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Selected Topics in Labor and Employment Law

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SELECTED TOPICS IN LABOR AND EMPLOYMENT LAW

A. Interviewing and hiring

1. General considerations

a. Basic principles

- i) Under a number of federal and state laws, including Title VII of the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), the Americans with Disability Act (“ADA”), and the California Fair Employment and Housing Act (“FEHA”), it is unlawful for an employer to fail or refuse to hire or employ any individual who is a member of a class protected by the statutes or to use discriminatory criteria in selecting or rejecting employees for employment.
- ii) In general, California law is applicable to more employers than federal law. *E.g.*, Title VII applies to employers with 15 or more employees; FEHA applies to employers with 5 or more employees.

b. Disparate impact

- i) Selection criteria, even if outwardly neutral, such criteria may become discriminatory if shown to have a “disparate impact” on a protected class and if the criteria cannot be justified on grounds of business necessity (*e.g.*, a “no beard” policy may discriminate against African-American men, because of a skin condition that affects them in high numbers and which can only be alleviated by growing a beard).

2. Preemployment applications and interviews

- a. Inquiries subject to close scrutiny: Inquiries that attempt to obtain information about protected characteristics such as race, religion, sex, sexual orientation, marital status, political affiliation, disability, national origin or disability are inherently suspect and subject to close scrutiny.
- b. Specific areas of inquiry
 - i) Age-related inquiries (*e.g.*, “date of birth”) are not per se unlawful, but are subject to close scrutiny. *See generally* 29 C.F.R. § 1625.5.

- (a) The ADEA permits the employer to notify the employee that the information is sought for a non-discriminatory purpose.
 - (b) Age-related information may be required by law for record-keeping purposes.
 - (c) In other instances, age-related information may be required, but should be obtained post-employment and maintained separately from the employee's personnel file.
- ii) Citizenship and national origin
- (a) It is unlawful to discriminate against an applicant legally permitted to work in the U.S. based on the applicant's citizenship or national origin. *See* 8 U.S.C. § 1324b.
 - (b) However, employers are required to request and obtain information establishing the applicant's identity and legal right to work on the I-9 form.
 - (c) To avoid possible discrimination claims, it is best to inform applicants that employment is contingent on proof of the legal right to work and request the I-9 be completed after the employment offer has been made.
- iii) Criminal records
- (a) Federal law does not expressly prohibit consideration of criminal records, but such inquiries might violate Title VII if they have a disparate impact on protected groups.
 - (b) Except in a specified instances (*e.g.*, applicants for peace officer positions), California law expressly prohibits requesting information regarding arrests that did not lead to conviction or pertaining to referral to or participation in a pretrial or post-trial diversion program. *See* Cal. Labor Code § 432.7(a).
- iv) Marital status
- (a) California law prohibits discrimination in employment based on marital status.

- (i) It is generally unlawful to request information regarding marital status or maiden names.
 - (ii) It is permissible to ask the applicant if he/she has ever used another name or if the applicant's spouse is employed by the employer, so long as the inquiries are not used for an employment decision based on marital status.
- (b) *See* Cal. Gov't Code § 12940(a); 2 Cal. Code Reg. §§ 7292.4(a)-(c).
- v) Membership in organizations or participation in activities
 - (a) Inquiries regarding membership in organizations or participation in activities are not prohibited.
 - (b) In fact, the California Fair Employment and Housing Commission ("FEHC") requires consideration of volunteer activities in determining whether an applicant is qualified for a position if prior experience is a job qualification. *See* 2 Cal. Code Reg. § 7291.0(d).
 - (c) However, such inquiries may reveal that the applicant is a member of a protected class and a refusal to hire could lead to claims of discrimination.
- vi) Pregnancy and family care obligations
 - (a) The ADA prohibits discrimination against an applicant who must care for a family member with a disability. *See* 29 C.F.R. App. § 1630.8. Presumably, therefore, inquiries to obtain information about such a family member would be unlawful.
 - (b) Under FEHC regulations, inquiries regarding pregnancy, birth control, childbearing or familial responsibilities are prohibited unless they relate to a specific and relevant working condition of the job. *See* 2 Cal. Code Reg. § 7290.9(b)(3).

vii) Religion

- (a) Employers must make reasonable accommodation for an employee's religious practices. *See* 42 U.S.C. § 2000e(j); Cal. Gov't Code § 12940(l).
- (b) Therefore, a failure to hire an employee needing a religious accommodation could give rise to a discrimination claim if the employer makes inquiries that would disclose the need for an accommodation prior to making an offer of employment.
- (c) To avoid discrimination claims to the extent possible, an employer who believes he/she needs to know the employee's availability during specific working hours prior to employment should state the hours of work, offer the position and ask if the employee is available those hours, inquire into the need for a religious accommodation and then determine whether such an accommodation is feasible within the parameters set by the EEOC and FEHC.

viii) Sex

- (a) Under the EEOC guidelines, a preemployment inquiry that requests "male" or "female" or title (*e.g.*, Mr., Mrs., Ms., Miss) are permissible as long as it is made in good faith for a nondiscriminatory purpose. Similarly, any inquiry that suggests a limitation or discrimination based on sex is unlawful unless based on a bona fide occupational qualification. *See* 29 C.F.R. § 1604.7.
 - (b) FEHC regulations prohibit inquiries regarding sex on an application or preemployment questionnaire unless justified by business necessity or for record keeping purposes. *See* 2 Cal. Code Reg. § 7290.9(b)(2).
- c. **Practice tip:** employers should carefully review applications and interview protocols to eliminate unnecessary inquiries that may expose them to liability.
- d. **Practice tip:** avoid promises or statements that could be construed to mean that the employee is entitled to continued employment

unless cause exists for termination (*see* discussion in § E.2.b.iii), below).

- i) Review hiring materials and employee handbooks to eliminate language that could create the impression of continued tenure.
- ii) Employment offer letters should emphasize “at-will” employment.

B. Independent contractors or employees?

1. Differences between independent contractors and employees

- a. Independent contractors are not subject to state or federal wage and hour laws;
- b. Employers need not deduct payroll taxes from independent contractor compensation or provide independent contractors with employment benefits; *but*
- c. Independent contractors are not relegated to the workers’ compensation system for job-related injuries and may sue the employer for damages. *See* Cal. Labor Code §§ 3600, 3602(c).

2. Tests for determining independent contractor or employee

- a. “Common law” test: Under the “common law” test, the issue is whether and to what extent the hiring party controls the manner and means by which the work is accomplished. Factors to be considered – no one of which is determinative – include:
 - i) The degree of skill required for the task;
 - ii) Who provides the instrumentalities and tools to perform the work;
 - iii) Whether the hired party works at the hiring party’s location;
 - iv) The duration of the relationship between the parties;
 - v) Whether the hiring party has the right to assign additional projects or tasks to the hired party;
 - vi) The extent to which the hired party has discretion over when and how long to work;

- vii) The method of payment;
 - viii) The hired party's role in hiring and paying assistants;
 - ix) Whether the work assigned is part of the hiring party's regular business;
 - x) Whether the hiring party is in business;
 - xi) Whether the hired party has been provided benefits normally available only to employees; and,
 - xii) The tax treatment of the hired party.
 - xiii) *See, e.g., Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 323-324 (applying common law test to determine employee status for ERISA purposes); *Barnhart v. New York Life Ins. Co.* (9th Cir. 1998) 141 F.3d 1310, 1313 (applying common law test to determine employee status under ERISA and the Age Discrimination in Employment Act); *S.G. Borello & Sons, Inc. v. Department of Indus. Relations* (1989) 48 Cal.3d 341, 350-351; Restatement 2d, *Agency*, § 220.
- b. "Common law plus" test:
- i) The courts presume the legislature intended the "common law" test to be applied, but in performing the analysis will give weight to the remedial purposes of the particular legislation at issue.
 - ii) *See, e.g., Rutherford Food Corp v. McComb* (1947) 331 U.S. 722, 728-731 (determining employee status under FLSA); *S.G. Borello & Sons, Inc., supra*, 48 Cal.3d at 352-355 (determining employee status for purposes of Workers' Compensation Act).
- c. Statutory employees
- i) In a number of instances, a statute will specifically define "employee" for purposes of the applicability of the particular law.
 - ii) *See, e.g., Insurance Contributions Act* (26 U.S.C. § 3121(d)); Cal. Unempl. Ins. Code § 621; Cal. Labor Code §§ 3351-3352.

3. Consequences of improper classification as independent contractors
 - a. Misclassification of employees as independent contractors will result in the employer being liable for payroll taxes, penalties and interest; and,
 - b. Could result in payment of wages, including overtime pay, and benefits that would have been paid had the employee been properly classified, as well as statutory penalties under state law.
4. Recent California laws regarding independent contractors
 - a. Independent contractor reporting law
 - i) Employers required to file Federal form 1099-MISC for independent contractors must file form DE542 with the California Employment Development Department, which requests certain information about both the employer and the independent contractor.
 - ii) Form DE542 must be filed within 20 days after making payments over \$600 or entering into a contract which involves more than \$600 in any calendar year.
 - iii) Penalties may be imposed in the amount of \$24 for each failure to report and \$490 if the failure results from a conspiracy between the employer and contractor.
 - b. Labor Code § 2810
 - i) The statute prohibits a company from entering into any contract for labor or services with a construction, farm labor, garment, janitorial or security guard contractor if the company knows or should have known that the contract did not contain sufficient funds to insure that the contractor complied with all local, state and federal employment laws and regulations.
 - ii) There is a “rebuttable presumption” that a company is in compliance with the statute if the contract is a written document and contains each of the following provisions (and any others that the Labor Commissioner may prescribe):
 - (a) The name, address, and telephone number of the company and the contractor through whom the labor or services are to be provided;

- (b) A description of the labor or services to be provided and a statement of when those services are to be commenced and completed;
 - (c) the employer identification number for state tax purposes of the construction, farm labor, garment, janitorial, or security guard contractor;
 - (d) The workers' compensation insurance policy number and the name, address, and telephone number of the insurance carrier of the construction, farm labor, garment, janitorial, or security guard contractor;
 - (e) The vehicle identification number of any vehicle that is owned by the contractor and used for transportation in connection with any service provided, the number of the vehicle liability insurance policy that covers the vehicle, and the name, address, and telephone number of the insurance carrier;
 - (f) The address of any real property to be used to house workers in connection with the contract or agreement;
 - (g) The total number of workers to be employed under the contract or agreement, the total amount of all wages to be paid, and the date or dates when those wages are to be paid;
 - (h) The amount of the commission or other payment made to the contractor for services under the contract or agreement;
 - (i) The total number of persons who will be utilized under the contract as independent contractors, along with a list of the current local, state, and federal contractor license identification numbers that the independent contractors are required to have under local, state, or federal laws or regulations; and,
 - (j) The signatures of all parties, and the date the contract or agreement was signed.
- iii) A company that fails to obtain any of the required information is presumed to know the information.

- iv) The company must retain a copy of the written agreement for at least 4 years after its termination.
- v) The statute does not apply to any company that is party to a collective bargaining agreement that covers the workers who are providing the services.
- vi) Penalties for non-compliance
 - (a) Employees “injured” by a company’s failure to comply with the statute may sue for:
 - (i) The greater of actual damages or \$250 per employee per violation for the initial violation and \$1000 for each subsequent violation; and
 - (ii) Injunctive relief.
 - (b) The successful employee in any such action may also recover attorneys’ fees and costs.

C. Overtime

1. California overtime rules and exemptions

a. General rule

- i) Unless an employee is exempt (*see* § c. below), work in excess of 8 hours in one day, work in excess of 40 hours in one workweek and the first 8 hours of the 7th day of a single workweek must be compensated at 1.5 times the employee’s regular rate of pay.
- ii) Work in excess of 12 hours in one day or in excess of 8 hours on the 7th day of a single workweek must be compensated at twice the employee’s regular rate of pay.
- iii) The regular rate of pay for a full-time salaried employee entitled to overtime is computed as 1/40th of the weekly salary.
- iv) *See* Cal. Labor Code § 510; 8 Cal. Code Regs. §§ 11010(3)-11150(3).

b. Specific rules for certain occupations

- i) Employees covered by collective bargaining agreements that provide for wages, hours of work and working conditions of employees, that provide for premium wage rates for all overtime hours and that provide for a regular hourly wage of not less than 30% more than the state minimum wage are not subject to the overtime rules. *See* Cal. Labor Code § 514;
- ii) Ski resorts may establish a 48 hour workweek in ski season, provided they pay 1.5 the employee's regularly hourly wage for hours worked in excess of 48 hours in a workweek or 10 hours in one day. *See* 8 Cal. Code Regs. § 11100(3)(K).
- iii) Camp counselors, personal attendants, employees with responsibility for children and others in 24-hour residential care facilities and resident managers of some homes for the elderly have less stringent overtime requirements. *See* 8 Cal. Code Regs. § 11050(3)(E).
- iv) Miners and smelting employees are subject to special overtime rules. *See* Cal. Labor Code §§ 750-752.5.
- v) Agricultural employees are entitled to 1.5 times their regularly hourly rate for work performed in excess of 10 hours in one day and for the first 8 hours of the 7th consecutive day in any workweek and to twice their regularly hourly rate for work over 8 hours of the 7th consecutive day of a workweek. *See* 8 Cal. Code Regs. § 11140(3)

c. Exemptions from overtime requirements

- i) The California Wage Orders generally provide for exemptions from overtime for professional, administrative and professional employees who meet both a salary test and a duties test.
- ii) Salary test: To be exempt from overtime requirements an employee must earn a monthly salary that is at least twice the state minimum wage (currently \$6.75/hr.) for full-time employment (defined as 40 hours per week).

iii) Duties tests:

(a) Executive employees are exempt if:

- (i) Their duties and responsibilities involve management of the enterprise or one of its departments or divisions;
- (ii) They customarily direct the work of two or more employees;
- (iii) They have the authority to hire and fire other employees or their recommendations for hiring, firing, promoting or transferring other employees are given particular weight;
- (iv) They customarily and regularly exercise discretion and independent judgment as part of their duties; and,
- (v) They are engaged in executive functions at least 50% of the time.

(b) Administrative employees are exempt if:

- (i) Their duties and responsibilities involve either:
 - (1) The performance of office or non-manual work directly related to management or general business operations of the employer's business or customers; or
 - (2) The performance of administrative functions within a school or educational institution in work directly related to academic instruction or training;
 - (3) They customarily and regularly exercise discretion and independent judgment;
 - (4) They regularly and directly assist the owner or a bona fide executive or administrative employee; or

- (5) They perform under only general supervision work that requires special training, experience or knowledge; or
- (6) They perform special assignments and tasks under only general supervision; and,
- (7) They are engaged in administrative functions at least 50% of the time.

(c) Professional employees are exempt if:

- (i) They are licensed by the state and are primarily engaged in one of the following licensed professions: law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting; or
- (ii) They are engaged in work commonly understood to be a “learned or artistic profession,” *i.e.*:
 - (1) Work requiring advanced training and study in science or other specialized endeavors (other than general education or apprenticeship); or
 - (2) Work that entails originality and creativity in an artistic endeavor and that entails invention, imagination or talent of the employee or work that is an essential part of or necessarily incident to any of such work; and
 - (3) Work that is predominantly intellectual and varied and whose output cannot be standardized in relation to any given period of time;
- (iii) They customarily and regularly exercise discretion and independent judgment in performance of the foregoing duties.

- (d) Specific occupational rules
 - (i) Pharmacists and registered nurses are *not* exempt under the professional exemption, but may be individually exempt under the administrative or executive exemptions. *See* Cal. Labor Code §§ 515(f), 1186.
 - (ii) Physicians and surgeons are exempt if they earn as much or more than a minimum hourly rate set by the Division of Labor Statistics and Research (“DLSR”) (unless they are interns or residents or covered by a collective bargaining agreement). *See* Cal. Labor Code § 515.6.
 - (iii) Certain highly skilled computer-related professionals are exempt if they meet both a duties test and earn at or above a DLSR prescribed minimum. *See* Cal. Labor Code § 515.5.
 - (iv) Outside salespersons are exempt if:
 - (1) They are 18 years or older;
 - (2) They regularly spend more than half their time away from the employer’s places of business; and,
 - (3) They sell tangible or intangible items or obtain orders or contracts for products, services or use of facilities. *See* Cal. Labor Code § 1171.
 - (v) Irrigators are exempt if they devote more than half of their working time engaged in irrigation. *See* 8 Cal. Code Regs. § 11140(3)(C).
- iv) If an employee spends the majority of her time performing two or more exempt functions, the employee will be considered exempt even if she does not spend more than 50% of her time on any single exempt function.

2. Federal overtime rules and exemptions

a. General rule

- i) Unless exempt, employees must be paid overtime compensation of 1.5 hours the regular hourly rate for each hour of work in excess of 40 hours in a workweek. *See* 29 U.S.C. § 207(a)(1).
- ii) Any executive, administrative or professional employee, even if employed in an occupation that would otherwise be exempt from overtime requirements, who earns less than \$455 per week in salary (\$23,660 annually) is deemed to be non-exempt. *See* 29 C.F.R. App. §§ 591.100, 541.200 and 541.300.

b. Exemptions

- i) Executive employees are exempt if:
 - (a) They earn above the statutory minimum (see above).
 - (b) Their primary duty (*i.e.*, the principal, main or major or most important duty) is management of the enterprise or a department or division thereof.
 - (c) They customarily and regularly (*i.e.*, more often than occasional) direct the work of two or more other employees; and,
 - (d) They have the authority to hire and fire employees or their suggestions and recommendations about hiring and firing are given particular weight; or
 - (e) They own at least 20 percent of the business in which they are employed and are actively engaged in its management.
- ii) Administrative employees are exempt if:
 - (a) They earn above the statutory minimum (see above).
 - (b) Their primary duty is office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and,

- (c) Their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance in the business operations.
- iii) Professional employees are exempt if:
- (a) They earn above the statutory minimum (see above).
 - (b) Their primary duty is work:
 - (i) Requiring advanced knowledge (*i.e.*, work which is primarily intellectual in character and consistently requires the exercise of discretion and judgment) in a field of science or learning usually acquired by a prolonged course of specialized intellectual instruction; or
 - (ii) Requiring invention, imagination, originality or talent in a recognized artistic or creative endeavor; or
 - (c) They hold a valid license or certificate in the practice of law or medicine or any of their branches and are actively engaged in the practice.
- iv) Computer-related professionals are exempt if:
- (a) They earn either above the statutory minimum on a salary basis (see above) or at least \$27.63 per hour on an hourly basis.
 - (b) They are employed as a computer systems analyst, computer programmer, software engineer or in another similar occupation.
 - (c) Their primary duty consists of:
 - (i) The application of systems analysis techniques and procedures, including consulting with users to determine system needs and requirements;
 - (ii) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs;

- (iii) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - (iv) Some combination of the above.
 - v) Outside salespersons are exempt if:
 - (a) Their primary duty is:
 - (i) Making sales; or
 - (ii) Obtaining orders or contracts for services for the use of facilities; and
 - (b) They are customarily and regularly employed engaged away from the employer's place or places of business in performing the primary duty.
 - vi) The FLSA also identifies a host of other specific occupations that are exempt from overtime requirements, including certain agricultural workers, employees of certain amusement and recreational facilities, motion picture theatre employees, certain radio and television station employees and resident domestic service employees among others.
 - vii) *See generally* 29 U.S.C. §§ 207, 213, 214; 29 C.F.R. App. §§ 541.100 *et seq.*, 541.200 *et seq.*, 541.300 *et seq.*, 541.400 *et seq.*, 541.500 *et seq.*
- c. "Belo" contracts
 - i) An employee, covered by an individual employment or collective bargaining agreement, who has duties that necessitate irregular hours or work, may be employed more than 40 hours if the contract:
 - (a) Was entered into before performance of the work;
 - (b) Specifies a regular rate of pay at least equal to the federal minimum wage;
 - (c) Provides for payment of one and half times the specified rate for all hours worked in excess of 40; and

- (d) Provides a weekly guaranty of pay for not more than 60 hours based on the specified rates.
- ii) The employees are entitled to the guaranteed rate every week, even if the employee works fewer hours than as specified in the agreement.
- iii) *See* 29 U.S.C. § 207(f); 29 C.F.R. §§ 778.402-414; *Walling v. A.H. Belo Corp.* (1942) 316 U.S. 624.

3. Compensatory time off (“CTO”)

a. California law

- i) Rules are complex
- ii) CTO applies only to non-exempt employees in certain occupations/industries.
- iii) Where applicable, CTO is permitted if
 - (a) requested by the employee in writing, in advance;
 - (b) the employee is regularly scheduled to work no less than 40 hours per week;
 - (c) CTO is provided equivalent to overtime pay rates (e.g., 1.5 hours of CTO for 9th hour of work);
 - (d) CTO policy is set forth in a written agreement;
 - (e) CTO is capped at 240 hours;
 - (f) employee is paid for accrued, but unused CTO;
 - (g) employee is permitted to use CTO within a reasonable time after request;
 - (h) employer maintains adequate records.
- iv) *See* Cal. Labor Code § 204.3.
- v) Consult a lawyer before attempting to implement CTO.

b. Federal law

- i) CTO in lieu of overtime pay is generally not permitted under federal law for non-exempt employees in the private sector.

- ii) However, because overtime is paid only for hours in excess of 40 hours in a week, the employer can offer time off to an hourly employee who has worked additional hours on a given day in the week so that the employee does not exceed a total of 40 hours of work during that week.
- iii) Special rules permit CTO for governmental employees.
- iv) *See* 29 U.S.C. § 207(o); 29 C.F.R. §§ 553.25-553.28.

4. Make up time

- a. An employee may make, and an employer may approve, a written request to make up work time lost as a result of a personal obligation and the hours will not be counted towards computing the total number of hours in a workday for purposes of overtime compensation, provided
 - i) The hours are performed in the same workweek as the week in which the time was lost;
 - ii) The employee does not work more than 11 hours in one day; and,
 - iii) The employee does not work more than 40 hours in the workweek.
- b. Employees must make a specific written request for each occasion of make up time.
- c. Employees who know in advance that they will be requesting make up time for a recurring personal obligation may make the request up to four weeks in advance, provided that the make up work is performed during the same work week that the time was lost.
- d. Employees may perform the make up time in advance of taking off the time during the same work week.
 - i) If the employee then does not take the time off, the employer is not liable for any daily overtime, provided the employee worked less than 11 hours in any given day and has worked no more than 40 hours in the week.
 - ii) If the employer revokes previously granted permission for make up time after the employee has performed the make up work, the employer would be liable for daily overtime.

- e. Make up time is available to employees working under scheduled alternative workweeks (see above).
 - i) The 11-hour per day and 40-hour per week caps still apply.
 - ii) However, with the employer's permission, the employee may perform up to 11 hours of work on a day the employee is not regularly scheduled to work without payment of overtime that would otherwise be required after 8 hours.
 - f. Employers may inform employees of the make up time option, but the employer may not encourage or solicit employees to request make up time.
 - g. *See* Cal. Labor Code § 513.
5. The regular rate of pay
- a. Hourly employees
 - i) For employees employed at a single hourly rate the regular rate is that hourly rate.
 - ii) If the employee receives production bonuses in addition to the hourly rate, the bonus must be divided by the number of hours worked and added to the hourly rate to determine the regular rate.
 - iii) *See* 29 C.F.R. § 778.108-778.110.
 - b. Salaried employees
 - i) California law
 - (a) The regular rate of pay for a full-time salaried employee entitled to overtime is computed as 1/40th of the weekly salary.
 - (b) *See* Cal. Labor Code § 515(d).
 - ii) Federal law
 - (a) The total weekly remuneration (less any statutory exclusions) is divided by the number of hours the salary is intended to compensate to determine the regular rate.

(b) If the salary covers a period longer than a single workweek, it must be reduced to its workweek equivalent in determining the regular rate.

(c) See 29 C.F.R. § 778.113.

6. Different rates of pay for different work

- a. Employees under both California and federal law may be paid different rates for different jobs performed in a week, if the work performed is objectively different. *E.g.*, 29 C.F.R. §§ 778.115, 778.419.
- b. The “regular rate” is a weighted average calculated by dividing the sum of the wages received for the different jobs in a workweek divided by the number of hours worked in the week. See 29 C.F.R. § 778.115.
- c. Federal law also permits an employee and the employer to agree that overtime pay will be 1.5 times the hourly rate for the work actually performed during overtime. See 29 C.F.R. §§ 778.415-778.421.
- d. Alternatively, if the employee works roughly the same number of hours each week in the different jobs, the employee and employer may agree upon a reasonable estimate rate for computing overtime.

7. The workweek and workday

- a. A workweek is any fixed and regularly recurring 168 hour period (i.e., 7 consecutive 24 hour days).
- b. A workday is any consecutive 24 hour period commencing at the same time each calendar day. See Cal. Labor Code § 500.
- c. If an employer has not designated a workday and workweek, the DLSE presumes that the workweek begins on Sunday at midnight and each workday begins at midnight.
- d. A “shift” is the designated hours of work by an employee, with a designated beginning and ending time.

8. Alternate workweek arrangements

- a. An employer may propose that its employees adopt a regularly scheduled alternative workweek that authorizes up to 10 hour days with a 40 hour workweek without payment of overtime.

- b. Employees are to receive one and half times their regular rate of pay for hours worked in excess of the regularly scheduled hours and for any work in excess of 40 hours in a workweek.
 - c. Employees are entitled to double their regularly rate of pay for work in excess of 12 hours per day and for any work in excess of 8 hours on days worked beyond the regularly scheduled workdays established by the alternative workweek arrangement.
 - d. *See* Cal. Labor Code § 511.
9. Fluctuating workweeks

a. California law

- i) The “fluctuating workweek” method of computing overtime for non-exempt salaried employees under federal law (discussed below) is not permitted in California.
- ii) *cf Espinoza v. Classic Pizza* (2003) 114 Cal.App. 4th 968 (fluctuating workweek permitted before change in daily overtime rules in 2000).

b. Federal law

- i) If the work hours of a salaried, non-exempt employee fluctuate, and there is a clear understanding that the fixed salary is compensation for all hours worked in a workweek, whatever they may be, then the FLSA permits the arrangement, so long as the compensation for hours worked in any given week equals or exceeds the minimum wage.
- ii) Overtime pay in such a situation is calculated by dividing the salary by the number of hours actually worked in a workweek and then compensating the employee at one and half times that rate for all hours over 40 that the employee worked in that week.
- iii) *See* 29 C.F.R. § 778.114.

D. Rest and Meal Breaks

1. Breaks are statutorily protected.

- a. The rules governing meal and rest breaks are mandated by statute and applicable Wage Orders and, except as provided by law, the protections afforded therein cannot be waived or reduced by agreement, including collective bargaining agreements.

- b. *See* Cal. Labor Code § 512; 8 Cal. Code Regs. §§ 11010(11),(12) – 11150(11),(12), 11160(10),(11); *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949.

2. Rest breaks

a. California law

i) General rule

- (a) Employees are entitled to one ten minute break for every four hours worked.
- (b) It should be given near the middle of the four hour period to the extent reasonably practical.
- (c) Employees working less than 3.5 hours need not be given a rest break.
- (d) Rest breaks are counted as compensable time.
- (e) *See* 8 Cal. Code Regs. §§ 11010(12) – 11150(12), 11160(11).

ii) Special rule for nursing mothers

- (a) Employers are required to provide break time to employees wishing to express breast milk for the employee's infant child, unless providing such a break would seriously disrupt the employer's operations.
- (b) Lactation breaks run concurrently with rest or meal breaks already provided.
- (c) If the employee requires additional break time, the additional time is non-compensable.
- (d) The employer is required to make reasonable efforts to provide the employee with a private room or location (other than a toilet stall) in close proximity to the work area for the employee to express milk.
- (e) *See* Cal. Labor Code §§ 1030 – 1032.

- iii) Special rest break rules exist for the following:
 - (a) Performers in the motion picture industry engaged in strenuous activity (e.g., swimmers, dancers, skaters). *See* 8 Cal. Code Regs. § 11120(12)(C).
 - (b) Employers of employees in certain on-site occupations (e.g., construction, drilling, mining) are permitted more flexibility in scheduling rest periods. *See* 8 Cal. Code Regs. § 11160(11).
 - (c) Employees with responsibility for children and others in 24-hour residential care facilities may be required to remain on site and maintain supervision even during rest periods. *See* 8 Cal. Code Regs. § 11150(12)(C).
- b. Federal law
 - i) Rest periods are compensable time.
 - ii) *See* 29 CFR § 785.18.
- 3. Meal breaks
 - a. California law
 - i) General rule
 - (a) Employers must provide a 30-minute meal break if employees work more than 5 hours, except that, if the work period per day does not exceed 6 hours, the meal period may be waived by mutual consent of the employee and employer.
 - (b) The meal period must begin during the 6th hour of work, although the employee may elect to take the meal period later so long as he/she was permitted to begin the break during the 6th hour.
 - (c) Employers must provide a second 30-minute meal break if employees work more than 10 hours in a work period, except that, if the work period does not exceed 12 hours, the second meal period may be waived by mutual consent of the employee and employer only if the first meal period was not waived.

- (d) *See* Cal. Labor Code § 512; 8 Cal. Code Regs. §§ 11010(11) – 11150(11), 11160(10).
- ii) Special meal break rules exist for the following occupations:
 - (a) Employees in the motion picture industry are entitled a meal period every 6 hours. *See* 8 Cal. Code Regs. § 11120(11)(A).
 - (b) Employees in logging camps and lumber mills are entitled to a meal period between the third and fifth hour of each shift. *See* Cal. Labor Code § 800.
 - (c) Employees in the healthcare industry who work shifts of more than 8 hours may waive one of their two meal periods by a writing signed by both the employer and employee.
 - (i) While the waiver is in effect, the employee must be paid for all work time, including “on duty” meal time (see below).
 - (ii) The employee can revoke the waiver with at least one day’s written notice.
 - (iii) *See* 8 Cal. Code Regs. §§ 11140(11)(D), 11050(11)(D).
- iii) On-duty meal time
 - (a) Unless employees are relieved of all duty during the 30-minute meal period, the meal period is considered “on duty” and the employee must be compensated for that time.
 - (b) Undue employer restrictions on employee meal times may result in a finding that the meal period is “on duty” and that the employees are entitled to overtime compensation.
 - (c) On-duty meal times are permitted only when:
 - (i) The nature of the work prevents the employee from being relieved of all duty;

- (ii) The employer and employee agree that the employee will receive a paid, on-duty meal period; and,
- (iii) The written agreement provides that the employee may revoke the agreement at any time.
- (d) *See* Cal. Labor Code § 512; 8Cal. Code Regs. §§ 11010(11) – 11150(11), 11160(10).

b. Federal law

- i) Meal periods are not compensable if the employee is relieved of all duty. Therefore, employees who are required to eat at their desks or machines must be paid for the time.
- ii) A 30 minute meal period is sufficient compliance
- iii) *See* 29 CFR § 785.19.

4. Rest and meal period recordkeeping requirements

a. Rest periods

- i) Employers are not specifically required to keep records that employees have taken rest periods.
- ii) However, employers may be liable for failure to provide rest breaks if they have not clearly informed their employees that they are entitled to rest breaks, have policies or practices which tend to discourage rest periods and know or should know that, as a result, their employees are not taking rest breaks.
- iii) The better practice, therefore, is for the employer clearly to document that employees have been told of their rights, to avoid conduct that may prevent or tend to prevent rest periods and where practical, actually to document employee rest periods.

b. Meal periods

- i) Employers are specifically required to keep records documenting that their employees have been afforded the meal period(s) required by law.

- ii) Meal periods during which all operations cease, however, need not be documented.
 - c. See 8 Cal. Code Regs. §§ 11010(7) – 11160(7); *Cicairos, supra*, 133 Cal.App.4th at 962-963.
5. Claims for non-compliance with rest and meal breaks
- a. Employers must pay the employee one hour of pay (at the employee's regular rate of compensation) for each workday in which a meal period is not provided, and one hour of pay for each workday in which rest periods are not provided. See Cal. Labor Code § 226.7.
 - b. The law is unsettled as to whether the compensation provided for in Labor Code § 226.7 is a "penalty" subject to the one-year statute of limitation in Cal. Code Civ. Proc. § 340 or "wages" subject to three or four-year statutes of limitation (e.g., Cal. Code Civ. Proc. § 338 (three years); Cal. B&P Code § 17238 (four years for unfair business practices)).
 - i) Federal courts have uniformly held that Labor Code § 226.7 provides for payment of "wages" (*see Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2006) 2006 U.S. Dist. LEXIS 40848 ("wages"); *Tomlinson v. Indymac Bank, F.S.B.* (C.D. Cal. 2005) 359 F.Supp.2d 891 (same); *Cornn v. United Parcel Service, Inc.* (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 30419 (same)).
 - ii) The Division of Labor Standards Enforcement has characterized the payments as penalties (*Hartwig v. Orchard Commercial, Inc.* (Cal. Dept. Industrial Relations, DLSE, May 11, 2005, No. 12-56901RB).
 - iii) The California courts of appeal have gone both ways (see *Nat'l Steel & Shipbuilding Co. v. Superior Court* (2006) 135 Cal.App.4th 1072, superseded by grant of review, April 12, 2006 ("wages"); *Mills v. Superior Court* (2006) 135 Cal.App.4th 1547, superseded by grant of review, April 12, 2006 ("penalties"); *Murphy v. Kenneth Cole Productions* (2005) 134 Cal.App.4th 728, superseded by grant of review, Feb. 22, 2006 ("penalties")).
 - iv) The California supreme court has granted review of several court of appeal opinions and will decide the question.

E. Terminating employment

1. Presumption of “at-will” employment

- a. Labor Code § 2922 provides: “An employment, having no specified term, may be terminated at the will of either party on notice to the other.”
 - i) As a result, an employment relationship is presumed to be “at will” unless facts or circumstances establish otherwise.
 - ii) In practice, this means that an employee can be fired for any reason or no reason, as long as it is not for an *unlawful* reason.
 - iii) The employee has no entitlement to any particular notice or “fair” treatment.
- b. *See Dore v. Arnold Worldwide, Inc.* (Aug. 3, 2006) __ Cal.4th __, 2006 Cal. LEXIS 9288; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317.

2. Exceptions to “at-will” employment

- a. Employment for a specified term
 - i) If a contract provides for a specified term of employment (*e.g.*, two years), then the employee may be terminated only for:
 - (a) Willful breach of duty;
 - (b) Habitual neglect of duty; or
 - (c) Continued incapacity to perform his or her duty.
 - ii) The foregoing reasons are more stringent than mere “good cause” (see below).
 - iii) Contracts requiring a particular period of notice (*e.g.*, 60 days) are treated as being contracts of employment for at least the specified notice period.
 - iv) *See, e.g.*, Cal. Labor Code § 2924; *Khajavi v. Feather River Anesthesia Med. Group* (2000) 84 Cal.App.4th 32, 57.

- b. Agreements to terminate only for cause
 - i) Express agreements
 - (a) The agreement may specify particular grounds for termination and, if so, those grounds must exist to justify termination; or
 - (b) The agreement may state that termination will be for “cause” or “good cause.”
 - ii) “Good cause” is defined as:
 - (a) “fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary, or capricious, unrelated to business needs or goals, or pretextual.”
 - (b) It is a “reasoned conclusion . . .
 - (i) supported by substantial evidence
 - (ii) gathered through an adequate investigation
 - (iii) that includes notice of the claimed misconduct and a chance for the employee to respond.” See *Cotran v. Rollins Hudig Hall Int’l, Inc.* (1998) 17 Cal.4th 93, 108.
 - (c) “Good cause” is determined case-by-case, based on all the facts.
 - (d) Some examples of “good cause” for termination are:
 - (i) Economic reasons for layoffs (*Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934);
 - (ii) Employees planning on entering into competition with the employer (*Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285);
 - (iii) Employee misconduct.
 - (1) The employer need not prove misconduct.
 - (2) Instead, the employer need only have a good faith belief that the

misconduct occurred, based on an adequate investigation (*Cotran, supra*, 17 Cal.4th at 107).

- (3) After-discovered evidence of misconduct (*e.g.*, falsification of an employment application) may be sufficient to justify a termination if the misconduct is sufficiently egregious (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620; *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614).

iii) Implied agreements

- (a) An employer may by words or conduct imply that an employee will be terminated only for cause.
- (b) Factors to be considered in determining whether an implied agreement exists include:
 - (i) The employer's personnel policies and practices;
 - (ii) The employee's length of service;
 - (iii) Actions or communications by the employer reflecting or suggesting assurances of continued employment (including equivocal language in personnel manuals);
 - (iv) Practices in the industry in which the employee is engaged; and
 - (v) Whether the employee gave independent consideration for the employer's promise.
 - (vi) *See Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654; *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311.
- (c) However, a clear and unambiguous at-will provision in a written employment agreement, signed by the employee, cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination.

See Dore, supra, 2006 Cal. LEXIS at *6; *Guz, supra*, 24 Cal.4th at 340.

c. Statutory exceptions to at-will employment

i) State law

- (a) FEHA prohibits termination (and other acts of discrimination) based on race, religious creed, color, national origin, marital status, medical condition, physical or mental disability, sex, age, sexual orientation, pregnancy or taking family care leave.
- (b) Numerous other statutes specifically prohibit employer retaliation, including termination, against employees exercising their rights under such statutes. For example,
 - (i) Cal. Labor Code §§ 921, 923 (Protecting employees' rights to join labor organizations);
 - (ii) Cal. Labor Code §§ 1101-1102 (Protecting employees' rights to engage in political activity);
 - (iii) Cal. Labor Code § 230(b) (Protecting employees who must take time off to appear as a witness in court);
 - (iv) Military & Vet. Code § 394 (Protecting employees ordered to perform military service);
 - (v) Cal. Labor Code § 6300 *et seq.* (Protecting employees who complain about, or participate in an investigation of, violations of workplace safety laws);
 - (vi) Cal. Labor Code § 1102.5 (Protecting employees who report suspected or actual violations by the employer of state or federal law).
 - (vii) For a complete listing of other statutes *see* 4 Wilcox, *California Employment Law* (2006) § 60.03[2].

- ii) Federal law
 - (a) Several federal statutes prohibit termination based on unlawful discrimination of various kinds:
 - (i) Title VII (race, color, sex, religious creed, national origin);
 - (ii) 42 U.S.C. § 1981 (race, ethnicity);
 - (iii) 42 U.S.C. § 1983 (race, sex, religion);
 - (iv) ADA (disability);
 - (v) ADEA (age).
 - (b) As under state law, many statutes prohibit retaliation, including retaliatory termination, against employees exercising various statutory rights. For example, employers may not retaliate against:
 - (i) Employees exercising their rights under ERISA (29 U.S.C. § 1140);
 - (ii) Employees who report violations of the FLSA or the Occupational Safety & Health Act (29 U.S.C. §§ 215(a)(3), 660(c));
 - (iii) Employees exercising their right to engage in collective bargaining (29 U.S.C. § 158));
 - (iv) Employees called for federal jury duty (28 U.S.C. § 1875)).
 - (v) For a complete list of the many other federal statutes that protect employees from retaliation, *see Wilcox, supra*, § 60.03[3].

3. Terminations in violation of public policy

- a. In addition to implied contracts to terminate only for good cause, California courts have created a further exception to at-will employment: terminations (or other retaliation) in violation of public policy. *See Gantt v. Sentry Ins.* 1 Cal.4th 1083, 1094; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172.
- b. A termination in violation of public policy is not only a breach of the employment contract, it gives rise to a claim in tort, *i.e.*, it

potentially affords a broader damages remedy, including punitive damages.

- c. To support a claim, the public policy must be:
- i) Based on a constitutional or statutory provision, rule or regulation;
 - ii) “Public” in the sense that it benefits public, as opposed to merely private, interests;
 - iii) Well-established at the time of the discharge; and,
 - iv) Substantial and fundamental.
 - v) *See Silo v. CHW Med. Found.* (2002) 27 Cal.4th 1097, 1104; *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 894.
- d. Substantial and fundamental public policies that have been found to support a claim include, for example:
- i) A number of the statutes listed in c.i)(b), above;
 - ii) Antitrust, anti-bribery and unfair business practices statutes (*Collier v. Superior Court* (1991) 228 Cal.App.3d 1117);
 - iii) Statutes requiring the prompt payment of wages (*Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563; *Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal.App.4th 1137);
 - iv) Advocating appropriate medical care for a patient (*Khajavi, supra*, 84 Cal.App.4th at 51-52);
 - v) Reporting misappropriation of public funds or false billing to the government (*Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418).
- e. Policies which have not been found to be sufficiently “public” or “fundamental,” and thus which will not support a claim, include:
- i) Reporting another employee’s misconduct at a prior job (*Foley, supra*, 47 Cal.3d at 670-671);
 - ii) Reporting misappropriation of the employer’s funds (*American Consumer Corp. v. Superior Court* (1989) 213 Cal.App.3d 664);

- iii) Refusing to agree to arbitration of claims (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105).
 - f. No claim exists where the employee is discharged for conduct based upon the employee's mistaken view of the law (e.g., for refusing to engage in conduct the employee mistakenly believes is unlawful or for exercising a "right" the employee mistakenly believes he/she possesses). See *TRW, Inc. v. Superior Court* (1994) 25 Cal.App.4th 1834; *DeSoto v. Yellow Freight Systems, Inc.* (9th Cir. 1992) 957 F.2d 655.
- 4. Employee right to payment upon termination of employment
 - a. With only minor exceptions, a discharged employee is entitled to immediate payment of all wages due, including accrued vacation or sick leave pay. See Cal. Labor Code § 201; *Smith v. Superior Court* (July 11, 2006) __ Cal.4th __, 20 C.D.O.S. 6119 (employee had immediate right to payment after completion of specific one-day assignment for which employee hired).
 - b. An employee without a contract for a definite time who resigns without notice must be paid within 72 hours.
 - i) Payment may be made by mail if the employee so requests and provides a mailing address.
 - ii) The date of mailing is the date for determining compliance with the 72 hour rule.
 - iii) An employee who gives at least 72 hours notice of resignation must be paid immediately upon conclusion of employment.
 - iv) See Cal. Labor Code § 202.
 - c. The place of payment must be:
 - i) For a discharged employee: the place where the employee worked.
 - ii) For an employee who quits: the office or agency of the employer that is located in the county where the employee worked.
 - iii) See Cal. Labor Code § 208.

- d. Waiting time penalties
 - i) An employer who willfully fails to pay wages when due to a discharged employee or to an employee who quits may be liable
 - (a) For the employee's daily wage;
 - (b) For each day, up to a maximum of 30 days, that the wages remain unpaid.
 - ii) The employer will not be liable if the employee "secretes or absents" her/himself to avoid payment or refuses payment which has been tendered by the employer.
 - iii) Waiting time penalties will not be assessed if the employer and employee are in a "good faith dispute" with respect to whether the wages are due.
 - iv) *See* Cal. Labor Code § 203; 8 Cal. Code Reg. § 13520.

F. COBRA / Cal-COBRA

1. COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985)

- a. Eligible employees and certain family members have the right to continue employer-sponsored group health insurance plans, at their expense, for specified periods of time following resignation or termination from employment, death of the employee or reduction in an employee's hours.
- b. Affected employers and plans
 - i) COBRA is applicable to employer-sponsored group health plans, including dental, vision, HMO, and similar plans.
 - ii) Coverage applies to both insured and self-insured plans.
- c. Exempt employers
 - i) Churches;
 - ii) The federal government; and
 - iii) Employers employing fewer than 20 employees.
 - (a) An employer is considered to employ fewer than 20 employees if fewer than 20 are employed on at least

50 percent of the employer's working days in a year.

- (b) All full-time and part-time employees, and principals of a firm, are counted in determining the number of employees.

d. Right to continued health insurance coverage

- i) "Qualified beneficiaries" under COBRA are entitled to elect to continue health insurance coverage upon the occurrence of a "qualifying event" that would otherwise result in loss of coverage.
- ii) Qualified beneficiaries include:
 - (a) Employees; and,
 - (b) Certain eligible family members.
- iii) The coverage offered must generally be identical to that provided to "similarly situated" individuals under the plan.
- iv) Each "qualified beneficiary" must be given an opportunity to elect coverage.
 - (a) For example, if a covered employee declines coverage, a spouse or dependent child is entitled to elect continued coverage; and,
 - (b) If a covered employee elects one type of coverage, a spouse or dependent child may elect a different type of coverage where a plan offers options as to the types of coverage available.
- v) Events triggering election rights include:
 - (a) Death of a covered employee;
 - (b) Termination of the employee for any reason other than gross misconduct;
 - (c) Reduction in the employee's hours of employment;
 - (d) A covered employee's divorce or legal separation;
 - (e) The date a covered employee becomes entitled to Medicare benefits;

- (f) The date a dependent child ceases to be covered under the terms of the plan; and,
 - (g) The filing of a Chapter 11 bankruptcy proceeding by the employer that results in the termination or a substantial reduction of health benefits for a retiree.
- vi) Election period
- (a) The period must begin on or before the date on which coverage would terminate as a result of the qualifying event.
 - (b) The period may not end earlier than the later of 60 days after:
 - (i) The date coverage would terminate; or
 - (ii) The qualified beneficiary receives notice of his/her election rights.
 - (c) Unless the employee specifies otherwise, the decision to elect is deemed applicable to all other qualified beneficiaries who would otherwise lose coverage.
 - (d) A plan must provide the qualified beneficiary at least 45 days after election to pay the premium for the continued coverage.
- vii) Length of coverage
- (a) 18 months for employees who have resigned, were terminated or whose hours were reduced.
 - (b) 36 months for spouses or dependents who would lose coverage for reasons other than the employee's termination from employment or reduction in hours.
 - (c) 29 months for employees or other qualified beneficiaries who are determined to have been disabled at the time of the termination from service or reduction in hours.
 - (d) Special continuation rules apply:
 - (i) if there are multiple qualifying events;

- (ii) a covered employee becomes eligible for Medicare coverage;
 - (iii) the employer is involved in bankruptcy; or
 - (iv) where state law continuation of coverage rules are applicable.
- viii) Termination of coverage can occur if:
 - (a) The qualified beneficiary fails to pay a premium in a timely fashion.
 - (b) The qualified beneficiary becomes covered by another plan.
 - (i) However, coverage may not cease if the employee has a preexisting condition and the new health plan excludes or limits coverage with respect to preexisting conditions.
 - (ii) Employers must give notice to the employee of the preexisting condition rules at the time of giving notice of other COBRA rights.
 - (c) The qualified beneficiary becomes entitled to Medicare benefits.
 - (d) The employer ceases to provide any group health plan for any employee.
- ix) Cost of continuation coverage
 - (a) General rule
 - (i) The plan may require the employee electing continued coverage to pay the entire premium.
 - (ii) The premium generally may not exceed 102% of the applicable premium, which is the cost to the plan for similarly situated employees and others covered by the plan.
 - (iii) The qualified beneficiary must be permitted to pay the premiums in monthly installments if he/she wishes.

- (iv) Qualified beneficiaries who are disabled may be required to pay up to 150% of the applicable premium for the 19th through 29th month of continuation coverage.
 - (b) Special rules exist for calculating the premiums for self-insured plans.
 - e. Notice requirements
 - i) The employer must give written notice to each covered employee and spouse at the time coverage under the health plan commences.
 - (a) The summary plan description must provide notice of the employee's COBRA rights.
 - (b) Posting notice is otherwise insufficient; mailing notice to the employee and spouse at the last known address is required.
 - ii) The employer must also provide notice to the plan administrator upon the occurrence of a qualifying event.
 - (a) Such notice must be given:
 - (i) within 30 days following an employee's termination, death, reduction in hours or entitlement to Medicare benefits; and
 - (ii) within 60 days following any other qualifying event (e.g., divorce, legal separation or ineligibility of a dependent child).
 - (b) The plan administrator must then provide notice to employee and/or family members of the right to continued coverage within 14 days thereafter.
 - f. Interplay between COBRA and Family and Medical Leave Act ("FMLA")
 - i) Typically, FMLA leave is not a qualifying event.
 - ii) However, FMLA leave may result in a qualifying event if:

- (a) The employee is or becomes covered by a group health plan immediately before or during FMLA leave;
 - (b) The employee does not return to work following the FMLA leave; and
 - (c) The employee (or qualified family member) would, in the absence of COBRA continuation coverage, lose coverage under the plan.
- iii) The “qualifying event” occurs if and when it becomes known that the employee will not return to work and thus is no longer entitled to the FMLA leave.
 - iv) Unless the employee has previously announced he/she will not return from leave, the qualifying event is deemed to be the last day of an FMLA leave and the length of the COBRA coverage period is measured from that date (even if the employee has not paid the employee share of health plan premiums during the leave and would thus not normally be covered under the plan).
 - v) The normal notification rules upon a qualifying event generally apply in these circumstances.
- g. See 26 U.S.C. § 4980B; 29 U.S.C. § 1161 *et seq.*; 42 U.S.C. § 300bb-1 *et seq.*; 52 Fed. Reg. 22716 *et seq.* (June 15, 1987); IRS Notice 94-103 (60 Fed. Reg. 2278-2279 (Jan. 6, 1995)).

2. Cal-COBRA (California Continuation Benefits Replacement Act)

- a. Cal-COBRA provides the same basic continuation of coverage benefits to employees of employers with 2-19 employees as COBRA provides to larger employers.
 - i) However, the coverage period is 36 months from a qualifying event.
 - ii) And the cost of coverage is 110% of the applicable premium, unless the qualified beneficiary elects disability coverage for the last 18 months, in which case the premium is 150% of the applicable premium.
- b. Cal-COBRA also provides up to an additional 18 months of coverage to employees of larger employees who have exhausted coverage under COBRA.

- i) However, the extended coverage does not apply to “non-core” coverage such as dental and vision plans.
 - ii) Employees must first exhaust COBRA coverage before electing Cal-COBRA extended coverage.
 - iii) The cost of the extended coverage is 110% of the applicable premium, unless the qualified beneficiary elects disability coverage, in which case the premium is 150% of the applicable premium.
- c. Employers are required to provide notice to employees of their coverage or extended coverage rights under Cal-COBRA.
 - d. It is currently unclear whether Cal-COBRA is preempted, and thus rendered unenforceable in whole or in part, by federal law.
 - e. See Cal. Health & Safety Code § 1366.20 *et seq.*; Cal. Ins. Code §§ 10116.5, 10128.50 *et seq.*

Bibliography

Cooley Godward LLP, "California Extends Continuation Health Coverage Period," (Jan. 24, 2003).

Chin, et al., *California Practice Guide: Employment Litigation* (Rutter Group 2003).

Geidt, T. & Rosenberg, R., "Wage and Hour—Avoiding Liability," California CPA Education Foundation 2005 Employment Practices Conference.

Simmons, *Wage and Hour Manual for California Employers* (11th ed. 2005).

Simmons, *Employee Handbook And Personnel Policies Manual* (9th ed. 2004).

Wilcox, *California Employment Law* (2006) (vols. 2, 4).