants

Anti-discrimination laws prohibit discrimination in recruiting and hiring. There are guidelines about what employers should and should not ask on application forms and in interviews. **See Chapter 2, When You Are Applying For a Job, for an overview of issues specifically affecting applicants.**

State Laws

The main California law prohibiting unlawful employment discrimination is the Fair Employment and Housing Act (FEHA). The FEHA prohibits discrimination based on race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age over 40. The FEHA protects against more types of discrimination than federal law.

The FEHA covers private employers which regularly employ five or more employees. In cases of harassment (based upon sex, race, and the other protected categories), the FEHA covers private employers with one or more employees. However, in cases of mental disability, the FEHA covers private employers with fifteen or more employees.

All state and local public employees are protected under the FEHA (even if there are less than five employees), but federal government employees are not protected by the FEHA.

There are some individuals and some types of employers who are not covered by the FEHA. The FEHA does not protect individuals employed by a parent, spouse, or child. Also, those working under a special license in a nonprofit, sheltered workshop or rehabilitation facility are not protected by the FEHA. Finally, the FEHA does not cover religious associations and religious nonprofit organizations.

There are also California laws that prohibit sexual orientation discrimination (California Labor Code § 1102.1) and provide for family and medical leave (California Family Rights Act, Government Code §§ 12945, 12945.2, 19702.3). The California Equal Pay Act prohibits pay discrimination on the basis of sex and covers private and public California employees.

The California Constitution also prohibits some forms of discrimination. Article I, § 8 of the California Constitution prohibits disqualification of any person from employment because of sex, race, creed, color, or national or ethnic origin.

Federal Laws

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, sex, national origin, religion, or color. Title VII does not prohibit marital status discrimination. Separate federal laws cover age discrimination, disability discrimination, and equal pay violations.

Only employers with fifteen or more employees are covered by Title VII. The law applies to private employers, labor organizations, employment agencies, and state and federal employers.

The Age Discrimination in Employment Act (ADEA) protects people age 40 and over from discrimination by private employers of 20 or more employees and by government employers. As with most anti-discrimination laws, the law applies to hiring, firing, compensation, and all terms, conditions, and privileges of employment. The ADEA generally prohibits policies such as mandatory retirement of employees who are 40 or older.

The Americans with Disabilities Act (ADA) prohibits discrimination against any qualified person with a physical or mental disability in any term, condition or privilege of employment. The ADA covers employers with 15 or more employees.

The Equal Pay Act requires equal pay without regard to sex for equal work. It applies to employers who are covered under the Fair Labor Standards Act. This means that government employers are covered. The Act covers many private employers, depending upon gross sales. In addition, individual employees may be covered if the employee's job tasks involve goods or services (even phone calls) crossing state lines.

Enforcement Agencies and Time Limits

Agencies write regulations, investigate complaints, and enforce anti-discrimination laws.

In California, the Department of Fair Employment and Housing (**DFEH**) and the Fair Employment and Housing Commission (**FEHC**) are the agencies that enforce the FEHA and write regulations about it. The federal Equal Employment Opportunity Commission (**EEOC**) enforces Title VII, the ADEA, the EPA, and the ADA.

Employees covered by the various laws may file discrimination complaints with the EEOC and/or the DFEH. The EEOC and the DFEH enforce the laws by receiving and investigating complaints. Both these agencies receive large numbers of claims and have lengthy delays before they investigate. It is important to present a well-organized claim to the agency with as much documentation as possible to support the claim. The EEOC and the DFEH do not deal with wrongful termination claims that are not based on one of the protected categories. They also do not handle personality conflicts; they accept harassment claims only when the harassment is based on sex, race, or other protected categories.

DFEH claims must be filed within **one year** of the discrimination. EEOC claims in California must be filed within **300 days** of the discrimination. **Note: Special time limits and procedures apply to EEOC complaints for federal government employees.** Employees covered by both the FEHA and Title VII can

file with either the EEOC or DFEH, and the charge will automatically be filed with the other agency as well.

The California Department of Industrial Relations, Division of Labor Standards Enforcement, Labor Commissioner (**Labor Commissioner**) enforces the California Equal Pay Act and the Labor Code's prohibition of discrimination on the basis of sexual orientation. A sexual orientation discrimination claim must be filed within **30 days** of the unlawful act. A California Equal Pay Act claim must be filed within **two years** of a nonwillful violation or within **three years** of a willful violation.

See Appendix A, Enforcement Chart.

Remedies

Federal and state anti-discrimination laws provide certain types of relief for employees if their claims are successful. Relief may include hiring, reinstatement, promotion, backpay, restored benefits, and/or reasonable accommodation. In some circumstances, employees may also be awarded money damages for pain and suffering or to punish an employer's wrongdoing. In addition, employers can be ordered to stop the illegal discrimination and to post information in the workplace that informs employees about their legal rights and about the illegal discrimination that occurred. **See also Appendix A, Enforcement Chart.**

RACE DISCRIMINATION

California Law: Fair Employment and Housing Act (Government Code § 12940(a)); Article 1 § 8 of the California Constitution.

Federal Law: Title VII (42 U.S. Code § 2000e); 42 U.S. Code § 1981; Executive Order 11246.

Race discrimination occurs when an employer makes a negative employment decision about a person because of the person's race or color. The Title VII and FEHA prohibitions against discrimination apply to all aspects of the employment

relationship, including hiring, firing, promotion, transfer, training, compensation, and other aspects of employment.

Q: May an employer ask a job applicant questions about his or her race or color?

A: No. Both Title VII and the FEHA prohibit questions regarding an applicant's race or color when used to make an employment decision. This includes questions on an application form regarding an applicant's complexion or color of skin, eyes, or hair.

However, most employers are required to collect information concerning the applicant's race, sex, national origin, and the job for which the applicant is applying ("applicant flow data"). Applicants may voluntarily respond to these requests for information but are not required to do so. This information is compiled into statistics on the employer's hiring practices so that the employer can make sure it is attracting and considering applicants who come from diverse backgrounds.

Employers are required to separate this data from the application before any decision about employment is made. The data must be kept for two years. The employer must keep it separate from the employee's personnel file and from any employees who make personnel decisions. **See also Chapter 2, When You Are Applying for a Job.**

Q: What forms does race discrimination take?

A: As in other types of discrimination, race discrimination can be intentional or unintentional. **See above, "Employment Discrimination in General," for definitions and discussion.**

Training only white employees for higher positions is intentional discrimination when other employees are just as qualified. Hiring only applicants who are taller than five feet six inches may result in unintentional discrimination because it often eliminates larger numbers of Asian and Latino applicants.

Q: Do some employment tests discriminate based on race?

A: Yes. Some tests appear neutral, but in reality they affect individuals from a particular race more than others. If a test excludes large numbers of protected individuals, the test may be illegal unless it is sufficiently related to the essential functions of the particular job to warrant its use.

Race Harassment

For a discussion of race harassment, please see this chapter, Sex Harassment and Other Forms of Workplace Harassment, below.

NATIONAL ORIGIN DISCRIMINATION

California Law: Fair Employment and Housing Act (Government Code § 12940(a)); Article I, § 8 of the California Constitution.

Federal Law: Title VII (42 U.S. Code § 2000e); Immigration Reform and Control Act of 1986 (IRCA) (8 U.S. Code. §§ 1324, et seq.)

National origin discrimination occurs when an employer makes a negative employment decision about a person because the individual or his or her family comes from a country other than the United States. The Equal Employment Opportunity Commission (EEOC) defines national origin discrimination as unequal treatment because of an "individual's, or his or her ancestor's place of origin; or because the individual has the physical, cultural, or linguistic characteristics of a particular national origin group."

The definition includes persons connected by marriage or in other ways with a particular national origin group. These persons may be victims of national origin discrimination. In addition, the laws protect any individual against whom an employer discriminates because the employer wrongly believes the person belongs to a particular national origin group.

Q: What forms does national origin discrimination take?

A: As in other types of discrimination, national origin discrimination can be intentional or unintentional. **See above, "Employment Discrimination in General," for more complete definitions.**

Q: What are some examples of national origin discrimination?

A: The most basic form of national origin discrimination occurs when individuals are treated unfairly or differently because they or their parents originally come from another country. For example, if an employer decides not to hire any applicants it believes might be of Mexican origin to avoid any potential "immigration problems," the employer is committing illegal national origin discrimination.

Refusing to hire an applicant because the applicant's last name sounds "foreign" or the applicant looks "foreign" is unlawful national origin discrimination.

If an employer asks all Latino and Asian employees to provide proof of legal immigration status and does not ask Anglo-looking employees for the same proof, the employer is committing unlawful national origin discrimination.

In determining if national origin discrimination is occurring, one important question is whether the employer is treating native, English-speaking, Anglo applicants and employees the same way as other applicants and employees who look or sound like they have a different national origin. **See also Chapter 2, When You Are Applying for a Job.**

Citizenship and Alienage Discrimination

A related form of discrimination is alienage discrimination. This occurs when, for example, employers hire only citizens. Various laws prohibit discrimination because of immigrant status. **For information about citizenship and alienage discrimination, please see Chapter 7, Workplace Laws and Immigrant Employees.**

Q: Do employer rules requiring English fluency discriminate based on national origin?

A: It depends. If fluency in English is not necessary to job performance, an English-fluency requirement may be discriminatory and unlawful. However, if English fluency is necessary to job performance, as in a position involving communication with English-speaking customers, the rule may be valid.

Q: May an employer refuse to hire an applicant because the applicant has a heavy accent?

A: It depends. An employer may not refuse to hire an applicant simply because the person has an accent. For example, in one case, an employer violated the law by not hiring an applicant because of the applicant's "noticeable" Filipino accent. The applicant's accent would not have interfered with his ability to perform the duties of the job.

However, if an applicant's accent would materially interfere with performing the duties of the job, the employer may lawfully refuse to hire that applicant.

Q: Do rules that require employees to speak only in English while at the workplace discriminate based on national origin?

A: It depends. If the employees affected by the rule are fluent in English, a rule requiring English-only is probably not discrimination based on national origin.

In contrast, if the employees do not speak English or speak only severely limited English, a rule requiring English-only at the workplace might be found to discriminate based on national origin. For non-English speaking employees, an English-only rule would mean that they could not speak while at work. Such a requirement would deny these employees a privilege of employment (conversing at the workplace) which is not denied to English-speaking employees.

In addition, employer rules requiring that employees speak only in English at certain times in the workplace are usually found valid if the employer can show the rule is necessary for the business of the employer. For example, where safety requires that all communications between employees be in the same language, an English-only rule would be justified.

Q: What laws protect against national origin discrimination?

A: In addition to the FEHA and Title VII, there is another federal law that protects against national origin discrimination: the Immigration Reform and Control Act (IRCA). Employees must file their claim under the law that covers their particular employer.

For claims of national origin discrimination, IRCA generally covers employers that are exempt from Title VII. However, IRCA does not cover employers with less than 4 employees. Therefore, IRCA's protection against national origin discrimination covers employers with 4 to 14 employees and employers with more than 14 employees that are not covered by Title VII. IRCA covers only hiring, firing, recruitment, referral, and retaliation. IRCA does not cover other terms and conditions of employment such as promotions, raises, vacations, or work assignments. Employees filing claims of national origin discrimination under IRCA must file their claims with the Office of Special Counsel (OSC), which is part of the United States Justice Department in Washington, D.C. Claims of discrimination to the OSC must be postmarked within 180 days of the date the discrimination occurred. **See Appendix A, Enforcement Chart.**

Q: What immigration status must an employee have to be protected by these laws?

A: The FEHA and Title VII protect individuals whether they are legally authorized to work in this country or not. Thus, even undocumented workers are protected by the FEHA and Title VII and may file claims of national origin discrimination with the DFEH or EEOC. On the other hand, IRCA's protections against alienage, citizenship, and national origin discrimination extend only to employees who are legally authorized to work in this country.

National Origin Harassment

For a discussion of national origin harassment, please see this chapter, Sex Harassment and Other Forms of Workplace Harassment, below.

SEX DISCRIMINATION

California Law: Fair Employment and Housing Act (Government Code §§ 12940 et seq.); Government Code § 11135; Labor Code § 1197.5; 2 California Code of Regulations §§ 7290.6 to 7292.6.

Federal Law: Title VII (42 U.S. Code § 2000e, et seq.); 29 Code of Federal Regulations §§ 1604 et seq.; Executive Order 11246; Equal Pay Act (29 U.S. Code 206(d)).

Sex discrimination occurs when an employer makes a detrimental employment decision about an individual because of the person's sex or gender. Title VII and the FEHA prohibit discrimination based on the sex of an employee or job applicant.

Pregnancy discrimination is unlawful sex discrimination. State and federal laws specifically protect "pregnancy, childbirth, or related medical conditions" against discrimination. **For further information about pregnancy discrimination, see this chapter, Pregnancy Discrimination, below.**

Sexual harassment is also sex discrimination. **See this chapter, Sex Harassment and Other Forms of Workplace Harassment, below.**

Q: Are there any jobs for which employers are allowed to hire only one sex?

A: For the vast majority of jobs, employers may not limit the jobs to only one sex. This would be unlawful sex discrimination. However, in some extremely limited circumstances, the law allows an employer to restrict employees to one gender if the gender qualification is reasonably necessary for the normal operation

of the business. This is an extremely narrow exception known as a bona fide occupational qualification or BFOQ. The employer must be able to prove that the gender restriction is necessary to essential functions of the job.

For example, the sex of an actor may be restricted for authenticity or genuineness when a part calls for one gender or the other.

An employer could also restrict a job to one gender to safeguard the privacy rights of clients or customers. However, this exception only applies when:

(1) the job requires an employee to observe nude individuals or to conduct body searches; and

(2) it would be offensive to have an individual of the opposite sex present; and

(3) it is harmful to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

Generally, this exception only applies to prison body searches or very personal care in hospitals or nursing homes. Additionally, employers are required to assign job duties in a manner that minimizes the number of jobs which are limited to one gender.

Employers cannot discriminate because of customer, client, or co-worker preferences or because of any stereotypical assumptions about gender.

Q: May an employer have height and weight standards?

A: An employer may not have height and weight standards unless they are job-related and apply to both men and women equally. In one case, height and weight standards were unlawful because they were not directly related to the job of being a prison guard. Instead, the employer should have used strength tests to select applicants who were strong enough for the job; height and weight were unnecessarily discriminatory criteria. However, in another case, an airline was allowed to use a height standard in selecting pilots, because shorter pilots were unable to operate any of the airline's aircraft.

Q: May an employer require applicants to take a strength and agility test?

A: Yes, but only if a designated level of strength or agility is actually necessary to complete the tasks of the job.

Most jobs do not really require a designated level of strength or agility. When an employer requires that a job applicant take a strength and agility test, it raises suspicion that the employer may be discriminating. Because of sex stereotypes, employers sometimes assume that women do not have the necessary strength to perform the functions of a particular job.

Q: May an employer have different appearance, grooming, and dress standards for men and women, such as different weight standards?

A: It depends. Appearance, grooming, and dress standards are generally allowed, but the employer must avoid any standard that both discriminates on the basis of sex and significantly burdens the individual.

If the employer has appearance or grooming rules for all employees and they reflect societal norms, then the differences for men and women are not a significant burden for the individual.

For example, an employer's policy requiring shorter hair length for men than for women is allowed because it reflects societal norms in style and does not significantly burden the male employee in his employment. However, if an employer policy required that all women wear identical company uniforms but allowed men to wear their own business attire, the policy might be discriminatory. The policy could significantly burden the female employees by making them look like lower-rank employees.

An employer may have different male and female weight restrictions based on accepted tables of desirable weight. However, if the designated weights require women to be slender, but allow men to be overweight, the requirement is discriminatory and is not allowed.

An employer policy requiring female employees to wear revealing costumes that provoke sexual harassment from customers and male co-workers might significantly burden the employee.

Q: May an employer discriminate against married women?

A: Title VII does not prohibit discrimination based on marital status. However, because Title VII prohibits sex discrimination, any employer rules directed toward married employees of one gender must be evenly applied to married employees of the other gender as well.

On the other hand, the FEHA does prohibit marital status discrimination. Employers covered by the FEHA may not discriminate against women or men on the basis of their marital status. **See also Marital Status Discrimination, below.**

Q: May an employer pay a man more than a woman when they are doing the same job?

A: No. Both state and federal laws prohibit employers from basing an employee's pay rate on the employee's sex.

The Equal Pay Act requires that employees receive equal pay regardless of sex. Under this law, complaining employees must be able to show that employees of the opposite sex receive more pay, performing equal work in the same establishment under similar working conditions on jobs requiring equal skill, effort, and responsibility. Additionally, for an employer to be covered by the Equal Pay Act, the employer must meet the requirements for coverage under the Fair Labor Standards Act. **See this chapter, Federal Laws, above.**

Title VII also prohibits wage discrimination because of the employee's sex. An employee may bring a claim under this law even if there is no member of the opposite sex who holds an equal but higher paying job. In one case, female prison guards showed that they were paid less than male guards because of intentional discrimination, so they did not need to show that their jobs were exactly the same as the male guards.

State laws which prohibit wage discrimination include the Fair Employment and Housing Act and the California Equal Pay Act. The Fair Employment and Housing Act prohibits discrimination on the basis of sex in general. The California Equal Pay Act prohibits pay discrimination on the basis of sex. As in the federal Equal Pay Act, under the California Equal Pay Act, complaining employees must be able to show that employees of the opposite sex receive more pay, performing equal work in the same establishment under similar working conditions on jobs requiring equal skill, effort, and responsibility. The California Equal Pay Act covers private and public California employees.

Q: Must an employer provide equal working conditions and facilities to male and female employees in similar positions?

A: Yes. Both the FEHA and Title VII prohibit sex discrimination with regard to terms, conditions, and privileges of employment. Employers may not discriminate on the basis of sex by providing less favorable working conditions and facilities to employees of one gender. Examples of working conditions and facilities include job duties, office space, clerical assistance, support services, support facilities, rest periods, restrooms, and locker rooms.

SEXUAL HARASSMENT AND OTHER FORMS OF WORKPLACE HARASSMENT

California Law: Fair Employment and Housing Act (Government Code § 12940(a), (h)); 2 California Code of Regulations §§ 7287.6, 7291.1(f)(1); Article 1 § 8 of the California Constitution.

Federal Law: Title VII (42 U.S. Code § 2000e et seq.); 29 Code Federal Regulations § 1604.11(a); 42 U.S. Code § 1981; Executive Order 11246.

Sexual harassment and harassment based upon race or nationality are forms of unlawful discrimination. Below is an outline of the various ways employers illegally harass employees. Discussions of employer responsibility and options for employee action follow.

Forms of Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature. Some examples include:

(1) Unwanted sexual advances;

(2) Offering employment-related advantages in exchange for sexual favors;

(3) Taking or threatening revenge after a negative response to sexual advances;

(4) Visual conduct: leering, making sexual gestures, displaying sexually suggestive objects, pictures, cartoons, or posters;

(5) Derogatory comments, epithets, slurs, and jokes;

(6) Verbal sexual advances or propositions;

(7) Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes, or invitations;

(8) Physical conduct: touching, assault, impeding or blocking movement;

(9) Harassment of job applicants: **See Chapter 2, When You Are Applying for a Job, Sex.**

The law recognizes two types of sexual harassment. These are quid pro quo sexual harassment and hostile work environment sexual harassment.

Q: What is quid pro quo sexual harassment?

A: Quid pro quo harassment occurs when an employer bases an employment decision upon whether or not an employee accepts sexual advances or other

harassing conduct. It also occurs when an employer makes an employee think that this will happen.

For example, quid pro quo sexual harassment occurs if a supervisor states or implies to an employee that she must accept his sexual advances or lose her job. Quid pro quo sexual harassment also occurs when a supervisor states or implies to an employee that she will not receive a promotion, a pay raise, or some other benefit if she does not accept sexual advances or allow other sexually harassing conduct.

In quid pro quo sexual harassment, the person harassing the employee must be someone who has the power, or someone who is believed to have the power, to hire, promote, fire, or otherwise cause a negative employment decision for the employee.

Q: What is hostile work environment sexual harassment?

A: Hostile work environment sexual harassment occurs when there is unwanted sexually harassing conduct that interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

The harassment must be "severe" or "pervasive." A few isolated incidents of sexually derogatory remarks are generally not considered by courts to be enough to create a hostile work environment. However, if a supervisor continually makes unwelcome sexually derogatory remarks to an employee or continually demands sexual favors, this is likely to be considered a hostile work environment.

Q: What does the term "unwanted" mean?

A: While it is very helpful to an employee's case if she objects to the harasser's conduct, the fact that she did not protest does not mean that the harassment was welcome. Often employees are too afraid to protest. However, as discussed below, an employer may not be legally responsible for harassment if upper-level personnel had no notice of it.

To determine whether conduct was "unwelcome," all of the circumstances should be looked at, including the nature of the sexual advances and the context in which the alleged incidents occurred.

Q: May an employee be sexually harassed by someone of the same gender?

A: Yes. The law recognizes same-sex sexual harassment.

Q: May a male employee be the victim of sexual harassment?

A: Yes. The law recognizes that both males and females may be the victims of sexual harassment.

Forms of Race and National Origin Harassment

Race or national origin harassment occurs when an employee is harassed because of his or her race or nationality. Employers must maintain workplaces free of racial and national origin harassment. Some illegal forms of harassment include:

(1) verbal harassment: racial epithets or derogatory slurs or comments concerning an individual's race, color, or national origin;

(2) physical harassment: an assault or physical interference with an individual's normal work or movement that is directed at the individual because of the individual's race, color, or nationality; and

(3) visual harassment: posting or distributing derogatory posters, cartoons, or drawings.

Illegal harassment based upon race or national origin is called hostile work environment harassment.

Q: What is hostile work environment harassment?

A: Hostile work environment harassment occurs when there is unwanted harassing conduct based on race or national origin that interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

The harassment must be "severe" or "pervasive." A few isolated incidents of derogatory remarks might not be enough to create a hostile work environment. However, if a supervisor continually makes unwelcome racially derogatory remarks to an employee, this is likely to be considered a hostile work environment.

Company or Employer Responsibility for Sexual, Racial, and National Origin Harassment

Q: When is a company responsible for the harassment of its employees?

A: An employer's legal responsibility for sexual, racial, or national origin harassment in the workplace is extremely broad. However, this responsibility varies. It depends upon whether the complaint is brought under state or federal law, what type of harassment is involved (i.e., quid pro quo sex harassment or hostile work environment), and the position of the person who commits the harassment.

Supervisors and Agents: Under the California FEHA, employers are always responsible for the acts of unlawful harassment by their supervisors and agents. Whether the employer knew about or forbade the harassment does not matter.

However, under Title VII, employers will only be liable for harassment by supervisors and agents if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action reasonably calculated to end the harassment. The employer is not responsible under this law if the employer could not be reasonably expected to know about the harassment.

Under Title VII, where an employer has a strong policy against unlawful harassment and maintains an effective complaint procedure, the employer might not be responsible for hostile work environment harassment. However, if the employer does not have a complaint process or the procedure in place is ineffective, the employer may be liable for the harassment. Courts have required that employer procedures be "reasonably calculated to end the harassment."

Harassment by Co-Workers: Under both laws, employers are responsible for sexual, racial, or national origin harassment by a co-worker if the employer, its supervisors, or its agents knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

For example, if an employee told a manager that she was being sexually harassed by a co-worker and the manager did not take any steps to look into and correct the situation, the employer might be liable.

Similarly, if a manager suspected one employee was harassing another, or another co-worker reported it, and the manager did not take some action to have the situation investigated and corrected, the employer could be liable.

In situations where employers take immediate and corrective action and are not liable, the individual harasser may still be liable.

Non-Employees: This area is far from settled. Some agencies take the position that if the employer knew or should have known of harassment by customers, vendors, or other non-employees and failed to take immediate and appropriate corrective action, the employer may be held responsible.

Q: What are an employer's responsibilities regarding a harassment-free workplace?

A: California employers must by law "take all reasonable steps to prevent harassment from occurring" in the workplace. The law requires posting a DFEH anti-harassment and anti-discrimination poster in a prominent and accessible location in the workplace. Employers must also distribute to employees either a DFEH information sheet about harassment or the employer's own information sheet with the required information.

Employers that fail to distribute this information are not automatically liable for harassment. Similarly, employers that distribute the information do not necessarily protect themselves from liability for acts of racial, sexual, or national origin harassment.

Courts look at what steps an employer has taken to prevent harassment from occurring in the first place. Courts also look to see if the employer took steps to stop harassment as soon as it started. Employers should not disadvantage the victim in some way, such as requiring the victim to transfer to a less convenient location or to a less desirable position.

Reporting

Q: What should an employee who is harassed do?

A: An employee who is harassed should report the harassment to an upper-level manager, an Equal Employment Opportunity (EEO) officer, or a representative of the human resources department.

If the employer does not take immediate and appropriate corrective action, then the employee should file a complaint with the state or federal agency. This should also be done if the employer's complaint process is inadequate. For example, if the employee finds that no one in the company takes personnel complaints and the harasser has no superiors, then the employee may want to turn to an agency.

Claims of sexual, racial, or national origin harassment can be filed with the DFEH and the EEOC. Claims can be filed with the DFEH if the employer has one or more employees. To file a claim with the EEOC, the employer must have fifteen or more employees.

Employees may want to consider the realities of their job situations before filing complaints with an agency. For example, a current employee may wish to give the employer notice in writing that the action or lack of action they have taken is inadequate before filing an agency complaint. The employee may also want to

consider telling the harasser to stop his or her behavior first. In fact, some courts do not hold the employer responsible unless the employee has given the employer notice of the harassment.

While it is against the law for employers to retaliate against employees who make complaints, employees should still be aware of the risks. Employees should assess their particular situation, get legal advice, and, if possible, give the employer an opportunity to correct the situation. **See also Chapter 1, Things You Should Know, Practical Suggestions.**

Q: What are an employee's responsibilities regarding reporting harassment to the employer?

A: As stated above, in order for an employee to recover any damages after bringing a suit for sexual, racial, or national origin harassment, many courts require that the employee give the employer notice that he or she was being harassed.

Quitting

Q: If an employee is being harassed at work and the harassment is intolerable, can he or she quit her job and then sue the employer for damages?

A: For an employee to bring a successful claim of "constructive discharge" (conditions are so bad the employee is forced to quit), the employee must give the employer notice that the conditions are intolerable before he or she quits. This notice is required so that the employer has an opportunity to correct the intolerable conditions while the harassed employee still works there, making it unnecessary for the employee to quit employment.

To be eligible for unemployment insurance benefits, an employee generally must report the harassment to the employer and give the employer an opportunity to correct the problem before the employee resigns.

PREGNANCY DISCRIMINATION

See also Chapter 6, Family and Medical Leave.

California Law: Fair Employment and Housing Act (FEHA) (Government Code §§ 12926(j), 12945); Government Code § 11135; 2 California Code of Regulations §§ 7286.0 et seq., 7291.2 et seq.

Federal Law: Pregnancy Discrimination Act as amended to Title VII (42 U.S. Code § 701; Title VII (42 U.S. Code 2000e(k)); 29 Code of Federal Regulations § 1604.10.

Pregnancy discrimination occurs when an employer makes a negative employment decision about an applicant or employee because of pregnancy, childbirth, or related medical condition. Such employment decisions include refusing to hire, firing, or placing an employee on a forced leave.

Q: Is pregnancy discrimination against the law?

A: Yes. The California Fair Employment and Housing Act (FEHA) prohibits discrimination against women because of pregnancy. The federal law, the Pregnancy Discrimination Act (PDA), also states that discrimination on the basis of pregnancy, childbirth, or related medical conditions is illegal.

Q: May an employer ask a job applicant if she is pregnant?

A: No. It is illegal for an employer to ask a job applicant if she is pregnant.

Q: May an employer make a hiring decision based on whether or not a job applicant is pregnant?

A: No. An employer may not make a hiring decision based on pregnancy as long as the applicant is capable of performing the job duties. An exception to this is

if the pregnant applicant will not be able to complete a formal training program of at least three months before the date that her leave is to begin.

In very limited situations, an employer can refuse to hire a pregnant applicant if she cannot perform the essential duties of the job. However, employers may not make these determinations on the basis of stereotypes about pregnant women. For example, airline companies may not refuse to hire or "ground" flight attendants simply because they are pregnant. In addition, employers are not permitted to ban all women of childbearing capacity from positions with possible chemical exposure. On the other hand, in one case, an employer was allowed to remove an unwed pregnant woman from her job as a counselor, because being a role model for young girls was an essential part of her duties.

Q: May an employer ask a job applicant if she plans to become pregnant?

A: No. An employer may not make a hiring decision based on the possibility that the applicant may become pregnant.

Q: What if the employer thinks customers prefer someone who is not pregnant?

A: Customer preference cannot be a basis for a hiring decision as long as the woman is capable of performing the essential duties of the job.

Q: May an employer ask a job applicant if she has children?

A: No. An employer should not ask a job applicant how many children she has or about her child care responsibilities. Employers may not refuse to hire applicants because of their child care responsibilities.

Q: May an employer ask an applicant if she has had an abortion?

A: No.

Q: Does the law protect an employee's job while she is out on a pregnancy-related disability leave?

A: Yes. In California, employees have a right to reinstatement to their original job or a substantially similar job, so long as the pregnancy-related disability leave was not longer than four months.

Exceptions:

(1) An employer is not required to reinstate an employee to her original job if the job has ceased to exist as a result of legitimate, unrelated business reasons.

(2) An employer is not required to reinstate an employee to her original job if preserving the job for the employee would substantially undermine the employer's ability to operate its business safely and efficiently.

Q: What if the original job is not available?

A: Where an employer meets one of the above exceptions allowing an employer to not return an employee to her original job, the employer must provide the employee a substantially similar job. A substantially similar job is one that is substantially similar to the employee's original job in all respects, including essential duties, compensation, employee benefits, hours, opportunities for advancement, and all other working conditions.

Exceptions:

(1) An employer is not required to reinstate an employee to a substantially similar job if the employer demonstrates that no substantially similar job is available.

(2) The employer demonstrates that filling the similar job with the employee who is on leave would substantially undermine the employer's ability to operate its business safely and efficiently.

Q: Can employees on pregnancy disability leaves be laid off?

A: Yes. Employees on pregnancy disability leave do not get any special protection when it comes to layoffs or other personnel actions. For example, if a particular employee's position is slated for lay-off based on a strict seniority system that is applied consistently to all similar employees, an employee on pregnancy disability leave is not protected from such a lay-off.

Q: May an employer require that a pregnant employee take a leave of absence or a transfer to another position?

A: No. An employer may not require that a pregnant employee take a mandatory leave of absence or a mandatory transfer to another position unless the employer can demonstrate a valid reason.

An employer may require an employee affected by pregnancy or childbirth to provide written verification from her physician that she is not disabled. However, this is only permissible under certain circumstances. The employer must regularly require such verification from other employees that may be temporarily disabled. Also, the employer has to have reasonable grounds for believing that the employee may be disabled.

Q: Do employees on pregnancy disability leaves continue accruing seniority?

A: It depends. Employees on pregnancy disability leaves must be allowed to continue accruing seniority and other benefits in the same way as other temporarily disabled employees on leave.

Q: May an employee take more than four months of pregnancy disability leave?

A: It depends. If the employer's policy allows employees with other kinds of temporary disabilities to take longer than four months leave, the employer must offer the same amount of time to employees with pregnancy-related disabilities. However, if the employer gives other temporarily disabled employees a shorter time for leave, an employee with a pregnancy-related disability must still be allowed to

get up to four months leave. Some employees may be eligible for family leave under the California Family Rights Act, in addition to the four months of disability leave. **See Chapter 6, Family and Medical Leave.**

Q: What are the rules regarding reinstatement if the employee's disability leave is longer than four months?

A: If the employee's disability leave has gone longer than four months, the employer is not required by law to reinstate the employee. However, the employer must treat the employee the same regarding reinstatement as it treats any other employee who has taken a disability leave of similar length.

Q: Is pregnancy disability leave paid or unpaid?

A: It depends on the employer's policy. If the employer's policy is to pay employees with other types of temporary disability leaves, the employer must pay employees on pregnancy disability leaves.

Q: Must the employer continue to provide the employee's health benefits while she is on pregnancy disability leave?

A: It depends. Employers are not required to continue health insurance for employees on pregnancy disability leave under California's anti-discrimination law (FEHA). However, if either the California Family Rights Act or the Federal Family and Medical Leave Act covers the company, the employer must provide up to twelve weeks of health benefits coverage on the same basis as if the employee were still working. **See Chapter 6, Family and Medical Leave.**

Q: Does a pregnant employee have a right to be transferred to a less hazardous or strenuous position?

A: In California, the employer is required to transfer an employee disabled by pregnancy, childbirth, or a related medical condition if all of the following are true:

(1) the employee requests the transfer;

(2) the employee's request is based on the advice of her physician or other licensed health care provider; and

(3) such transfer can be reasonably accommodated by the employer.

Employers are not required to create additional employment that would not otherwise be created. In addition, employers are not required to discharge another employee or transfer an employee with more seniority. Similarly, an employer need not promote another employee who is not qualified to perform the job to accommodate the employee's transfer request.

Under federal law, if the employer usually authorizes temporary transfer of temporarily disabled employees to a less hazardous or strenuous job, the employer must provide the same to an employee temporarily disabled due to pregnancy or childbirth. Also, a union contract requiring such a temporary transfer for temporarily disabled employees must be applied in the same way to an employee temporarily disabled due to pregnancy or childbirth.

Q: What are an employee's rights to her original position after a temporary transfer?

A: An employee who temporarily transfers to a less hazardous or strenuous position because of a pregnancy-related disability must have the same opportunity to transfer back to her original position or to a substantially similar position as an employee returning from a pregnancy-related disability leave.

For more information about taking pregnancy-related leaves, see Chapter 6, Family and Medical Leave.

MARITAL STATUS DISCRIMINATION

California Law: Fair Employment and Housing Act (FEHA) (Government Code §§ 12940 et seq.).

Federal Law: Title VII (42 U. S. Code §§ 2000e et seq.) (sex discrimination).

Marital status is one's status of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment or other marital state. Marital status discrimination occurs when an employer makes a decision about a person's employment because the person is "married" or "single." This type of discrimination also sometimes occurs when an employment decision is based upon the employment or lack of employment of the person's spouse.

While California law expressly lists "marital status" as a prohibited category of discrimination, federal law does not specifically prohibit "marital status" discrimination. However, marital status discrimination may still be illegal under the federal Title VII if an employer's policy or rule is unevenly applied toward men and women. For example, if an employer hires only unmarried female applicants but hires both unmarried and married male applicants, then the employer is committing sex discrimination, which is illegal under Title VII.

Q: May an employer ask an applicant if he or she is married either on a job application form or during an interview?

A: Under the FEHA, an employer should not ask about an applicant's marital status unless the employer intends to gather legitimate information related to marital status. For example, an employer can properly inquire about previous names for the purpose of asking former employers about the applicant's work history. **See also Chapter 2, When You Are Applying for a Job.**

Q: Does the FEHA prohibit discrimination against an employee or applicant because of an in-law relationship with another employee?

A: No. California's protection against marital status discrimination only applies to a direct relationship between an applicant or employee and his or her spouse. The protection does not apply to discrimination an applicant suffers because of other family relationships. For example, if an employer does not allow in-law relatives to supervise employees, the employer can legally refuse to hire an applicant because his or her sister-in-law supervises the position for which the applicant is applying.

Q: What is a "no-spouse" rule?

A: A "no-spouse" rule is an employer's policy of not hiring the spouse of any current employee or any other rule that treats the spouse of an employee differently from other employees or applicants.

Q: May an employer refuse to hire an applicant because the applicant is the spouse of an employee? Are "no-spouse" rules legal?

A: Under the FEHA, an employer may not make a hiring decision based on whether the applicant is a spouse of a current employee unless either of two situations apply:

First, an employer may refuse to place one spouse under the direct supervision of the other if the employer has concerns about supervision, safety, security or morale. For example, an employer may worry that other employees would think that the spouse would get beneficial treatment and that morale would suffer.

Secondly, an employer may refuse to place spouses in the same department or facility due to concerns about supervision, security, or morale. This is permissible only if the marital relationship makes potential conflicts of interest or other hazards more likely than usual. Under this exception, employers must carefully assess the actual work setting to determine whether the potential for conflicts or hazards is greater for married couples than for other employees.

For example, an employer may not refuse to hire spouses into the same department solely because they would be working the same hours or because of the future possibility that one of the spouses could be promoted to supervisor.

An employer may refuse to hire spouses as sales representatives in a department where the employer pays higher sales commissions as the number of sales increases. The employer's concern that spouses might pool their sales for a higher-percentage commission is legitimate under the law.

As discussed above, for employees who are only covered by Title VII (federal government employees), an employer policy against hiring spouses of employees is only forbidden if it impacts one sex more than the other. However, even then, if an employer can show that the reasons behind the rule are "job-related," the rule is permitted.

Q: May an employer force an employee to quit or fire him or her for marrying a co-worker? What if the spouse is a supervisor?

A: Under the FEHA, an employer has the duty to make reasonable efforts to assign job duties to minimize problems of supervision, safety, security or morale. However, there are exceptions if one spouse is the supervisor of the other. **See above question regarding "no-spouse rules."**

SEXUAL ORIENTATION DISCRIMINATION

California Law: Labor Code § 1102.1

Q: May an employer discriminate against an employee or applicant because of the employee's sexual orientation?

A: Under the California Labor Code, an employer with five or more employees may not treat an employee differently because of actual or perceived sexual orientation. However, there is an exception. An employer can offer insurance benefits to legal spouses of employees while denying them to partners who are not legally married to employees.

Under federal law, there is no protection against sexual orientation discrimination by employers. However, there may be other legal arguments to use if the employer's discrimination is also directed at sex, race, religion, national origin, color, age, or disability.

Q: If an employer discriminates against an employee or applicant because of actual or perceived sexual orientation, where may the person file a claim? What are the time limits?

A: Employees and applicants may file claims of sexual orientation discrimination with the Division of Labor Standards Enforcement (DLSE). This agency is also called the Labor Commissioner's Office.

Caution: The filing deadline for sexual orientation discrimination is much shorter than for other types of discrimination. Employees have only **30 days** after an act of sexual orientation discrimination to file a claim. This is far shorter than the DFEH time limit of one year and the EEOC time limit of 300 days for other forms of discrimination. **See Appendix A, Enforcement Chart.**

POLITICAL ACTIVITY

California Law: Labor Code §§ 1101, 1102, 1103

Q: May an employer threaten to fire or fire an employee because of that employee's political affiliations?

A: No. An employer covered by the California Labor Code may not fire, threaten to fire, coerce, influence, or create any rules that interfere with an employee's engaging in or participating in politics.

RELIGIOUS DISCRIMINATION

California Law: California Constitution, Article 1 § 8; Fair Employment and Housing Act (Government Code § 12940); 2 California Code of Regulations §§ 7293.0 to 7293.4.

Federal Law: Title VII (42 U.S. Code §§ 2000(e) et seq.)

Q: What laws prohibit discrimination based on religion?

A: The main state law that prohibits religious discrimination is the Fair Employment and Housing Act (FEHA). The FEHA prohibits religious discrimination by employers who have 5 or more employees. Claims of unlawful religious discrimination under the FEHA must be filed with the DFEH within one year of the date the discrimination occurs.

The main federal law that prohibits religious discrimination is Title VII. Title VII prohibits religious discrimination by employers who have 15 or more employees. Claims of unlawful religious discrimination under Title VII must be filed with the EEOC within 300 days of the date the discrimination occurs.

See Appendix A, Enforcement Chart.

Q: What is the definition of "religion" under California's anti-discrimination law?

A: "Religion" includes any traditionally recognized religion. It can also be beliefs, observances, or practices which an individual sincerely holds, as long as these beliefs or practices occupy in his or her life a place of importance parallel to that of traditionally recognized religions.

Q: How does unlawful religious discrimination occur?

A: There are two ways unlawful religious discrimination occurs. First, it occurs if an employer makes a decision about a person's employment based upon the applicant's or employee's religious beliefs or lack thereof. Employment decisions include hiring, firing, promotion, transfer, training, compensation, and other aspects of employment.

Unlawful religious discrimination also occurs when the employer refuses to reasonably accommodate the religion of the applicant or employee. The employer must accommodate an applicant's or employee's religion unless the accommodation would be unreasonable because of undue hardship on the employer's business. Examples of reasonable accommodation appear in the next questions. Employees who need religious accommodation should notify the employer.

Q: How must an employer reasonably accommodate an applicant's religion?

A: When an employer knows about an applicant's religious practices, the employer should schedule interviews or other functions of the application process so as not to interfere with those practices.

Q: What are some examples of ways an employer can reasonably accommodate an employee's religion?

A: An employer may restructure jobs, reassign jobs, or modify work practices. In addition, an employer may allow the employee to take time off for his or her religious observances and make up the hours at another time. The employer has the right to choose a reasonable accommodation to satisfy the law and is not required to use the particular accommodation that the employee would most prefer.

Q: What factors determine if a particular accommodation creates an undue hardship on the employer's business?

A: Undue hardship only comes up if the employer says the company cannot make any reasonable accommodation to the applicant's or employee's religious beliefs or practices. Whether an accommodation would create an undue hardship on the employer depends on various factors, including:

(1) the size and type of establishment;

(2) the number of employees;

(3) the composition and structure of the workforce;

(4) the nature and cost of the accommodation in relation to the size and operating cost of the employer; and

(5) reasonable notice to the employer of the need for the accommodation.

Q: Must an employer reasonably accommodate an employee's style of dress or grooming if it relates to the employee's religious practices?

A: In most cases, yes. Unless an employer can prove that accommodation creates an undue hardship on the employer's business, an employer should accommodate an employee's religious practices.

In one case, an employer did not have to accommodate an employee's grooming habit regarding his facial hair. To comply with state safety requirements, the employer implemented a new policy. The policy required any employee whose duties involved potential exposure to toxic gases to shave for the purpose of achieving a gas-tight seal when wearing a respirator on the face. One employee, a devout Sikh, stated that his religion did not allow him to shave any body hair. He requested that the employer let him keep his beard and continue in his job. In this case, the court decided that the potential for safety risks put an undue burden on the employer's business.

Q: May an employer ask a job applicant or employee about his or her availability to work evening and weekend shifts?

A: Generally, yes. An employer may ask applicants and employees if they are available to work on weekends and evenings if the question is reasonably related to the normal requirements of the job. The employer may not ask these questions if the questions are really meant to determine the applicant's or employee's religion or if working those hours is unrelated to the normal operation of the job.

Q: May religious associations and corporations discriminate based on an applicant's or employee's religion?

A: Yes. Nonprofit religious organizations and religious corporations are exempt from the California Fair Employment and Housing Act. Under Title VII, a religious organization may make hiring decisions and other employment decisions based on an individual's religion.

AGE DISCRIMINATION

California Law: Fair Employment and Housing Act (Government Code §§ 12920, 12921, 12926(a), 12940, 12941, 12942); FEHC Regulations §§ 7295.0 to 7296.2.

Federal Law: Age Discrimination in Employment Act (29 U. S. Code §§ 621 et seq.); 29 Code of Federal Regulations §§ 1625 et seq.; Older Worker Benefit Protection Act (29 United States Code §§ 623).

Age discrimination occurs when a person is treated differently in any term or condition of employment because he or she is age 40 or over. The purpose of the laws is to make sure employers base their employment decisions on a person's abilities, not upon stereotypes about how well an older person will perform the job.

Q: What laws prohibit age discrimination?

A: The California Fair Employment and Housing Act (FEHA) prohibits age discrimination by employers who have five or more employees. These employers may not use a person's age as a motivating factor when making decisions on hiring, firing, promotions, demotions, compensation, or any other terms or conditions of employment. Claims of unlawful age discrimination under the FEHA must be filed with the DFEH within one year of the date the discrimination occurs. **See Appendix A, Enforcement Chart.**

The Age Discrimination in Employment Act (ADEA) is the federal law that prohibits age discrimination. The ADEA covers private employers who have 20 or more employees and government employers. The federal ADEA prohibits age discrimination in all terms and conditions of employment. The ADEA also prohibits retaliation.

For California employees, administrative claims under the federal ADEA must be filed with the EEOC (1) within 300 days of the date the discrimination occurs or (2) if the employee has already filed with the California DFEH, within 30 days after receipt of notice of termination of DFEH proceedings, whichever is earlier.

People who do not want to wait while their ADEA claim goes through the administrative agency process are eligible to file their own lawsuit directly in federal court, so long as they wait for 60 days after filing the claim with the EEOC.

When an employee files his or her own lawsuit directly in court, specific time limits apply. In ADEA cases, if the employer's discrimination was unintentional, the deadline for filing the ADEA lawsuit is two years. However, if the employer either knew its actions violated the ADEA or showed reckless disregard for whether its conduct was prohibited by the ADEA, the time period for filing the lawsuit is three years.

Employees should be aware that if the EEOC files a civil lawsuit against the employer on behalf of the employee, the employee loses his or her right to file a private lawsuit.

Q: May an employer refuse to consider an application or inquiry because the applicant is age 40 or over?

A: No.

Q: May an employer request an applicant's birthdate or age either on an application form or during a personal interview?

A: It depends. Under the Department of Fair Employment and Housing Pre-Employment Guidelines, employers should not ask any questions which tend to identify if the applicant is age 40 or over. This includes questions such as an applicant's birthdate, age, or dates of attendance of elementary or high school.

However, employers may ask questions about whether the applicant meets legal age requirements. For example, an employer may ask a job applicant if he or she is over 18 and may ask the applicant if, after being hired, the employee can show proof that he or she is over 18.

According to the ADEA federal regulations, however, if an application form clearly states that the ADEA prohibits discrimination against individuals age 40 and over, then an employer may request information about age.

Q: If an employer chooses to hire or promote a job applicant or employee who is under age 40 over another applicant or employee who is age 40 or over, has the employer committed unlawful age discrimination?

A: It depends. If the employer has based this decision on the younger applicant's or employee's superior qualifications, superior training and experience, or seniority in prior service, the decision to hire or promote the younger applicant is legal. However, if the employer chooses the younger person over the older person because the employer prefers younger employees, the employer may have committed unlawful age discrimination.

Q: Is it possible for an employer to commit unlawful age discrimination if both candidates for a job or promotion are over age 40?

A: Yes. Where two individuals age 40 or over apply for the same position, if the employer chooses the younger candidate because of age, the employer may have committed unlawful age discrimination.

Q: May an employer require that applicants and employees age 40 or over undergo physical or medical examinations to determine whether the applicant or employee meets job-related physical or medical standards?

A: It depends. Employers may require that applicants and employees age 40 and over undergo such examinations so long as such examinations are uniformly and equally required of all applicants and employees regardless of their age. However, applicants and employees should be aware that some of these tests may be restricted or prohibited under the disability discrimination laws. **See also Chapter 3, Privacy, Testing and Examinations.**

Q: Is it unlawful age discrimination for an employer to discipline or fire an employee who is age 40 or over?

A: Employers may discipline or fire employees age 40 or over if the action is for valid reasons other than age. **See also Employment Discrimination in General at the beginning of this chapter.**

Q: May an employer require that employees retire at a particular age?

A: In general, no. A private employer may not discharge or force the retirement of an employee because the employee is a certain age over 40. Retirement plans, pension plans, union agreements or similar plans which require mandatory retirement of an employee age 40 or over are generally unlawful.

However, there are exceptions. When specific requirements are met, exceptions apply in cases of particular executive employees, tenured faculty members, firefighters, law enforcement officers, and physicians.

Q: What is the Older Workers Benefit Protection Act?

A: The Older Workers Benefit Protection Act prevents employers from coercing older employees into agreements that give up their rights under the ADEA. The law states that these agreements are not valid unless they are knowing and voluntary.

Agreements are not considered knowing and voluntary unless the agreement satisfies a list of specific requirements that are listed in the law. These require that:

(1) the agreement is written;

(2) the agreement is written in language understandable to the employee;

(3) the agreement specifically discusses the ADEA rights that the employee would give up;

(4) the employee is advised in writing to consult an attorney before signing the agreement; and

(5) the employee is given a reasonable period of time within which to consider the agreement.

Workers age 40 or over who are asked to waive their rights under the ADEA should carefully review the specific requirements of the Older Workers Benefit Protection Act.

Note: Other laws, such as the Employee Retirement Income Security Act (ERISA), may also protect retiring employees but are not within the scope of this book.

DISABILITY DISCRIMINATION

California Law: Fair Employment and Housing Act (FEHA), (Government Code §§ 12940(k), 12926(i), (k), (l), (m); 2 California Code of Regulations §§ 7293.5 to 7294.2); Labor Code §§ 1025 to 1028 (Drug and Alcohol Rehabilitation Programs).

Federal Law: Americans with Disabilities Act (ADA), (42 U.S. Code §§ 12101 et seq.; 29 Code of Federal Regulations §§ 1630 et seq.); Rehabilitation Act of 1973 (29 U.S. Code §§ 701 et seq.); 34 Code of Federal Regulations §§ 104 et seq.

Disability discrimination occurs when an employer makes a decision about the employment of a qualified applicant or employee because the individual either:

(1) has a disability;

(2) has a record of a disability; or

(3) is regarded or perceived as having a disability, whether or not the person in fact has a disability.

Disability discrimination also occurs when an employer denies a disabled employee "reasonable accommodation."

To prevent this type of discrimination, Congress passed laws to remove the barriers which prevent qualified people with disabilities from enjoying the same employment opportunities available to people without disabilities.

Q: What laws cover disability discrimination?

A: There are three main laws that prohibit disability discrimination. The California law that prohibits disability discrimination is the Fair Employment and Housing Act (FEHA). In cases of physical disability or medical condition, the FEHA covers all employers with five or more employees.

In cases of mental disability, FEHA employer coverage varies. Public employers are covered if they have five or more employees. However, private employers are only covered if they have fifteen or more employees.

The Americans with Disabilities Act (ADA) is one of the two federal laws that prohibit disability discrimination. The ADA covers all private employers who employ fifteen or more employees as well as state and local government employers who regularly employ fifteen or more employees. The ADA has exemptions for federal government employers, Native American tribes, and certain private membership clubs (other than labor organizations) that are not covered by the Internal Revenue Code § 501(c).

The Rehabilitation Act of 1973 (Rehabilitation Act) is another federal law that protects against disability discrimination. The Rehabilitation Act only covers government employers, employers with federal contracts, and employers receiving federal financial assistance.

Q: What is a disability?

A: Under the ADA, a disability is a physical impairment or mental impairment that substantially limits a major life activity. **See pages 5-43 and 5-44 for differences between California law and the federal ADA.**

A physical impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

A mental impairment is any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Major life activities are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Courts use several factors to determine whether the impairment substantially limits the major life activity. The factors include:

(1) the nature and severity of the impairment;

(2) the duration or expected duration of the impairment; and

(3) the actual or expected long-term impact of the impairment.

Q: Are there any impairments which are specifically excluded from the definition of disability?

A: Yes. The Fair Employment and Housing Act and the Americans with Disabilities Act have excluded certain impairments from the definition of disability. They include:

(1) sexual behavior disorders;

(2) current use of drugs;

(3) compulsive gambling;

(4) kleptomania; and

(5) pyromania.

In addition, many temporary disabilities, including pregnancy, are not covered by the disability discrimination laws.

Q: How is the FEHA different from the ADA regarding disability discrimination protections?

A: The FEHA's definition of disability says that the impairment must "limit" a major life activity, whereas the federal ADA requires that the impairment "substantially limit" a major life activity.

The FEHA's definition of "physical impairment" also includes "any other health impairment that requires special education or related services."

The FEHA has a separate provision stating that people cannot be discriminated against because of a medical condition. A medical condition includes, but is not limited to, "any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence."

The FEHA says that its definition of "physical disabilities" and "mental disabilities" excludes the same conditions which the ADA definition of "disabilities" excludes.

Q: What questions can an applicant be asked about medical conditions?

A: See Chapter 2, When You Are Applying for a Job, Disability and Medical Condition, and Chapter 3, Privacy, Medical Inquiries and Examinations. The EEOC, the governmental agency that handles ADA complaints, has detailed guidelines about what questions applicants should and should not be asked about medical conditions. These are found at Title 29, California Code of Regulations §§ 1630 et seq.

Q: How is a workers' compensation claim different from a disability discrimination claim?

A: Workers' compensation is a system under California law for workers who have a job-related injury or illness. Disability discrimination claims can be either job-related or not. Disability discrimination claims deal with unlawful treatment of employees who have a "disability" as defined by the FEHA or the ADA and whether the employer must provide reasonable accommodations. A Workers' Compensation claim generally concerns payment of medical coverage and temporary or permanent disability payments for an employee's job-related injury or illness. A Workers' Compensation disability does not necessarily meet the definition of a disability under the FEHA or ADA. Short-term injuries are often covered by the Workers' Compensation system but are not disabilities for purposes of discrimination claims because they do not substantially impair life activities.

Q: What does the law require of covered employers?

A: A covered employer must make reasonable changes or accommodations for a person with disabilities who is qualified for a position. Employers must only make reasonable changes or accommodations for known disabilities. When a disability or a need for an accommodation is not obvious, an employee or applicant should inform the employer of the need for a change or accommodation.

An employer may then require that an employee provide medical documentation describing the functional limitations of the disability. An applicant or employee who does not want to reveal his or her specific disability should ask the doctor to only identify the functional limitations of the disability, not the disability itself. **See Chapter 3, Medical Inquiries and Examinations, for a discussion of when an employer can require a medical examination.**

Reasonable changes or accommodations can include:

(1) adjustments to the job application process;

(2) changes to the work environment enabling a person with a disability to perform the essential functions of the position;

(3) changes that enable a person with a disability to enjoy the same advantages and privileges as people without disabilities who are in similar jobs;

(4) allowing the employee to use accrued leave such as vacation or sick days for time needed away from work **(see also Chapter 6, Family & Medical Leave)**;

(5) allowing the employee to work at home;

(6) allowing the employee to use equipment, aids, or services; or

(7) reassigning or transferring the employee to a vacant position if no other reasonable accommodation can be provided.

The ADA requires some interaction between the employer and the person with the disability to identify appropriate changes to remove the employment barriers. Typically, a disabled employee best knows what is the most effective and

cost-efficient solution, but the employer has the right to choose between different effective accommodations.

Employers are not required to lower quality and quantity standards to accommodate a qualified person with a disability if these same standards are applied uniformly to all employees in similar positions.

A person is qualified for a job if:

(1) the person meets the requirements for the position, which may include education, skill, experience, or other qualifications; and

(2) the person can perform the essential functions of the job either with or without reasonable changes or accommodations made by the employer, without endangering the health or safety of the person or others.

The essential functions of a job include only fundamental job duties and do not include marginal functions of a job. A job function may be essential if:

(1) the reason the position exists is to perform the function;

(2) the function is highly specialized so that the employee is hired to perform that function; or

(3) there are a limited number of employees available to perform the job function.

A person meets the safety requirements for a job unless the employer can show:

(1) hiring the person would produce a significant risk of substantial harm to the person or others, and

(2) the risk cannot be reduced or eliminated through reasonable changes or accommodations.

Q: Are there any instances when an employer is not required to make reasonable changes or accommodations for a person with a disability?

A: Yes. An employer is not required to make changes or accommodations for a person with a disability if doing so would cause an undue hardship to the employer's business. An undue hardship occurs if an employer has to incur significant difficulty or expense in making changes or accommodations for the person with a disability.

There is no set formula which determines whether a change or accommodation causes an undue hardship. Instead, courts look at various factors to make individual determinations. Some factors considered include:

(1) the cost of the accommodation;

(2) the number of employees at the company;

(3) the overall financial resources of the employer;

(4) the availability of tax credits for the expense of the accommodation; and

(5) the effect of accommodation on the facility.

When cost of a requested accommodation results in an undue hardship, the person with a disability should be given the option of paying the portion of the cost that creates the undue hardship.

Q: Other than an undue hardship on the employer's business, are there other valid reasons an employer may not hire, retain, or promote an employee or applicant with a disability?

A: Yes. An employer is not required to hire, retain, promote, or extend other employment advantages to an employee or applicant if the employer can demonstrate that after reasonable changes or accommodations are made:

(1) the employee or applicant cannot perform the essential functions of the job; or

(2) the employee or applicant cannot perform the essential functions of the job without endangering the employee's or applicant's health or safety, because the job imposes an imminent and substantial degree of risk to the individual; or

(3) the employee or applicant cannot perform the essential functions of the job without endangering the health or safety of others, and there would be less danger if a person without a disability performed the job.

Q: May an employer fire an employee who is an alcoholic or drug user?

A: It depends. Under the California Labor Code, employers may fire employees who, due to their current drug or alcohol usage, are unable to perform their job duties or are unable to perform them without endangering the health and safety of themselves or others. However, the Labor Code also states that private employers with 25 or more employees must allow any employees who want to voluntarily participate in a rehabilitation program to do so, without retaliation, as long as it does not impose an undue hardship on the employer's business.

The ADA protects current alcohol users, provided that the alcohol use does not result in unacceptable job performance. The ADA does not protect current drug users.

Q: May an employer refuse to hire, retain, or promote an employee or applicant with a disability because of a condition or disease which poses a future risk to job longevity?

A: No. An employer may not deny employment opportunities to qualified people with disabilities based upon speculation about a future condition. Under the FEHA, future risk of illness from a physical disability is not a valid reason for an employer to discriminate, as long as the individual is able to perform the job for a reasonable period of time. Factors which may be used to evaluate the "reasonableness" of the length of time that the employee will be able to perform include, among others:

(1) the nature of the physical disability;

(2) the length of training required in relation to the expected length of employment;

(3) the time commitment routinely required of other employees for the job in question; and

(4) the normal workforce turnover.

Chapter 6
FAMILY AND MEDICAL LEAVE

California Law: Fair Employment and Housing Act (Government Code §§ 12926(j), 12945); Government Code § 11135; 2 California Code of Regulations §§ 7291.2 et seq., California Family Rights Act (Government Code §§ 12945.1, 12945.2, 19702.3); 2 California Code of Regulations §§ 7297 et seq.

Federal Law: Family and Medical Leave Act (29 U.S. Code §§ 2601 et seq.); 29 Code of Federal Regulations §§ 825 et seq.

Until recently, employees did not have the legal right to take leaves of absence from work because of illness or family illness, nor did they have the right to take time off to care for new children in the family. Employees only got to take such leaves if their employers provided them and only in the manner the employers allowed. Recently, two new laws went into effect which changed this state of affairs. The **California Family Rights Act (CFRA)** and the Federal **Family and Medical Leave Act (FMLA)** give certain employees legal rights to these types of leaves of absence and specify how these leaves must be taken.

The CFRA and the FMLA protect leave for illnesses and for the care of children. The **Fair Employment and Housing Act (FEHA)** and the FMLA also provide for pregnancy disability leaves.

Remedies

The family and medical leave laws provide relief to employees when employers do not comply. Remedies depend upon the circumstances of each particular case. The types of possible relief include reinstatement, promotion, back pay, benefits, compensation for harm suffered by employees, costs (certain expenses of bringing a lawsuit), and attorney's fees. In aggravated cases, government agencies or courts may order extra monetary awards to employees.

Q: Who is protected by the FEHA, CFRA and/or the FMLA?

A: The requirements for coverage under the CFRA and the FMLA are:

(1) the employee must have worked for the employer for at least one year and have worked for at least 1,250 hours for the employer during the past year; and

(2) the employer must have at least 50 employees; and

(3) the employee must be employed at a worksite within 75 miles of which the employer employs 50 or more employees. (If the employer has 50 or more employees either at the employee's worksite or within 75 miles of that worksite, this requirement is satisfied.)

The FEHA, which protects pregnancy disability leave in California, generally covers private employers which regularly employ five or more employees. It also generally covers all state and city employees. However, the FEHA does not protect individuals employed by their parents, spouse, or children. It also does not protect those working under a special license in a nonprofit sheltered workshop or rehabilitation facility, nor does it cover religious associations and religious nonprofit organizations.

Q: Should an employee use state or federal law to enforce his or her rights?

A: The CFRA and the FMLA are the same in most areas except pregnancy disability leave; however, they are enforced by different administrative agencies. For the FEHA and the CFRA, claims are filed with the California Department of Fair Employment and Housing (DFEH). For the FMLA, claims are filed with the Wage and Hour Division of the U.S. Department of Labor. An employee may file claims with both agencies. By filing with both agencies, the claim will be investigated under both state and federal law.

There are some differences in the laws which may affect whether an employee is covered by the California or federal law. Employees should look at the coverage provided by the laws, described below, to determine if one or more of the laws provides the particular type of protection the employee needs.

PREGNANCY DISABILITY LEAVE UNDER THE FEHA

For information about discrimination on the basis of pregnancy and pregnancy disability leave, see Chapter 5, Employment Discrimination, Pregnancy Discrimination.

Q: How long is pregnancy disability leave under California's FEHA?

A: FEHA provides up to four months pregnancy disability leave with a right to reinstatement. **See page 6-4 for a definition of pregnancy disability leave.** If an employer's policy allows employees with other kinds of temporary disabilities to take longer than four months leave, the employer must offer the same amount of time to employees with pregnancy-related disabilities. However, even if the employer only gives other temporarily disabled employees a shorter time, an employee with a pregnancy-related disability must still be allowed up to four months.

Q: Is the leave paid or unpaid?

A: The leave is unpaid unless the employer gives other employees with temporary disabilities paid leave.

Q: Does the law protect an employee's job while she is out on a pregnancy-related disability leave?

A: Yes. In California, employees have a right to reinstatement to their original job or a substantially similar job, so long as the pregnancy-related disability leave was not longer than four months.

Exceptions:

(1) An employer is not required to reinstate an employee to her original job if the job has ceased to exist as a result of legitimate, unrelated business reasons.

(2) An employer is not required to reinstate an employee to her original job if preserving the job for the employee would substantially undermine the employer's ability to operate its business safely and efficiently.

Q: Must an employee use all of her pregnancy disability leave at the same time?

A: No. The leave need not be used all at the same time. For example, a woman could have a pregnancy-related disability which requires her to stay home from work for three weeks during her sixth month. If the same or a different pregnancy-related disability occurs later, by law she is still entitled to use the balance of the four months for additional pregnancy disability leave if necessary.

Q: What is the difference between pregnancy disability leave and parenting or maternity leave?

A: Pregnancy Disability Leave occurs when a woman is actually disabled by pregnancy, childbirth, or a related medical condition. Her physician or other licensed health care practitioner determines that she is unable to perform the essential duties of her job or is unable to perform those duties without undue risk to herself or others. This type of leave falls under the FEHA and the FMLA.

Parenting or Maternity Leave is leave that a parent takes after the birth, adoption, or placement of a child to care for and bond with the child. This type of leave falls under the FMLA and the CFRA.

California employees covered by both the FEHA and the CFRA may take up to four months of pregnancy disability leave under the FEHA in addition to twelve weeks of parenting leave under the CFRA.

Q: While on a pregnancy disability leave, may an employee use her accrued paid leave?

A: Yes. Employees are allowed to use any of their accrued paid leave time as part of their pregnancy disability leaves if they so choose. They may use vacation time, sick days, or any other type of accrued paid leave prior to any unpaid portion of their pregnancy leave.

Q: Must the employer continue to provide the employee's health benefits while she is on pregnancy disability leave?

A: It depends. The FEHA does not require employers to continue health insurance during pregnancy disability leave. With regard to health benefits, the FEHA only requires employers to refrain from discriminating against pregnancy when they have policies to provide health benefits to other employees on temporary disability leave. However, if the employee is covered by the Federal Family and Medical Leave Act, the employer must continue the health benefits for up to twelve weeks. Under that law, the benefits are available on the same basis as if the employee were still working. **See this chapter, Federal Family and Medical Leave Act.**

Q: Is a pregnant employee who goes on pregnancy disability leave eligible for State Disability Insurance (SDI)?

A: Yes. Employees who are on temporary pregnancy-related disability leave are eligible for disability insurance benefits. **See also Introduction, A Note About State Disability Insurance.**

Q: How much notice of a disability leave must an employee give to an employer?

A: Employers generally may require that employees who plan to take a pregnancy disability leave give them reasonable notice of the date leave will begin and the estimated duration of it. Employers may only require this, however, when

they have given employees reasonable notice of this requirement. Also, an employer cannot require that notice be in advance if a medical emergency prevents the employee from giving advance notice.

CALIFORNIA FAMILY RIGHTS ACT

Q: When can an employee take a leave under the California Family Rights Act?

A: Eligible employees may take leaves:

(1) for the birth, adoption, or foster placement of a child;

(2) to care for a spouse, parent, or child due to a verified serious health condition; or

(3) for the employee's own verified serious health condition that makes the employee unable to perform the functions of his or her position. In some cases, the employer may challenge the verification.

Although the CFRA covers parenting leave, it does not cover pregnancy-related disability leave. The California FEHA covers pregnancy disability leave separately. **See this chapter, Pregnancy Disability Leave Under the FEHA, above.**

Q: Under the CFRA, what is the maximum amount of time that an employee may be on leave?

A: Under the CFRA, employees may take up to twelve weeks of leave during any twelve month period. If two parents work for the same employer, they may only take a total of twelve weeks of leave within each twelve month period for the birth or placement of a child. In addition to the above family care leave, employees protected by the California FEHA may get up to four months of pregnancy disability leave for the period of time they are actually disabled because of a pregnancy-related condition.

Q: Under the CFRA, must an employer reinstate an employee returning from family leave to the same or a comparable position?

A: Yes; an employer must guarantee the employee his or her employment in a same or comparable position when the employee returns from the leave.

Q: What does "employment in the same or a comparable position" mean?

A: "Employment in the same or a comparable position" means employment with the same or similar duties, pay, and geographic location.

Q: May an employer lay off an employee who is out on family or medical leave?

A: Yes. An employee who is out on family or medical leave does not have more protection from being laid off than she or he would otherwise. If an employee would be laid off regardless of family or illness, then the employee does not have any special protection because of family or medical leave.

Q: Under the CFRA, are there any special circumstances under which an employer is not required to reinstate a highly-paid employee to the same or a comparable position when he or she returns from leave?

A: Yes. An employer may refuse to reinstate a highly-paid employee (known as a "key employee") to the same or a comparable position if **all** of the following apply:

(1) the employee is a salaried employee among the highest paid 10% of the employer's employees within 75 miles of the work site at which the employee is employed;

(2) the refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer; and

(3) the employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary under number (2) above.

If the employer gives notice of number (3) above after the employee's leave has already started, the employer must give the employee a reasonable opportunity to return to work after the notice.

Q: Is CFRA leave paid or unpaid?

A: CFRA leave is unpaid unless the employee chooses or the employer requires the employee to use his or her accrued paid leave (such as paid vacation days). Employers may require or employees may choose to use paid sick leave for a leave for the employee's own serious illness.

However, the employee's paid sick leave generally may not be used for a leave because of a birth or placement of a child or the sickness of a spouse, parent, or child. The sick leave may only be used this way under an agreement between employer and employee or under a particular employer's policy. Note: At the time of the writing of this book, state legislation is pending which may require employers to allow their employees to use sick leave for family members' short-term illnesses.

Q: During a CFRA leave, do the employee's health benefits continue?

A: Yes. Under the CFRA, during the period that an eligible employee takes a leave, the employer shall maintain coverage under a group health plan for the duration of the leave up to twelve weeks. Coverage must be at the same level and under the same conditions as if the employee were not on leave. For example, if the employer pays the cost of health benefits when the employee is working, then the employer must pay for the benefits during CFRA leave as well. An employer has the option to pay for coverage for a longer period of leave.

Q: Are there any situations when an employer may collect from the employee the health benefit premiums that the employer paid while the employee was on leave?

A: Yes. The employer may recover the premium if: (1) the employee does not return to work after the period of leave has expired; and (2) the employee's failure to return is not because of the continuation, recurrence, or onset of a serious health condition and is not because of other circumstances beyond the control of the employee.

Q: Must an employer pay for other types of benefit plans during the employee's leave, such as life insurance, disability, pensions, and unemployment?

A: If an employer maintains benefits coverage during other types of leave, then an employee out on CFRA leave might have a right to the same coverage.

For example, if the employee is out on an unpaid CFRA leave for his or her own serious health condition, then the employee should check whether the employer maintains benefits for employees who take other kinds of unpaid disability leave. If the employee is out on an unpaid CFRA leave to care for family or other reasons, then the employee should check whether the employer maintains benefits for employees who take unpaid personal leave.

If the employer does not customarily offer another kind of unpaid leave with benefits continuing, then an employee on CFRA leave still has the right to continue to participate in employee benefit plans having to do with health and welfare. However, the employer may require the employee to pay premiums at the group rate in order to continue the benefits during the CFRA leave, with the exception of the health coverage discussed in the previous two questions.

During unpaid CFRA leave, the employer does not need to make payments to pensions or retirement plans. The employee may continue to make contributions to a pension plan in accordance with the terms of the plan. The employer also does not need to count the leave period for purposes of time accrued under pensions or retirement plans.

Q: Does a CFRA leave affect an employee's seniority status?

A: Taking a CFRA leave does not take away any seniority that the employee had at the start of the leave. Whether seniority must continue to accrue during a paid CFRA leave depends upon whether the employer allows seniority to accrue when employees are out on other types of paid leave.

Q: Does an employee needing leave have to give advance notice to his or her employer?

A: If the employee can determine the need for leave in advance, the employee must provide the employer with reasonable advance notice of the need for leave. If the leave is because of planned medical treatment or supervision, the employee must make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer. The leave must be approved by the health care provider of the individual needing treatment or supervision.

Q: May an employer require that an employee provide verification of the need to take a CFRA leave due to illness?

A: Yes. An employer may require that an employee's request for a CFRA leave be supported by a certification issued by the health care provider of the individual requiring care. There are specific requirements for the certification to be sufficient.

Q: What are the specific requirements for the certification to be sufficient?

A: When the request for CFRA leave is to care for the serious health condition of a spouse, parent, or child, the certification must include: (1) the date on which the serious health condition began; (2) the probable duration of the condition; (3) an estimate of the amount of time that the health care provider believes the employee needs to care for the family member; and (4) a statement that the serious health condition warrants the participation of a family member to provide care.

Additionally, if the time period that the health care provider estimated for the leave expires, the employer may require that the employee obtain recertification for additional leave.

Employers may not require second and third opinions regarding a parent, spouse, or child's serious health condition.

When the request for CFRA leave is because of the employee's own serious health condition, the certification must include: (1) the date on which the serious health condition began; (2) the probable duration of the condition; and (3) a statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.

The employer may require later recertification on a reasonable basis if additional leave is required.

Q: What if the employer doubts the certification submitted by the employee for the employee's own illness?

A: If the employer has reason to doubt a certification submitted by an employee for the employee's own illness, the employer may require, at the employer's expense, that the employee obtain a second opinion by another health care provider. The employer may designate or approve the second health care provider, but this health care provider must not be employed on a regular basis by the employer.

If the second health care provider's opinion differs from the opinion in the original certification, the employer may require that the employee obtain a third health care provider's opinion regarding information in the original certification. This third opinion must also be at the employer's expense. This third health care provider must be designated or approved jointly by both the employer and the employee. The opinion of the third health care provider shall be final and binding on both the employer and the employee.

Q: When an employee is returning from a CFRA leave because of the employee's own serious health condition, may the employer require that the employee provide a certification that the employee is able to return to work?

A: Yes. An employer with a uniformly applied practice or policy of requiring certification for returns to work may require the same of employees returning from CFRA leaves. However, this provision of the CFRA does not override any provision of a union agreement that governs an employee's return to work.

Q: May an employer make a negative decision about an individual's employment because the individual takes a CFRA leave or gives information or testifies regarding a CFRA leave?

A: No. An employer may not refuse to hire, discharge, fine, suspend, expel, or discriminate against an individual because the individual exercises the right to take CFRA leave. It is also unlawful to make negative decisions about a person's employment because the person gives information or testifies as to any CFRA leave in an investigation or proceeding.

Q: Must an employee use all of his or her CFRA leave at one time?

A: No. CFRA leave may be taken in one or more periods. The total may not be more than twelve weeks in any twelve month period.

Intermittent CFRA leave for birth, adoption, or foster care placement of a child must conclude within one year of the birth, adoption, or placement. Generally, each period of intermittent leaves of this type must be at least two weeks long, but an employer must allow shorter leaves on any two occasions.

Q: What is the time limit or statute of limitations for filing a claim under the CFRA?

A: The time limit for filing a claim under the CFRA is one year from the time that the employer violates the law.

Q: Where may an employee file a complaint if his or her employer is violating the CFRA?

A: Employees may file CFRA claims with the California Department of Fair Employment and Housing. **See also Appendix A, Enforcement Chart.**

FEDERAL FAMILY AND MEDICAL LEAVE ACT

The FMLA and the CFRA are the same in most ways. However, there are a few differences, some of which are pointed out below.

Q: Under the FMLA, what are the allowable reasons for an employee to take a leave?

A: Under the FMLA, eligible employees may take leaves:

(1) for the birth, adoption, or foster placement of a child;

(2) to care for a spouse, parent, or child due to a serious health condition; or

(3) for the employee's own verified serious health condition.

The one difference here between the FMLA and the CFRA is that number (3) above in the FMLA includes pregnancy-related problems. The CFRA does not include pregnancy-related problems, as they are covered under the California Fair Employment and Housing Act (FEHA). California women protected by these laws may take up to four months of pregnancy disability leave under the FEHA in addition to twelve weeks of parenting leave under the CFRA. Women in other states may only be eligible for a total of twelve weeks of leave for pregnancy disability and parenting leave.

As in the CFRA, employees may take a maximum of twelve weeks in a twelve-month period for family and medical leave under the FMLA. The twelve

weeks available under the CFRA and the FMLA run at the same time; the total leave maximum is twelve weeks.

Q: During FMLA leave, do the employee's health benefits continue?

A: Yes. Employers must continue health benefit coverage under the same conditions as if the employee was working for up to twelve weeks of leave. Unlike the CFRA, which does not cover pregnancy disability leaves (these are covered by the California FEHA), the FMLA includes health benefit coverage during periods of pregnancy disability also.

An employee taking up to four months of pregnancy disability leave under the California FEHA could get twelve weeks of her health benefits paid if she is also protected by the FMLA. The California FEHA itself does not provide a right to continuation of health benefits. For example, if an employee covered by all three laws takes seven weeks of pregnancy disability leave, then takes six weeks parenting leave, health benefits must continue during the first twelve weeks off because of the FMLA.

Q: Must an employee take all of his or her FMLA leave at one time?

A: It depends. For FMLA leaves because of the employee's illness or the illness of a spouse, parent, or child, the leave may be taken intermittently or on a reduced leave schedule when medically necessary. Taking leave intermittently or on a reduced schedule does not subtract from an employee's leave entitlement.

When the FMLA leave is because of the birth or placement of a child, the leave may not be taken intermittently or on a reduced leave schedule unless the employer and the employee agree otherwise. In addition, twelve months after the date of the birth or placement of a child, an employee is no longer entitled to this type of leave. The CFRA is more flexible. Under CFRA, an employer must allow intermittent leave for a new child for one year after the birth, adoption, or placement. Generally, each period of intermittent leave of this type must be at least two weeks long, but an employer must allow shorter leaves on any two occasions.

Q: May an employee take twelve weeks of leave under the CFRA and then take another period of leave under the federal FMLA?

A: No. Leave taken under the CFRA runs at the same time as any leave for which the employee would be eligible under the FMLA. The total amount of either or both types of leave must not exceed twelve weeks in any twelve month period. Note, however, that CFRA leave for a new child or for illness can be taken in addition to FEHA pregnancy disability leave if necessary; in that case, the total time off may equal more than twelve weeks.

Q: What is the time limit or statute of limitations for filing a claim under the FMLA?

A: Employees must file claims of FMLA violations within two years of the violation. If the employer violated the FMLA "willfully," the employee has three years to file a claim. Under the CFRA, the employee must file with the Department of Fair Employment and Housing (DFEH) within one year.

Q: Where may an employee file a claim if his or her employer is violating the FMLA?

A: Employees filing claims under the FMLA have a few choices. Employees may file administrative claims with the Wage and Hour Division of the U.S. Department of Labor. In addition, employees protected under the FMLA have the right to proceed directly to federal or state court without going through an administrative agency first. **Please see Appendix A, Enforcement Chart.**

Chapter 7
WORKPLACE LAWS AND IMMIGRANT EMPLOYEES

California Law: Labor Code §§ 200 et seq., 400 to 410, 1171 et seq.; California Code of Regulations, Title 8, Chapter 5, Group 2, Articles 1-15 (or 8 California Code of Regulations §§ 11000 et seq.); Government Code §§ 19820 et seq., 19851 et seq.; Fair Employment and Housing Act (Government Code §§ 12900-12990); Workers' Compensation (Labor Code §§ 3201 et seq.); Unemployment Insurance Code.

Federal Law: Fair Labor Standards Act (29 U. S. Code §§ 201 et seq.); Title VII of the Civil Rights Act of 1964 (42 U.S. Code §§ 2000e et seq.); Immigration Reform and Control Act (IRCA) (8 U.S. Code §§ 1324 et seq.) (8 Code of Federal Regulations Parts 109 and 274a); National Labor Relations Act (29 U.S. Code §§ 151 et seq.)

Q: Does an employee's immigration status affect whether the employee is covered by workplace laws?

A: It depends. All employees, whether or not they are working legally, can file claims with the Department of Fair Employment and Housing (DFEH), the Equal Employment Opportunity Commission (EEOC), and the various agencies that enforce state and federal labor laws. However, employees without authorization to work usually cannot receive back pay or reinstatement if they are wrongfully terminated from their jobs. As discussed below, the Immigration Reform and Control Act (IRCA) affects what relief is available to undocumented employees under the workplace laws.

In addition, undocumented employees should be aware of a potentially serious problem. If an undocumented employee files a claim against an employer under any of the laws discussed below, there may be no special protection for that employee if the employer reports him or her to the Immigration and Naturalization Service (INS). The fact that the employee had filed a claim against the employer under a state or federal law would not be likely to protect the employee or to have any effect on any INS proceedings.

The following is an overview of some state and federal laws as they relate to an employee's immigration status. Laws often change. Prior to filing any type of claim, seek advice or assistance from an immigration law specialist.

California Department of Industrial Relations, Division of Labor Standards Enforcement, Labor Commissioner (Wage and Hour Law)

The state laws regarding the wages, hours, and working conditions of many occupations in California probably protect undocumented employees as well as documented employees. Although the Division of Labor Standards Enforcement has not stated whether or not the laws they enforce apply to undocumented employees, these laws explicitly protect "employees." An "employee" is any person employed by an employer. The Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE), Labor Commissioner's Office enforces the state laws about wages, hours, and working conditions. **See also Chapter 4, Wage and Hour Laws.**

Note that the state Labor Commissioner's office generally does not ask for proof of legal work authorization or check the employer's I-9 employment eligibility forms.

Fair Labor Standards Act (Wage and Hour Law)

Undocumented employees as well as documented employees are protected under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). The FLSA is the federal law that requires most employers to pay their employees the national minimum wage, pay employees overtime wages, give equal pay to men and women performing the same work (the Federal Equal Pay Act), and keep records of wages and hours. The U.S. Department of Labor's Wage and Hour Division enforces these provisions of the FLSA. **See also Chapter 4, Wage and Hour Laws.**

In general, under the FLSA, back pay should be awarded to undocumented employees who prove that they performed work and were not paid by the employer. However, if a wage claimant is not present in the United States, he or she may or may not be able to collect an award of back pay. Undocumented employees should

consult an attorney, immigration rights organization, or legal services organization about this issue.

Reinstatement is often not available to undocumented employees. If a court or agency were to order an employer to reinstate an undocumented employee, the employer would become subject to sanctions, or penalties, under IRCA. Therefore, employers generally are not ordered to reinstate undocumented employees. However, "grandfathered" employees might receive reinstatement as a remedy for violations of wage and hour laws. An undocumented employee is "grandfathered" under IRCA if the employee began working for the employer on or before November 6, 1986 (when IRCA took effect). For a "grandfathered" employee, ordering reinstatement is possible, because IRCA excuses the employer from the usual penalties for employing undocumented employees.

Undocumented employees should be aware of another potential problem. When the U.S. Department of Labor investigates an employee complaint, it also checks the employer's I-9 employment eligibility verification forms. If there are questions about the forms, the Department of Labor may report the employer to the Immigration and Naturalization Service (INS), which may do its own investigation. Employees without legal permission to work should get advice from an attorney, union, immigrant rights organization, or a legal services organization before making a claim to the U.S. Department of Labor.

Workers' Compensation

All employees in California are eligible for workers' compensation benefits, including undocumented employees. Workers' compensation benefits are benefits payable to an employee or his or her family due to an employee's job-related injury or death. A job-related injury is an injury, disease, or other medical condition which occurs in the course of employment and which arises out of the employment. It can also include a pre-existing injury, disease, or condition made worse by the employment. Workers' compensation benefits can include payments for medical costs, "temporary disability" payments for the period of time the employee is recovering from the injury, and a "permanent disability" payment. Employees may receive these benefits regardless of who is at fault for the injury.

All California employers are required to carry workers' compensation insurance. An employer must report any on-the-job injury to the insurance provider. If the employer fails to do this, the employee may report the injury and file a claim for workers' compensation.

Unemployment Insurance

An employee's immigration status affects whether the employee is eligible for Unemployment Insurance benefits. To be eligible for Unemployment Insurance, an employee must be able to provide verification of lawful immigration status or work authorization. Alternatively, an employee can show his or her presence under "color of law" status ("grandfathered" under IRCA) during the base period when wage credits were earned. An undocumented employee is "grandfathered" under IRCA if he or she began working for the employer on or before November 6, 1986.

Unemployment insurance is a state-administered benefit program that pays benefits to eligible unemployed workers while they are searching for work. In general, to be eligible, employees must have left their last job through no fault of their own. For example, when employees are fired (without misconduct), are laid-off, or have quit for "good cause," they are not at fault for the loss of job. **See Chapter 10, Post-Employment Issues.**

Fair Employment and Housing Act (Discrimination)

Undocumented employees are covered by the Fair Employment and Housing Act (FEHA) and may file claims of unlawful discrimination with the Department of Fair Employment and Housing (DFEH).

Although undocumented employees can file charges of discrimination with the DFEH, these employees may or may not be eligible to receive the remedies of back pay (wages for time the employee would have worked had he or she not been fired) and reinstatement. However, these remedies may be available if the employer hired the employee on or before November 6, 1986 and the employee is "grandfathered" under IRCA.

Title VII of the Civil Rights Act of 1964 (Discrimination)

Undocumented employees are protected by Title VII and may file charges of unlawful discrimination with the Equal Employment Opportunity Commission (EEOC). Whether undocumented employees can receive the remedy of back pay under Title VII has not yet been decided by the courts. Undocumented employees who wish to pursue back pay under Title VII face an uphill battle and should get advice and assistance from a lawyer who specializes in this area.

Undocumented employees cannot get the remedy of reinstatement unless the employee is "grandfathered" under IRCA. An undocumented employee is "grandfathered" if the employer hired him or her on or before November 6, 1986.

National Labor Relations Act (Unions)

The National Labor Relations Act (NLRA) is a federal law that protects the rights of employees to form unions, bargain collectively with their employers through representatives of their own choosing, and engage in other activities for the purpose of collective bargaining or other mutual aid and protection. The NLRA also protects the rights of employees not to engage in union activities. The NLRA is enforced by the National Labor Relations Board (NLRB).

Undocumented employees as well as documented employees are considered "employees" under the NLRA and may file charges against their employer with the NLRB for unfair labor practices. However, the types of relief employees may get for employer wrongdoing may vary, depending upon whether the employees are documented or undocumented.

When the NLRB finds that an employer has committed unfair labor practices, the NLRB will issue an order to the employer requiring that the employer stop the illegal practice. In addition, employees with legal working papers may receive reinstatement and back pay. Undocumented employees may also receive reinstatement and back pay if they started working for the employer on or before November 6, 1986 and they also do not have an INS ruling saying that they cannot be present and employed in this country.

However, if the employee is undocumented (and either unable or unwilling to complete the employee portion of the I-9 form) and began working for the employer after November 6, 1986, the NLRB will not order reinstatement and back pay for the employee. Unfortunately, this means that undocumented employees do not get the same full protection and compensation under the NLRA as employees who are legally authorized to work.

CITIZENSHIP/IMMIGRATION STATUS DISCRIMINATION

California Law: California Constitution

Federal Law: U.S. Constitution, Immigration Reform and Control Act (IRCA) (8 U.S. Code §§ 1101 et seq.); 8 Code of Federal Regulations Parts 109 and 274a.

Citizenship discrimination occurs when an employer makes a negative employment decision about an individual because of the person's citizenship or immigration status. A person is a U.S. citizen if he or she is born in the United States, has at least one U.S. citizen parent, or has gone through the "naturalization" process to become a citizen after being a lawful permanent resident (LPR). "Immigration status" concerns what type of working papers the individual has.

Q: Is it legal to refuse to hire a person because he or she is not a citizen of the United States?

A: IRCA protects employees who are legally authorized to work in the United States from citizenship discrimination by employers with four or more employees.

Subject to two exceptions, employers may not make employment decisions based on an applicant's citizenship or the citizenship of the applicant's parents, spouse, or other relatives.

First, if two applicants are equally qualified, the employer may lawfully choose the U.S. citizen over the non-citizen. However, depending on the circumstances, such a practice could be unlawful national origin discrimination

under Title VII. **See Chapter 5, Employment Discrimination, National Origin Discrimination.**

Second, employers may discriminate based on citizenship where required by "law, regulation, or executive order, or required by federal, state, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the federal, state, or local government" (8 United States Code § 1324b(a)(2)(c)). The above rule may be used by an employer to defend a charge of citizenship discrimination. However, employees may bring equal protection challenges under the Constitution against unreasonably discriminatory laws, regulations, and contracts.

Q: What are the requirements for a person to work legally in the United States?

A: To work legally in this country, a person must either be a citizen of the United States or have legal authorization to work. Under IRCA, within three days of an employee beginning work, an employer must verify an employee's legal right to work in the United States. Employees must present documents to the employer which prove the employee's legal right to work, and the employer and employee must fill out an I-9 employment eligibility form. Employers must require this proof from all new employees, not just employees who do not look or sound Anglo.

See also Document Abuse Discrimination, below.

Q: What are some examples of citizenship discrimination?

A: If an employer is confused about what work authorization papers are and decides to hire only U.S. citizens, the employer is committing illegal citizenship discrimination.

If an employer has a policy of only accepting certain types of legal work papers, such as "green cards," the employer is committing illegal citizenship discrimination.

Q: What laws protect against citizenship discrimination?

A: Claims of unlawful citizenship discrimination can be brought under the equal protection clause of the California Constitution and/or the U.S. Constitution. Under both the California and U.S. Constitutions, state and local governments or agencies must provide the people with equal protection of the laws. Filing a lawsuit for a violation of the California or U.S. Constitution is complicated, and individuals need to consult with an attorney to do so.

In addition, the federal Immigration Reform and Control Act (IRCA) prohibits citizenship discrimination. IRCA prohibits citizenship discrimination by all employers having four or more employees on the date the discrimination occurs. IRCA's citizenship discrimination provisions only cover:

(1) U.S. citizens and U.S. nationals;

(2) Lawful permanent residents (people with "green cards");

(3) Lawful temporary residents under the general amnesty or farmworker (SAW) legalization program;

(4) People who have been granted asylum; and

(5) People who entered the U.S. as refugees.

While an equal protection challenge under the California or U.S. Constitution can apply to all areas of an employment relationship, IRCA only covers discrimination in hiring, firing, recruitment/referral for a fee, and retaliation.

Employees filing claims of citizenship discrimination under IRCA must file their claims with the Office of Special Counsel (OSC), which is part of the United States Justice Department in Washington, D.C. Claims of discrimination to the OSC must be postmarked within 180 days of the date the discrimination occurred. **See Appendix A, Enforcement Chart.**

Q: Do Title VII and the FEHA protect against citizenship discrimination?

A: Technically, the answer is no. Title VII and the FEHA do not explicitly protect against citizenship discrimination; however, they do protect against national origin discrimination. To the extent that any citizenship discrimination has the purpose or effect of causing national origin discrimination, these laws prohibit it. **See Chapter 5, Employment Discrimination, National Origin Discrimination.**

DOCUMENT ABUSE DISCRIMINATION

Federal Law: Immigration Reform and Control Act (IRCA) (8 U.S. Code §§ 1101 et seq.); 8 Code of Federal Regulations Parts 109 and 274a.

Q: What is document abuse discrimination?

A: Document abuse discrimination occurs when an employer makes a negative employment decision about an individual because of the type of documents he or she produces for I-9 eligibility requirements. For example, if an employer decides to fire or lay off an employee because the employee produces a document showing refugee status, the employer would be committing unlawful document abuse discrimination. IRCA prohibits document abuse discrimination.

Q: What must employers and employees do to comply with IRCA's work authorization document requirements?

A: IRCA requires employers to verify that their employees have legal permission to work in this country. To comply with IRCA, an employer must request documentation from the employee, not later than three days from the date of hire, which proves an employee's identity and legal right to work. The employer and employee must verify this information by filling out an "I-9 Employment Eligibility Verification Form."

The law gives an employee the right to choose what documents to produce from the list on back of the form. **Since the list of proper documents is changing in 1997, workers who have questions about what documents an employer can require should ask an immigration lawyer or immigrant rights organization.** An employer does not have the right to choose which types of papers are acceptable. An employer must accept any papers from the list that prove an employee's identity and right to work. The only exception to this requirement is that an employer does not have to accept any papers that look fake.

Three types of employees are not required to show documents proving they have legal authorization to work in this country.

(1) "Grandfathered" employees are employees who began working for the employer in question before IRCA went into effect. Employees who began working for the employer on or before November 6, 1986 do not need to produce documents proving a legal right to work.

(2) "Casual hires" are employees who do domestic jobs around the house or yard in private homes on an irregular basis. Once a month is irregular, whereas once a week is not. "Casual hires" do not need to produce documents proving a legal right to work.

(3) "Independent contractors" are people running their own businesses. These individuals do not need to produce documents proving their legal right to work.

Q: What documents may an employee use to complete an I-9 form?

A: The list of the types of documents that an employee may use to complete an I-9 form is changing at the time of the writing of this book. **Workers who have questions about what documents an employer can require should consult an immigration lawyer or immigrant rights organization.**

Q: Where may an employee file a claim if the employee has been the victim of document abuse discrimination?

A: Employees who have been the victims of document abuse discrimination may file claims under IRCA with the Office of Special Counsel (OSC) at the U.S. Justice Department in Washington, D.C.

See Appendix A, Enforcement Chart for the requirements.

Chapter 8

RETALIATION

California Law: Fair Employment and Housing Act (FEHA) (Government Code § 12940(f)); Labor Code § 98.6 (wages and hours), § 132a (workers' compensation), § 230 (jury duty, testifying as a witness), §§ 6310-6312 (health and safety), §§ 1102 (political activity), 1102.1 (sexual orientation), 1102.5 (employer retaliation), 2 California Code of Regulations § 7287.8.

Federal Law: Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S. Code § 2000e-3(a)); Age Discrimination in Employment Act (ADEA) (29 U.S. Code § 623(d)); Occupational Safety and Health Act of 1970 (OSHA) (29 U.S. Code § 660(c)(1)); National Labor Relations Act (NLRA) (29 U.S. Code §§ 157, 158)

Various laws contain sections prohibiting employers from "retaliating" against employees who assert their legal rights. Under these laws, retaliation occurs when an employer discriminates or makes a negative employment decision about an employee because the employee:

(1) opposed what he or she reasonably believed was an illegal practice by the employer; or

(2) participated in formal procedures to stop the illegal practice.

Complaining about illegal employer practices to the management is a way of "opposing" illegal employment practices. Having meetings to discuss these practices or refusing to participate in illegal practices are other examples. Filing a complaint with an administrative agency is "participating" in formal procedures to stop an illegal practice. Testifying or assisting in any investigation, proceeding, hearing, or litigation under the above laws or others are also ways of participating in procedures against illegal practices.

Some laws protect against retaliation for both "opposition" conduct and "participation" conduct. These laws include the FEHA, Title VII, the ADEA, and the NLRA. The California Labor Code sections which protect employee safety and health also cover retaliation for both opposition and participation.

Other laws appear to protect against retaliation for only "participation" conduct. These laws include the California Labor Code sections regarding wages and hours and jury duty or testifying as a witness.

Remedies

The law can provide relief when employers illegally retaliate against employees for exercising their rights. An agency or court can order an employer to notify all employees of their right to be free from retaliation. Depending upon the particular law and circumstances of each case, possible remedies may include back pay, reinstatement, damages, restored benefits, attorney's fees, and case costs.

Q: What are some examples of employee actions that are protected from employer retaliation?

A: An employer may not retaliate against an employee for any of the following actions:

(1) complaining to a superior or human resources representative about sexual harassment;

(2) meeting with other employees to discuss race discrimination occurring at the company;

(3) filing discrimination complaints with the EEOC or DFEH (based on race, sex, national origin, age, disability, etc.);

(4) filing wage complaints with the California Labor Commissioner (unpaid wages, overtime, etc.);

(5) filing workers' compensation claims;

(6) reporting certain safety violations or testifying about these violations (usually to the Division of Occupational Safety and Health or OSHA); and

(7) reporting the employer's violations of state or federal law to a government agency (sometimes called "whistle-blowing").

Q: What employer conduct is retaliation?

A: Retaliation can include termination, demotion, discipline, refusal to hire, or any harmful employer action in response to the employee's exercise of legal rights.

Q: What is NOT retaliation?

A: An employer who fires or disciplines an employee based on legitimate reasons, such as poor performance, is not retaliating. Employers do not have to allow employee conduct that is unjustifiably disruptive or harmful to legitimate business interests.

Q: What must an employee show to assert a retaliation claim?

A: In general, an employee must show that:

(1) the employee opposed or participated in proceedings against what the employee reasonably believed was an illegal practice under a law that also prohibits retaliation;

(2) the employer then subjected the employee to an adverse employment action; and

(3) the employee's protected opposition or participation conduct caused the employer's adverse action.

Q: What is a "whistle-blower?"

A: A "whistle-blower" is an employee who reports to a government agency what the employee reasonably believes is an employer's violation of a state or federal statute, regulation, or constitutional provision. Several state and federal laws protect employees who suffer retaliation for blowing the whistle on their employers. Most often, these cases involve the employee's discharge for reporting the illegal conduct.

Q: May an employer retaliate against employees because they are involved in labor organizing or are members of a union?

A: No. The National Labor Relations Act (NLRA) prohibits private sector employers from retaliating against employees for union activity. Various California laws give similar protections to public employees and agricultural employees.

For example, an employer may not retaliate against employees for collective bargaining or for forming, joining, or assisting a union. In addition, an employer may not retaliate against an employee who files an unfair labor practice charge or testifies in any unfair labor practice proceeding.

When an employer retaliates against employees for organizing or for union-related activities, what the employees should do next varies with the particular situation. Employees should consult the union about what to do, if possible. Otherwise, employees can ask for guidance from labor relations experts, legal services organizations, or the National Labor Relations Board. Certain state employees and public education employees can go to the Public Employees Relations Board, and agricultural workers can go to the Agricultural Labor Relations Board. Claims for union retaliation must generally be filed with these agencies within **six months**.

Q: May an employer retaliate against an employee for taking time off for jury duty or for serving as a witness in court?

A: No. Under the California Labor Code, an employer may not discharge or discriminate against an employee for taking time off to serve on a jury as long as the

employee provides the employer with advance notice of the responsibility. Similarly, if an employee is required by law to serve as a witness in court, the employer may not discharge or discriminate against the employee for taking the time off after giving reasonable notice.

Q: Where can employees file claims for retaliation, and what are the time limits?

A: For retaliation complaints that involve violations of the California Labor Code (Cal/OSHA, sexual orientation discrimination, whistleblower, jury duty, witness service, wage claims filed with the Labor Commissioner, political activity), claims can be filed with the California Division of Labor Standards Enforcement (DLSE), also called the Labor Commissioner. These complaints must be filed **within 30 days**. In some cases, an employee can also file a claim directly in court.

For a retaliation claim that involves employment discrimination on the basis of race, color, sex, religion, national origin, age, or disability, an employee can file a complaint with the Department of Fair Employment and Housing (DFEH) (at least five employees) within **one year** or with the Equal Employment Opportunity Commission (EEOC) (at least 15 employees) within **300 days**.

For a retaliation claim involving workers' compensation, an employee can file with the Workers' Compensation Appeals Board within **one year**.

Chapter 9
WORKPLACE SAFETY AND HEALTH

California Law: California Occupational Safety and Health Act of 1973 (Cal/OSHA) (California Labor Code §§ 6300 et seq.); Hazardous Substances Information and Training Act (California Labor Code §§ 6360 et seq.); Safe Drinking Water and Toxic Enforcement Act of 1986 (California Health and Safety Code § 25249.5 et seq.); 8 California Code of Regulations §§ 3200 et seq., § 5194 (hazardous substances information); 22 California Code of Regulations § 12000.

Federal Law: Occupational Safety and Health Act of 1970 (OSHA) (29 U.S. Code §§ 651 et seq.); 29 Code of Federal Regulations §§ 1900 et seq.

California and the federal government have both passed laws which regulate workplace safety and health. The California law is called the California Occupational Safety and Health Act (Cal/OSHA). The federal law is called the Occupational Safety and Health Act (OSHA). These laws set specific "standards" governing health and safety. Those standards may, for example, specify how much employees can be exposed to a particular chemical. If exposure levels are above the permissible level, there will be a violation of safety standards. The laws also require that employers inform employees about certain unsafe working conditions or known hazards in the workplace. This chapter concerns Cal/OSHA, but federal law provides many similar rights.

Hazardous Substances

Q: What are "hazardous substances?"

A: The California Occupational Safety and Health Act (Cal/OSHA) regulations list "hazardous substances" and "permissible exposure levels." Employees may be "exposed" to hazardous substances by ingesting or swallowing them, inhaling them, absorbing them through the skin or eyes, or otherwise coming into contact with the substances. California regulations include the following examples of "hazardous substances" and conditions for which employee exposure must be

monitored: (1) dangerous air contamination in confined spaces, (2) excessive noise, (3) cotton dust, and (4) cancer-causing substances, such as asbestos, coke oven emissions, lead, formaldehyde, ethylene dibromide, ethylene oxide, and vinyl chloride.

Employees or their union representatives may ask the employer for a Material Safety Data Sheet (MSDS) on any listed "hazardous substance" present in the workplace. The MSDS gives information on the listed hazardous chemical. If the employer does not already have the MSDS on a particular substance used in the workplace, the employer is required to order it from the manufacturer within seven days of a request from an employee, a union representative, or a physician. A manufacturer should respond to an employer's request within fifteen working days and supply the MSDS to the employer.

Employees' Rights

Q: Does an employee have the right to refuse hazardous work?

A: It depends upon the circumstances. Under some union agreements, an employee may file a grievance about the unsafe condition but may not use "self-help" and refuse to do the work. Unionized workers should always consult their union representatives about the right to refuse work.

Under Cal/OSHA, an employer may not fire, lay off, or discriminate against an employee for refusing to perform hazardous work. However, to qualify for this protection, an employee must be able to show both of the following:

(1) doing the work would be a violation of a Cal/OSHA health standard or safety order; and

(2) there is a real and apparent hazard to the worker or others.

Please note that many employers violate these laws and fire or discriminate against employees who refuse to perform hazardous work. Any employee who is fired, laid off, or not paid for refusing to perform hazardous work which violates a safety order or health standard may file a claim with the California Labor

Commissioner for reinstatement and lost wages for the time the employee is without work because of the firing or lay-off. The employee has **30 days** from the time that the employer does this to file a claim.

Federal OSHA also has certain protections for workers who refuse hazardous work under Title 29 of the United States Code § 660(c) and Title 29 of the Code of Federal Regulations, Part 1977. Under the federal law, an employee is only protected from performing hazardous work if the employee reasonably believes that there is a substantial danger of serious injury and tries in good faith to ask the employer to correct the problem. If the employer does not correct the condition and disciplines or fires the employee for refusing to perform the work, the employee has **30 days** from the discipline or firing to complain to the United States Secretary of Labor, Assistant Secretary for Occupational Safety and Health.

Q: Must an employer supply safety devices to employees?

A: Generally, yes. Employers have a duty to provide personal safety devices, safeguards, and safe work procedures when necessary to protect employees from known or reasonably suspected dangers.

Safety devices may include hard hats, masks, respirators, aprons, gloves, goggles, or other types of reasonable equipment which prevent specific dangers.

Safeguards may include ventilation, barriers, or other features preventing specific dangers.

Safe work procedures may include ways of handling chemicals or machinery that limit exposure. Adjusting work schedules can also limit exposure.

Q: Must an employer give employees or union representatives information regarding the employer's monitoring of hazardous conditions and exposure levels?

A: Yes. Employers must give employees and their union representatives the opportunity to observe the monitoring or measuring of employee exposure to hazards.

Q: What if an employer's monitoring reveals an employee's exposure or overexposure to a harmful substance?

A: If an employer's monitoring reveals that an employee has been exposed or overexposed to a harmful substance, the employer should tell the employee. The employer should also inform the employee of the corrective action being taken. In addition, the employee and the employee's union representative must have access to accurate records of the employee's exposure to hazardous substances.

Q: Must employers provide free medical examinations or testing to employees who believe they have been exposed to hazardous substances at work?

A: Generally, yes. Under the California Labor Code and regulations, employees exposed to cancer-causing substances and many other hazardous conditions have a right to free medical examinations and testing.

Q: When will Cal/OSHA investigate a workplace?

A: Generally, Cal/OSHA investigates a workplace when the agency learns that a workplace is not safe. Usually this occurs after an employee or a union representative files a complaint with the agency or after a death, serious injury, illness, or serious exposure occurs at a workplace.

Cal/OSHA should investigate within three working days of a complaint of a "serious violation" and within fourteen working days of a complaint of a "nonserious" violation. For Cal/OSHA to consider a complaint to be "serious" there must be a substantial probability that death or serious physical harm could result from the condition. All other complaints are considered "nonserious."

Cal/OSHA may determine that a complaint has no reasonable basis; if so, the agency does not have to respond to the complaint.

The employer and a representative for employees have the right to accompany the Cal/OSHA inspector during any inspection. Both the employer and any employees have the right to privately discuss safety and health problems with the inspector. When there is no designated employee representative, the Cal/OSHA inspector is supposed to consult with a reasonable number of employees about safety and health at the workplace.

After investigating, Cal/OSHA may issue a "notice" or a "citation" for violations of workplace safety and health standards. Cal/OSHA does this when the employer violates a particular regulation. For example, the employer may receive a citation for having a particular illegal level of exposure to a hazardous substance. Citations identify the violation and order the employer to correct the violation within a specified period of time. Citations must be publicly posted at the workplace for three days or until the unsafe condition is fixed, whichever is longer.

Q: Where may an employee file a complaint about unsafe working conditions?

A: Employees may file complaints under the state law with the California Department of Industrial Relations' Division of Occupational Safety and Health (also known as Cal/OSHA). Under federal OSHA, employees may go to the United States Secretary of Labor, Assistant Secretary for Occupational Safety and Health.

Q: Will the reporting employee's identity be kept confidential?

A: Yes. The reporting employee's identity should be kept confidential unless the employee designates on the claim form that the employee's identity should be revealed.

Q: Is it legal for an employer to fire or discriminate against an employee for complaining to the employer or the state or federal agency about safety and health problems at work?

A: No. An employer may not fire or unlawfully discriminate against an employee for complaining to the employer, a union representative, or a state or federal agency about safety or health problems at work. Employees who are fired or discriminated against for this conduct may file retaliation claims with the California Labor Commissioner's Office **within 30 days** of the firing or discrimination. If an employee is disciplined or fired for participating in federal OSHA proceedings, the employee may complain **within 30 days** to the United States Secretary of Labor, Assistant Secretary for Occupational Safety and Health. **See also Chapter 8, Retaliation.**

Q: Under Cal/OSHA, what are the penalties for employers, managers, and supervisors who violate the workplace safety and health laws?

A: Violations of Cal/OSHA standards or orders may result in penalties of up to $7,000 for each violation. In cases of willful or repeated violations, the employer may have to pay up to $70,000 in penalties to the agency. Employers who fail to correct violations within the specific time allotted may be assessed penalties of up to $7,000 for each day the violation continues.

In particularly serious cases, employers, managers, or supervisors may be criminally prosecuted. They are subject to imprisonment for up to six months and/or fines up to $5,000. Where a violation causes death or serious impairment to an employee, an employer, manager, and/or supervisor may receive up to one year in prison and/or a fine of up to $70,000.

Q: May an employee file a lawsuit against an employer for the employer's violations of workplace safety and health laws?

A: Generally, no. Employees may not file their own lawsuits against their employers for violating the workplace safety and health standards. Under state law, employees may file complaints with Cal/OSHA. Under federal law,

employees may file complaints with the United States Secretary of Labor, Assistant Secretary for Occupational Safety and Health.

As discussed in Chapter 8, employees can also file claims of retaliation for Cal/OSHA complaints with the California Labor Commissioner within 30 days of the retaliation.

Employees who are personally injured by an employer's unsafe practices may have a Worker's Compensation claim. Employees with Worker's Compensation issues should seek the advice of a lawyer as soon as possible.

Illness and Injury Prevention Programs

Q: What is an Illness and Injury Prevention Program?

A: California employers are required by law to have an effective Illness and Injury Prevention Program (IIPP). Employers must instruct employees on safe work practices and provide specific instructions concerning hazards unique to the job. For most employers, the IIPP must be in writing, in a form readily understandable to all affected employees. Employers with fewer than ten employees may orally communicate this information to employees.

The IIPP must identify the person(s) responsible for the program and the employer's system for identifying workplace hazards. The IIPP must also state the employer's methods for correcting unsafe or unhealthy conditions or practices in a timely manner.

In a workplace where employees could be exposed to hazardous chemicals, an IIPP might:

(1) identify the hazardous chemicals in the workplace and explain what the acceptable levels of exposure are;

(2) identify what to do to lessen the likelihood of exposure;

(3) identify the symptoms of exposure; and

(4) state what to do in an emergency.

In a workplace where repetitive tasks often cause physical injuries, an IIPP might:

(1) identify what to do to lessen the likelihood of injury;

(2) identify how the workplace should be adjusted to avoid these injuries; and

(3) identify how work activities might be changed to avoid these injuries.

In addition, some common safety and health issues likely in an IIPP include information on fire protection, first aid availability, earthquake safety, protective clothing and equipment, walkways, stairs, and exits.

Chapter 10
POST-EMPLOYMENT ISSUES

During periods of transition after leaving or losing employment, employees should be aware of their post-employment rights. Employees may also wish to look ahead at these issues before they leave their positions so that they may know what to expect. Post-employment issues include unemployment insurance eligibility, wrongful termination, and employer references.

UNEMPLOYMENT INSURANCE

California Law: Unemployment Insurance Code; 22 California Code of Regulations §§ 125-1 - 2113-1.

Unemployment insurance is meant to provide benefits for employees who are temporarily unemployed through no fault of their own. It is a federal program administered by the state. In California, the Employment Development Department (EDD) administers it. Unemployed workers apply for benefits at EDD. When employers or former workers disagree with EDD decisions, they can appeal to the California Unemployment Insurance Appeals Board.

ELIGIBILITY

Q: What are the eligibility requirements for unemployment insurance benefits?

A: Employees must meet several criteria to be eligible for unemployment insurance benefits.

First, the employee must have left his or her last job "without fault." Usually, this means the employer laid off or fired the employee without any "misconduct" on the employee's part. An employee who quits a job without a

good reason is generally not eligible for unemployment insurance benefits. **See How You Left Your Last Job, below.**

Second, the employee must be "able, available, and looking for work." This means the employee must be physically and mentally able to work. The employee must also actively seek and be willing to accept suitable work. Suitable work can be work in the employee's usual occupation. Another occupation is suitable work when the employee can apply past experience to the position or when the employee can adapt his or her skills to it. Thus, an employee should actively apply for work.

People who are unemployed and not able to work are ineligible for unemployment insurance benefits, but may be eligible for State Disability Insurance (SDI). **See Introduction, A Note About Workers' Compensation and State Disability Insurance.**

Third, the employee must have earned a set minimum amount of wages (from any employers) during the "base period." The "base period" is a particular twelve month period determined by what date the employee files the unemployment insurance claim.

Q: How does EDD determine "base period" earnings?

A: If the employee files the initial claim in February, March, or April, the "base period" is the 12 months that ended the previous September 30. If the employee files the initial in May, June, or July, the "base period" is the 12 months that ended the previous December 31. If the employee files the initial claim in August, September, October, the "base period" is the 12 months that ended the previous March 31. Lastly, if the employee files the initial claim in November, December, or January, the "base period" is the 12 months that ended the previous June 30.

Once the EDD determines the base period, it is split into quarters. Quarters are the following 3-month periods: January 1 to March 31, April 1 to June 30, July 1 to September 30, October 1 to December 31. To qualify for benefits, employees must have either:

(1) earned wages of at least $1,300 during the quarter with the highest earnings; or

(2) earned wages of at least $900 during the quarter with the highest earnings and earned 1.25 times the amount earned that quarter during the whole base period.

Q: Are some types of employees excluded from receiving unemployment benefits?

A: Yes. Some employees are ineligible for benefits under the California Unemployment Insurance Code. Among the excluded categories are casual domestic employees, people who work for their spouses or children, religious workers, and others. Employees who are unsure whether they are eligible for Unemployment Insurance should review the categories discussed in California Unemployment Insurance Code §§ 601 to 657.

Q: Are independent contractors excluded from receiving unemployment benefits?

A: Yes. Independent contractors are ineligible for unemployment benefits because they are not "employees." However, some employers call workers "independent contractors" when in fact they are not. Whether a worker is an "independent contractor" or "employee" is determined by examining several factors. Some of the factors include whether the employer supervises the person's work and whether the worker uses the employer's tools and equipment to complete the work. Workers who are unsure of their status should pursue their possible eligibility with the EDD.

Q: How much are the weekly benefits to eligible employees?

A: The amount of weekly benefit is determined from the employee's highest quarter during the "base period" (see above). The more the employee earned that quarter, the higher the weekly benefit the employee will receive. The amount of benefit ranges from $40 to $230 per week.

For example, if the employee earned between $900 and $948.99 during the highest quarter, the employee is eligible for a $40 weekly benefit. On the other hand, if the employee earned $7,633.33 or more during the highest quarter, the employee is eligible for the maximum benefit of $230 per week.

Note: the date of the initial claim determines what "quarters" are in the "base period." For example, if an employee files a claim at the end of July, the base period will include different quarters than if the employee files at the beginning of August. If some quarters had significantly higher earnings than others, the employee might want to consider what is the best date to file the claim.

Q: How long are benefits paid?

A: Employees can generally receive benefits for a maximum of 26 weeks. Payments are made within a "calendar benefit year" of 52 weeks beginning on the Sunday of the week during which the employee files for benefits. The EDD pays benefits during weeks in which the employee is unemployed, able and available, and searching for work. Employees must submit a "continued claim form" for each week benefits are claimed. An employee is not eligible for benefits if he or she is not looking for work, is sick, or is on vacation.

Employees need not receive payments in successive weeks. However, after receiving 26 payments, the employee is not eligible for any more unemployment benefits in the "calendar benefit year." (Unemployment benefit extensions beyond 26 weeks may be available in limited circumstances during times of high unemployment or when employees participate in certain types of job training programs.)

Q: What happens if a person is still unemployed after a year?

A: After the "calendar benefit year" ends, a person may file a new claim. The person must still be unemployed and able, available, and looking for work. But the employee must also have worked during at least part of the previous "calendar benefit year." The employee must have earned the minimum amount required

during a quarter in the new applicable base period for establishing a new unemployment insurance claim.

Q: Why do employers oppose their former employees who are applying for unemployment benefits?

A: Although many employees feel their former employers oppose their receiving unemployment benefits out of spite, many employers are just trying to save money. Employers' payroll taxes fund unemployment insurance benefits. The employer's tax rate increases with the number of employees who receive unemployment insurance benefits. This is why many employers routinely fight all unemployment insurance claims by former employees.

Q: What happens if the EDD denies the unemployment insurance claim?

A: If the EDD denies the claim, the employee may appeal the decision by requesting a hearing before an administrative law judge (ALJ). The employee has **20 days** from the date of EDD's "Notice of Determination" letter to appeal the determination and request a hearing. The appeal letter can simply state that the employee wants to appeal and disagrees with the EDD's determination. While the ALJ will conduct the hearing, employees can take several steps to better prepare their cases. The Women's Employment Rights Clinic and other legal services organizations may be able to represent claimants at unemployment insurance hearings.

Q: What can an employee do to prepare for an unemployment insurance hearing?

A: Employees can take several steps to prepare for an unemployment insurance hearing.

(1) Employees should be aware that employees and employers both have a right to bring a legal representative to an unemployment hearing. Employees should first call any local legal clinics, or legal services offices to see if representation is available. However, if representation is not available, employees can do a fine job

of representing themselves. The ALJ conducts the hearing by asking questions of both sides and is usually helpful to people representing themselves.

(2) As soon as a hearing date is set, the employee should arrange to get a copy of his or her EDD file. By this time, the employee's EDD file is usually at the Unemployment Appeals Office (a different office from the EDD office). The employee should call first to make sure the file is at this office and ask about the procedure for obtaining a copy.

The employee should read through the entire file. This lets the employee know what the former employer has submitted to the EDD up to this point. The employee should also read the notes taken by the EDD interviewer. They are usually found on the "Record of Claim Status Interview" form. The employee should make sure what the interviewer wrote down from the interview is accurate. If any statements are inaccurate, the employee should point this out at the hearing.

(3) The employee should stay focused on the issue of the hearing. The "Notice of Determination" letter from the EDD states the issue. The issue is the reason for the disqualification. The ALJ is only interested in whether the employee is eligible or ineligible for unemployment benefits. The ALJ is not interested in events that occurred between the employee and former employer if they do not affect this issue.

Employees can get pamphlets from the Appeals Office such as "Unemployment Appeals" and "Twenty-Seven Ways To Avoid Losing Your Unemployment Appeal." Employees should also check if their Appeals Office has a library which employees may use. With these resources, employees should gather as much information as possible about the eligibility issue of the hearing.

(4) After the employee gets more information about the eligibility issue, the employee should think about what facts to tell or show the judge that support the employee's side of the story. The employee should make a list of these points to take to the unemployment hearing to help remember the information. The employee should also bring any documents that may be helpful to the employee's case to give to the ALJ at the hearing. Bring extra copies of the documents for the ALJ and for the employer. If the employee has witnesses, those witnesses should come to the hearing or be available to be questioned by telephone.

(5) At the hearing, the employee should give honest answers and direct all answers to the ALJ. The ALJ will often be evaluating whether the employee is believable or "credible." Employees should testify honestly, make good eye contact with the judge, and give a clear, logical description of what happened. The employee should avoid arguing with the former employer. The employee should remember to stick to the eligibility issue and remember to communicate the important facts that are on the employee's list.

Note: at the time of the writing of this book, the Office of Appeals is proposing use of the telephone for as many of its functions as possible. It is uncertain whether hearings may be held over the telephone in the near future.

HOW YOU LEFT YOUR LAST JOB

As discussed at the beginning of this section, the way a person leaves his or her last job affects whether the person is eligible for unemployment benefits. Some of the general principles are discussed below.

Layoffs

Q: If an employee is laid off for lack of work, is the employee eligible for unemployment benefits?

A: Yes, employees who are laid off for lack of work are eligible for benefits.

Striking Employees

Q: Are striking employees eligible for unemployment benefits?

A: Striking employees are generally not eligible for unemployment benefits. EDD refers to strike situations as "trade disputes."

Voluntary Quits

Q: If an employee quits a job, is the employee eligible for unemployment benefits?

A: Generally, when an employee quits a job, the employee is only eligible for benefits if the employee had "good cause."

Q: What is the legal definition of "good cause?"

A: "Good cause" is defined as a "real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action." In other words, a "reasonable person" in the same situation would have quit.

Q: What types of cases are "good cause quits?"

A: Most of the cases that qualify as "good cause quits" fall into three broad categories: danger to health, domestic circumstance, or intolerable working conditions.

Q: When is a danger to health a good cause for voluntarily quitting a job?

A: Many work situations could create a danger to an employee's health. In general, an employee must have a reasonable, good faith, and honest fear of harm to his or her health or safety from the work environment. A claim is likely to be viewed more favorably when the employee consulted with a physician or therapist before quitting and acted on the professional's advice that the work environment was harmful to the employee's health.

Q: What domestic reasons are good cause for voluntarily quitting a job?

A: Several domestic situations can create good cause for voluntarily quitting a job. The most common claims involve maintaining a marital relationship (such as a spouse's job transfer to another city), caring for a minor child, or the health, care or welfare of family members. Remember, however, that to collect unemployment benefits, the workers must be able and available to work.

Q: What intolerable working conditions are good cause for voluntarily quitting a job?

A: One example of an intolerable working condition is when an employee suffers a substantial wage reduction or downgrade in position. In such a case, there may be good cause for voluntarily quitting. However, ordinary job dissatisfaction or resentment toward a supervisor is not good cause.

Sexual harassment can present intolerable working conditions when the employee has complained and efforts to resolve the problem have been unsuccessful.

Good cause also includes an employer's refusal to pay overtime owed to the employee.

Q: Is quitting a job when an employee "expects" to be fired "good cause?"

A: No. Voluntarily quitting because an employee expects to be fired is not good cause. However, if the employee is clearly told to resign or be fired, good cause may be found.

Q: If an employee has good cause to quit a job, is the employee automatically eligible for unemployment insurance benefits?

A: Not necessarily. Usually, the EDD requires that the employee with good cause tried to solve the problem before quitting. For example, an employee with a

problem relating to health or working conditions generally must ask for a leave of absence or transfer before quitting. The employee has a duty to discuss the problem with the employer and try to work out some solution before quitting.

Termination

Q: If an employee is fired for poor job performance, is the employee eligible for unemployment benefits?

A: Generally, yes. Termination for unsatisfactory work performance, honest errors in judgment made in good faith, and even low levels of carelessness usually do not disqualify an employee from receiving unemployment benefits. However, when an employer terminates an employee for misconduct, the employee is ineligible for unemployment benefits.

Q: What is misconduct?

A: "Misconduct" under the unemployment insurance law is often different from what an employer might call "misconduct."

"Misconduct" is conduct that is in willful disregard of an employer's interests and that deliberately violates and disregards an employer's valid standards of behavior. "Misconduct" can also be high levels of carelessness, and it can be conduct for which an employee has been repeatedly warned.

"Misconduct" is generally not mere inefficiency or poor job performance, isolated instances of carelessness, or good faith errors in judgment.

Q: If the employer tells the EDD that the employee was fired for "misconduct," does that mean the employee is ineligible for benefits?

A: Not necessarily. Employers often misunderstand what misconduct is under unemployment law and incorrectly tell the EDD the employee was fired for "misconduct." This occurs many times when the reason for firing the employee

was something less than dishonesty or the high level of carelessness necessary to be considered misconduct by the Unemployment Appeals Board.

Sometimes the EDD gets enough information from the employer to realize that what occurred was not misconduct for purposes of Unemployment Insurance and finds the employee eligible for benefits. However, other times the EDD does not get enough accurate information and disqualifies the employee from receiving benefits. The employee must then appeal the EDD's decision by requesting a hearing.

Q: What are the most common forms of misconduct?

A: The most common forms of misconduct are insubordination, excessive tardiness or absenteeism, and dishonesty.

Q: What is insubordination?

A: Employee conduct that intentionally disregards an employer's interests and willfully violates the standard of behavior that an employer has a right to expect is insubordination and disqualifies an employee from receiving benefits.

Insubordinate actions include: (1) disobeying reasonable orders; (2) disputing, exceeding, or ridiculing authority; and (3) directing profanity at an employer or the employer's customers. Generally, insubordination requires that the employee committed the act more than once and received prior reprimands or warnings from the employer. However, a single act could be insubordination when it substantially harms the employer's business.

Q: When does tardiness or absenteeism constitute misconduct?

A: Repeated tardiness with multiple warnings shows substantial disregard for an employer's business interests and is misconduct. On the other hand, absenteeism or tardiness caused by a compelling reason, such as illness, is not misconduct. Even where an absence is justifiable, however, failure to notify an employer could be misconduct.

Q: What is an example of employee dishonesty that most likely will result in disqualification?

A: Many cases of dishonesty involve theft. Theft of an employer's property is misconduct and disqualifies the employee from receiving unemployment benefits.

OVERPAYMENT

Q: What is an "overpayment"?

A: An overpayment occurs when an employee receives benefits that the employee was not eligible to receive.

An overpayment may happen in several ways. For example, an overpayment may occur if the EDD accidentally sends out extra checks. An overpayment can occur if an employee chooses to collect benefits while an appeal is pending and the employee then loses the appeal. An overpayment can also occur through the fault of the employee. An employee is at fault when he or she makes a false statement to obtain unemployment benefits.

Q: Must an employee always repay an overpayment?

A: An employee who receives any overpayment must pay the overpaid amount back unless:

(1) the overpayment was not due to fraud, misrepresentation or willful nondisclosure by the employee; **and**

(2) the person received the overpayment without fault and would suffer serious financial hardship in paying it back.

FALSE STATEMENT

Q: What is a "false statement?"

A: False statement is deliberately giving untrue information to the EDD, either orally or on an application. A false statement can also be the deliberate failure to report information, such as failing to report that the employee has work or an offer to work while receiving unemployment benefits.

An employee can be disqualified from receiving unemployment benefits for making a false statement if:

(1) an employee makes a statement that the employee knows is untrue to obtain benefits; or

(2) the employee withholds important information to obtain benefits.

Q: What is the penalty for making a false statement?

A: If the employee's false statement does not result in the payment of benefits, the employee is disqualified from receiving unemployment benefits for a period from 2 to 15 weeks.

If the employee's false statement results in the payment of benefits (an "overpayment"), the employee is disqualified for 5 to 15 weeks and must repay the overpayment plus a penalty of 30 percent of the overpayment.

WRONGFUL TERMINATION

Employees often feel that they have been illegally or "wrongfully" terminated by their employers. Whether or not this is true depends upon the reasons behind the firing and upon the nature of the employment contract. The general rule in California is that employment contracts are "at will," meaning that

employers do not generally need "cause" or a good reason to terminate employees. However, there are many exceptions to the rule, as discussed later in this section.

Under California law, an employee is wrongfully terminated when:

(1) the termination violates public policy; and/or

(2) an employment contract is broken.

An employee can also challenge a termination because it violates anti-discrimination laws, family and medical leave laws, or other rights protected by state or federal law. **See Chapter 5, Employment Discrimination; Chapter 6, Family and Medical Leave; Chapter 7, Workplace Laws and Immigrant Employees; Chapter 8, Retaliation; or Chapter 9, Workplace Safety and Health.**

Termination

Q: Was there a termination?

A: If there was no termination, then there can be no wrongful termination claim. As a general rule, only firings are "terminations." However, in some rare instances, a resignation can be characterized as a "constructive termination."

Q: What is a "constructive" termination?

A: Constructive terminations occur when the work conditions are so intolerable that the employee feels compelled to resign. Constructive terminations are very difficult to prove. Examples include severe harassment or acts of violence by an employer.

Wrongful Termination

If there was a termination, then the next question is whether or not it was a wrongful or illegal termination. Not all terminations are illegal. The events and reasons behind the termination are very important in determining whether or not the firing was legal. As discussed above, only terminations that fit into one of the two main categories are considered "wrongful termination" by the courts. They are the following.

(1) Violation of Public Policy

Q: When has an employee been terminated in violation of public policy?

A: When an employer fires an employee for taking part in an activity that "benefits the general public," the employee may claim termination in violation of public policy.

Q: What does "benefits the general public" mean?

A: Activities that "benefit the public" must be recognized by laws or constitutional provisions. Examples of wrongful terminations in violation of public policy include terminations for whistleblowing activities, reporting health and safety violations to OSHA, violations of Labor Code provisions, refusal to commit perjury, or violations of constitutional rights. On the other hand, a termination for reporting a theft by a co-employee will probably not violate public policy. That reporting only benefits that specific employer, not the public at large.

(2) Breach of an Employment Contract

Q: What is an employment contract?

A: An employment contract is an agreement between the employee and the employer. There are two types of employment contracts: "express" contracts and "implied" contracts.

Q: What is an express contract?

A: An express contract is a written or oral employment agreement. Most express contracts vary in their terms and protections, so careful analysis of the precise wording of the contract is necessary. Employment contracts may specify "just cause" for firings or "progressive discipline" procedures (that is, disciplinary steps that must be taken before an employee can be fired).

Q: What is an implied contract?

A: An implied contract may exist when an employer's acts make the employee reasonably believe that she or he can only be fired for "just cause or good cause." Whether or not there is an implied contract depends upon the particular employment situation. In deciding whether or not there is an implied contract to terminate an employee only for just cause, the courts will consider things such as how long the employee has been working, what the employer's personnel policies and practices are, and statements made by the employer to assure the employee that she or he would continue to be employed unless there was cause for termination.

Q: If there is an employment contract (express or implied), was the contract breached?

A: If an employment contract exists, it may be breached or broken if the employee is fired without "just cause" (also known as "good cause"). In determining whether there was good cause for termination, the courts will balance

the employer's interest in operating the business efficiently against the employee's interest in keeping the job. Examples of just cause are unsatisfactory work performance, chronic absenteeism or lateness, insubordination, and dishonesty.

Q: What is "at will" employment?

A: An employer may terminate "at will" employees without good cause. If there is no employment contract that requires good cause, then the employee is generally considered to be "at-will." "At-will" employees have little, if any, job security beyond the basic protections found in state and federal law.

Q: Can I sue for breach of contract if I am unionized and the employer didn't follow the union contract?

A: Generally, unionized employees will need to file a grievance under the union contract instead of filing a wrongful termination lawsuit in court.

What Employees Can Do

Q: Does the California Labor Commissioner's Office handle wrongful termination claims?

A: Generally, no. The Labor Commissioner only handles special types of terminations, such as termination for filing OSHA complaints or termination due to sexual orientation discrimination. Otherwise, the Labor Commissioner will hear a claim for an employee's non-payment of wages or late payment of wages, but the agency will not rule on the legality of the firing itself.

Q: Where does an employee bring a wrongful termination claim?

A: Generally, there is no government agency that handles wrongful termination claims, so the employee must file a lawsuit in court. The employee should either contact an attorney or, if the amount of money due is below $5,000, file in small

claims court. Lawsuits for violations of public policy, discussed above, must be filed within one year of the termination. Breach of contract claims must be filed in court within two years for oral contracts and four years for written contracts.

Note, however, that if an employee has a discrimination claim or a claim for wages due, such a claim can be filed with the appropriate government agency, such as the EEOC, DFEH, or California Labor Commissioner.

Often, public employees cannot go to court with wrongful termination claims unless they have first filed claims with the department or agency itself. This type of procedure is called a "claim against a public entity" or a "tort claim." (See California Government Code § 911.2.) The deadline for filing such a claim is generally six months, but the rules of the particular public agency involved should be carefully reviewed.

Q: Can I sue my employer for being "wrongfully demoted?"

A: In 1995, the California Supreme Court held that a employee could sue for being unfairly demoted. While the courts may recognize this as a valid claim, the lost wages the employee could get would usually be only the difference in wages between the original position and the position to which the employee was demoted. It often will be difficult to find a lawyer to represent a employee in a wrongful demotion suit. If the damages are less than $5,000, the employee can go to small claims court.

EMPLOYER REFERENCES

California Law: Labor Code §§ 1050 to 1054; Civil Code §§ 44 to 47.

Q: What may a former employer say to a prospective employer who calls for a reference?

A: A former employer may say anything to a prospective employer concerning the job performance or qualifications of a former employee so long as the statements are true and accurate.

Many employees falsely believe that former employers may not give out negative reference information, but this is not true. No matter how damaging the statement, if the statement is true, it is legal.

Q: Why do many employers refuse to give any information or only respond with the former employer's job title, dates of employment, and salary?

A: While employers may truthfully answer any questions from inquiring prospective employers, they are not required to do so. Employers often fear that they might be sued by a former employee or a subsequent employer for giving reference information that is considered inaccurate or misleading. To protect themselves from potential lawsuits, many employers have general policies not to give references or only to disclose the former employee's job title, dates of employment, and salary.

Q: What types of information are employers not allowed to give to prospective employers who call for a reference?

A: Former employers are not allowed to make false statements or malicious misrepresentations about a former employee's job performance or qualifications. Employees whose former employers make such statements may have legal claims against the employer. These legal claims include defamation, invasion of privacy, blacklisting, and retaliation.

Q: If a former employer violates the law when responding to prospective employer inquiries, what can the employee do?

A: First, the employee should try to get the employer to stop. Employees should contact a local law school clinic or legal services office to see if assistance is available. If assistance is not available, the employee could write a letter to the former employer stating the law and asking that the employer follow the law. Although employees often want to sue the former employer, these types of cases can be very hard to prove. Sometimes, simply persuading the former employer to stop the illegal conduct helps the employee more.

AGENCY/COURT	TYPES OF CLAIMS	JURISDICTION	DEADLINES	RELIEF
Department of Fair Employment and Housing (DFEH) 30 Van Ness Avenue Suite 3000 San Francisco, CA 94102 (415) 557-2005 Agency claim must be filed before an employee can go to court.	Employment discrimination under the Fair Employment and Housing Act based on: race, color, sex (including pregnancy), religion, national origin, age, marital status, medical condition or physical or mental disability. California Family Rights Act	Discrimination: 5+ employees. Harassment: 1+ employees. Mental disability: 15+ employees. Family leave: (1) 50 + employees within 75 miles of work site; (2) employee worked for the employer for at least one year and worked at least 1,250 hours during the year before leave.	File charge within one year of unlawful practice. One year to file suit in court after receiving Right to Sue letter from DFEH.	After a DFEH investigation, the Fair Employment and Housing Commission (FEHC) or the court may award relief. If the FEHC holds a hearing, it may order hiring, reinstatement, back pay, and injunctive relief. The FEHC may also award actual damages up to $50,000 and/or a civil penalty up to $25,000. The court may order hiring, reinstatement, back pay, and injunctive relief. The court may also order attorney's fees and any amount of compensatory damages and punitive damages.
Equal Employment Opportunity Commission (EEOC) 901 Market Street Suite 500 San Francisco, CA 94103 (415) 356-5100 Agency claim must be filed before an employee can go to court. Exception: employees can go either to the EEOC or directly to court with an Equal Pay Act complaint.	Employment discrimination under Title VII based on: race, color, sex (including pregnancy), religion, or national origin. ADA: physical or mental impairment. Equal Pay Act: pay discrimination (men vs. women). ADEA: age discrimination (40 or over).	Race, color, sex, religion or national origin: 15+ employees. Physical or mental impairment: 15+ employees. Equal Pay Act: employees covered by the Federal Fair Labor Standards Act. Age discrimination: 20+ employees.	File charge within 300 days of unlawful practice. **Special rules apply for federal government employees.** 90 days to file suit in court after receiving Right to Sue letter from EEOC.* **See Chapter 5 for special filing rules under the ADEA.**	After an EEOC investigation, the court may order relief. The court may order hiring, reinstatement, back pay, and injunctive relief. In cases of intentional discrimination under Title VII or the ADA, the court may also award compensatory and punitive damages with certain limits depending upon the size of the employer.

Note: San Francisco addresses are provided where available. Agencies and courts listed may have locations in your area.
*** Consult your attorney about whether your claim should be filed in federal court or state court.**

AGENCY/COURT	TYPES OF CLAIMS	JURISDICTION	DEADLINES	RELIEF
California Department of Industrial Relations, Division of Labor Standards Enforcement, Labor Commissioner 30 Van Ness Avenue Suite 3400 San Francisco, CA 94102 (415) 557-7878 Agency claim does not need to be filed. Employee can go directly to court if the court jurisdictional requirements are satisfied.*	Wage and hour claims. Access to personnel file. Violations of the California Labor Code: sexual orientation discrimination, Cal/OSHA retaliation, jury duty discrimination, political discrimination, lie detector law. California Equal Pay Act.	All employees covered by the California Labor Code. Exceptions: the Labor Commissioner generally does not hear claims for public employees and claims that require interpretation of a union agreement containing an arbitration clause.	Unpaid wages or overtime: within 3 years, unless wage claim is based on an oral contract (within 2 years) or a written contract (within 4 years). Labor Code claims of discrimination or retaliation: within 30 days of the violation. Nonwillful violation of equal pay: within 2 years after incident occurred. Willful violation of equal pay: within 3 years after incident occurred.	Recovery of back wages, waiting time pay, and interest. For discrimination and retaliation claims, lost wages, lost benefits, plus reinstatement and other equitable relief as appropriate under the circumstances. For California Equal Pay Act claims, Labor Commissioner may award wages and interest.
U.S. Department of Labor 455 Market, Suite 800 San Francisco, CA 94105 (415) 744-5590 Agency claim does not need to be filed. Employee can go directly to court if the court jurisdictional requirements are satisfied.*	Wage and hour claims Federal Family and Medical Leave Act (FMLA) Federal OSHA retaliation	All employees covered by the Federal Fair Labor Standards Act. Federal family and medical leave: (1) 50 + employees within 75 miles of work site; (2) employee worked for the employer at least one year and worked at least 1,250 hours during the year before leave.	Nonwillful violation: within 2 years after incident occurred. Willful violation: within 3 years after incident occurred. Federal OSHA retaliation: within 30 days	For wage claims, either the Department of Labor or the individual may sue for wages, overtime compensation, and injunctive relief. For FMLA claims, either the Department of Labor or the individual can sue for wages, benefits, actual damages, interest, liquidated damages, equitable relief (court orders to prevent violations), attorney's fees, and costs.

Note: San Francisco addresses are provided where available. Agencies and courts listed may have locations in your area.
*** Consult your attorney about whether your claim should be filed in federal court or state court.**

AGENCY/COURT	TYPES OF CLAIMS	JURISDICTION	DEADLINES	RELIEF
Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices U.S. Department of Justice PO Box 27728 Washington, DC 20038-7728 (800) 255-7688 or (202) 616-5594	IRCA claims: national origin, citizenship, and immigration status discrimination (including document abuse).	4-14 employees. Over 14 employees for issues not covered by Title VII.	Charge filed within 180 days of date discrimination occurred	Can include hiring, reinstatement, backpay, attorney's fees, personnel training, correct personnel records, lift restrictions of work assignments, fines paid to government.
California Department of Industrial Relations, Division of Occupational Safety & Health, San Francisco District Office 1390 Market St., Suite 718 San Francisco, CA 94102 (415) 557-1677	Safety, health and sanitation under Occupational Safety and Health Act (Cal/OSHA)	Most California workplaces. Exceptions include federal government agencies and domestic workers in private households. Workers should contact Cal/OSHA if unsure of jurisdiction.	Employees may make a complaint and ask Cal/OSHA to inspect their workplace at any time that he or she believes there are unsafe working conditions.	Cal/OSHA should inspect the workplace within 3-14 days of the complaint. Complainant has the right to confidentiality. An employer may be fined for violating Cal/OSHA. A complaint of retaliation for making a complaint to Cal/OSHA or refusing to do hazardous work can be filed with the Labor Commissioner within 30 days.
Employment Development Department 3120 Mission Street San Francisco, CA (415) 695-6500 Office of Appeals 185 Berry Street, Suite 200 San Francisco, CA 94107 (415) 357-3801	Unemployment insurance and State Disability Insurance (State Disability Insurance is a specialized area beyond the scope of this manual).	California private and public employees.	If claim for unemployment insurance is denied, written request for appeal may be filed within 20 days of the date of the Notice of Determination letter.	

Note: San Francisco addresses are provided where available. Agencies and courts listed may have locations in your area.
*** Consult your attorney about whether your claim should be filed in federal court or state court.**

AGENCY/COURT	TYPES OF CLAIMS	JURISDICTION	DEADLINES	RELIEF
Superior Court* County of San Francisco 633 Folsom (temporary) San Francisco, CA 94107 (415) 554-5150 For claims at least $25,000. Municipal Court City of San Francisco 633 Folsom Street, Room 205 (temporary) San Francisco, CA 94107 (415) 554-4532 For claims up to $25,000. Small Claims Court 575 Polk Street San Francisco, CA 94102 (415) 554-4565 For claims up to $5,000	Discrimination claims under Title VII or Fair Employment and Housing Act: only after filing with DFEH or EEOC. Wage and hour claims: may be brought directly to court; not required to file with agency. California Equal Pay Act Wrongful termination	Discrimination claims under Title VII or Fair Employment and Housing Act: jurisdiction exists after issuance of a "right to sue" letter. Claims may be filed in the court in the area where the violation occurred.	After receipt of a "right to sue" letter, lawsuit must be filed within 1 year for DFEH and 90 days for EEOC. Unpaid wages or overtime: within 3 years, unless wage claim is based on an oral contract (within 2 years) or a written contract (within 4 years). Nonwillful violation of equal pay: within 2 years after incident occurred. Willful violation of equal pay: within 3 years after incident occurred. Wrongful termination: 1 year for termination against public policy; 2 years for oral contract; 4 years for written contract.	See remedies under DFEH and EEOC. For state wage claims, court may award back pay, waiting time pay, attorney's fees, and interest. For California Equal Pay Act claims, court may award wages and interest and may double them. The court can also award attorney's fees. Wrongful termination: back pay, compensatory and punitive damages.
United States District Court for the Northern District of California* 450 Golden Gate Avenue San Francisco, CA 94102 (415) 522-2000	Wage and hour claims Federal Family and Medical Leave Act Employment discrimination under Title VII, ADA, Equal Pay Act, ADEA	All employees covered by the Fair Labor Standards Act. Federal family and medical leave: (1) 50+ employees within 75 miles of work site; (2) employee worked for the employer at least one year and worked at least 1,250 hours during the year prior to leave. Title VII, ADA, ADEA: jurisdiction requires agency "Right to Sue" letter.	Nonwillful violation: within 2 years after incident occurred. Willful violation: within 3 years after incident occurred. EEOC claims: 90 days to file suit in court after receiving Right to Sue letter. EPA: nonwillful violation of equal pay: within 2 years after incident occurred; willful violation of equal pay: within 3 years after incident.	See remedies under U.S. Department of Labor. See remedies under EEOC.

Note: San Francisco addresses are provided where available. Agencies and courts listed may have locations in your area.
*** Consult your attorney about whether your claim should be filed in federal court or state court.**

RESOURCES

Castle Publications Manuals

Simmons, Employment Discrimination and EEO Practice Manual for California Employers

Simmons, Wage and Hour Manual for California Employers

Simmons, Family and Medical Leave Manual for California Employers

Simmons, Wrongful Discharge and Employment Practices Manual

Simmons, Employers' Guide to the Americans with Disabilities Act

The employer manuals by Richard J. Simmons are available from Castle Publication, Ltd., P.O. Box 580, Van Nuys, CA, 91408.

In law libraries

Wilcox, California Employment Law, Matthew Bender & Co., Inc.

Rossein, Employment Discrimination, Clark Boardman Callaghan.

O'Brien, California Unemployment and Disability Compensation Programs.

At various advocacy agencies

Employment Law Center, Legal Aid Society of San Francisco, Unemployment Claims Appeals.

National Immigration Law Center, Los Angeles, Worker's Rights Curriculum, Instructor's Handbook.

Baker & McKenzie, San Francisco, Handbook on Undocumented Workers (1992).

Center for Labor Research & Education, Berkeley, California Worker's Rights (2nd ed., 1994). This can be ordered from the Center for Labor Research and Education at 2521 Channing Way, No. 5555, Berkeley, California 94720-5555.