Federal Labor Laws Impacting the Public Sector Employment Relationship

Spring Conference
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By: James Baird

1. FAIR LABOR STANDARDS ACT (“FLSA”)

A. Constitutional Question.

Many people believe that the FLSA is unconstitutional. Throughout the years, the Court’s position on this has changed. Employers challenging the FLSA should always raise the issue of the Act’s constitutionality until the Court squarely addresses it.


Court held that amendments to the FLSA extending coverage to public employers was an unconstitutional exercise of congressional authority.

Majority: Rehnquist, Burger, Blackmun, Powell and Stewart

Dissent: Brennan, White, Marshall and Stevens


Court overturned Usery and held that the FLSA was applicable to the states and public employers.

Majority: Blackmun, Marshall, Brennan, White and Stevens

Dissent: Powell, Burger, Rehnquist and O’Connor

Justice Rehnquist: “I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court. “

Justice O’Connor: “I would not shirk the duty acknowledged by National League of Cities and it progeny, and I share Justice Rehnquist’s belief that this Court will in time again assume its constitutional responsibility.”


Court held that Congress lacked the authority under the Indian Commerce Clause to abrogate the states’ Eleventh Amendment immunity and that Congress may not authorize, pursuant to its Article I powers, suits in federal court by private parties against unconsenting states.

Significance: Since the FLSA does not specifically abrogate the states’ Eleventh Amendment immunity a person could not sue the state or public employer for a violation of the FLSA.

Majority: Rehnquist, O’Connor, Scalia, Kennedy and Thomas

Dissent: Stevens, Souter, Ginsburg and Bryer


Supreme Court of Maine held that the Eleventh Amendment sovereign immunity protected the state from an officer’s claim of overtime under the FLSA. The court held that although Congress may have intended to subject the states to the overtime provisions of the FLSA, it did not have the necessary power, pursuant to
the Constitution, to accomplish this end. The court went further and stated that if “Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims.” To hold otherwise, “by concluding that a state, immune from suit in federal court, must defend against that same suit in its own courts, would effectively vitiate the Eleventh Amendment.”

B. Substantive Issues Under the FLSA

1. Overview: The FLSA is the principal federal wage and hour law. The FLSA requires that most employees be paid minimum wages and be compensated at one and one-half times their regular rate of pay for all hours worked in excess of forty hours in a week. The FLSA also requires equal pay for equal work and prohibits age discrimination in employment. Most employers, including public sector employers, are covered by the FLSA.

The minimum wage, overtime, and child labor provisions of the FLSA are enforced by the Wage and Hour Division of the U.S. Department of Labor. The equal pay and age discrimination provisions are enforced by the Equal Employment Opportunity Commission (“EEOC”). In addition, to government enforcement proceedings, private individuals are permitted to maintain civil suits to recover damages under all of these provisions.

2. Records must be maintained: In order to meet the record keeping requirements of the FLSA (29 U.S.C. § 211), the following records must be maintained for all employees:

(a) Name and Social Security identification number;
(b) Home address;
(c) Birth date if under 19;
(d) Sex;
(e) Occupation;
(f) Time of day and day of the week employee’s workweek begins;
(g) Regular hourly rate of pay;
(h) Hours worked per day and per week;
(i) Total weekly earnings exclusive of overtime pay;
(j) Total overtime premiums earned;
(k) Total additions and deductions from pay;
(l) Total wages paid per pay period;
(m) Date paid and pay period covered by payment.

3. Record retention requirements:

(a) Payroll records must be kept for three (3) years.
(b) Supplementary basic records, such as time cards and worksheets, must be kept for two (2) years.

4. Implications of failure to maintain required records: The chief danger to an employer who fails to maintain adequate or accurate work records is that it will be held responsible for what such records would have shown. Thus, employee testimony as to their hours worked will be credited in the absence of accurate records of such work. The courts and agencies believe that the employer can hardly complain about this consequence, since it would have been easily avoided by accurate record keeping.

5. Recording Hours Worked

(a) What constitutes “hours worked”? “Hours worked” are all hours an employee is engaged to work, engaged to wait, or actually at work, whether authorized or unauthorized. Thus, if an employee starts work early or works beyond the end of his shift, such work must be compensated, whether or not it was authorized or even necessary. Employees may be disciplined, however, for unauthorized work.
(b) **The Portal-to-Portal Act.** Under the Portal-to-Portal Act, 28 U.S.C, §§ 251-262, “hours worked” do not include certain travel and other preliminary and postliminary activities performed prior or subsequent to the actual work day. Nonetheless, all of the activities may be made compensable by contract, custom, or practice.

(c) **Certain Activities.**

(i) **Uniform Changing**

Where changing or washing is indispensable to the performance of an employee’s work or is required by law or by the rules of the employer, the time spent changing clothes or washing before or after work must be considered hours worked.

(ii) **Rest Periods**

Short rest periods of five (5) to twenty (20) minutes must be counted as hours worked and may not be offset against other working time.

(iii) **Meal Periods**

*Bona fide* meal periods of at least thirty (30) minutes are not work time. During this time, the employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved from duty if he or she is required to perform any duties, whether active or inactive, while eating. It is not necessary that an employee be permitted to leave the premises if he or she is otherwise completely freed from duties during the meal period. The core test is whether the time is spent predominantly for the benefit of the employer.

(iv) **Waiting Time and On-Call Time**

Whether waiting time is time worked under the FLSA depends upon particular factual circumstances. Where facts show that the employee was “engaged to wait,” then waiting time will be considered hours worked. Generally, an employee who is unable to use the time effectively for personal purposes will be found to be “engaged to wait” and thus the time must be considered working time. 29 C.F.R. § 785.15.

Similarly, an employee who is required to remain on call on or near the employer’s premises so that he or she cannot use the time effectively is considered to be working. On the other hand, an employee who is merely required to leave word where he or she may be reached is not working while on call. Consequently, whether time spent on the premises is compensable depends on the degree to which the employee is free to engage in personal activities during idle periods when subject to call. The specific factors looked at in determining compensable time include:

Whether there is an on-premises living requirement;

Whether there is excessive geographical limitations on an employee’s movement;

Whether the frequency of business calls is unduly restrictive;

Whether the employee actively engages in personal activities during the on-call time;

Whether a paging device would allow more unrestricted movement.

See, *e.g.*, *Owens v. Local No. 169*, 30 Wage & Hour Cases (BNA) 1633 (9th Cir. 1992); *Rousseau v. Teledyne Movible Offshore Inc.*, 805 F.2d 1245 (5th Cir. 1986) (guards on a barge who were free to eat, sleep, watch television, play sports, read, not eligible for compensation).

(v) **Lectures and Courses**
Attendance at lectures, meetings, training programs, and similar activities are considered hours worked unless:

Attendance is outside of regular working hours;

Attendance is truly voluntary;

The course, lecture, or meeting is not directly related to the employee’s job (such as learning the requirements of a new or higher-rated job); and

The employee does not perform any productive work.

(vi). Travel Time

Under the Portal-to-Portal Act, ordinary travel to and from work does not constitute hours worked, unless compensable by contract, custom or practice. However, when an employee who regularly works at a fixed location in one city must make a one-day special trip to another city, the extra time spent occasioned by the special assignment should be counted as hours worked. Travel that keeps an employee away from home overnight is considered work time, and includes any hours on non-working days that correspond to normal working hours. (However, travel time spent as a passenger outside of normal working hours is not counted as hours worked.)

All time spent by an employee in travel that is part of his or her principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. However, the use of an employer’s vehicle for travel by an employee and activities performed by an employee that are incidental to the use of the vehicle for commuting shall not be considered working time if use of the vehicle for travel is within the normal commuting area for the employer’s business and the use of the employer’s vehicle is subject to an agreement between the employer and the employee. (Employee Commuting Flexibility Act of 1996.)

Two recent decisions on travel time were favorable to employers. In *Imada v. City of Hercules*, 4 Wage & Hour Cases 2d (BNA) 705 (9th Cir. 1998), the Ninth Circuit held that travel by police officers of 1 to 2 hours to training was ordinary commuting and hence not compensable. In *Morillion v. Royal Packing Co.*, 4 Wage & Hour Cases 2d (BNA) 1498 (Cal. App. 1998), the California appellate court held that travel by farm workers in employer buses to work sites was not compensable under both state and federal law.

(vii) Absences from Work

The FLSA does not require an employer to pay an employee for absence due to vacation, holiday, illness, or any other reason. Courts have held that the granting of leaves of absence with or without pay is a matter of contract.

6. Rounding Practices in recording hours worked

When time clocks are used to record hours worked, the employer must follow prescribed rounding rules. Time must be rounded to the nearest increment, not to exceed fifteen (15) minutes. Thus, for example:

<table>
<thead>
<tr>
<th>Minutes on Time Card</th>
<th>Round to</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-7</td>
<td>0 minutes</td>
</tr>
<tr>
<td>8-22</td>
<td>15 minutes</td>
</tr>
<tr>
<td>23-37</td>
<td>30 minutes</td>
</tr>
</tbody>
</table>

Time clocks, whenever possible, should be located close to the department where the employees work. Punch-in and punch-out times should correspond very closely to the time worked, otherwise serious questions will arise regarding the accuracy of time records. Time clocks are not required, but if punch-ins and punch-outs are controlled, they are the best evidence.
7. *Dual Compensation Laws:* Many states have higher minimum wage requirements than those enacted by the FLSA. Nothing in the FLSA excuses noncompliance with any federal or state law or municipal ordinance establishing a higher minimum wage, a lower maximum work week for overtime purposes, or a higher standard relating to minors than what is already established. Thus, employers must comply with the more stringent of these laws.

8. *Procedural Enforcement:* The provisions of the FLSA are administered, enforced, and interpreted by the Secretary of Labor, through the Wage and Hour Division of the Department of Labor. The Wage and Hour Division may conduct audits and investigations, make on-site inspections, and examine employer records. The Department of Labor may sue for monetary and injunctive relief on behalf of an employee. Liquidated damages also may be awarded if the employer did not act in good faith. An individual employee may sue in state or federal court to recover FLSA mandated pay, as well as for retaliatory discharge.

9. *Criminal Penalties:* Under the FLSA, penalties for willful, voluntary, and intentional violation of the law may be assessed. Imprisonment for up to six months for a second violation can occur.

(a) *California Law.* - An employee has the option to bring a claim before the Labor Commissioner of the State of California or to file directly a lawsuit in state court. Additionally, an administrative hearing before the Labor Commissioner is subject to *de novo* judicial review. This means the parties receive a new trial and the decision of the Labor Commissioner is entitled to no weight. If the party taking the appeal is unsuccessful, the court is required to award reasonable attorneys’ fees and costs.

A party who successfully files a claim directly with the court also is entitled to attorneys’ fees and possibly liquidated damages. Cal. Lab. Code § 218.5.

California's Division of Labor Standards Enforcement can file suit on behalf of employees and also collect liquidated damages.

(b) Criminal Penalties. Under both the FLSA and California law, penalties for willful, voluntary, and intentional violation of the law may be assessed. See 29 U.S.C. § 216(a); Cal. Labor Code §§ 203, 210, 225.5. Imprisonment for up to six months for a second violation of the FLSA can occur.

(c) General Defenses

(i) independent contractor status;

(ii) employees are exempt from coverage;

(iii) statute of limitations (2 to 3 years under the FLSA, depending whether act is willful; in California: 2 years for non-written contract, 4 years for written contract, 3 years for statutory violations, and 1 year to recover statutory penalties);

(iv) acting in conformity with written official interpretations of the FLSA;

(v) an employer can avoid or reduce liquidated damages if it had reasonable good faith belief it was not violating the FLSA or the California Labor Code (reliance on the opinion of counsel may be significant, see, e.g., *Marshall v. Union Pacific Motor Freight Co.*, 650 F.2d 1085 (9th Cir. 1981)).

10. *Overtime Compensation:*

(a) Generally: All employers that are not otherwise exempt must be paid at the rate of one and one-half times their regular rate of compensation for all hours worked in excess of forty in any given week. There is no daily overtime requirement. An employee's regular rate of pay includes all compensation (including salary, commission, and noncash wages) except for discretionary bonuses. In other words, the regular rate
of pay will include such things as shift differentials and call-in pay. The regular rate does not include amounts paid to health and welfare plans or amounts on account of illness or vacation.

Overtime pay must be given for all hours worked, even if the time is not authorized. An employee must establish that she was “employed” by defendants during the periods of time for which she claims unpaid compensation. An employee claiming overtime is employed during the hours in question if the employer had actual or constructive knowledge that she was working. Significantly, where an employer has no knowledge that an employee is working overtime and the employee either fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, no violation occurs. If, however, the employer knows or has reason to believe the overtime work is being performed, the time is compensable even though it is not authorized. Employers may discipline employees for working unauthorized overtime.

(b) Special Circumstances:

(i) Working two jobs in one workweek: Employees may sometimes be asked to perform two jobs with two different levels of compensation in the same workweek. These employees can be compensated for hours exceeding forty hours in a week according to two approaches.

Weighted Average Approach -- Under this approach, an employee’s total compensation for the two jobs is divided by the total number of hours worked. This figure is the weighted average regular rate. For example, if an employee works 40 hours at a regular rate of $6.00 per hour, and 10 hours at a regular rate of $5.00 per hour, the weighted average rate would be $5.80. Thus, the employee would be entitled to one-half the weighted average rate of $5.80 for each of the 10 hours of overtime worked.

Rate of Overtime Approach -- An employee and employer may agree prior to the performance of the work that the employee will be paid overtime compensation based upon the rate of the job being performed during the overtime hours. This agreement should be in writing.

(ii) Joint Employment: With numerous companies combining operations and centralizing staff functions, joint employment issues are becoming more common. An employee working for joint employers is entitled to overtime compensation for forty hours of total work and cannot legally be required to work more than forty hours of straight time each week for joint employers.

Specifically, where an employee performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the week, a joint employment relationship generally will be considered to exist if:

there is an arrangement between the employers to share the employee’s services, such as to exchange employees;

one employer is acting directly or indirectly in the interests of another employer in relation to the employee;

the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

(iii) Telecommuting

The Fair Labor Standards Act (FLSA) as well as state wage and hour laws, require that non-exempt employees be paid a minimum hourly wage and overtime pay for time worked in excess of forty hours a week.

The FLSA does not contain any unique requirements or exceptions for telecommuters, and thus these laws apply regardless of an employee’s work location. A public employer must therefore carefully consider how to ensure compliance with wage and hour laws, and any applicable collective bargaining agreements, when employees work from home.
Exempt or salaried telecommuting employees should be required to maintain careful time records. Although these time records may be helpful in evaluating an employee’s productivity, care should be taken not to jeopardize the employee’s exempt status under the FLSA. In other words, the timekeeping or accountability system should not undermine the fact that the telecommuting employee is paid on a salaried basis.

For non-exempt telecommuting employees, an employer is responsible for maintaining the employee’s time records. Thus, the primary FLSA concern is keeping track of the telecommuter’s working time to insure compliance with minimum wage and overtime requirements. Non-exempt telecommuting employees should fill out time sheets on a regular basis, or use a computerized timekeeping system that records when the employee logs on and off the computer system. An employer should also develop methods to verify the employee’s time records. All timekeeping requirements and overtime policies should be clearly stated in the telecommuting policy.

11. Exemptions from Minimum Wage and Overtime:

(a) Burden of Proof: The employer claiming the exemption bears the burden of proving that the exemption exists. Such exceptions are strictly interpreted.

(b) Exemptions: Although the minimum wage and overtime pay requirements apply to the majority of employees, certain classes of employees are exempt from these requirements under the FLSA.

(i) **White Collar Exemptions**: There are four “white collar” exemptions from the FLSA requirements. Executive, administrative, and professional employees will be exempt from the FLSA requirements if they meet a three-part test requiring that certain work be performed, that a certain minimum salary level be met, and that compensation be made on a salaried basis. Common to all three exemptions are two different sets of criteria based on salary -- the short and long tests.

### Executive Exemption

**Long test**: Because of the recent increases in the minimum wage, the long test is essentially obsolete. The long test provides for exemption for those employees who, in addition to meeting other criteria, were paid a minimum compensation of $155 per week, and now all employees earning at least minimum wage would meet this criterion. Moreover, because the Short test is easier to meet, the Long test is of even lesser value.

**Short test**: If any employee receives at least $250 per week then the level of scrutiny will be reduced as to the type of work performed by the employee. An employee who meets the higher salary level will be exempt if the employees primary duties consist of: the management of the enterprise (or a customarily recognized department or subdivision) and customarily and regularly directing the work of two or more full-time employees.

Under the short test used for higher salaried executives, it is only necessary that these be the employee’s primary duties -- that is, they are performed at least fifty percent of the time, or there are other factors present to support the significance of the employee’s management or supervisory duties.

**Salary Basis and Pay Docking**:

Pay Docking: To qualify for the executive exemption, an employee must be paid on a salary basis. Under the Department of Labor regulations, an employee is paid on a salary basis if paid a predetermined salary that is not subject to reduction based upon the quality or quantity of work performed.

**Exception**: Significantly, partial pay docking is permitted under the Family and Medical Leave Act (“FMLA”) for absences covered by the Act. This exception to the general rule must be strictly followed.

Under the DOL regulations, an inadvertent partial-day docking may be made up without losing the exception, but a docking due to lack of work jeopardizes this exemption. Individuals may be docked for full-
day absences due to illness where they are not yet eligible for or have exhausted sick leave benefits. Absences due to jury and military reserve duty must be compensated, but the employer may offset jury fees or military pay received by employees against their regular salary.

DOL regulations provide an express exception to the rule of no deductions for “quality or quantity of the work performed,” allowing “penalties imposed ...for infractions of safety rules of major significance.” The U.S. Supreme Court recently focused on this matter of permissible versus prohibited deductions for exempt employees in Auer v. Robbins, 519 U.S. 452 (1997).

Specifically, in Auer, the Court resolved the split among the circuit courts with respect to the issue of the effect of disciplinary deductions upon exempt status. Until Auer, in interpreting the DOL regulations, some courts had focused on the policy that authorizes pay deductions, while others concerned themselves with the application of such policies. Some circuits held that the practice of pay docking does not automatically defeat salaried status. In contrast, other circuits held that if the employer’s policy is to deduct for absences of less than a day, the salary exemption is inapplicable, even if no deduction is actually made.

The Court expressly requested that the Secretary of Labor submit an amicus brief addressing this issue and the express provisions for the salary-basis test under the statute. The Secretary stated that the salary basis test should be interpreted to provide that exempt status will be lost if there is either an actual practice of making such deductions or an employment policy creating a “significant likelihood” of deductions. Adopting the Secretary’s interpretation, the Court ruled that the subject employees had not lost their exempt status because the policy at issue provided that a pay deduction was only one of a number of specified possible penalties and hence there was not the significant likelihood of such a deduction. The Court went further, explaining that “nor, under the Secretary’s approach, is such a likelihood established by the one-time deduction in a sergeant’s pay, under unusual circumstances.” Finally, the Court reaffirmed the availability of the “window of correction” period, during which employers can “correct” a pay deduction that would otherwise eliminate exempt status. If a deduction is not permitted under the salary basis test and is inadvertent or is made for reasons other than a lack of work, the exemption will remain if the employer reimburses the employee for the deduction and promises to comply in the future.

Salary Requirements: Presently, individuals must receive a salary of at least $155 per week to qualify for the executive exemption. However, as noted earlier, most employers utilize the short test, which requires a minimum weekly salary of $250.

Administrative Exemption

Primary duties: For these individuals, it is only necessary to prove that their “primary duties” consist of performance of office or non-manual work directly related to management policies or general business operations of his or her employer and its customers, and that the performance of such duties includes work requiring the exercise of discretion and independent judgment.

Professional Exemption

This exemption is very similar to the administrative and executive exemptions. Mostly, this exception applies to computer systems analysts, computer programmers, software engineers, and other similarly skilled individuals. No particular license, certification, or academic degree is required for exemption. The exemption does not apply to employees who operate computer, employees who manufacture, repair, or maintain computer hardware and related equipment, or employees whose work is highly dependent on, or facilitated by, the use of computers but who are not engaged in computer systems analysis and programming occupations.

12. FLSA Reform Heads List

The Department of Labor regulations that implement the white-collar exemption (the salary and duties tests) continue to cause problems for state and local governments. Representative Cass Ballinger (R-NC) has asked the independent U.S. General Accounting Office to do a study on the issues and impacts surrounding
the “white-collar exemption.” Hearings are expected later this year where there is a hope that the Congress will not limit itself to addressing just the “white-collar” problem.

II. INDEPENDENT CONTRACTORS

A. Employee status under the FLSA is not determined by common law agency principles but rather by a standard of “economic reality.”

B. An opinion letter from the Wage and Hour Division of the U.S. Department of Labor explains the standard as follows:

Under the Act, an employee, as distinguished from a person who is engaged in a business of his own, is one who as a matter of economic reality follows the usual path of an employee and is dependent upon the business he serves. The employer-employee relationship is tested by “economic reality” rather than technical concepts; it is not determined by common law standards relating to master and servant.

C. One court has described the standards for determining employee versus independent contractor status under the FLSA “economic reality” test as follows:

(1) the extent to which the services in question are an integral part of the “employer’s” business;

(2) the amount of the “employee’s” investment in facilities and equipment;

(3) the nature and degree of control attained by exercised by or exercised by the “employer”;

(4) the “employee’s” opportunities for profit or loss;

(5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and

(6) the permanency and duration of the relationship.

III. FAMILY LEAVE LAW UNDER THE FLSA

A. Entitlement to Leave

1. An eligible employee (one year’s service of 1,250 hours) shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(a) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(b) Because of the placement of a son or daughter with the employee for adoption or foster care.

(c) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(d) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

2. Expiration of Entitlement. The entitlement to leave under subparagraphs (a) and (b) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

B. Leave for reasons C and D can be taken intermittently.

C. Job guaranteed.
D. Insurance coverage continued.


F. Employers should have an FMLA policy spelling out the Act’s coverage and requirements.

G. It is imperative that employers properly notify employees after three days of absence due to a potential or actual serious illness or injury that the absence is considered subject to the FMLA. Otherwise, the 12-week period does not begin until such notice is given. Employers should have a form letter and the FMLA doctor’s report form available to send out.

H. Serious illness continues to be broadly defined by Department of Labor (e.g. broader definition than that of disability under A.D.A.).

IV. ADA UPDATE

A. Number of Charges Filed

The number of ADA charges filed has exceeded predictions and now accounts for about 20 percent of the caseload of the Equal Employment Opportunity Commission (EEOC). Resolutions are at a much slower rate than under other types of charges, likely due to the new law’s complexity. Approximately 1,700 ADA charges are being filed each month.

B. Type of Employment Decision Challenged

1. Issue Alleged

As with employment discrimination charges filed under other laws, discharge is the most frequently alleged issue cited in ADA cases. The issues cited in charges under the ADA is as follows:

<table>
<thead>
<tr>
<th>Issue</th>
<th>Percentage/Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge</td>
<td>50.0</td>
</tr>
<tr>
<td>Failure to Accommodate</td>
<td>25.0</td>
</tr>
<tr>
<td>Hiring</td>
<td>11.0</td>
</tr>
<tr>
<td>Harassment</td>
<td>10.0</td>
</tr>
<tr>
<td>Discipline</td>
<td>7.2</td>
</tr>
<tr>
<td>Re-hire</td>
<td>3.9</td>
</tr>
<tr>
<td>Layoff</td>
<td>4.9</td>
</tr>
<tr>
<td>Wages</td>
<td>3.5</td>
</tr>
<tr>
<td>Promotion</td>
<td>3.5</td>
</tr>
</tbody>
</table>

Total percentage exceeds 100% because charging parties often allege multiple violations.

2. Type Of Disability Alleged

The type of disability alleged in ADA charges does not correspond percentage-wise to the most common disabilities.

<table>
<thead>
<tr>
<th>Disability</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Back Impairments</td>
<td>18.5%</td>
</tr>
<tr>
<td>Neurological Impairments</td>
<td>11.5%</td>
</tr>
<tr>
<td>Emotional/Psychological Impairments</td>
<td>12.5%</td>
</tr>
<tr>
<td>Heart Impairments</td>
<td>4.2%</td>
</tr>
<tr>
<td>Diabetes</td>
<td>3.5%</td>
</tr>
<tr>
<td>Substance Abuse</td>
<td>4.0%</td>
</tr>
</tbody>
</table>

Vision Impairments 3.3%
Hearing Impairments 3.3%
Arthritis 2.8%
Cancer 2.7%
Epilepsy 2.6%
HIV 1.9%

The following list identifies the most common ADA compliance issues confronting employers and the EEOC’s position with respect to the employer’s obligations under the ADA. A summary of recent court decisions addressing many of these issues is contained in Chapter 13.

C. Ten Common Employer Mistakes in ADA Compliance

1. Misunderstanding Definition of “Disability”

(a) ADA prohibits discrimination against a “qualified individual with a disability.”

(b) “Disability” is defined as:

A physical or mental impairment that substantially limits one or more of the major life activities of such an individual;

A record of such an impairment;

Being regarded as having such an impairment;

(Under the FEHA, the definition of a disability also includes a condition that is “physical” and “handicapping” such that it “makes achievement unusually difficult,” but the California Supreme Court has interpreted this definition to be virtually synonymous with the ADA definition of disability.)

Examples of “major life activities” include walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, working, and caring for oneself. EEOC Guidance on Psychiatric Disabilities says that ability to interact with others also is a major life activity.

Temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. The EEOC’s Guidance on Psychiatric Disabilities provides: "An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time. It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual’s ability to perform a major life activity.”

Mitigating Conditions

The statute does not address whether medications or other treatments should be considered in determining if an impairment “substantially limits” a major life activity.

The EEOC Interpretive Guidance on definition of “disability” indicates that the corrective effects of medications should not be considered in determining if an individual is afflicted with a disability: “The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis without regard to mitigating measures such as medicines or assistive or prosthetic devices.”

(c) A limited number of impairments are not considered to be disabilities. These include:

Temporary conditions such as a broken limbs, appendicitis, and influenza;

Pregnancy;
Physical characteristics such as height, weight, eye color, or hair color that are within normal ranges;
Common personality traits such as poor judgment or a quick temper;
Exceptional abilities; and
Most sexual behavior disorders, compulsive gambling, kleptomania and pyromania.

(d) Individuals who currently engage in illegal use of drugs are not disabled under the ADA or FEHA.

Term “illegal use of drugs” refers both to the use of unlawful drugs such as cocaine and to the unlawful use of prescription drugs;

Individuals who are rehabilitating from drug problems and are not current users are protected.

2. Misunderstanding Definition of “Qualified” Individual with a Disability

Regardless of whether an individual has a “disability,” he also must be “qualified” in order to seek protection under the ADA. That means that the employee must be able to perform the essential functions of the job, with or without reasonable accommodation.

Whether a job duty is essential is determined on a case-by-case basis. A job function may be essential because:

Reason the position exists is to perform that function;
Removing the function would fundamentally alter the nature of the position;
A limited number of employees available who can perform that function; or
Function is highly specialized.

Factors noted by EEOC include:

Employer’s judgment;
Written job description done prior to advertising or interviewing;
Amount of time spent performing the function;
Consequences of not performing the function;
Terms of a collective bargaining agreement; and
Work experience of past and present employees in the job.

A disabled individual may be required to meet:

Basic qualifications and production standards.
Legitimate quantitative and qualitative production standards.

3. Asking Inappropriate Pre-employment Questions

(a) Permissible vs. Impermissible Inquiries
An employer may:

Ask about an applicant's ability to perform both essential and marginal job functions (however, employers may not refuse to hire an applicant with a disability who cannot perform a marginal function).

Ask the applicant if he can perform a specific function (e.g., can you lift 50 pounds, can you drive a truck?).

Demonstrate a job function and then ask if the applicant can perform the function.

Ask an applicant to describe or demonstrate how he can perform the function. This request must be made of all applicants unless the applicant has an obvious disability which may prevent the performance of a particular function.

An employer may not:

Ask whether an applicant has a disability which prohibits him from performing the job.

Ask if the applicant has a specific disability.

Ask the applicant about leave for treatment, when he first became disabled and the like, even if the applicant volunteers he has a disability.

Ask about applicant's workers' compensation history.

(b) Inquiries related to reasonable accommodation

If an applicant asks for a reasonable accommodation for the hiring process and the need for accommodation is not obvious, the employer may ask the applicant for reasonable documentation from an appropriate health professional concerning the individual’s disability and functional limitations.

An employer may only request information necessary to verify the existence of a disability and the need for an accommodation.

An employer should make it clear to the applicant that these are the reasons it is requesting the information.

Although an employer generally may not ask an applicant whether reasonable accommodation will be needed for the job, if an employer reasonably believes, before making the job offer, that an applicant will need accommodation to perform the functions of the job, then an employer may ask the following limited questions:

Whether the applicant needs reasonable accommodation; and

What type of reasonable accommodation would be needed to perform the functions of the job.

An employer can ask these questions if:

The employer reasonably believes the applicant will need a reasonable accommodation because an obvious disability;

The employer reasonably believes the applicant will need a reasonable accommodation of a hidden disability because the individual voluntarily discloses the disability to the employer; or

The applicant voluntarily discloses to the employer the need for reasonable accommodation to perform the job.

(c) Post-offer medical examinations.
Under ADA, medical examination may only be given after offer of employment has been made. Offer can be conditioned upon successfully passing the exam. Neither physical agility tests nor tests for the illegal use of drugs are considered medical exams. Post-offer medical exams must be given to all offerees in the same job category. Information obtained as part of the medical history or medical examination must be kept separate from the personnel file and treated as confidential medical records.

4. Misunderstanding Need to Consider Reasonable Accommodation

The ADA and FEHA require that an employer provide a reasonable accommodation to the known physical or mental limitations of an individual with a disability unless doing so would cause an “undue hardship” on the employer’s business.

(a) Reasonable accommodation is required in three areas to permit employee to perform the essential functions of the job;

in testing and application procedures (see above); and

to permit a disabled employee to enjoy benefits and privileges of employment that are “equal to” or “substantially equivalent to” those afforded similarly situated non-disabled employees.

(b) ADA lists specific reasonable accommodations including:

Making existing facilities (work and non-work areas) accessible to disabled individuals;

Job restructuring of non-essential, marginal job functions. This may involve transferring the function to another position;

Job reassignment;

Part-time or modified work schedules;

Granting unpaid leave;

Acquisition or modification of equipment;

Providing qualified readers or interpreters, but not personal use items such as glasses and hearing aids;

Adjustment or modification of exams, training materials or policies; and

"Other," i.e., a catchall leaving room for accommodations not previously listed.

(c) The EEOC’s regulations provide: “[i]n general,... it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed.” However, the EEOC also states that if an employee with a known disability is not performing well or is having difficulty in performing a job, the employer should assess whether this is due to a disability. See Technical Assistance Manual.

(d) To request an accommodation, the individual or his or her representative must let the employer know of the need for an adjustment or change at work for a reason related to a medical condition. An individual may
use “plain English” and does not need to mention the ADA or use the phrase “reasonable accommodation” in order to request a reasonable accommodation and start the reasonable accommodation process.

(e) The ADA regulations require, when necessary, an informal, interactive process between the employee and the employer to determine if a reasonable accommodation is possible and the appropriate accommodation. The EEOC has specified the following process for identifying a reasonable accommodation:

Look at the particular job involved and determine its purpose and essential functions.

Consult with the individual with a disability to find out his or her specific physical or mental abilities and limitations as they relate to the essential job functions.

In consultation with the individual, identify potential accommodations and assess how effective each would be in enabling the individual to perform essential job functions.

If there are several effective accommodations that would provide an equal employment opportunity, consider the preference of the individual with a disability and select the accommodation that best serves the needs of the individual and the employer.

An employer is only required to provide an effective reasonable accommodation, it is not required to provide the best accommodation.

An employer is only required to provide accommodations that are needed because of the individual’s disability.

An employer may request documentation of the individual’s limitations if the need for a requested accommodation is not obvious or if the employer does not believe that an accommodation is needed.

5. Failing to Consider Leave or Modified Schedule as Reasonable Accommodation

(a) An employer must consider a modified work schedule, including flexibility in work hours or work week, or part-time work, as an accommodation unless it would cause an undue hardship. The EEOC gives the following examples of individuals who may need modified schedules:

Individuals who require special medical treatment for their disability (such as cancer patients, people who have AIDS, or people with mental illness);

Individuals who need rest periods (including some people who have multiple sclerosis, cancer, diabetes, respiratory conditions, or mental illness);

Individuals whose disabilities (such as diabetes) are affected by eating or sleeping schedules; and

Individuals with mobility and other impairments who find it difficult to use public transportation during peak hours, or who must depend upon special transit schedules.

(b) Although the ADA does not require an employer to provide an employee with additional paid leave time, the EEOC has stated that an employer should consider allowing use of accrued leave, advanced leave, or unpaid leave.

(c) The EEOC has stated that a no-fault attendance policy should not itself be considered a violation of the ADA. Nevertheless, an employer should be prepared to give an employee additional unpaid leave if she is covered under the ADA, requests such leave, and the additional leave would not impose undue hardship. See Technical Assistance Manual.

6. Failing to Consider Reassignment as Reasonable Accommodation
Another reasonable accommodation required by the ADA and FEHA is reassignment to a vacant position for which the employee is qualified. An employer’s accommodation obligation does **not** require the employer to:

promote an individual with a disability;

displace another employee from her existing position; or

create a new position.

According to the EEOC’s Technical Assistance Manual, reassignment should be considered only when an accommodation in the employee’s present job is not possible or would create an undue hardship. If possible, such reassignment should be made to an equivalent vacant position or one which will be vacant within a "reasonable amount of time." However, if reassignment to an equivalent position is not possible, then reassignment to a lower-graded vacant or soon-to-be-vacant position for which the employee is qualified should be considered. In such a situation, the employee’s salary could be reduced to the salary paid to other employees in the lower position, provided that is the employer’s practice with respect to other employees reassigned to lower positions.

7. **Failing to Consider Modification of Job Duties as Reasonable Accommodation**

Job restructuring or modification as a reasonable accommodation involves reallocating or redistributing the marginal functions of the job to other employees.

An employer is not required to reallocate essential functions of the job as reasonable accommodation because the essential functions, by definition, are those that a qualified individual must be able to perform with or without an accommodation. An employer may be required to modify the essential functions of the job by changing **when or how** they are performed.

(a) **Light Duty**

(i) An employer is not required to create light duty jobs by eliminating essential functions to accommodate an individual with a disability.

(ii) If an employer has a light duty program pursuant to which it has a certain amount of light duty positions reserved for employees with industrial injuries, then the ADA requires that it place a qualified disabled employee with a non-industrial illness or injury in those positions as a reasonable accommodation, absent undue hardship. See EEOC Guidance on Workers’ Compensation.

(iii) If an employer has a light duty program pursuant to which it **creates** light duty positions on an as-needed basis only for industrially-injured workers, then the ADA does not require that it create such positions for employees with non-industrial disabilities.

(iv) The ADA also does not require an employer to make temporary light duty positions permanent as a reasonable accommodation for employees with disabilities.

8. **Treating Reasonable Accommodation as Undue Hardships**

(a) Employers may be absolved from providing reasonable accommodation if there is no reasonable accommodation that can be provided without undue hardship. "Undue hardship" depends on the size and resources of the employer, as well as the nature of the employer’s business. Unlike other disability statutes, however, the ADA requires employers to incur more than just *de minimis* costs in order to accommodate the disabled.
(b) "Undue hardship" refers to any accommodation that would be unduly costly, expensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business or service.

(c) The EEOC has specifically rejected cost measurements based on comparing the cost of accommodation to the value (salary level) of a given position.

(d) The employer can choose the least expensive of multiple reasonable accommodations.

(e) The terms of a collective bargaining agreement may be relevant to whether a given accommodation poses an undue hardship.

(f) A negative effect on the morale of co-workers is not sufficient, standing alone, to create an undue hardship. However, restructuring a job which creates a heavier workload for other employees may constitute an undue hardship.

9. **Requiring Inappropriate Medical Exams**

For a current employee, medical examinations may be required when:

(a) There is a need to determine whether the employee is still able to perform the essential functions of the job;

(b) If necessary to the reasonable accommodation process;

(c) If required by applicable federal, state or local law as long as job related and consistent with business necessity; or

(d) If otherwise job related and consistent with business necessity;

The ADA imposes no restrictions on the selection or location of a physician or obtaining additional information from the employee’s physician.

Medical records must be kept confidential, in a file separate from personnel files and in a separate locked cabinet. Only those with a true need to know should have access.

10. **Misanalyzing Whether Employee or Applicant Is a Direct Threat**

(a) Direct threat according to the EEOC means a significant risk of substantial harm to the health and safety of individual or others that cannot be eliminated or substantially reduced by reasonable accommodation.

(b) Focus on reasonable judgments as to:

Duration of the risk.

Nature and severity of the harm.

Likelihood that the potential harm will occur.

Imminence of the potential harm.

(c) Only where reasonable accommodation cannot eliminate risk or reduce it to an acceptable level will direct threat defense be successful.

(d) An employer can refuse to hire an individual with a psychiatric disability who has a history of violence or threats of violence only if the employer can show that the individual poses a direct threat.
The EEOC has indicated that the employer must identify the specific violent behavior that would pose the direct threat, which includes an assessment of the likelihood and imminence of future violence.

The EEOC’s position on whether an applicant poses a direct threat is uncertain given that the example provided in the EEOC’s Guidance on Psychiatric Disabilities is so extreme. Specifically, the example given is an applicant whom the employer learns engaged in several recent escalating and overt acts at his prior job (including an attempted fight with a coworker, other altercations at work, punching a wall, and threatening his supervisor with a gun), was given time off for treatment which proved unsuccessful, did not receive any subsequent treatment, and was terminated two weeks prior to his application for employment after he threatened to “get his supervisor” with a gun.

V. AN FMLA UPDATE

A. Complaints Filed

The Family and Medical Leave Act (hereinafter “FMLA” or “Act”) became effective on August 5, 1993. Since its inception, there has been an increase in the amount of cases filed under it each year. In its first two months, there were only 49 cases filed under the FMLA. This number jumped to 1,422 from the period beginning October 1993 and ending September 1994. From October 1994 until September 1995, the cases increased to 2,179. The latest Department of Labor statistics demonstrate that the trend has continued for the period from October 1, 1995 to September 30, 1996, in which 2,394 complaints were filed, an increase of 215 complaints from the previous fiscal year.

The vast majority of cases filed are concentrated in two areas, namely employers’ refusal to grant FMLA leave (1,332 cases) and their refusal to restore employees to the same or equivalent positions after their return from leave (3,506 cases). Out of the 6,044 cases filed under the FMLA, violations were found in 3,528 cases and no violations in 2,516 cases. The significant number of violations found is likely due to employers' confusion in interpreting and implementing the FMLA, rather than a willful disregard of the statute.

FMLA cases have been resolved in a number of ways from simply granting the FMLA leave to dropping the adverse action. However, there has been a significant amount of money paid by employers who have violated the FMLA. Employees have been restored to their jobs with back pay and benefits in 869 cases totaling nearly $3.7M in damages. Another 468 cases involved back pay without job restoration with nearly $1.9M paid by employers. Finally, in 233 cases, benefits have been restored costing employers $207,834.

B. Ten Difficult FMLA Compliance Issues

The following list identifies the most common difficult Family and Medical Leave Act (FMLA) compliance issues. The pertinent section of the FMLA regulations is cited for your reference. All sections cited below appear in Volume 29 of the Code of Federal Regulations.

1. Failure to Notify Employees of FMLA Rights And Obligations, Including Failure to use DOL Employer Response Form or Equivalent (§§ 825.300-825.301)

If an eligible employee requests FMLA leave or if the employer designates time off as FMLA leave, then the employer must provide the employee with the following:

(a) Written Notice of FMLA Rights and Obligations

The written notice must include, as appropriate, the following:

That the leave will be counted against the employee’s annual FMLA leave entitlement;

Any requirement for a medical certification and the consequences of failing to provide certification;

The employee’s right to substitute paid leave and whether the employer will require any substitution and any conditions related thereto;

Any requirement to make premium payments to maintain health benefits, the arrangements for payments, and the consequences of failing to do so;

Any requirement for a fitness-for-duty certificate;

The employee’s status as a “key employee” and its consequences;

The right to restoration to the same or equivalent position; and

Potential liability for the employer’s share of health insurance premiums paid by the employer if the employee fails to return to work.

The DOL’s “Employer Response to Employee’s Request For Leave” Form satisfies the written notice requirement. If a significant portion of workers are not literate in English, then the employer must provide the Employer Response Form in a language in which the employees are literate.

If an employer does not have an FMLA handbook policy, then an employee must also be provided with written guidance/DOL Fact Sheet at the time FMLA leave is requested.

2. Failure to Notify Employee That Leave Will Count Towards 12-week FMLA Entitlement (& 825.208(b)(1)-(b)(2))

(a) Substance of Designation

An employer must designate time off as FMLA leave when the employer knows the leave is for an FMLA qualifying reason. In all circumstances, it is the employer’s responsibility to designate leave as FMLA leave when the employer knows the leave is for an FMLA qualifying reason. If the employer fails to designate a qualifying leave as FMLA leave, then the employee is entitled to the FMLA protections, but the leave cannot be counted against the employee’s 12 weeks of leave.

(b) Timing of Designation

Oral designation of FMLA leave must be given one to two business days after need for leave is given. Written confirmation that the time off is FMLA leave must be made by the next pay day, or if the next pay day is less than one week after the oral designation, by the subsequent pay day. A notation on the employee’s paycheck satisfies the written confirmation requirement.

(c) Frequency of Notice

An employer must designate time off as FMLA leave each time an employee takes time off for a known FMLA reason. For intermittent leaves or reduced leave schedule leaves, only one notice is required under the FMLA.

3. Misunderstanding as to What Qualifies as a Serious Health Condition (§ 825.114)

FMLA leave can be taken by an eligible employee for the employee’s serious health condition that prevents performance of an essential function of the job or to care for a parent, spouse, or child with a serious health condition.

“Serious health condition” means an illness, injury, impairment, or a physical or mental condition that involves:
(a) Inpatient care - Any period of incapacity or any subsequent treatment in connection with such inpatient care.

(b) Absence plus treatment by a health care provider -- Any period of incapacity of more than three consecutive calendar days (and any subsequent treatment or period of incapacity relating to the same condition) that also involves:

Treatment two or more times by a health care provider, nurse or physician's assistant or provider of health care services under orders from, or on referral by a health care provider; or

Treatment by a health care provider on one occasion that results in a regimen of continuing treatment under the supervision of a health care provider.

(c) Pregnancy -- Any period of incapacity due to pregnancy or for prenatal care.

(d) Chronic Conditions Requiring Treatment -- Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

Requires periodic visits for treatment to a health care provider;

Continues over an extended period of time; and

May be episodic rather than a continuing period of incapacity.

Examples include asthma, diabetes, and epilepsy.

(e) Permanent/Long Term Conditions Requiring Supervision – Any period of incapacity which is permanent or long term for which treatment may not be effective. Continuing supervision, but not active treatment, by a health care provider is required.

Examples include Alzheimer's, a severe stroke or the terminal stages of a disease.

(f) Multiple Treatments (Non-Chronic Conditions) -- Any period of absence to receive multiple treatments by a health care provider for restorative surgery after an accident or injury, or for a condition that would result in an absence of more than three consecutive calendar days if left untreated.

Examples include chemotherapy for cancer, physical therapy for severe arthritis, and dialysis for kidney disease.

Serious health conditions would likely include the following:

Heart attacks

Most cancers

Back conditions requiring extensive therapy or surgery

Appendicitis

Pneumonia

Severe arthritis

Treatment for allergies
Mental illness resulting from stress or substance abuse if all conditions are met (but the employer still has the right to take action pursuant to a consistently applied policy prohibiting substance abuse)

Ongoing pregnancy

Miscarriage

Physical examinations to determine if a serious health condition exists and evaluations of the condition

Serious health conditions usually would not include:

Voluntary or cosmetic treatments

Routine physical, eye or dental examinations

Common cold, flu, ear aches, minor ulcers, upset stomachs, headaches other than migraines, unless complications arise

4. Designating Leave Retroactively When Inappropriate to Do So (§ 825.208(b)-(e))

(a) Employer Knows of FMLA Reason But Fails to Designate

If an employer knows leave is for an FMLA qualifying reason but does not so designate, no retroactive designation may be made regardless of whether the employee is still on leave or has returned. The time off may not be counted against the employee’s 12 week entitlement but the employee receives all FMLA protections.

(b) Employer Learns of FMLA Reason While Employee Still on Leave

If an employer learns that leave is for an FMLA reason after leave has begun and the employee is still on leave, that portion of the leave that is FMLA qualifying may be retroactively designated.

(c) Employer Learns of FMLA Reason After Employee Has Returned To Work

If an employer learns that leave was for an FMLA reason after the employee has returned to work, then the employer can retroactively designate the leave as FMLA leave if does so within two business days of the employee’s return to work.

(d) Employer Has No Knowledge of FMLA Reason, Employee Wants Retroactive Designation

If an employer never learns that leave is for an FMLA reason but the leave was for an FMLA purpose, then the employee must notify the employer within two business days of returning to work that the leave was for an FMLA reason and leave may then be retroactively designated. If the employee fails to do so, he/she has no FMLA protection for the absence.

5. Failure to Designate Qualifying Workers’ Compensation And Short-term Disability Leave Time as Family And Medical Leave (§§ 825.207(d), 825.208(a))

The FMLA specifically provides that FMLA leave may be taken for any “serious health condition,” including a work-related injury. Similarly, the fact that an employee is receiving short-term disability benefits (or sick or vacation pay), does not affect the employer’s ability and obligation to designate the leave as FMLA leave and count it against the employee’s 12 weeks of leave.

6. Counting Isolated Days of Absence Against Employee’s Attendance Record When the Absences Are Protected as Intermittent Leave (§§ 825.203, 825.220(c))
An employee may take leave intermittently (i.e., in separate blocks of time of as little as one hour or one day for the same illness or injury) to care for an immediate family member with a serious health condition or because of a serious health condition of the employee when “medically necessary.”

(a) “Medically necessary” means there must be a medical need for the leave and that the leave can best be accomplished through an intermittent leave.

(b) Intermittent leave and leave on a reduced leave schedule may be taken for a chronic serious health condition or for pregnancy even if no treatment by a health care provider is received for a particular absence.

(c) An employee may take intermittent or reduced leave in increments as small as the shortest period of time the employer’s payroll system uses to account for absences or use of leave, provided it is one hour or less.

(d) An absence covered by the FMLA cannot be counted against the employer’s attendance system. A policy that counts all absences regardless of the reason violates the FMLA.

(e) Employees needing intermittent leave or leave on a reduced leave schedule must attempt to schedule the leave so as to not disrupt operations.

(f) An employee cannot be required to take more FMLA leave than he/she needs. Only the time actually taken can be charged against the employee’s leave entitlement.

(g) An employer may limit leave increments to the shortest period of time the employer’s payroll system uses to account for absences or use of leave, provided it is one hour or less.

(h) For part-time employees and those who work variable hours, the FMLA leave entitlement is calculated on a pro rata basis. A weekly average of the hours worked over the 12 weeks prior to the beginning of the leave should be used for calculating the employee’s normal workweek.

(i) Under the FMLA, an employee may take leave intermittently (for a few days or even a few hours) or on a reduced leave schedule for childcare only with the employer’s consent.

(j) An employee cannot be required to take more FMLA leave than he/she needs.

7. Failure to Grant Leave to Provide Psychological Comfort to Seriously Ill Family Member (§ 825.116)

The definitions of “needed to care for” a family member with a serious health condition under the FMLA include providing psychological comfort and reassurance which would be beneficial to the family member. Thus, an employee is entitled to leave under the FMLA if the employee’s presence would provide psychological comfort to a covered family member with a serious health condition.

8. Misunderstanding of Method of Counting Intermittent/Reduced Leave for Exempt Employees (§§ 825.205(a)-(b), 825.500(f))

(a) An exempt employee’s FMLA leave entitlement is calculated on a pro rata or proportional basis based on the actual number of hours the employee works per week. A weekly average of the hours worked over the 12 weeks prior to the beginning of the leave should be used for calculating the employee’s normal workweek.

(b) If an intermittent or reduced schedule leave is taken by an exempt employee, there must be a written agreement regarding the employee’s normal schedule or average hours worked each week in order to determine how much leave the employee is using.

(c) An employer may dock an exempt employee for a partial day or hours taken pursuant to the FMLA without affecting the employee’s exempt status.
Only the time actually taken can be charged against the employee’s leave entitlement.

9. **Failure to Designate 12-Month Period (§ 825.200(b)-(e))**

An employer can define a 12-month period as:

- The calendar year;
- Any fixed 12-month leave year (i.e., fiscal, anniversary);
- A 12-month period measured forward from the date leave begins; or

A rolling 12-month period measured backward from the date an employee uses FMLA leave.

If an employer does not advise employees how it will calculate the 12-month period, the employee can select the most advantageous 12-month period.

An employer must select a 12-month period and uniformly apply it to all employees in all facilities. The only exception to this required uniformity is where the employer has eligible employees in a state with a family and medical leave statute. Then, the employer may use the 12-month period required by that state’s family and medical leave statute.

If an employer decides to change the 12-month period being used, then it must provide employees with at least 60 days notice of the change. During the 60-day notice period, employees are entitled to leave under whichever of the two 12-month periods provides them with the greatest benefit.

10. **Transferring Employee on Intermittent or Reduced Schedule Leave Where Leave Is Not “Foreseeable and Based on Planned Medical Treatment” (§ 825.204)**

An employer may transfer an employee on an intermittent or reduced schedule leave to an alternative position with equivalent pay and benefits that better accommodates the need for leave only if the employee is on a leave that is **foreseeable and based on planned medical treatment**. An employer may not transfer an employee on an unforeseeable intermittent or reduced schedule leave. An employer also may not transfer an employee to an alternative position in order to discourage the employee from taking leave.

**VI. SEXUAL HARASSMENT UPDATE**


1. **The Impact of Ellerth and Faragher**

These two cases recently decided by the Supreme Court greatly emphasize the increased importance of maintaining, distributing and effectively implementing sexual harassment policies. The Court decided that employers can be vicariously liable for sexual harassment committed by their supervisory employees. Nevertheless, the Court also held that if the sexual harassment does not culminate in a tangible employment action, an employer may raise the following **affirmative defense** and escape liability: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Though the Court did not offer much guidance on this affirmative defense it did provide, however, that an employer’s failure to have an anti-harassment policy will be a large factor in deciding part “a” of the affirmative defense. The decision implies that, while an employer’s failure to have an anti-harassment policy
is not a per se failure to meet the affirmative defense, harassment policies are a very large element in establishing reasonable care.

On part “b” of the affirmative defense, the Court provided a much clearer rule. The Court’s holding provides that if an employer has an anti-harassment policy that includes a reasonable complaint procedure and an employee fails to use the complaint procedure, the employer will likely escape liability for sexual harassment by its supervisory employees, provided no tangible employment action was taken against the complaining employee. Of course, a bad work environment that fosters retaliation and gives employees a reason not to complain will undermine the employer’s use of the affirmative defense and will make an employee’s failure to use a complaint procedure more reasonable. In this case, an employer may still be liable despite the existence of a well-disseminated policy and complaint procedure.

2. The Factual Holding in Faragher

The factual holding in the Faragher case emphasized the weight of the Court’s pronouncements. The Court held that the City of Boca Raton was foreclosed from arguing that the affirmative defense applied because the City had no “serious prospect” of being able to establish the elements of the defense.

Rather, the Court held that the City was liable as a matter of law because it “had entirely failed to disseminate its policy against sexual harassment ... [and] its officials made no attempt to keep track of the conduct of supervisors like [those accused of the harassment].” The Court further cited the fact that “the City’s policy did not include any assurance that the harassing supervisors could be bypassed in registering complaints.” Based on these three facts, the Court concluded that the City could not prove the affirmative defense as a matter of law. In other words, the City of Boca Raton was held liable for the sexual harassment specifically because its sexual harassment policy, the implementation of that policy and the distribution of the policy was inadequate.

3. Practical Lessons from Ellerth and Faragher

Every employer should have a sexual harassment policy that is disseminated among all of its employees. This is necessary to protect an employer’s ability to raise the affirmative defense of having exercised reasonable care to prevent and correct sexual harassment.

Every sexual harassment policy must include a complaint procedure that allows a complaining employee to bypass an allegedly harassing supervisor when registering complaints. Complaint procedures should make alternative avenues of complaint available to employees and should not require employees to register complaints with their direct supervisors.

Employers should also anticipate and prevent employees from having reasonable excuses for not using the complaint procedure, such as fear of retaliation or belief that the complaints would be futile. Allowing a corporate culture to exist where such excuses are reasonable will decrease the protection of the new affirmative defense and will make it more likely that an employer could be found liable despite the existence of a disseminated policy and complaint procedure. Adding no-retaliation provisions and promising to fully investigate all complaints are some ways in which an employer can overcome such excuses.

At a minimum, these are three lessons that every employer must learn and employ in order to protect itself from liability for sexual harassment.


1. The Holding from Oncale

In a unanimous decision and opinion by Justice Scalia, the Supreme Court held that same-sex sexual harassment is actionable under Title VII. The Court reasoned that Title VII prohibits discrimination “because of sex” in the terms and conditions of employment and that the critical issue in this determination is not sexual content but rather “whether members of one sex are exposed to disadvantageous terms or conditions
of employment to which members of the other sex are not exposed." The Court expressly noted that harassment does not have to be motivated by sexual desire to support an inference of discrimination on the basis of sex. Rather, the key question is whether the discrimination is because of sex.

2. Practical Lessons from Oncale

Sexual harassment is not limited to interaction between the opposite sexes. Employers must be cognizant that same-sex harassment will be given the same treatment and analysis by the courts as the more common claims against members of the opposite sex.

In addition to the holding on same-sex harassment, however, the Court’s short opinion is important for two other aspects of sexual harassment law as well. First, the opinion addresses the standard by which the severity of the harassment must be measured. It states that the objective severity of the harassment should be measured from the viewpoint of a reasonable person in the plaintiff’s position. This point is important to the debate over the reasonable woman vs. the reasonable person standard and emphasizes the importance of context in the evaluation.

Second, the Court’s opinion is important because of the extent to which it emphasizes the importance of context in determining the existence of sexual harassment. The Court explained that the analysis “requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. The Court emphasized that what may be sexual harassment in the office is not necessarily so in other contexts, such as on the football field, and concluded that courts and juries should employ common sense and an appreciation for social context to distinguish between simple teasing and roughhousing and unlawful sexual harassment.

C. Post-Faragher/Ellerth Federal Court Cases

1. What Constitutes Reasonable Care or an Adequate Sexual Harassment Policy?

In Fiscus v. Triumph Group Operations, the employer maintained a written anti-harassment policy in the employee handbook and posted it at the workplace. The policy required employees to report harassment to a department supervisor, department manager, human resource manager, or to the president and provided for timely and confidential investigations, sexual harassment training for management and first-line supervisors, and contained a no-retaliation policy. The court found that the policy was sufficient to support the employer’s affirmative defense.

In Jones v. Petroleum Corp., the employer’s sexual harassment policy was read and signed by all employees. It stated that the employer would not tolerate sexual harassment, listed proscribed conduct, and provided a sexual harassment reporting procedure, including contacting a supervisor or the personnel manager at a specified number. The court found the policy legally sufficient to demonstrate the employer’s exercise of reasonable care for the first element of the employer’s reasonable care defense.

In Landrau Romero v. Caribbean Restaurants, Inc., the court found sufficient a policy against sexual harassment allowing employees either to present a complaint to the human resources director or to the administrative director by phone or by mail, and requiring the directors to confidentially investigate and appropriately discipline harassing behavior. The employer provided additional employee training devoted to explaining the policy. The court held that the employer’s actions satisfied the first prong of the affirmative defense and, because the employee never told anyone about the alleged harassment, granted summary judgment for the employer.

In Sconce v. Tandy, the employer’s sexual harassment policy consisted of a handbook statement, given to all employees, prohibiting sexual harassment as a violation of the policy, describing the types of conduct that would not be tolerated, and directing employees to submit complaints to one of three officers whose addresses were given. The court found this policy adequate to support the first part of the employer’s affirmative defense.
2. What Constitutes Failure to Exercise Reasonable Care or an Inadequate Sexual Harassment Policy?

In *Wilson v. Tulsa Junior College*, the employer maintained a policy that required employees to report sexual harassment to their supervisor or to the director of personnel, and required the supervisor or director of personnel to report all formal complaints to the director of civil rights. The court found the policy inadequate because the director of personnel’s office was located in a separate facility that was not accessible during the evening or on weekends, and the policy failed to define what constituted a “formal complaint.”

In *Ocheltree v. Scollon Productions, Inc.*, the employer did not have a specific policy against sexual harassment but maintained an informal open door policy whereby employees were encouraged to bring work-related problems not solved by a supervisor, to the president or vice-president. However, the president and vice-president failed to make themselves available to the complaining employee. The court found that the open door policy itself was not per se unreasonable, but remanded this case for a further factual investigation into whether the employer’s approach to sexual harassment was adequate.

In *Lancaster v. Scheffler Enterprises*, the court found that simply forcing employees to sign a policy or merely issuing a policy does not constitute reasonable care. The court opined that an employer must take reasonable steps to prevent harassment, correct wrongful behavior and enforce the policy.

3. What is an Unreasonable Failure by the Employee to Take Advantage of the Employer’s Prevention and Correction Policies or to Avoid the Harm Otherwise?

In *Duran v. Flagstar Corp.*, the employer maintained a 1-800 number that employees could call to report sexual harassment. The complaining employee alleged that she used the number and that no one returned her call. However, phone records for the relevant time period did not reflect a call from the employee. The court held that the employee’s failure to use the phone line was unreasonable and, therefore, the employer fulfilled the second element of the affirmative defense.

In *Speight v. Albano Cleaners*, the court held that the employee’s failure to report the alleged harassment, even though the employee was aware of the employer’s sexual harassment policy, knew the steps to take to report harassment, and had multiple opportunities to discuss the harassment with a high level supervisor and the president, was unreasonable. Therefore, the court found that the employer established the affirmative defense and granted summary judgment in favor of the employer.

In *Jones v. Petroleum Corp.*, the court held that two employees failed to reasonably use the employer’s complaint procedure to report harassment by their manager. The procedure allowed employees to either contact the number listed in the harassment policy, contact headquarters or complain to the regional manager. The employees claimed they did not use the policy because they feared retaliation from their manager if they reported his behavior. The court held that a generalized fear of repercussions, without concrete evidence, can never constitute reasonable grounds for failure to complain to the employer.

In *Sconce v. Tandy*, the employee claimed that a threat of termination prevented her from using the employer’s reporting procedures. The court found that the threat was not a reasonable excuse where the evidence showed that the employer’s procedures were fairly administered and the employee was not required to report the misconduct to the individual accused of harassment. Because the employer also conducted an investigation upon learning of the employee’s allegations from the EEOC, the court found that the employer established the affirmative defense to the harassment claim.

4. Does an Employee’s Delay in Reporting Sexual Harassment Constitute an Unreasonable Failure to Take Advantage of the Employer’s Prevention and Correction Policies or to Avoid the Harm Otherwise?

In *Corcoran v. Shoney’s Colonial, Inc.*, the employee waited eight months from the initiation of sexual comments before reporting the conduct. The employee claimed that she finally reported the harassment
when her manager exposed himself to her and forced her to touch his genitals. The court found that this delay was not unreasonable, opining that sexual comments are frequent in the workplace and the employee reported the harassment when it became impossible to ignore.

In Fall v. Indiana Board of Trustees, the employee waited three months from the time of physical sexual harassment until reporting the incident, and finally did so when the alleged harasser insinuated that the employee would be fired. The court found that the delay was not unreasonable because the final reporting was accompanied by an increase in the intensity of the harassment.

In AGCO v. Montero, the court found that a two-year delay in reporting sexual harassment was unreasonable on the part of the employee. The court noted that the employee failed to present evidence to support her belief that the employer’s harassment policy would be honored and that she would be retaliated against. Therefore, the employer proved the second element of its affirmative defense.

5. What Constitutes an Appropriate Response to a Complaint or of Sexual Harassment?

In Indest v. Freeman Decorating, Inc., an employee reported several incidents of sexual harassment to the employer’s human resource director. Pursuant to the employer’s anti-harassment policy, the human resource director immediately investigated the complaint by interviewing witnesses to the incident, the complainant’s supervisors, and the alleged wrongdoer. After finding a violation of the policy, the employer issued a verbal and written reprimand to the wrongdoer, suspended him without pay for seven days, and prohibited him from attending the annual management and sales meeting. The employer informed the complainant of the reprimand and suspension, assured her that she not would suffer any form of retaliation, promised the complainant that she would never have to work at any trade shows where the wrongdoer was present and offered to pay for any counseling that she might need. The court, finding this an appropriate remedial response to the complaint, held that the employer met the affirmative defense, and could not be held liable for the sexual harassment.

In Parkins v. Civil Constructors of Illinois, Inc., an employee filed a complaint with her Union alleging that she had been sexually harassed by five male employees. Upon hearing of the complaint, the employer immediately launched an investigation into the incident, interviewing the complainant, the five alleged wrongdoers, and more than twenty employees. After concluding that the complainant had been harassed the employer punished each of the five wrongdoers: one received a verbal reprimand, three received a one-week suspension without pay, and one received a three-week suspension without pay. The employer also informed the wrongdoers that any more complaints of harassment against them would result in their termination. The court held that the employer’s response to the complaint was reasonably likely to prevent future harassment and affirmed a finding of summary judgment for the employer.

6. What Constitutes an Inappropriate Response to a Complaint of Sexual Harassment?

In Howard v. Burns Bros., Inc., evidence that an employer received a complaint about sexual harassment long before taking any remedial action, was sufficient for the case to be submitted to the jury under Title VII.

APPENDIX A

II. CALIFORNIA WAGE-HOUR COMPLIANCE ISSUES

California’s laws regarding protection of wages, hours, and working conditions for employees differ substantially from federal law and the laws of other states. California’s laws regulating compensation are among the most rigorous in the country. While the federal Fair Labor Standards Act only protects non-exempt employees, and only regarding minimum wage and overtime pay, the California Labor Code contains a variety of provisions that protect employees, regardless of exempt status or position.

California and federal wage and hour laws apply only to employees and do not apply to independent contractors. Consequently, the first issue that must be addressed is whether an employment relationship exists.
A. Establishing An Employment Relationship:

INDEPENDENT CONTRACTOR STATUS VERSUS EMPLOYEE

California administrative agencies, especially the Employment Development Department and the Division of Labor Standards Enforcement (“DLSE”), scrutinize independent contractor relationships thoroughly. The issue of independent contractor status is a jurisdictional one that, in most cases, determines whether these administrative agencies can process the claim.

The definitions of employee and employer contained in the Wage Orders and the Labor Code are broad and vague and do not provide meaningful guidance in determining which workers may safely be categorized as independent contractors for wage and hour purposes. The Wage Orders provide that employ “means to suffer, engage or permit to work.” Similarly, an employee “means any person employed by an employer.” An employer “means any person … who directly or indirectly … employs or exercised control over the wages, hours, or working conditions of any person.” The Labor Code defines an employee as “every person … rendering actual service in any business for an employer.” An employer is “every person engaged in any business or enterprise … which has one or more persons in service under any appointment, contract of hire, or apprenticeship.”

The critical legal distinction between employees and independent contractors is the right to control the manner and means by which work is performed, that is, the details of the work. See, e.g., Toyota Motor Sales U.S.A., Inc. v. Superior Court, 220 Cal. App. 3d 864, 269 Cal. Rptr. 647, 652 (1990). "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established.”

Societa Per Azioni De Navigache Italia v. City of Los Angeles, 31 Cal. 3d 446, 458, cert. denied, 459 U.S. 950 (1982).

While the primary consideration is who controls the manner and means by which work is accomplished, the DLSE, in its Operations and Procedures Manual, has set forth additional factors to be considered to determine if the employment status of a person in service of an employer is that of an employee or an independent contractor:

1. Whether the person performing the service is engaged in a distinct occupation or business. If the person performing the service is engaged in a separately established business distinct from that of the employer, it evidences that the person is an independent contractor and not an employee. It is evidence that a business is established separately if the person operating the business holds himself or herself out to the general public, or a significant portion of the business community in some readily identifiable way, as ready to perform services similar to those performed for the principal.

2. Whether the work is done under the direction of the employer, or by a specialist without supervision. Where the work being performed is customarily subject to extensive supervision, an inference is created that the relationship is one of employer/employee.

3. The skill required in the particular occupation. Unskilled labor is usually supervised and, therefore, if a person is performing services which require little or no skill or experience, an inference “is created that such person is an employee.

4. Whether the employer or the person performing the service supplies the instrumentalities, tools, and the place of work. Where the tools, instrumentalities or facilities used to accomplish the work are not significant in nature, no inference is created with respect to the employment status. However, if the tools, instrumentalities and facilities are of substantial value and are provided by the employer, an inference is created that there is an employer/employee relationship.
5. Whether the person performing the services has the right to hire and terminate others. If the person performing the services has the right to hire others to assist in the performance of the services for which he or she was hired and terminate them, an inference is created that the person is an independent contractor.

6. The length of time for which the person is to perform the services. If the length of time for which the person is to perform the services is short, an inference that the relationship is one of principal/independent contractor is created. However, if the nature of the work is such that only a short relationship would be expected, this inference must be discounted.

7. The method of payment, whether by the time, a piece rate or the job. If payment is made by the job, there is a greater inference that the relationship is one of principal/independent contractor than if payment is based on an hourly or piece rate wage.

8. Whether the services are a part of the regular business of the employer. If the services performed are a regular part of the business of the employer, an inference is created that the person performing such services is an employee.

9. Whether the parties believe they are creating the relationship of employer/employee or principal/independent contractor. The employment status that the parties believe they are creating may be evidenced by a contract, either oral or written. However, in order to determine the true employment status, such contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed.

These factors have evolved for assessing relationships; however, no one factor is a determinant and each relationship must be examined individually in light of all the facts surrounding that relationship. The basic concept to keep in mind is that the less right of control the principal has over the manner and means of performance, the less likely there is an employer/employee relationship.

The penalties for misclassification may be quite substantial. A principal may owe a misclassified worker any and all unpaid wages, including overtime, for up to three years. Since principals do not usually keep time records on independent contractors, typically the employer will have a great difficulty disproving whatever wages the worker claims. Moreover, the penalty for failing to pay all wages due every pay period is $50 or $100 (for willful violations) per employee, per pay period and up to 25% of the wages which were not paid to each employee each pay period. Labor Code § 210. It is also a misdemeanor. Labor Code § 215.

Further, employers have a statutory obligation to provide itemized wage statements to employees each pay period. Obviously, lump sum payments made per project (as is done with many independent contractors) violates this requirement and could result in additional penalties of $250 per employee for the first violation and $1,000 per employee for each subsequent violation. Labor Code § 226.3. In addition, an employer must pay a terminated employee wages due and owing in a timely fashion or be subjected to penalty of up to 30 times the employer’s daily wage. Labor Code § 203.

Thus, a principal who thinks he has engaged an independent contractor can unwittingly subject himself or herself or to quite substantial penalties for not meeting all the requirements of California wage and hour laws.

B. Labor Code Provisions Applicable To All Employees

1. Time, place, and manner of wage payments

a. Regular Pay Days (Labor Code § 204)

Non-exempt employees must be paid twice each calendar month on days designated as regularly scheduled pay days. Work performed from the first to the 15th must be paid by the 26th of the month; work performed
from the 16th to the end of the month must be paid by the 10th of the following month. *Overtime* earned in one pay period must be paid no later than the pay day for the next regular pay period.

Employees for weekly, bi-weekly, or other semi-monthly pay periods must be paid within seven days of the close of the pay period.

Exempt employees must be paid at least once a month on or before the 26th day of the month during which labor was performed. The entire monthly salary must include the unearned portion between the date of payment and the last day of the month.

Striking employees must be paid on the next regular pay day (Labor Code § 209).

There are special pay provisions for car salesmen who are paid on a commission basis (Labor Code § 204.1), agricultural workers (Labor Code §§ 205, 205.5), and live-in domestic help (Labor Code § 205).

*Penalty*: The failure to pay wages when due may result in penalties of $50.00 per pay period for each failure to pay each employee for the first violation or $100.00 per pay period for each employee for willful or subsequent violations (Labor Code § 210) plus 25% of the wages not paid to each employee being assessed. These penalties are paid to the State of California.

**b. Pay Day Notice (Labor Code § 207)**

An employer must post notice indicating the regular pay days and the time and place of payment. Failure to post this notice is prima facie evidence of a violation of Labor Code sections relating to regular pay days, payment of strikers, and paycheck requirements.

**c. Resignations/Terminations And The Employee’s Final Paycheck (Labor Code §§ 201, 202, and 203)**

Labor Code section 201 requires employers to pay employees all wages (*including* all accrued and unused vacation pay) at the date and time of termination, if the employee is discharged or laid off. Labor Code section 202 states that employees who resign and who do not have a written contract for a definite period of employment, must be paid their wages *within 72 hours* of the time of quitting. If the employee has given the employer at least 72 hours notice, the wages are due at the time of termination.

If an employee quits without providing 72 hours advance notice, the employee shall be entitled to receive payment of his or her wages *by mail* if he or she so requests. The date the check is mailed will constitute the “date of payment.”

A “willful” failure to pay a terminated employee wages due in a timely manner will subject the company to waiting time penalties. Lab. Code § 203. These penalties accrue at the rate of one day’s wage for each work day the employee has to wait, with a maximum penalty of 30 days wages payable to the employee. A “willful” failure to pay does not require evil intent but rather a conscious failure to pay wages. A "good faith dispute" that wages are due, however, will preclude imposition of waiting time penalties. A "good faith dispute" that wages are due occurs when an employer presents a defense, based on law or fact which, if successful, would preclude any recover on the part of the employee. The fact that a defense is ultimately unsuccessful does not mean a “good faith dispute” did not exist. This section applies to *all* employees, regardless of exempt status.

Vacation accrued to the time of termination must be calculated on the basis of *daily* accrual, even if it ordinarily is calculated on an annual, monthly, or weekly basis.

**d. Disclosure Of Compensation (Labor Code § 232)**

Under Labor Code section 232, an employer may *not* require employees to refrain from disclosing the amount of their wages; may *not* require them to sign a waiver or other document that denies the right to do
so; and may not discharge, discipline, or otherwise discriminate against them for job advancement because they disclose the amount of their wages.

**e. Itemized Deduction Statement Requirements (Labor Code § 226)**

Each employee must be furnished with a statement of deductions showing: gross wages earned; total hours worked by each employee working on an hourly basis; all deductions; net wages; inclusive dates for the pay period; name and Social Security number of employee; and name and address of employer. If an employer fails to furnish employees with itemized statements as required, they are subject to civil penalties of $250.00 per employee for the first violation and $1,000.00 per employee for subsequent violations.

**f. Setoffs And Authorized Deductions From Wages (Labor Code § 221)**

California severely limits the circumstances in which an employer can deduct wages from an employee’s paycheck. As a general proposition, only statutorily prescribed (e.g., taxes) or expressly authorized (e.g., health insurance co-payments, union dues) deductions may be made from an employee’s paycheck. Section 221 of the Labor Code prohibits an employer from collecting or receiving from an employee any part of the wages paid to the employee.

Labor Code section 221 has been interpreted by the California Supreme Court as restricting the employer from making deductions that resulted from losses beyond the employee’s control or which resulted from the employee’s simple negligence. *Kerr’s Catering Service v. Department of Industrial Relations*, 57 Cal. 2d 319 (1957). Of course, an employer generally may discipline an employee for losses due to simple negligence.

Deductions may be permissible in the event of “gross negligence, recklessness, or willful misconduct” without first obtaining employee authorization. Note, however, that an employer who makes deductions on such grounds acts at its peril and has the burden of proving that one of the prerequisites to a lawful unauthorized deduction was met. Otherwise, if the deduction occurred on an employee’s final paycheck, then the employer will be subject to the waiting time penalties associated with a willful withholding of wages set forth in Labor Code section 203.

Any deduction to satisfy a debt is valid only if approved in advance and in writing by the employee. Any deduction of a “balloon” payment from the final check is unlawful unless it is authorized in writing in a new and valid agreement at the time of termination. This general proposition covers: loans to the employee, educational assistance, obligations incurred from a product purchase plan, and overpayment of wages where the employee was not aware or could not reasonably be expected to have been aware of the overpayment.

**2. Employee leave policies**

**a. Vacation Policies (Labor Code § 227.3)**

Labor Code section 227.3 prohibits, in the absence of a collective bargaining agreement, the forfeiture of *vested* vacation benefits upon an employee’s termination of employment. This section has been interpreted to prohibit “use it or lose it” vacation policies. In a nutshell, California law generally does not allow employers to enforce a vacation policy that requires a terminating employee to forfeit earned vacation or that prohibits the carryover of earned vacation pay. (Note, however, that the DLSE will not enforce claims against *funded* vacation plans that are subject to the Employment Retirement Income Security Act of 1974 (“ERISA”))

Unless clear to the contrary, vacation pay generally will be deemed to have been earned from the first day of employment even if the vacation pay plan provides that an employee is not eligible to take vacation time off until the completion of the first six months or year of employment. Thus, vacation pay for a terminating employee must be prorated on a daily basis and must be paid at the final rate of pay in effect at the time of the employee’s separation.
If California employers want to deny the accrual of vacation pay to short-term employees, then they must provide clearly that no vacation pay is earned for some specific initial period of time. Credit for vacation pay purposes for time worked during this initial period of time of no accrual cannot be given retroactively once the employee works beyond the period.

Employees who voluntarily refrain from taking vacation time off and receiving vacation pay, even though they know the employer’s policy is “use it or lose it,” do not waive their statutory right to payment for accrued but unused time. *Henry v. Amrol, Inc.*, 222 Cal. App. 3d Supp. 1, 6-7 (1990).

Employers can approximate the effect of a “use it or lose it” policy by having a “no additional accrual” policy. Such a policy places a cap or ceiling on the accrual of additional vacation pay until the employee takes paid vacation to bring the accrued but unused vacation pay below a defined maximum level. However, vacation pay accumulates unless the parties’ employment contract provides otherwise. *Boothby v. Atlas Mechanical, Inc.*, 6 Cal. App. 4th 1595 (1992).

Many employers, through a “no additional accrual” policy, permissibly limit accrual of vacation pay to an amount equal to twice the amount of vacation the employee earns in a qualifying period. Alternatively, an employer simply could “cash out” an employee’s accrued vacation pay if, for example, the employee fails to take paid vacation within 12 months of the end of the qualifying period during which full vacation benefits were earned.

Section 227.3 does not purport to limit an employer’s right to control the scheduling of its employees’ vacations. Consequently, there appears to be no problem prohibiting employees from taking a vacation until the calendar year following the year during which the vacation benefits accrued. Similarly, an employer may establish a minimum number of hours that must be worked during a period to qualify for vacation benefits. Alternatively, employers may exclude altogether specific employee classifications from its vacation program, or may differentiate among classifications of employees for that purpose, provided that such exclusions or differentiations do not have an unjustified disparate impact on one of California’s many protected groups. Indeed, there is no legal obligation for an employer to provide vacation benefits at all.

Note: Vacation pay constitutes “wages” within the meaning of the California Labor Code. Thus, a failure to pay vested vacation benefits to an employee upon termination could subject an employer to “waiting time” penalties.

### b. Floating Holidays

The California Labor Commissioner has indicated that floating holidays will be treated as equivalent to additional vacation days. (The same is true of personal time off (“PTO”) policies.) Therefore, if an employee leaves without having taken floating holiday(s), the employee will have to be paid for it (them) on a pro rata basis. For example, if an employee’s employment is terminated at the end of six months of a relevant 12-month period, then the employee would receive 50% of any unused floating holiday benefit.

### c. Sick Leave

Currently, neither state nor federal law requires that employees be given paid sick leave. However, many employers pay for a specific amount of sick leave. Although there is no Labor Code provision that prevents “forfeiture” of accrued paid sick leave, if the employer’s policy provides for the periodic payment of unused sick leave (for example, at the employee’s anniversary date or at the end of a calendar year), then there is a substantial risk that these paid sick leave benefits will be treated as “wages” under the Labor Code. Accordingly, employers should consider drafting paid sick leave policies in such a way that it is clear that employees do not qualify for sick leave benefits until and unless the employee suffers a *bona fide* illness or injury requiring absence from the job. It also is advisable to indicate specifically that “unused” sick leave benefits will not be paid for upon termination.

### d. Paid Leave Policies
If the employer combines its vacation, holiday and sick leave policies into a single benefit program (a “paid time off” or “PTO” program) and if such a program provides employees a certain number of paid days off per period for any purpose, including vacation, then the state enforcement agency takes the position that these programs are subject to the same rules as pure vacation policies.

e. Severance Plans

No state or federal law requires employers to pay severance to discharged employees in the absence of an agreement to do so (absent a violation of the WARN Act). If, however, an employer establishes a plan for the purpose of making severance payments, the plan may be held to be employee welfare benefit plan governed by the provisions of ERISA. Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984). Claims for severance pay pursuant to a plan are not handled by the California Labor Commissioner, but rather must be pursued through the federal Department of Labor or a court action.

On the other hand, if an employer enters into an individual employment contract with an employee that provides that the employee will receive, under given conditions, a certain amount of severance pay upon termination, then the employee’s eligibility for severance pay may be litigated before a Labor Commissioner or court which will decide whether the given conditions apply.

Severance pay agreements often are offered to terminated employees in exchange for a release of claims. (Note: there is some risk that offering a severance pay-based release, prior to a threat of litigation being made by an employee, may be evidence of improper conduct if the employee then sues).

C. California’s Wage Orders

California has a series of Wage Orders that cover numerous industries and occupations. An employer is subject to the provisions of an industry-wide Wage Order if its business is specified in one of the 12 industry specific Wage Orders. (Orders 1-3 and 5-13). If an employer’s business does not fall within the scope of the industry-wide Wage Orders, then certain of its employees may be covered by one of three occupation-wide orders. (Orders 4, 14 and 15). The order applicable to each facility must be posted at that facility.

The California Wage Orders are administrative regulations that set forth requirements for minimum wages, overall compensation, and working conditions in various industries and occupations in the State of California. These orders, which are set forth in 8 Cal. Code Reg. §§ 11000-11150, are as follows:

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<thead>
<tr>
<th>WAGE ORDER</th>
<th>INDUSTRY OR OCCUPATION</th>
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<td>Manufacturing Industry (§ 11010)</td>
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<td>2-80</td>
<td>Personal Service Industry (§ 11020)</td>
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<tr>
<td>3-80</td>
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<td>4-89</td>
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<td>15-80</td>
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D. Recent Amendments to Wage Orders Nos. 1-89, 4-89, 5-89, 7-80, and 9-90
The IWC recently issued its Summary of Action - Industrial Welfare Commission State of California Amendments to Orders 1-89, 4-89, 5-89, 7-80, and 9-90 setting forth its amendments to Wage Orders Nos. 1-89, 4-89, 5-89, 7-80, and 9-90, which go into effect on January 1, 1998. (A copy of this Summary of Action is included in the Appendix.) The amendments are summarized as follows:

1. Amendment to Orders 1, 4, 5, 7, and 9: elimination of the daily overtime pay requirement. Effective January 1, 1998, employers of non-exempt employees covered by Wage Orders 1, 4, 5, 7, and 9 are obligated to pay overtime pay only for those hours worked in excess of forty (40) per week: "No employee eighteen (18) years of age or over shall be employed more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee’s regular rate of pay for all hours worked over forty (40) hours in the workweek. No overtime pay shall be required for hours of work in excess of any daily number." (Amendment to Section 3(A) of Orders 1, 4, 5, 7, and 9.) Thus, non-exempt employees covered by these Orders will continue to be entitled to overtime pay at the rate of one and one-half their regular rates of pay for those hours worked in excess of forty (40) per week, but they will no longer be entitled to overtime pay for hours worked in excess of eight hours per day. This amendment represents adoption of the same overtime standard under the FLSA and the law of most states.

2. Amendment to Orders 1, 4, 5, 7, and 9: Elimination of "seventh day" overtime premium pay. Pursuant to the amendment providing that overtime pay is required only for those hours worked in excess of forty (40) per week, the following provision in Orders 1, 4, 5, 7, and 9 is no longer applicable and is eliminated effective January 1, 1998: "An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6)." (Section 3(D), Orders 1 and 9; Section 3(E), Orders 4 and 7; Section 3(F), Order 5.) Thus, work on a seventh day will be treated as work on any other day -- overtime pay does not become due until the total hours worked exceed forty (40), regardless of the number of workdays worked.

3. Amendment to Order 5: Section 3(D) exclusion limited to organized camp counselors only. Section 3(D) has been amended as follows, effective January 1, 1998: "This section does not apply to organized camp counselors, provided that persons employed in such occupations shall not be employed more than fifty-four (54) hours nor more than six (6) days in any workweek, except under the following conditions. In case of emergency, employees may be employed in excess of fifty-four (54) hours or six (6) days in any workweek provided the employee is compensated for all hours in excess of fifty-four (54) hours and six (6) days in the workweek at not less than one and one-half (1 1/2) times the employee’s regular rate of pay."

4. Amendment to Order 5, Section 3(I), and Order 9, Section 3(G): Provision for dormitory and kitchen facilities and elimination of exemption from daily overtime for ambulance drivers and attendants working 24-hour shifts. As amended, these sections provide as follows: "Employers shall provide adequate dormitory and kitchen facilities for ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours." The express exemption from the daily overtime requirement has been deleted as moot in light of the elimination of the daily overtime requirement with respect to all employees covered under this Order.

5. Amendment to Order 5: New Provision for inapplicability of Section 3 (A) to certain commissioned employees. The following provision has been added to Section 3 of Order 5, which covers the public housekeeping industry: "Provisions of subsection (A) above shall not apply to any employee whose earnings exceed one and one-half (1 1/2) times the minimum wage if more than half (1/2) of that employee’s compensation represents commissions." This provision eliminates the overtime pay requirement with respect to those employees under Order 5 whose earnings exceed one and one-half (1 1/2) times the state minimum wage AND who receive more than half (1/2) of their compensation in the form of commissions.

6. Amendment to Section 11 of Orders 1, 4, 5, 7, and 9: Waiver of right to meal period. Section 11, "Meal Periods," of Orders 1, 4, 5, 7, and 9 has been amended to permit nonexempt employees under these orders who are entitled to two (2) 30-minute meal periods because of the length of their workdays to waive one of the meal periods. The amendment provides as follows: "(C) Notwithstanding any other provision of this
order, employees who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day’s written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.” Subsection (C) represents a new provision under Orders 1, 7, and 9 and an amendment to the current subsection (C) under Orders 4 and 5 eliminating the current limitation of the waiver provision to the health care industry.

E. Exempt Employees

Certain categories of employees (e.g., outside salespersons, government employees, members of employer’s immediate family) are exempt from all provisions of the Wage Orders. Individuals employed as administrative, executive, and professional capacities are exempt from most of the provisions of the Wage Orders, including the provisions regarding minimum wage, overtime, and rest and meal periods.

1. Executive, administrative and professional capacities

The Wage Orders themselves do not separately define what is meant by “executive,” “administrative,” or “professional” capacities. Instead, they provide a two-part test under which a person will not be considered to be employed in any of those capacities unless he or she meets one of two alternative criteria:

a. The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion, independent judgment, and for which the remuneration is not less than $900.00 per month (except for Orders 1, 4, 5, 9 and 10, which provide for remuneration not less than $1,150.00 per month which need not be all in cash); or

b. The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting.

The term “primarily” is defined in the Wage Orders to mean that over 50% of the employee’s time is spent on the designated duties.

Although the test set forth in the Wage Orders does not make any distinction between “Executive” and "Administrative" employees, the DLSE, in its Operations and Procedures Manual, established separate tests for determining whether an employee is exempt as an Executive or Administrator.

2. Executive exemption

In order for an employee to be exempt as a bona fide, executive, all the following requirements must be met:

a. the primary duty must be management of the enterprise, or of a customarily recognized department or subdivision thereof;

b. in most cases, the employee must customarily and regularly direct the work of at least two or more other employees therein;

c. the employee must have the authority to hire and fire, or command serious attention to his or her recommendations on such actions affecting employees;

d. the employee must customarily and regularly exercise discretionary powers; and

e. the employee must not devote less than 50% of work time to activities not directly and closely related to managerial duties even if the employee is in “sole charge” of an establishment.

3. Administrative exemption
The administrative exemption is defined in the Operations and Procedures manual in accord with the general principles embodied in the federal regulations, with several differences. The proportion of time that must be spent on administrative duties and the related evaluation of routine work is not the same, so employers cannot automatically rely on federal exemptions in California. Many types of employees are potentially exempt under this provision, and many are improperly treated as exempt. Honorific titles that do not adequately portray the nature of the employee’s duties are insufficient to qualify an employee for the exemption.

According to the DLSE, the exempt employee who works in an administrative capacity is one who:

a. customarily and regularly exercises discretion and independent judgment in the performance of "intellectual" work which, in the context of an administrative function, is office or non-manual work directly related to management policies or the general business operations of the employer or the employer’s customers;

b. regularly and directly assists a proprietor or an exempt administrator, or performs, under general supervision, work along specialized or technical lines requiring special training, experience or knowledge, or executes special assignments and tasks under only general supervision; and

c. devotes more than 50% of his or her work time to the activities described above, and

d. whose remuneration for work is not less than $1,150.00 per month.

The wages orders provide that the work of the exempt administrative employee must be “primarily” (i.e., more than 50% of the time) intellectual work that requires the exercise of discretion and independent judgment. The administrative exemption does not include employees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee with the required frequency.

4. Professional exemption

The Wage Orders cover most employees in professional capacities. The scope of the professional exemption in California is far more narrow than federal exemptions under the FLSA. In almost all cases, only licensed or certified occupations are exempt as professionals. Some employees who meet the federal exemption requirements for a professional, but not the state’s standards, may in some cases meet the duties and remuneration tests for the administrative or executive exemption under state standards. Examples of this include a supervising nurse or a chief psychologist.

Professionals exempted from the requirements of the Wage Orders generally are those licensed or certified by the state and actively practicing one of the following professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, and accounting. Historically, medicine means physicians, not nurses; law means attorneys, not paralegals; accounting means certified public accountants, not uncertified accountants. Significantly, no minimum remuneration is required to qualify such enumerated professionals for exemption.

The provisions of the Wage Orders cover registered nurses, professional therapists, medical technologists, statisticians, and uncertified accountants. These are among the many classifications of professional employees that often are improperly treated as exempt for overtime requirements. Order 4 explicitly covers occupations often considered to be among artistic or learned professions, including artists, copy righters, editors, librarians, nurses, photographers, social workers, statisticians, teachers (other than state certified), and other related occupations listed as professionals. When persons in these occupations are employed in an industry covered by an industry order, they are then covered by that order. Thus, a news reporter employed by a TV broadcasting organization would be covered by Order 11.
Relatively few individuals qualify for exemption as members of artistic professions in California, since most of those who have sufficient control over the nature of their own work and over their work hours are self-employed. Academic degrees are not required, but a specialized course of study of at least four years is generally one element involved in establishing a professional standing in the fine arts.

An individual exempted by virtue of the creative and discretionary nature of his work in an artistic profession must meet the remuneration tests. Remuneration, depending on which order, must be at least $900.00 or $1,150.00 per month or on a fee basis. The fee is a payment for a single job regardless of the time required for its completion. In determining whether payment on a fee basis has met the requirement for exemption, it is necessary to determine the time required on the job and to make reference to a standard 40 hour work week. Thus, the payment would have to be at a rate which would amount to at least $900.00 or $1,150.00 per month if 40 hours a week were worked.

5. Outside salespersons

Pursuant to Labor Code § 1171, outside salespersons are excluded from coverage of all the provisions of the Labor Code governing wages, hours, and working conditions, and of the minimum wage and overtime provisions of the Wage Orders. An outside salesperson is defined as any person, 18 years of age or older, who customarily and regularly works half of the working time away from the employer’s place of business, selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities. The apparent reason for specifically providing that minimum wage and other provisions do not apply to individuals employed as outside salespersons is that these employees normally control their hours and are paid on a commission basis. The DLSE’s position is that when an employer establishes any fixed location at which the employee must work, that location constitutes one of the employer’s places of business, and the exemption will not apply if the employee works 50% or more of the time at one or more such locations. For example, an employee who drives and makes sales from a catering or ice cream truck is not considered an outside salesperson because the truck is considered the employer’s place of business.

6. Personal attendants

None of the Wage Order provisions regulating household occupations applies to personal attendants. “Personal attendant” includes baby sitters and any person employed by a private household or by any third party employer recognized in the healthcare industry to work in a private household to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision, if there is no other significant amount of work required. The DLSE’s position is that household work related to the care of a child or infirm person, such as cooking, making beds, or washing clothes for the individual, may be included in the duties of a personal attendant. Other general household work may be included only if it does not constitute a “significant” amount of the employee’s duties. The DLSE defines a “significant” amount as not exceeding 20% of the hours worked in a work week.

F. Comparison Of State And Federal Exemptions

Federal and state criteria for the executive, administrative, and professional exemptions are different in some respects, and similar in others. Some of the important differences are summarized as follows:

1. The compensation requirements under the California Wage Orders are higher than those in the federal regulations.

2. The percentage of non-exempt work that may be performed under the federal long test varies. An executive or administrative, to be exempt, may not expend more than 20% of the time doing non-exempt work in manufacturing or more than 40% of the time performing non-exempt duties in retail/service. Similarly, administrators under the FLSA, may not spend more than 20% of their time on non-exempt work (40% in retail/service). Finally, professionals under the FLSA are limited to 20% of time on non-exempt work. The California Wage Orders, however, provide that the work of employees in any of these classifications must be “primarily” that of an executive, administrator, or professional, and defines “primarily” to mean more than half of the employee’s work time.
3. Federal regulations provide an exemption on the basis that the employee is in “sole charge” of an establishment. In California, there is no such blanket exemption; the employee must meet the standard duties and remuneration tests.

4. Federal regulations require a “salary” on a weekly basis, which may not include the value of lodging or other wages in kind. The California Wage Orders use the term “remuneration,” which may include lodging or other forms of compensation and generally must be on a regular monthly basis.

5. Federal regulations exempt a broader range of professional occupations than does state law. The California Wage Orders specifically cover several professions that are exempt from the FLSA.

G. Wage Order Provisions Applicable To Non-Exempt Employees

1. Overtime obligations

a. Overtime Premium Pay

Under certain Wage Orders, non-exempt employees in California must be paid an overtime premium equivalent to 1.5 times the regular hourly rate for all hours of work in excess of 40 in one week and in excess of 8 in one day, and for the first 8 hours on the seventh day of work in one week. Double time pay generally is required for all hours worked in excess of 12 hours in one day, and for all hours worked in excess of 8 hours on the seventh day of work in one week.

However, effective January 1, 1998, pursuant to the IWC’s amendment to Orders Nos. 1, 4, 5, 7, and 9, the daily overtime pay requirement for non-exempt employees covered by these Orders is eliminated. The amendment provides that “No employee eighteen (18) years of age or over shall be employed more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee’s regular rate of pay for all hours worked over forty (40) hours in the workweek. No overtime pay shall be required for hours of work in excess of any daily number.” (Amendment to Section 3(A) of Orders 1, 4, 5, 7, and 9.) Thus, non-exempt employees covered by these Orders will continue to be entitled to overtime pay at the rate of one and one-half their regular rates of pay for those hours worked in excess of forty (40) per week, but they will no longer be entitled to overtime pay for hours worked in excess of eight hours per day. These amended Wage Orders were recently approved by the California appellate court in California Labor Federation v. Industrial Welfare Commission, 4 Wage & Hour Cases 2d (BNA) 1015 (Cal. App. 1998).

Salaried, non-exempt employees who work overtime are entitled to overtime premium pay just as hourly, non-exempt employees. There is a common misconception that salaried employees are automatically exempt. They are not. Unless employees fall within one of the three so-called “white collar” exemptions (executive, administrative, professional), within the outside salesperson exemption, or within one of a few miscellaneous exemptions (e.g., certain apprentices, learners, students, etc., for whom special exemption certificates may be issued), they are considered “non-exempt” under state law and hence eligible for overtime pay. Remember, an employee may be exempt under federal wage laws and non-exempt under California’s wage laws, and vice-versa.

b. Unauthorized Overtime

According to the DLSE, an employee who works overtime even though not requested to do so must be paid overtime pursuant to the Wage Orders if the employer or supervisor knew of it or had reason to believe the employee was working and did not prevent the overtime work. The mere promulgation of a rule against overtime work is not enough to avoid liability for overtime pay; managers have the power to enforce the rule and must make every effort to do so. Employers, however, may discipline employees who work overtime without authorization.

c. Alternative Work Schedules
An exception to the current eight-hour overtime standard affords considerable flexibility to eligible employers who have employees willing to implement alternative work schedules. In fact, flexible work schedules may be superseding the traditional eight-hour days as employees choose more days off in lieu of overtime. Most employers who have experimented with work schedules report boosts in employee morale without affecting productivity or safety.

Effective January 1, 1998, pursuant to the amendment to Wage Orders 1, 4, 5, 7, and 9 eliminating the daily overtime pay requirement, the former provisions and procedures under these orders for instituting alternative work schedules without daily overtime pay requirements are moot. Employers should note that the amendment eliminating the daily overtime requirement has not been extended to other orders, and thus employers seeking to implement alternative work schedules for their employees subject to other orders should continue to comply with the provisions and procedures discussed below.

Employers covered by certain Wage Orders have the option to enter into “a regularly scheduled week of work consisting of such hours and days as shall be agreed upon” up to 12 hours during a workday and 40 hours during a workweek, without overtime pay obligations. Non-exempt employees covered by such an arrangement must receive premium pay for hours worked in excess of their regular schedules for a workday and for all hours worked in excess of 12 during a workday or 40 during a workweek. Schedules that might be instituted under these wages orders would include, for example, three 12-hour days; two 12-hour days and two 8-hour days; and three 11-hour days and one 7-hour day.

Alternate work schedules under the relevant Wage Orders may be implemented only with the approval of two-thirds or more of the affected employees as reflected by votes cast in a secret ballot election. The vote must be preceded by a written disclosure notice and group meeting concerning the effects of the proposed schedule, i.e., its impact on the affected employees’ wages, hours and benefits. A mechanism must exist for the affected employees to rescind an alternate work schedule agreement after one year if it becomes undesirable (an employer generally may rescind the schedule at any time). An employer furthermore must reasonably accommodate employees who are unwilling or unable to work the alternate schedule.

If an employer institutes an alternate work schedule, then it should examine whether or not its employees are entitled to additional meal and rest periods in accordance with state law requirements. Moreover, an evaluation of the impact of alternate work schedules on various fringe benefit obligations, including vacation, holiday, and sick leave pay, as well as on insurance and retirement programs, should be made.

2. Compensatory time off

Generally, there is no problem in providing compensatory time off to individuals who are exempt from the overtime pay requirement, because no overtime pay problems arise; compensatory time off for exempt employees is a matter of contract.

As to nonexempt employees, permissible compensatory time off schemes are restricted in scope. Compensatory time off is permitted in California with respect to certain Wage Orders if the time off is taken at one and one-half times the number of overtime hours worked and if certain additional requirements are met, as specified in Labor Code section 204.3. Note, however, that federal law requires any compensating time off to be taken within the same payroll period as the overtime hours in question. Accurate record keeping is especially important if a compensatory time plan is adopted.

3. Meal and break periods

Non-exempt employees may not be required to work more than 5 hours without a meal period of at least 30 minutes. The meal period need not be paid. When a workday is not more than 6 hours, however, the employer and the employee may waive the otherwise required meal period. If the employee is not relieved of all duty during the 30-minute meal period, then the meal period must be considered an “on duty” meal period and counted as time worked. An “on duty” meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty and when an on-the-job meal is agreed to in writing by
the parties. The amendment to Section 11 of Orders 1, 4, 5, 7, and 9, effective January 1, 1998, permits nonexempt employees under these orders who are entitled to two (2) 30-minute meal periods because of the length of their workdays to waive one of the meal periods. The amendment provides: "(C) Notwithstanding any other provision of this order, employees who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day’s written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect." Subsection (C) represents a new provision under Orders 1, 7, and 9 and an amendment to the current subsection (C) under Orders 4 and 5 eliminating the current limitation of the waiver provision to the health care industry.

Non-exempt employees must be given ten-minute rest periods for every four hours of work, to be taken in the middle of each work period as far as is practical. This rest period must be counted as hours worked and is paid time.

4. Reporting pay and split shift procedures

Employers are obligated to pay reporting pay to employees who are required to report to work and are either not put to work, or are furnished less than one-half of their normal or customary day’s work. In such circumstances, employees must be paid for half of the scheduled day’s work, but in no event for less than 2 hours nor more than 4 hours, at the employee’s regular rate of pay. Consequently, if an employee is required to report to work on a day he or she is normally scheduled to work, the employee most likely is entitled to 4 hours’ pay. If the employee is required to report to work on a day he or she is not normally scheduled to work, the 2-hour guarantee generally would apply. Reporting pay need not be paid to an employee on paid stand-by status who is called to work at a time other than his or her scheduled time. Reporting pay also need not be paid where the failure to provide work is due to circumstances beyond the employer’s control and the employer has made every reasonable effort to notify employees.

A split shift premium of one hour at minimum wage, per workday, must be paid when an employee’s work schedule is interrupted by non-paid, non-working periods, other than bona fide rest or meal periods, established by the employer. No such premium need be paid if the split shift is established for the convenience of the employee.

5. Uniforms

In California, if an employee is required to wear a uniform, then the employer is obligated to provide and usually to launder the uniform, regardless of the amount of wages paid to the employee. This differs from federal law, which obligates employers to pay for and clean uniforms only where to do so would reduce the employee’s income below minimum wage.

H. Bringing Claims / Statute Of Limitations

1. Filing a claim

An employee may sue in state court or with the DLSE for wages due and owing. There is no administrative exhaustion requirement before filing a civil action.

2. Statute of limitations

For statutory claims such as minimum wage and overtime, an appellate court has held that the three-year statute of limitations (governing causes of action based on statutes) is appropriate. See Aubry v. Goldhor, 201 Cal. App. 3d 399 (1988) (applying section 338 of the California Code of Civil Procedure).

For other types of wage payment claims that are governed by an employment contract between an employer and employee, the DLSE takes the position that the appropriate contract statute of limitations applies.
Therefore, if an employer and employee have an oral arrangement, then a claim for unpaid wages will have to be filed within two years, under section 339 of the California Code of Civil Procedure. If an employer and employee have a written employment agreement, a claim for unpaid wages must be filed within four years of the date when the wages allegedly were not paid, under California Code of Civil Procedure section 337.

The state agency charged with enforcing the state’s wage and hour laws has published an interpretive bulletin regarding the statute of limitations of vacation pay claims under Labor Code section 227.3. Although the bulletin is not a study in clarity, the agency seemingly takes the view that the statute of limitations (two years if based on an oral contract; four years if based on a written contract) begins to run as the vacation is earned or at the point when the employee is eligible to take the vacation. As the agency wrote: “If this were not so, then vacation earned 10, 15 or 25 years ago would be converted to a monetary sum and due on termination.” The agency noted that the statute requires that in the resolution of any dispute with regard to vested vacation time, the principles of equity and fairness be applied. However, the agency concludes with a caveat that if the employer had an unlawful “use it or lose it” policy, then the applicable statute of limitations would be tolled. Thus, the employee in that situation could recover all vested vacation benefits in a claim raised for the first time at termination, even if the claim was for vacation earned, but not taken, many, many years earlier. These claims often are made by highly compensated, exempt employees, particularly where their employer has not maintained detailed records of the employees’ time off work.

APPENDIX B

“Implementing Technology Policies”

Implement an Electronic Communications Policy. Every policy should contain the following provisions:

Electronic communications should be viewed the same as other communications -- take the same care.

Electronic communications are solely for business use; the company reserves the right to review and disclose all information transmitted by or stored in the system. Also the company reserves the rights to repair, inspect and service the computer. Define personal use parameters.

Electronic communications are not secure, even with the use of a personal access code or password, and even after they are deleted. Stress that message deletion features and passwords do not neutralize the company’s ability to access communications at any time.

Employees are not to use electronic communications to communicate derogatory, defamatory, obscene, or otherwise inappropriate messages.

Only software purchased by the company may be installed on the network.

Create limitations on how employees may use public bulletin board systems.

Create electronic communications retention/destruction rules.

Establish the right to monitor, and obtain employee written consent acknowledging the employer’s absolute right to monitor.

Establish disciplinary action (up to and including termination) if employees violate the policy.

Subject electronic communications to the company’s no-solicitation/no-distribution policy.

Limit computer access for certain types of information.

Harmonize with other company policies.

Internet-specific policy recommendations:
Strict prohibitions on personal use of the Internet (or limitation of primary use to business-related purposes).

Strict prohibition on unauthorized use of the Internet, including connecting, posting, or downloading sexually-oriented information; engaging in computer-hacking and related activities; and attempting to disable or compromise the security of information contained in company computers.

Treat Internet messages as non-confidential unless encrypted.

The employer must review and approve information posted on the Internet that identifies the company in order to reflect the company’s standards and policies.

Prohibit employees from posting confidential, sensitive, or proprietary information on the Internet.

Prohibit all non-work-related subscriptions to news groups and mailing lists.

Prohibit the reproduction of copyrighted information.

Absent management approval, prohibit Internet or external network connections that may permit unauthorized persons to gain access to the company’s systems and information (no hosts with public modem dial-ins, no World Wide Web home pages and file transfer protocol).

**Telephone Monitoring Policy and Guidelines:**

Advise employees that their telephone conversations will be monitored and obtain their consent. Also, discuss the company’s reasons for monitoring. Post notices advising employees of monitoring.

Provide non-monitored telephones for employees to use for personal calls. This will highlight that the employee should not have an expectation of privacy on the monitored phone.

Cease monitoring if a telephone call is personal.

If monitoring does not involve marketing or opinion research or telephone solicitation, obtain consent of both parties to the conversation.

**Policies and Guidelines for Computer Monitoring:**

Explain to employees how and when the employer will measure their work and why measurement is necessary.

Give employees access to the records and regular, supportive feedback, e.g., on a weekly or monthly basis. Explain how employees may correct any erroneous records.

Measure only those items that are essential for meeting company goals.

Use statistics to identify problems early. Low productivity could indicate a need for further employee training.

Try to establish work goals that enable individuals to regulate their work day as much as possible.

Be careful about using statistics to inspire competition among employees.