

USING THE CALIFORNIA LABOR LAWS OFFENSIVELY:

ORGANIZING THROUGH ENFORCEMENT OF STATE EMPLOYMENT LAWS

Year 2008 Edition

**DAVID A ROSENFELD
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091**

**Phone: (510) 3371001
Fax: (510) 3371023
drosenfeld@unioncounsel.net**

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I. INTRODUCTION

The California Labor Code¹ is a potent weapon of worker advocacy. Unions can press the statutory rights of their members or those they seek to organize in union and non-union settings. Unions can use the labor laws to improve the working conditions of their members and to advocate for the rights of workers for organizing purposes.

While employing labor laws to advance worker rights, unions can simultaneously put economic pressure on employers. Effective use of labor laws demonstrates that unions can improve working conditions as well as “beat the boss.”

Most California workplace laws are found in the Labor Code. Regulations governing wages, hours and working conditions are found in the 17 Industry and Occupation Wage Orders promulgated by the Industrial Welfare Commission (IWC). Together, these constitute the primary sources of California rules governing the workplace, although there exist additional provisions in other codes, regulations and in court-developed doctrines. Additional laws prohibiting discrimination are found in the Government Code.

Enforcing employment laws, including the Labor Code, is not always simple. This paper describes the choices to be made in using and enforcing state labor law, and explains available options. This paper also describes specific legal problems encountered when using labor laws in the union setting, largely because of federal law preemption (wherein federal law displaces state law in certain arenas). Additionally, this paper points out in what circumstances organizers can enforce these laws without going to court or employing lawyers.

Amendments to the Labor Code during 2000-2004 substantially increased the protections California law affords workers. With the passage of the “Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999” (AB 60), which restored the eight-hour day in California, labor law’s promise has been restored and expanded.² AB 60 also compelled the IWC, in 2000, to reevaluate and improve the wage orders. Per AB 60, the IWC issued the first wage order governing

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- 1 Other states have similar laws. Even if the employer is headquartered out-of-state, California laws apply as long as the work is performed in California. The Labor Code is not applicable on many federal enclaves such as navy and army bases. It is not applicable to Indian tribes and businesses owned by such tribes. Some states have very few wage and hour protections so the union will have to rely on federal statutes, primarily the Fair Labor Standards Act. References to § are to the Labor Code unless otherwise indicated.
 - 2 The Legislature has taken away the control of overtime, flexible workday, meal periods, make-up time and other labor standards from the Industrial Welfare Commission by enacting statutes which govern. § 510 et. seq. This was done because the Legislature was dissatisfied with the way IWC gave away workers’ rights by gutting the IWC orders under the administration of Pete Wilson. In order to prevent any further erosion of the IWC orders, the IWC is currently not funded and does not operate.

on-site industries, particularly the building and construction industry, logging, mining and drilling. Those changes, along with other amendments to the labor laws, will be discussed in more detail.³

II. USING CALIFORNIA EMPLOYMENT LAWS TO ORGANIZE IN UNION AND NON-UNION SETTINGS

The California Labor Code and related employment laws are powerful weapons unions should wield to organize workers and to attack non-union employers. Labor laws force employers to obey labor standards, which many of them ignore. Often non-union workers are afraid to report violations, or more often they are unaware of their rights. Most organizers know that many non-union companies routinely violate the wage and hour laws and other employment-related laws. Every dollar an unfair employer does not pay his workers as required by law goes directly into profit and allows the unfair employer to compete unlawfully against fair union employers.

Similarly, unions sometimes need additional weapons against union employers. Unions may be in a struggle to enforce contracts or may need to bring additional pressure on union employers to sign agreements. The collective bargaining agreement (cba) is one way of making sure that employers obey the laws through enforcement of the terms of the cba. In either case, the employment laws contain a number of extraordinary provisions that can be effective weapons.

Labor laws are often ignored, underused and under enforced. In some cases, laws that have been on the books for years need to be revitalized and implemented. A number of new laws need to be explored and exploited. Some laws still have not been enforced in the context of collective bargaining agreements (cba). Because of anti-worker administrations that have refused to enforce labor laws, unions have ignored their use against non-union employers. Unions have begun to think more creatively and aggressively.

Part III lists some surprising examples of the use of labor laws. Part IV discusses enforcement issues. Part V is a list of all relevant labor laws with a short summary of each.

Some important caveats: (1) We have not listed many sections of the Labor Code which apply to specific industries such as theaters, mines, pharmacies, and so on; (2) Some of the statutes have exceptions and limitations which we have not mentioned; (3) Some of the statutes and penalties may not be enforceable through civil actions and may only be the subject of criminal actions or actions brought by the Labor Commissioner; (4) "On-site" industries, including construction, mining, logging and oil drilling, are now covered under Wage Order 16, which became effective January 1, 2001; (5) Some of the provisions of the Labor Code and the IWC wage orders do not apply where a collective bargaining agreement is in effect; (6) Some laws, particularly those concerning discrimination, must be enforced first by filing a charge with the appropriate state agency, usually the Department of Fair Employment and Housing; (7) Class action lawsuits based on violations of the Labor Code and other laws can be filed in the organizing period to demonstrate to workers that the union can achieve results. Employer wage and hour

3 A detailed summary of AB 60 is available upon request from our office. During the time of the Davis administration over 475 bills were enacted affecting labor legislation.

violations create useful organizing weapons. To avoid conduct that may be deemed objectionable, such lawsuits should be filed before any NLRB recognition petition is filed.

Another problem is that employers misclassify workers as independent contractors when they are really employees. The governing factors need to be carefully evaluated if the employer claims that workers are not employees.⁴

The following websites provide useful information:

Labor Commissioner: <http://www.dir.ca.gov/dlse/dlse.html>

IWC Orders: <http://www.dir.ca.gov/t8/ch5g2.html>

Labor Code: <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=lab&codebody=>

III. EXAMPLES OF THE USE OF THE LABOR CODE AND EMPLOYMENT LAWS

- (1) Employee is asked to do an errand or drive some place in his/her own car and gets into an accident. Employee must be defended by employer from any lawsuit and employer must pay any judgment. Employee must also be reimbursed the cost of mileage. Employee is entitled to attorney's fees if he must pursue claim in court. §2802
- (2) Employee is required to bring tools to worksite and tools are stolen at night or over the weekend. Employer must reimburse employee for stolen tools. §2802.
- (3) Employees are required to supply tools, supplies or equipment. Except under circumstances where employee is paid more than twice the minimum wage employer must provide tools, supplies or equipment. IWC Wage Orders §9(B) Arguably, all required tools must be paid for and provided by employer. §2802. On construction jobsites employees may not be required to supply any tools. IWC Order 16 §8.
- (4) Employees must be paid from the first point where they are required to report work. Labor Code §510(b); Morillion v. Royal Packing, 22 Cal. 4th 575 (2000).
- (5) Employees required to travel between worksites during the day must be paid for time spent in traveling and expense of traveling. IWC Orders § 3(A) and Labor Code §§510 and 2802
- (6) Employee signs a document and later wants a copy. Employee must be provided a copy of any document that he/she is required to sign as a condition of employment. §432.
- (7) Employer requires employees or applicants to take a written truth test. All those who refuse to take the test and are denied jobs may be entitled to back pay and jobs. §432.2.
- (8) Employer requires employee to pay cost of application. Violates Labor Code §450.

⁴ S.G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341 (1989)

- (9) Employer disciplines employee because he/she is arrested, and the charges are dismissed. During investigation, employer asks employee if employee has ever been arrested. Employer refuses to promote employee because of arrest that did not lead to conviction. Each violates Labor Code. §432.7
- (10) Employer requires employees to wear clothes purchased at store in which employees work. Employer requires employees to do their grocery shopping in store where they work. Auto dealer pressures employees to buy cars or parts from dealer. Each is unlawful. §450
- (11) A small employer fires workers who support union and NLRB won't do anything because the employer is too small. This is illegal under California law and employees can sue directly in state court. §923
- (12) Employer represents that product was "Made in USA" when in fact labor from foreign country was used in making product. Employer represents that employees who make its product worked under sanitary conditions, which is not true. Violations of §1011.
- (13) Non-union building contractor has no license. There is a \$100 per day per employee penalty for any contractor who employs any individuals and does not have an appropriate license. §1021
- (14) Employer misrepresents former employee's work history to prevent him from getting a job. Violation of §1050.
- (15) Employer discriminates against employees because of sexual orientation or perceived sexual orientation. Violates §1102.1.
- (16) Employer terminates employee who discloses violations of state laws or regulations to governmental agency. Violates California whistleblower protection law. §1102.5
- (17) Employer pays minimum wage or very near minimum wage and has employees work some unpaid time or fails to give all rest periods (ten minutes rest per four hours worked in most cases). In some cases employer will not be meeting minimum wage requirements. Substantial penalty for failure to pay minimum wage each pay period for each employee. §1197.1
- (18) Employer fires employee because employer is threatened with levy for judgment against employee. Discharge for threat and/or for levy on judgment would violate law. §2929
- (19) Employer hires outside agency to shop cashiers or fires employees based on report without letting employees see the report. Illegal under law requiring employer to give copy of shopper's report to employee. §2930
- (20) Employer fails to provide rest breaks, lunch breaks or pay overtime for all hours in excess of eight hours in a day or forty in one week. Employer can be forced to pay damages, compensation, penalties and attorney's fees through class action lawsuit. IWC Orders, Labor Code §§226.7, 218.5, 510, 512 and 2699.

- (21) Employer does not pay piece rate workers working at home. Piece rate workers at home are considered employees and entitled to protections of Labor Code. §200
- (22) Employer electronically records employee's private conversation without letting worker know. Statutory penalty and misdemeanor. Penal Code §632
- (23) Employer turns down applicant based on credit report. Reason for non-hire not disclosed to applicant. Illegal. Civil Code §§1786-1786.56
- (24) Employer turns over employee medical records to prospective employer or allows other workers to see medical records of employee. Violates Civil Code §§56 et seq.
- (25) Employer terminates employee who threatens to report illegal conduct to proper authorities. Wrongful termination action.
- (26) Supervisor repeatedly uses racial epithets toward employee. Claim for intentional infliction of emotional distress.
- (27) Employer provides employment records pursuant to subpoena where employee not given notice of subpoena. Violation of Civil Code §1985.6
- (28) Employer tests employee for HIV without telling employee. Employer uses HIV test results for employment decisions. Health & Safety Code §§ 120980, 120990, 121015 and 121025.
- (29) Employer questions applicant regarding marital status; participation in AIDS support group; whether applicant has a disability; genetic characteristics; whether applicant intends to raise or bear children; or religion. These are all generally prohibited inquiries under discrimination laws.
- (30) Employer uses difficult job-screening test that has no relationship to skill needed for a job. Prohibited under discrimination laws.
- (31) Employer forces employees to retire at age 70. Violates discrimination laws.
- (32) Workers deliver product (such as water, chips and so on) to stores, but are paid only commission by the company. As a result are treated as outside salespersons and paid no overtime. Violates Labor Code §510 and Ramirez v. Yosemite Water Co., 20 Cal. 4th 785 (1999).
- (33) Workers not given a lunch hour. Entitled to one hour's pay for each missed lunch hour. Entitled to one hour's pay per day if all breaks are not given. Labor Code §226.7
- (34) Workers paid for most of work time including overtime except designated time which is unpaid. Employees entitled to minimum wage for unpaid time. Employee receives double minimum wage under statute. Labor Code §§ 1197.1 Armenta v. Osmose, Inc., 135 Cal.App. 4th 314 (2006).

IV. ENFORCEMENT OF THE LABOR CODE AND OTHER EMPLOYMENT LAWS

A. Labor Commissioner Enforcement and the IWC Wage Orders

The California Labor Commissioner has jurisdiction to hear and resolve complaints that an employer has violated the terms of the Labor Code. The Labor Commissioner is given the power to enforce all provisions of the Labor Code and all state labor laws unless they are administered or enforced through some other specific statutory scheme. Labor Code §95(a). Complaints are filed with a Deputy Labor Commissioner who is authorized to hold hearings. Generally an informal conference is held and if the dispute is still unresolved, thereafter a formal hearing is set. After the hearing, a decision is rendered. If the employer or employee fails to timely appeal, the decision is automatically enforced in the courts. If the case is appealed by the employer (or employee), the entire case is retried in court. The law provides that if a party appeals a decision of the Labor Commissioner, that party is liable for the attorneys fees of the other party if the appealing party does not do better. Labor Code §98.2(b). As long as the employee obtains a judgment greater than \$0, he/she may obtain attorney's fees. Employers must post a bond to appeal.

The Labor Commissioner provides a generally convenient forum for the individual employee to confront the non-union employer for most violations of the Labor Code. An organizing union can help workers file claims and can represent workers at Labor Commissioner hearings. Enforcement of the Labor Code, however, is not consistent and the Labor Commissioner will sometimes decline to hold hearings on violations. The administration of this system varies with the appointment of the Labor Commissioner.

The Labor Commissioner has issued a compendium of decisions and rules titled "The 2002 Update of The DLSE Enforcement Policies and Interpretations Manual," which is a very helpful guide to the Labor Code. It is available at <http://www.dir.ca.gov/dlse/Manual-Instructions.htm>. The deference which courts give to these interpretations is the subject of much debate and litigation.

Some provisions of the Labor Code and the IWC Orders are not applicable where there is a collective bargaining agreement. Others are applicable only if the cba meets certain minimum requirements. See e.g. Labor Code §514 and §3(H) of the IWC Orders.

B. Small Claims Court

An individual may go to small claims court for any claim up to \$7,500. No lawyers are permitted in small claims court and the person who files the claim may not file an appeal if he/she loses. Alternatively, the individual may file a complaint with the Labor Commissioner. Unless the claim is substantial, it is usually preferable to file a claim first with the Labor Commissioner who will hear and adjudicate individual claims. If the Labor Commissioner declines to hear the case or if a class action would be an appropriate vehicle, the dispute can be pursued in a state court. If the Labor Commissioner dismisses a case without a hearing, the employee can go directly to state court.

C. Class Actions

Class actions are available to remedy many employment practices that affect a group of workers.⁵ In an organizing context, a union may choose to bring a lawsuit on behalf of an individual or a class of people.⁶ Labor Code §218.5 provides that the prevailing party in any action to collect wages is entitled to attorneys fees if requested in the complaint. There are other provisions for obtaining attorneys fees. E.g. §1194. Thus, even situations in which violations of the Labor Code are minor or the amount of wages involved is insubstantial, the violation can be rectified, because the employer and not the individuals harmed will pay attorneys fees.⁷

A class action can be a very effective organizing device because the union can demonstrate its ability to win direct worker benefits. In some cases, the lawsuit can be settled as a part of an overall settlement that includes a contract in order to ensure compliance with the law and an adequate remedy.⁸ The courts will scrutinize such settlements to ensure they are fair to the class.

Individuals who are damaged can file representative actions under Business and Professions Code §17200.⁹

In 2003, the Legislature enacted Labor Code §2699 known as the Labor Code Private Attorneys General Act which allows aggrieved employees to bring civil actions to recover penalties provided for in the Labor Code. The law was amended in 2004 to require the sending of a letter to the employer and the Labor and Workforce Development Agency detailing the violations before filing a lawsuit. The employee can also recover attorney's fees and the court can impose additional penalties. It is a powerful tool for employees to enforce the Labor Code.

D. Enforcement of Discrimination Laws

The filing of a charge with the California Department of Fair Employment and Housing (DFEH) or the appropriate federal agency enforces most discrimination laws.¹⁰ Filing the charge with the appropriate administrative agency must be done prior to bringing suit in court. A union can file an administrative claim on behalf of its members. An organizer can assist an individual worker or a group of workers in filing a charge. The employees of the DFEH usually assist in the filing of

5 The California Supreme Court reaffirmed the usefulness of class actions in Sav-On Drug Stores, Inc. v. Superior Court, 34 Cal. 4th 319 (2004).

6 One advantage of state law over the federal Fair Labor Standards Act is that class actions are available for state law claims; class actions are not available for FLSA violations except to the extent each person individually joins in as plaintiff.

7 The same section provides for attorneys fees to collect fringe benefits but that is preempted by ERISA.

8 It is important that the union not suggest that a lawsuit will be traded for recognition or a contract.

9 Additional information on the use of §17200 is available from our office.

10 The EEOC or the Department of Labor. The statute of limitations is usually six months for federal agencies although some are shorter and some can be extended beyond the six months.

those charges. If the DFEH does not take any action, the employee who has filed the charge can get a right-to-sue letter and proceed to file a civil suit.

E. ERISA Preemption

ERISA¹¹ preemption sometimes precludes enforcement of Labor Code provisions and other employment laws. Most provisions of state law relating to health and welfare, pensions and other benefit plans are preempted by ERISA and are not enforceable. Preemption is the principle that where federal legislation governs a certain legal arena, states may not enact their own legislation in that arena because of potential conflicts. However, even when no direct conflict exists, an arena of law may be off limits to states. For example, Labor Code §227, which concerns fringe benefit payments, is unenforceable.

F. NLRA Preemption

Enforcement of employment law in the union context is complicated. Some provisions of the Labor Code can conflict with the bargaining obligations or other duties created by the National Labor Relations Act (NLRA); in such an instance the NLRA usually preempts state law. The Labor Code applies to all non-union settings but not to all situations where there is a collective bargaining relationship: the collective bargaining agreement is supposed to set the terms and conditions of employment under federal law although the Labor Code and other state laws can still establish certain minimum working conditions. NLRA preemption generally arises where a state law requires a state court to interpret terms of a collective bargaining agreement; a state court is precluded from doing so by NLRA preemption.¹²

The United States Supreme Court has clarified that mere reference to a collective bargaining agreement does not necessarily constitute “interpretation” of a cba, and in such case the NLRA does not preempt state law. Prior to the Livadas decision, the Labor Commissioner considered Labor Code § 229 precluded by the NLRA and therefore followed a long-standing practice of refusing to hear any claims in which an employee covered by a cba containing an arbitration procedure sought unpaid wages.¹³

Before Livadas, the Commissioner would routinely dismiss any unpaid wages claim if the employer worked under a collective bargaining agreement; after the Livadas decision, the Labor Commissioner now must investigate such claims. The Labor Commissioner must proceed on claims to collect wages if there is no dispute as to the amount owed that requires interpretation of a cba. For example, if someone receives a final paycheck late there is no dispute and the Labor Commissioner will proceed to collect the statutory penalty under §203.

11 ERISA is the federal law governing pensions, health and welfare and other benefit plans. 29 U.S.C. §1001 et. seq. ERISA preemption is found in 29 U.S.C. §1144.

12 Cramer v. Consolidated Freightways, Inc., 255 F 3d 683 (9th Cir. 2001) (en banc), cert. denied, 534 U.S. 1078 (2002)

13 Livadas v. Bradshaw, 512 U.S.107 (1994)

On the other hand, where the issue before the Labor Commissioner or in Court would require interpretation of a collective bargaining agreement, federal law will probably preempt the action. This means that a dispute involving a question of cba interpretation must be resolved through arbitration, if an arbitration procedure is provided.¹⁴ That procedure becomes the exclusive remedy. Wrongful termination actions, for instance, are usually preempted unless some specific statutory claim (such as a discrimination claim) is alleged.

Remember that under Livadas, NLRA preemption is not applicable where all that is necessary is performing a computation based on the contract. There is no need to interpret the collective bargaining agreement where it is simply a matter of a mathematical computation to award wages or a penalty under a Labor Code provision. Similarly where the discrimination claims does not require interpretation of the contract, that action would not be preempted. Many state laws are considered labor protections and are not subject to preemption. For example, the state law requirement that employees be provided rest breaks and meal periods is not preempted and is enforceable where there is a collective bargaining agreement even if it also provides for meal periods and rest breaks.¹⁵

One additional question is the applicability of the Labor Code and employment laws during the hiatus between contracts.¹⁶ This is a period when unions often want to use employment laws to bring pressure on employers to settle a contract dispute. Be alert that employers will raise preemption defenses in these circumstances.

G. Use the Grievance Procedure

Alternatively, the provisions of employment law may be directly enforced through the grievance procedure. If there is language in the contract by which state law is incorporated (such as: "The employer will comply with all applicable state law."), a grievance concerning state law may be pursued. Some arbitrators will apply state law even without such explicit language, depending on the breadth of the grievance procedure. For example, if the grievance procedure is applicable to "All disputes between the parties" instead of "Disputes concerning the interpretation or application of the agreement," unions can argue a claim asserting a violation of the Labor Code is a "dispute between the parties." Arbitrators may be willing to apply the provisions of the Labor Code as either a substantive part of the agreement or as a remedy. For example, the union can argue for statutory penalties provided by §203 for failure to pay wages upon termination.

If the language of the cba is more specific and states the employer will not "discriminate" against employees, then the provisions of the discrimination laws may be applicable in arbitration.

14 Lingle v. Norge Division, Magic Chef, 486 U.S. 399 (1988)

15 Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949 (2005)

16 The applicability of some provisions may depend on whether the cba is retroactive. See, National Broadcasting Company, Inc. v. Bradshaw, 70 F. 3d 69 (9th Cir. 1995)

In some cases employees will be required to exhaust the contractual remedies before pursuing individual discrimination claims in court.¹⁷

H. Criminal Penalties

Some employment statutes impose criminal (mostly misdemeanor) sanctions. The District Attorney has the power to prosecute these violations. However, civil liability by way of private lawsuits may also be imposed under many Labor Code sections, even when they expressly provide for criminal sanctions. The District Attorney may also bring civil actions under Business and Professions Code § 17200.

I. Business and Professions Code §17200

It is possible to combine other claims with Labor Code violations. Violations of the Labor Code may be unfair business practices under California Business and Professions Code §17200. This provision has turned out to be one of the most effective weapons in lawsuits over prevailing wage and other wage claims. The California Supreme Court has affirmed the use of this statute in wage and hour violations.¹⁸ Among other issues, section 17200 can extend the statute of limitations to file a claim by one year to four years. A section 17200 suit may concern a breach of an employment contract (oral or written) or company policies. After Proposition 64 effective in late 2004, these actions can only be brought in the name of workers who suffer actual injury such as wage or job loss.

J. Enforcement of Employer-Adopted Handbooks and Grievance Procedures in the Non-Union Setting

In the non-union setting, employers are increasingly adopting alternative grievance procedures and sometimes even providing for arbitration. It may even be possible to enforce the Labor Code through the non-union employer's own grievance and arbitration procedure. Labor Code §229 provides that such arbitration procedures need not be utilized for wage claims. The Supreme Court has ruled that the Federal Arbitration Act applies to individual employment agreements.¹⁹ Some employer arbitration procedures are "unconscionable," that is, too one-sided, and may not be enforceable.²⁰

In the non-union setting, employers often issue handbooks. Some of these handbooks contain such statements as: "The Employer complies with all state and federal wage and hour laws" or "The employer will pay overtime after eight hours." When handbooks contain such statements,

17 Wright v. Universal Maritime Service Corp., 523 U.S. 70 (1998)

18 Cortez v. Purolator Co., 23 Cal. 4th 116 (2000).

19 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

20 Armendariz v. Foundation Health PsychCare Services, Inc., 24 Cal 4th 83 (2000); Davis v. O'Melveny & Myers, 485 F. 3d 1066 (9th Cir. 2007). Generally employers cannot use mandatory arbitration procedures to prohibit class actions in the employment context. Gentry v. Superior Court, 42 Cal.4th 443 (2007)

the employee may be able to enforce this written agreement through a lawsuit, a claim before the Labor Commissioner or even by using the employer's internal appeal procedure. Even without explicit language, the trend in the courts is to treat handbooks and personnel policies as enforceable contracts. However, except in the union setting, an employer is generally free to change such policies and handbooks without notice to employees. Note that a written agreement in a handbook or in personnel policies may extend the statute of limitations to four years since such a claim seeks enforcement of a written agreement.²¹

K. Other Federal Laws

Many federal laws that govern the workplace have not been addressed in this pamphlet. Some include the WARN Act, the Fair Labor Standards Act,²² ERISA, the Americans with Disabilities Act, Title VII and other discrimination laws. These claims may be asserted in combination with Labor Code claims or on their own.

L. Protected Concerted Activity in the Workplace is Protected by the NLRA

One point: the National Labor Relations Act prohibits an employer from terminating or discriminating against an employee because that employee has engaged in “protected concerted activity.” This means that if employees jointly (as few as two people or even one person acting on behalf of others) file a complaint over a workplace issue, it is unlawful under the National Labor Relations Act to discriminate against those employees or to interfere with their employment. Employees who complain about improper pay, discrimination or other working conditions are protected under the National Labor Relations Act whether or not a union represents them.²³ If employees complain about benefit plans and suffer retaliation, the employer may be in violation of ERISA.²⁴ Whistleblower protection is afforded by state or federal law.

M. Individual Liability

Many provisions of the Labor Code impose liability upon employees and agents of the employer in addition to the employer itself. It is therefore important to determine where individual liability may also be imposed. Corporate officers managers may be held liable for unpaid wages where they exercise control over wages, hours or working conditions.²⁵

21 See California Code of Civil Procedure §337. Claims based on statutory violations have a three-year statute. C.C.P. §338. If a civil penalty is sought, the limitations period is one year. C.C.P. §340(1).

22 29 U.S.C. §201 *et. seq.*

23 Meyers Industries, 281 NLRB 882, *affirmed*, 835 F. 2d 1481 (D. C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

24 29 U.S.C. §1140. Our office has additional materials on using ERISA in organizing strategies.

25 The California Supreme Court ruled that there is generally no individual liability for unpaid wages in Reynolds v. Christian Bement, 36 Cal. 4th 1075 (2005). Individuals may be held liable for overtime and minimum wage violations under the Federal Fair labor Standards Act. 29 USC §201 *et. seq.*

N. Immigration Issues

In 2002 the Supreme Court issued the Hoffman Plastic²⁶ decision holding that the NLRB may not reinstate undocumented workers who are fired as a result of union activity. In reaction, the California Legislature enacted legislation to limit the effect of Hoffman. This legislation preserves traditional wage and hour and discrimination remedies for undocumented workers under California’s laws.²⁷ The Courts are allowing wage and hour cases to proceed irrespective of immigration status.²⁸

O. Local Labor Standards Ordinances

Increasingly various municipalities, districts and counties are enacting local living wage ordinances and other forms of labor standards. They have withstood most challenges.²⁹ The Legislature has now formally allowed such local legislation so long as it does not expressly contradict state law or is not preempted by state law. Labor Code §1205 It is important to determine if there is such a local ordinance in effect which governs any employer. These local ordinances often contain effective enforcement provisions. A useful website for information is: Living Wage Resource Center (Acorn): <http://www.livingwagecampaign.org/>

P. Minimum Wage

The California state minimum wage effective January 1, 2008, is \$8.00. The Federal minimum wage was increased effective July 23, 2007 to \$5.85 per hour. Effective July 23, 2008 it will be \$6.85. Effective July 23, 2009, it will be \$7.25 per hour. The minimum wage may be higher under local ordinances.

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26 Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002)

27 Labor Code §1171.5

28 Reyes v. Van Elk, Ltd., 148 Cal. App 4th 604 (2007)

29 RUI ONE Corp. v City of Berkeley, 371 F.3d. 1137 (9th Cir. 2004), cert. denied, 534 U. S. 1081 (2005).

V. A SUMMARY OF THE IMPORTANT PROVISIONS OF THE LABOR CODE AND THE INDUSTRIAL WELFARE COMMISSION WAGE ORDERS ³⁰

- (1) **EMPLOYEES MAY NOT BE DISCIPLINED FOR OFF DUTY LAWFUL CONDUCT** · Employees may not be discharged because of lawful off duty conduct. §98.6 and §96(k)
- (2) **EMPLOYEES PROTECTED WHEN THEY COMPLAIN TO THE LABOR COMMISSIONER** · Employees are protected when they assert their rights to complain about violations of the Labor Code. §98.6
- (3) **EMPLOYEES MAY NOT BE DISCHARGED OR DISCRIMINATED AGAINST IN VIOLATION OF LABOR CODE** · Broad protection for employee who discriminated against in violation of most provisions of Labor Code. Six months statute to bring claim to Labor Commissioner. §98.7.
- (4) **DISCHARGED EMPLOYEE MUST BE PAID WAGES** · Discharged workers must be paid at time of discharge all unpaid wages including vacation and other earned wages. Where employee has authorized direct deposit employer may deposit final wages in direct deposit. §201. Discharge includes layoff as well as permanent termination.³¹
- (5) **EMPLOYEE WHO QUILTS MUST BE PAID WITHIN 72 HOURS** · Where an employee quits, he/she must be paid within 72 hours of quitting. If the employee gives more than 72 hours notice of quitting, the employee must be paid at the time of quitting. If the employee demands payment by mail and does not provide the 72-hours notice, the employer must mail payment to the employee within 72 hours. §202
- (6) **30-DAY WAITING PENALTY FOR UNPAID WAGES** · Failure to timely pay wages upon quitting, termination or layoff can result in a penalty. If the employee is not timely paid, wages continue to accrue for up to 30 days until the employee is paid. The penalty is applied at the rate of pay at the time of quitting, termination or layoff. This provision can apply where there is a dispute about the payment (such as a refusal to pay vacation pay) if the refusal to pay is willful. §203
- (7) **30-DAY WAITING PENALTY FOR BOUNCED CHECKS** · Employers who pay with checks returned for insufficient funds are subject to a maximum 30-day penalty. The penalty is set at the rate of pay the worker was receiving when the check

30 Many provisions of the Labor Code are applicable to public employers. Labor Code §220 specifically exempts employees of state, county or municipal bodies from sections 200 to 211 and 215 to 219. Labor Code §220 exempts state employees for Sections 201.5, 201.6, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205 and 205.5.

31 In the curing, canning and drying of perishable crops, the period for payment is 72 hours. §201 Motion picture industry requires payment in 24 hours under some circumstances. §201.5 See, Smith v. Superior Court, 39 Cal. 4th 77 (2006)(model engaged for one day entitled to payment upon termination)

bounced. The penalty does not require willfulness on the part of the employer, although the penalty is excused if the violation was unintentional. §203.1

- (8) **PAYMENT OF WAGES/TIME PERIODS** · Wages must be paid at least twice monthly on days designated in advance by the employer. Wages earned between the 1st and the 15th of each month must be paid before the 22nd. Wages earned between the 16th and the end of the calendar month must be paid before the 10th of the next month. If a collective bargaining agreement provides a different arrangement, that different arrangement governs. Payment of wages on a weekly, biweekly or semimonthly basis is allowable provided the employer does not withhold more than seven days of pay. §204³²
- (9) **COMPENSATING TIME OFF** · In limited circumstances an employer may compensate employees for overtime with time off at the rate of one and one-half hours per hour worked after 40 per week instead of paying employees at one and one-half their rate of pay. §§204.3 and 513
- (10) **PAYMENT OF ALL WAGES CONCEDED DUE** · Employers must pay all wages conceded to be due within the time periods mentioned above. If the employer disputes some portion of what an employee claims, the employer does not have to pay that portion until the dispute is resolved. This prevents employers from coercing employees into accepting less than owed by withholding all wages. §206
- (11) **RELEASE OF WAGES UNPAID IS VOID** · Any release of claim for unpaid wages shall be void if wages not actually paid. §206.5
- (12) **NOTICE POSTED OF REGULAR PAYDAY** · Employers must post notices defining the regular payday and the time and place of payment. §207
- (13) **PAYMENT OF WAGES FOR DISCHARGED EMPLOYEE AT PLACE OF DISCHARGE** · Discharged (including laid-off) employees must be paid at the place of discharge. If an employee quits, he/she has to be paid at the office of the employer in the county where he/she was working. §208
- (14) **STRIKING EMPLOYEE TO BE PAID** · Where an employee strikes, striker is entitled to all unpaid wages on the next regular payday. The employer must return all deposits to the employee. Failure to pay on the next regular payday may also be an unfair labor practice under the NLRA. There are preemption problems in the enforcement of this section. §209
- (15) **CIVIL PENALTY FOR FAILURE TO PAY** · Failure to pay wages in accordance with §§204, 205 and 1197.5 results in a civil penalty of \$100 for each initial

32 There are various exceptions for agricultural employees, employees who work for several employers, employees who are highly commissioned, employees who work for auto dealers, and executive, administrative and professional employees. Where any employer fails to pay on the scheduled payday, this may be a violation of the Fair Labor Standards Act for failure to pay the federal minimum wage.

violation. For subsequent violations, the penalty increases to \$200 plus 25% of the amount withheld. The Labor Commissioner recovers this penalty and the penalty goes to the State Treasury. §210

- (16) **PAYMENT IN NEGOTIABLE INSTRUMENTS** · Employers must pay in negotiable instruments (checks) or cash. The employer must maintain sufficient funds to cover the check for at least thirty days. Scrip or coupons redeemable in goods or services are not legal forms of payment. §212
- (17) **EMPLOYER MAY DEPOSIT MONEY IN BANK ACCOUNT IN LIEU OF DIRECT PAYMENT** · Employer may not require direct deposit. If an employee voluntarily authorizes direct deposit, employer may do so. §213
- (18) **AUTHORITY OF DISTRICT ATTORNEY TO PROSECUTE ACTIONS** · District attorneys can prosecute actions. This section gives the district attorney the specific authority to file Labor Code suits. Further, any wage claimant is given the authority to sue directly in court for wages or penalties due. §218
- (19) **ATTORNEYS FEES IN WAGE ACTIONS** · Attorneys fees are paid to the prevailing party if demanded in a complaint for the nonpayment of wages. §218.5 Interest must be paid on unpaid wages. §218.6
- (20) **COLLECTION OF WAGES PAID BY EMPLOYER** · Employers may not collect or receive any part of wages previously paid. Employers may not recoup overpayments. §221³³ Similarly employers may not make any deductions from pay except those authorized by statute. §224
- (21) **UNLAWFUL TO WITHHOLD AMOUNTS AGREED UPON THROUGH COLLECTIVE BARGAINING** · It is unlawful to withhold amounts agreed upon through collective bargaining. This is probably unenforceable as preempted under the federal labor laws. §222
- (22) **EMPLOYERS MUST PAY FOR MEDICAL OR PHYSICAL EXAMINATIONS** · Employers may not require applicants for employment or current employees to pay for medical or physical examinations taken as a condition of employment. §222.5
- (23) **ILLEGAL TO PAY LESS THAN REQUIRED BY STATUTE OR CONTRACT** · It is illegal to secretly pay less than required by statute or contract. This section is not applicable to collective bargaining agreements due to NLRA preemption. However, this would apply where there are prevailing wage requirements. §223
- (24) **CIVIL PENALTIES FOR VIOLATIONS OF CERTAIN SECTIONS** · Violations of Sections 212, 216, 221, 222 and 223 result in civil penalty of \$50 for first violation and \$100 for each subsequent willful violation plus 25% of the amount unlawfully

33 Public employees are protected from deductions to satisfy overpayments. CSEA v. State of California, 198 Cal. App. 3d 374 (1988).

withheld. The penalty is recovered by the Labor Commissioner or in a private action for the State Treasury. §225.5

- (25) **ITEMIZED WAGE STATEMENT** · The Labor Code requires a detailed and itemized wage statement, separate from paycheck, showing: (1) Gross wages earned; (2) Total hours worked if wages based on hour; (3) All deductions; (4) Piece-rate units earned and applicable piece rates; (5) All applicable hourly rates of pay and the number of hours at each rate; (6) Net wages earned; (7) Inclusive dates for period for which employee paid; (8) Name of employee and only the last 4 digits of the Social Security Number or a separate employee identification number must be used and (9) Name and address of legal entity which is the employer. The statement must be accurate. The employer must keep records for three years. Deductions must be kept in ink. Employers must afford former and current employees the right to inspect or copy the records. Any employee suffering injury from knowing and willful failure of an employer to maintain the required records is entitled to actual damages or \$50 in the first pay period and \$100, in subsequent pay periods not to exceed \$4000. Current and former employees entitled to inspect and copy those records which must be maintained by employer. The employer must comply with a request to inspect or copy these records within 21 calendar days. Any failure to do so triggers a \$750 penalty. §226
- (26) **CIVIL PENALTY FOR FAILURE TO PROVIDE ITEMIZED STATEMENT OR MAINTAIN RECORDS** · There is a civil penalty of \$250 per employee per violation in initial citation and \$1,000 per employee per violation thereafter for violations of §226. §226.3
- (27) **REST BREAKS AND MEAL PERIODS MUST BE PROVIDED AND ONE HOUR'S PAY IF NOT PROVIDED** · If an IWC order requires a rest break or meal period, it must be provided. One hour's pay for each meal period not provided and one hour's pay if rest breaks are not permitted.³⁴ §226.7
- (28) **TERMINATED EMPLOYEES ENTITLED TO PAYMENT FOR UNUSED VACATION** · Terminated employees are entitled to payment of unused vacation time unless otherwise provided for by a collective bargaining agreement. §227.³⁵
- (29) **JURY SERVICE PROTECTED**; · Illegal to discriminate against employee for taking time off to serve as juror or appearing as witness pursuant to a subpoena. §230(a) and (b)

34 These amounts are not penalties and a three year statute of limitations governs. Murphy v. Kenneth Cole Productions, Inc., 40 Cal. 4th 1094 (2007). Our office has the briefs in this case if a reader wants more detail on this issue. The employer must provide lunch periods and rest breaks. The extent to which an employer must discipline employees who do not take them or take action to make the time available is still before the courts. Cf. Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949 (2005).

35 Use-it-or-lose-it policies are not permitted although an employer may place a limit on the amount which may be accrued.

- (30) **VICTIMS OF DOMESTIC VIOLENCE MAY TAKE TIME OFF FROM WORK TO OBTAIN RELIEF** · Employers may not discriminate against employees who take time off work to seek relief, including court relief, for domestic violence or sexual assault. §230(c)
- (31) **EMPLOYEES MAY ATTEND JUDICIAL PROCEEDINGS RELATED TO VICTIMS OF MOST FELONIES** · Employees who are victims of most felonies may attend judicial proceedings relating to those felonies without discrimination or retaliation. Protection extends to attending proceedings involving certain relatives and domestic partners. §230.2
- (32) **EMPLOYEES HAVE THE RIGHT TO PARTICIPATE IN SCHOOL OR DAY CARE ACTIVITIES** · Employer of twenty-five or more employees must allow employee who is a parent, guardian or grandparent with custody of child to participate in school activities or activities of licensed daycare facility for up to forty hours per child per year, but no more than eight hours per month. Vacation or compensatory time off must be used first. §230.8
- (33) **PHYSICAL EXAMINATIONS FOR DRIVER'S LICENSE** · If employer requires driver's license, employer must pay cost of any physical examination required for license. §231
- (34) **DISCLOSURE OF WAGES OR WORKING CONDITIONS** · No employer may require that employees refrain from disclosing amount of wages or working conditions; no employer may require any employee to sign waiver of right to disclose wages or working conditions or discharge or discipline employee who discloses amount of his/her wages or working conditions. §§232, 232.5³⁶
- (35) **USE OF SICK LEAVE TO ATTEND TO ILLNESS OF CHILD OR PARENT** · Employees may use up to six months worth of accrued sick leave to attend to sickness of child, spouse or parent, if sick leave is provided by the employer. Domestic partners are entitled to the same use. Employer conditions on use of sick leave apply. Employee may only use half of available sick leave for this purpose. §233 Employer may not discipline an employee under absence program who uses sick leave pursuant to §233 to care for child, parent, spouse or domestic partner. §234
- (36) **WAGE ASSIGNMENTS ARE LIMITED** · No wage assignment is valid unless meets the specific requirements of section 300, including written statement specifying transaction for which assignment occurs, spousal consent, notarization, maximum 50% of wages assigned and assignment is revocable at any time. §300

36 Such confidentiality rules are unlawful under the NLRA. Cintas Corporation, 344 NLRB 943 (2005), enforced, 482 F. 3d 463 (D.C. Cir. 2007).

- (37) OWNERSHIP OF GRATUITIES · Employers may not take any portion of gratuities left for employees. No deductions allowed for cost to process tips left on credit cards. §351³⁷
- (38) PAYMENT FOR BONDS OR PHOTOGRAPHS · If employer requires a photograph or bond of an employee, employer must bear the cost. §401
- (39) EMPLOYER ACCEPTANCE OF CASH BONDS · Employer may not require cash bonds unless employee is entrusted with property of value equal to bond or employer regularly advances goods or merchandise to employee. All cash bonds must be deposited in bank. §402 and §403
- (40) PUTTING UP PROPERTY AS BOND · If employer requires property to be put by employee as part of contract of employment, subject to the same conditions as a bond. §406
- (41) ILLEGAL CONSIDERATION TO SECURE EMPLOYMENT · Employer cannot condition employment upon investment in or purchase of stock in business. §407
- (42) COPIES OF ANY DOCUMENT SIGNED BY EMPLOYEE · If an employer requires any employee or job applicant to sign any document for the purpose of obtaining or holding employment, copy of the document must be provided to employee upon request. §432
- (43) POLYGRAPH AND SIMILAR TESTS · Employers may not require applicant for employment or employee to take polygraph, lie detector or similar test or examination as condition of employment. §432.2 Note: The law applies to more than polygraph tests and applies to written truth tests. Note: this is also broader than Federal Polygraph Act. Illegal to use voiceprints or voice stress patterns without advance written consent. Penal Code §637.3. This section does not apply to public employees.
- (44) ILLEGAL TERMS OF EMPLOYMENT · The employer may not require any applicant or employee to agree to any term or condition of employment that is illegal. §432.5
- (45) DISCLOSURE OF ARREST THAT DOES NOT LEAD TO CONVICTION · Employer may not ask employee or applicant about arrest or detention that did not lead to conviction. Employer may not ask about use or enrollment in any pretrial diversion program. Employer may not use fact of arrest or detention in any employment decision, including discipline or promotion, unless arrest leads to conviction. §432.7

37 Employers may require employees who directly serve the public to pool their tips.

- (46) EMPLOYER DISCLOSURE OF MARIJUANA ARRESTS · Provisions of law concerning non-disclosure of arrest records also apply to certain marijuana arrests and convictions. §432.8
- (47) NO TAPE RECORDING OR VIDEO RECORDING OF CERTAIN AREAS · Unlawful for an employer to tape or video record locker room, restroom or area where employees change their clothes. §435
- (48) COERCION OF EMPLOYEES TO PATRONIZE EMPLOYER IN PURCHASE OF ANYTHING OF VALUE · It is illegal for employer to require employees to patronize employer or other person in the purchase of any thing of value. This applies to tools, equipment or supplies. Unlawful to charge employee to submit employment application. §450

EIGHT-HOUR DAY RESTORATION AND WORKPLACE FLEXIBILITY ACT OF 1999
(AB 60 AMENDING LABOR CODE §§510—558)³⁸

- (49) DAILY OVERTIME REQUIRED · Any work in excess of eight hours in one workday, 40 hours in one workweek and the first eight hours on the seventh day of work in any workweek must be compensated at no less than one and one-half times the employee’s regular rate of compensation. §510. Note also:
 1. Double time is required after twelve hours in any workday.
 2. Double time is required after eight hours on the seventh day of work.
 3. Applies to all employees except executive, administrative and professional employees, defined as an employee “primarily engaged in” executive, administrative or professional activity (which means more than half of the work time) who earns a monthly salary equivalent to twice the minimum wage or more.³⁹
 4. Compensation must be paid for all time, including travel time, spent from the first place at which the employer requires an employee’s presence.
 5. Certain exemptions exist such as some computer software employees and most physicians.⁴⁰

38 Labor Code §§510—558 have been amended at almost every session of the legislature since AB 60 was passed.

39 The wage orders contain additional exemptions. For example employees governed by DOT regulations are not subject to the overtime requirements. Outside salespersons are entirely exempt from the wage orders.

40 §515.5 and .6.

- (50) **EMPLOYER MAY ADOPT A REGULARLY SCHEDULED ALTERNATIVE WORKWEEK** · Employer may adopt a four-day ten-hour regular workweek without paying daily overtime after eight, if two-thirds of the employees so choose in secret ballot election. Employer must make reasonable effort to accommodate those who cannot work more than eight hours per day. Employers must file results of elections with Labor Commissioner. Strict rules regarding these elections have been established by the IWC and it is difficult to comply.⁴¹ §511
- (51) **MANDATORY MEAL PERIOD** · Employer must provide a meal period of at least thirty minutes if the employee works more than five hours. The meal period may be waived by mutual agreement of employer and employee if work period is less than six hours. A second meal period is required after ten hours unless the work period is less than twelve hours, in which case the meal period may be waived by mutual agreement of employer and employee. §512
- (52) **MAKEUP WORK TIME PERMITTED** · Employer may approve written request of employee to make up lost time at straight time rates provided the request is not solicited by the employer and provided the employee does not work more than eleven hours in any workday or forty hours in the work week. §513
- (53) **CIVIL PENALTIES** · The first violation of sections 510 through 552 triggers a \$50 penalty per employee for each pay period. For each subsequent violation, the penalty is \$100 per pay period.⁴² §558
- (54) **DAY OF REST, ONE DAY IN SEVEN** · No employer may require employees to work more than six days in seven. §552. Every employee entitled to one day's rest in seven. §551 Days of rest may be accumulated through the month provided all rest days are given in the month. Applicable where collective bargaining agreement does not provide otherwise. §554⁴³

NOTE: The provisions of sections 510 and 511 are not applicable to employees covered by a valid collective bargaining agreement if the agreement provides premium wage rates for all overtime hours worked and a regularly hourly rate of pay at least 30 percent more than the state minimum wage. §514

41 The IWC Orders detail the procedures required to implement the alternative workweek. It is important to determine whether the employer has complied with these complicated procedures wherever a 4/10 workweek exists.

42 The penalties contained throughout the Labor Code are payable to the state General Fund, the LWDA or specific agencies or funds.

43 The IWC orders specify how the accumulation of days of rest provision is administered. Section 3. This means that the maximum number of days an employee can work without a day off is either 26 or 27. Of course, overtime rules apply to the consecutive days in the workweek. An exemption may exist if the collective bargaining agreement provides for specific exemption.

NOTE: The provisions of sections 510 through 557 do not apply to employees in agricultural occupations within the meaning of Wage Order No. 14-2001.

- (55) **EMPLOYER CANNOT INTERFERE WITH RIGHTS OF EMPLOYEES TO JOIN AND SUPPORT A UNION; EMPLOYER MAY NOT FORCE EMPLOYEES TO AGREE NOT TO JOIN UNIONS** · Under California law it is illegal to interfere with right of employees to join and support unions. Also illegal to force employees to agree not to join union. §§921, 923. Note: Applicable only if employer not governed by NLRA.⁴⁴ Cannot discipline employee for hiring an attorney.
- (56) **MISREPRESENTATION OF EMPLOYMENT CONDITIONS WHERE EMPLOYEE MOVES FROM ONE LOCATION TO ANOTHER** · Illegal to induce employee to move from one location to another whether in the state or outside the state by misrepresenting the kind, character, length of work, housing conditions of work or the existence or non-existence of labor dispute. §970. Double damages may be awarded.
- (57) **NOTICE OF STRIKE IN EMPLOYMENT ADVERTISEMENTS** · Employers must include notice in any advertisement if strike, lockout or trade dispute exists. §973
- (58) **MISREPRESENTATION OF LABOR ENGAGED IN PRODUCTION, MANUFACTURE OR SALE OF PRODUCTS** · Employer may not misrepresent by a label the kind, nature, and character of labor employed. Employer may not misrepresent extent of labor employed. Employer may not misrepresent number or kind of persons exclusively employed. Employer may not misrepresent that a particular or distinctive class or character of laborers employed when in fact another class or character is employed. This section means an employer may not misrepresent that union labor is used when the labor is non-union. Similarly, an employer could not misrepresent that goods are "Made in America" when they are made elsewhere. §1011
- (59) **MISREPRESENTATION OF UNION LABOR EMPLOYED** · Illegal to misrepresent that union labor employed in manufacture, production or sale of articles or performance of services. §1012
- (60) **UNION LABEL OR TRADEMARK, REGISTERED WITH STATE** · Union owns label or trademark if union has registered with state. §1014

44 In order to use these statutes against small employers over whom the NLRB will not assert jurisdiction, a union should file a charge with the NLRB. If the Region dismisses the charge because it will not assert jurisdiction, the dismissal letter will allow jurisdiction in the state court. Do not withdraw such charges if the Region says the NLRB will not assert jurisdiction; require the charge be dismissed. The NLRB will not assert jurisdiction over horse racing employers and other employers who share an exemption with public employers.

- (61) UNAUTHORIZED USE OF UNION LABEL OR TRADEMARK · Non-Union/unauthorized use or display of label, trademark, insignia, seal, device or form of advertisement of union illegal. §1016
- (62) UNAUTHORIZED USE OF UNION CARD · Illegal to use card of labor union to obtain aid, assistance or employment when not authorized to do so. §1017
- (63) UNAUTHORIZED USE OF UNION BUTTONS · Illegal to wear union button unless entitled to do so under rules of union. §1018
- (64) ILLEGAL FOR EMPLOYER THAT NEEDS CONTRACTOR'S LICENSE TO HIRE EMPLOYEES · Illegal for any employer required to have contractor's license to employ any employees if the employer does not have the license. \$200 per day per employee penalty for violation. §1021
- (65) ILLEGAL FOR EMPLOYER THAT NEEDS CONTRACTOR'S LICENSE TO EMPLOY INDIVIDUAL FOR WHOM LICENSE ALSO REQUIRED · It is illegal for employer to hire person as contractor for which license is needed when that person lacks a license. \$200 per day per each employee civil penalty. §1021.5
- (66) EMPLOYER MUST ACCOMMODATE EMPLOYEE ATTENDING DRUG OR ALCOHOL REHABILITATION PROGRAM · Any employer with twenty-five or more employees must accommodate employee who voluntarily enters into drug or alcohol rehabilitation program, provided the accommodation does not impose an undue hardship upon the employer. §1025
- (67) EMPLOYER MUST PROTECT PRIVACY OF EMPLOYEE IN DRUG OR ALCOHOL PROGRAM · Employer must protect privacy of fact that employee has entered into a drug or alcohol rehabilitation program. §1026
- (68) EMPLOYER MUST PROVIDE PLACE FOR LACTATION · Employer must provide place and time for employees to express milk. §1030
- (69) EMPLOYER MUST ACCOMMODATE ILLITERATE EMPLOYEES · Employer must accommodate illiterate employees in relation to their work so long as accommodation does not impose unreasonable hardship and must also provide information as to literacy programs. §1041
- (70) EMPLOYER MAY NOT ATTEMPT TO INTERFERE WITH REEMPLOYMENT OF EMPLOYEE BY MISREPRESENTATION · It is illegal for employer to attempt, through misrepresentation, to prevent any former employee from obtaining employment. §1050
- (71) ILLEGAL TO FORCE EMPLOYEE TO BE FINGERPRINTED OR PHOTOGRAPHED WHERE PURPOSE IS TO PROVIDE PRINT OR PHOTO TO A THIRD PERSON · Illegal to require person to be fingerprinted or photographed

where employer intends to give fingerprints or photographs to third person to possible detriment of employee. If fingerprints or photographs used AT WORK, illegal to give to a third person. This applies to applicants as well as to employees. §1051

- (72) **DISPLACED JANITOR OPPORTUNITY ACT** · Successor employers must hire janitors of former employers and retain them for 60 days. §1060 et. seq.
- (73) **EMPLOYERS MAY NOT CONTROL THE POLITICAL AFFILIATIONS AND ACTIVITIES OF EMPLOYEES** · Employers may not restrict employees from participation in politics or running for political office. Employers cannot control or direct the political affiliations of employees. Political affiliation is defined broadly and includes activities on behalf of various groups such as gay rights groups. Not applicable to public employees. §1101
- (74) **EMPLOYERS MAY NOT INFLUENCE OR COERCE EMPLOYEES IN POLITICAL ACTIVITIES** · Illegal to influence or coerce employees regarding political action or political activity through threat of job loss. Political activity has a very broad meaning and, for example, applies to groups advocating rights of gay people. §1102. This may be used to attack some employment-related tests that tend to screen based on political activities.
- (75) **CANNOT DISCRIMINATE BASED ON ACTUAL OR PERCEIVED SEXUAL ORIENTATION** · California prohibits discrimination in employment based on actual or perceived sexual orientation. The law requires applies to employers with five or more employees and excludes religious employers and not-for-profit corporations. §1102.1
- (76) **WHISTLEBLOWER STATUTE** · Employers may not enforce rules that prohibit employees from providing information to state or federal agencies where the employee has reasonable cause to believe that information discloses a violation of state or federal rule, or discloses non-compliance with such a rule. Employers may not retaliate against employees who refuse to participate in any activity that would result in violation of state or federal law or non-compliance with either. Up to \$10,000 penalty for violation. §1102.5
- (77) **SUCCESSOR CLAUSE ENFORCEABLE WHERE NATIONAL LABOR RELATIONS ACT NOT APPLICABLE** · If the National Labor Relations Act does not apply to employer, a successor clause makes the cba enforceable against successor until its expiration or for three years, whichever comes first. Note that federal law on this subject is considerably weaker. §1127⁴⁵

45 It is necessary to file NLRB charge and obtain dismissal on ground that NLRB lacks jurisdiction to allow suit in state court.

- (78) **PROFESSIONAL STRIKEBREAKERS** · California makes it illegal to hire or use professional strikebreakers. A professional strikebreaker is someone who has been hired twice before during the course of a lockout or strike and who has worked the duration of the strike for the purpose of replacing locked-out or striking employees. May be preempted by the NLRA. §§1130 and 1136.2
- (79) **PHARMACISTS NOT EXEMPTED AS PROFESSIONALS FROM IWC ORDERS UNLESS EXEMPTED AS ADMINISTRATIVE OR EXECUTIVE EMPLOYEE** · No pharmacist is exempt from overtime requirements of IWC orders unless the pharmacist is an administrative or executive employee. The professional employee exemption does not apply. §1186
- (80) **LIQUIDATED DAMAGES FOR FAILURE TO PAY MINIMUM WAGES** · Liquidated damages in an amount equal to unpaid wages payable in action to collect minimum wages. §1194.2
- (81) **CIVIL PENALTY FOR FAILURE TO PAY MINIMUM WAGES** · A civil penalty of \$100 per pay period per employee is due where employees are not paid minimum wage and \$250 per pay period per employee is due for subsequent violations. §1197.1
- (82) **DISCRIMINATION IN WAGES BASED ON GENDER** · Illegal to discriminate in wages, based on gender. State Equal Pay Act. §1197.5
- (83) **EMPLOYEE MAY INSPECT PERSONNEL RECORDS** · With certain exceptions employers must make personnel records available at work for employees to inspect at reasonable times. §1198.5
- (84) **RESTRICTIONS ON EMPLOYMENT OF MINORS** · California restricts the employment of minors. Generally, there are substantial restrictions on the employment of minors under sixteen and less severe restrictions on employment of minors under eighteen and over sixteen. §§1285 through 1399
- (85) **RESTRICTIONS ON FARM LABOR CONTRACTORS** · Farm Labor Contractors must register with the Labor Commissioner and various safeguards are provided. §§1682-1699
- (86) **STATE WARN ACT** · State law now requires notification before mass layoff, relocation or termination. Similar to Federal WARN Act but broader in some respects. For example, covers employer with 75 employees and where layoff affects 50 or more employees. §§1400-1408
- (87) **TALENT AGENCIES SUBJECT TO REGULATION** · Talent agencies must register and are subject to restrictions. §§1700-1701s

- (88) **PREVAILING WAGE REQUIREMENTS** · Workers on public works must be paid prevailing wages. This is generally limited to “construction, alteration, demolition or repair work.”⁴⁶ There are some circumstances where other employees such as building service employees must be paid prevailing wages.⁴⁷ §§1720-1780 Labor Management Cooperation Committees have special enforcement rights.⁴⁸ Our office has sponsored a website for Public Works Compliance issues.⁴⁹
- (89) **EIGHT-HOUR DAY FOR ALL WORK PERFORMED FOR STATE OR MUNICIPAL CORPORATION** · Work performed under public contract or authority of state or municipal corporations (does not include all public entities) is limited to eight hours per day, forty hours per week. Work in excess of that period, employee must be paid time and one-half. §§1810, 1811 and 1815
- (90) **EMPLOYERS MUST PROVIDE WORKPLACE FREE FROM EFFLUVIA AND WITH A SUFFICIENT NUMBER OF TOILETS** · Employers must provide a clean workplace free of effluvia from drains. Employer must provide sufficient number of bathrooms. Sufficient number of separate bathrooms for each sex must be provided. §2350
- (91) **EMPLOYERS MUST PROVIDE FREE, FRESH AND PURE DRINKING WATER** · Employers must provide fresh, free and pure drinking water. §2441
- (92) **INDUSTRIAL HOMEWORK REGULATED: NO INDUSTRIAL HOMEWORK PERMITTED IN SPECIFIED INDUSTRIES** · No industrial homework permitted in various industries, including manufacture of food items and garments. Licenses required for other industrial homework. §§2650-2667
- (93) **GARMENT MANUFACTURING** · Manufacturers of garments must obtain a license; keep specified records and may not subcontract to non-registered persons. §§ 2670-2692. Persons contracting with workers to manufacture garments are liable for unpaid wages, including uncompensated overtime. §2673.1

46 There are other statutory requirements mandating the payment of the prevailing wage. Workers on construction projects financed under the California Industrial Development Financing Act must be paid prevailing wages. Gov. Code §91533(1).

47 Public Contracts Code §10128 and Public Utilities Code §465. Prevailing wage requirements are enforceable by filing complaints with the Department of Labor Standards Enforcement of the Labor Commissioner. A lawsuit may also be filed directly in court on a third-party beneficiary theory. See *Tippett v. Terrich*, 37 Cal. App. 4th 1517 (1995). These third-party beneficiary lawsuits are very effective as long as one worker is willing to put his/her name on the lawsuit as a class representative.

48 Our office has additional material on enforcing the prevailing wage requirements. One important aspect of these laws is that Unions and Joint Labor Management Cooperation Committees have the ability to enforce the prevailing wage laws.

49 <http://www.publicworkscompliance.com/index.cfm>

- (94) SAFETY IN EMPLOYMENT · Occupational safety and health regulated by numerous statutes in various industries. Employer must have safety program to prevent accidents. §§ 6300-9061
- (95) INDEMNIFICATION BY EMPLOYER · Employer must indemnify employees for any loss caused by employer's "want of due care." §2800
- (96) INDEMNIFICATION BY EMPLOYER OF LOSSES OR EXPENSES INCURRED BY EMPLOYEE · Employer must indemnify employee for all losses or expenses suffered by the employee as a direct consequence of his work duties or at the direction of his employer. Employer pays attorneys fees if employee brings suit to enforce this right. §2802 One of the most important Labor Code provisions.
- (97) EMPLOYER MUST SAFEGUARD MUSICAL INSTRUMENTS · Employer who fails to take reasonable precautions to safeguard musical instrument is liable to employee for instrument's loss or damage. §2800.1
- (98) CONTRACTS FOR LABOR OR SERVICES IN SPECIFIED INDUSTRIES MUST PROVIDE SUFFICIENT FUNDS TO COMPLY WITH APPLICABLE LAWS. · Contracts for labor or services in construction, farm labor, garment, janitorial and security guard industries must provide sufficient funds to comply with applicable laws including labor laws. If the contracting entity enters into such subcontract knowing it does not provide sufficient funds, the contracting entity will be liable for such violations. §2810
- (99) EMPLOYER MUST PAY EMPLOYEE FOR ALL WAGES EARNED UPON DISMISSAL OR QUITTING · At the time of dismissal or resignation, employer must pay employee all wages earned. §§2926, 2927
- (100) DEDUCTIONS FROM WAGES · If employee is late to work, employer may deduct a maximum of one-half hour's worth of pay in addition to proportionate ratio of wages for hours missed. §2928
- (101) DISCHARGE FOR GARNISHMENT · Employer may not discharge employee for threat of garnishment of wages or for only one garnishment. Note federal law on same subject. §2929
- (102) EMPLOYEE ENTITLED TO COPY OF SHOPPER'S REPORT · Employer must give employee copy of shopper's report if shopper is outside agency and if used for discharge or discipline. Must give copy to employee before interview which might result in termination for dishonesty. §2930
- (103) AGGRIEVED EMPLOYEES MAY BRING ACTIONS AND COURTS MAY IMPOSE PENALTIES. · This provision allows aggrieved employees to enforce the Labor Code and for the Court to impose civil penalties. This has created a very broad right to employees to enforce labor laws effective January 1, 2004 and is

referred to as the Labor Code Private Attorneys General Act. It was amended in 2004 to require the employees to notify the employer and the Labor and Workforce Development Agency of the specific violations and to allow the Agency to investigate the claims before filing suit. §2698-99

- (104) **EMPLOYEES MAY NOT BE DISCHARGED FOR SEEKING WORKERS' COMPENSATION BENEFITS** · Unlawful to discriminate against worker who files workers' compensation claim or indicates intention to do so. Unlawful for insurer to cause employer to discriminate. §132a
- (105) **EMPLOYEES MAY NOT BE REQUIRED TO PAY FOR WORKERS' COMPENSATION COSTS** · Employees may not be forced to pay any part of the costs of workers' compensation coverage including reducing their pay or participation in profit sharing because of any workers compensation costs. §3751⁵⁰
- (106) **EMPLOYEES MAY NOT BE DISCIPLINED FOR REFUSING TO WORK IN VIOLATION OF SAFETY ORDERS WHERE THE VIOLATION WOULD CREATE A REAL AND APPARENT HAZARD** · State law prohibits employers from laying off or discharging workers for refusal to work in violation of safety orders where violation of the safety order would create a real and apparent hazard. §6311
- (107) **EMPLOYEES PROTECTED FOR FILING SAFETY COMPLAINTS AND PARTICIPATING ON SAFETY COMMITTEES** · Employer may not discipline employee for making a safety complaint or for participating in a safety committee established under California Labor Code 6401.7. §6310(3)
- (108) **EMPLOYER MUST FURNISH SAFE AND HEALTHFUL EMPLOYMENT** · Responsibility of employer or joint employers to furnish employment and place of employment that is safe and healthful for the employees working there. §6400
- (109) **EMPLOYER MUST PROVIDE SAFETY DEVICES** · All safety devices and safeguards must be supplied by the employer. "Every employer shall do every other thing reasonably necessary to protect the life, safety and health of employees." §6401⁵¹
- (110) **SMOKING RESTRICTIONS IN WORKPLACE** · Prohibits smoking in most workplaces. §6404.5

50 Prachasaisoradej v. Ralph's Grocery Co., Inc. 42 Cal.4th 217 (2007).

51 Sections 6402 and 6404 impose additional employer safety duties.

VI. THE IWC ORDERS

The 1999 eight-hour day legislation also required the IWC to review the IWC Orders. In 2000 the IWC convened a series of hearings and changed the wage orders and added two new ones. Wage Orders are in effect for all covered industries and are available on line at <http://www.dir.ca.gov/Iwc/WageOrderIndustries.htm>

The most significant addition is the new On-Site Wage Order 16, which covers construction, mining, logging and oil drilling.⁵²

The following is a summary of the provisions which most IWC Wage Orders have in common. However, the wage orders are not uniform so it is important to read the applicable order for the industry or occupation involved to see if there are any differences. Wage Order 16 for on-site work does have significant differences.

Commonly referred to orders are: Order 1-2002 which applies to manufacturing; Order 4-2002 which applies to professional, technical, clerical and mechanical occupations; and Order 7-2002 which applies to retail establishments. There are 17 IWC Orders.⁵³ The wage orders are not applicable to outside salespersons,⁵⁴ and certain sections are not applicable to professional,⁵⁵ executive or administrative employees, and in most cases to employees directly employed by the State or any county, incorporated city or town or other municipal corporation. Copies of the wage orders are available from the Labor Commissioner's office or on the Internet at www.dir.ca.gov.labor_law/DLSE or <http://www.dir.ca.gov/Iwc/WageOrderIndustries.htm>

- (1) **OVERTIME PAYMENTS** · Employees must be paid time and one-half after eight hours in a workday or forty hours in a workweek. Employees must be paid time and one-half on the seventh day of the workweek. Employees must be paid double time after twelve hours in a day and after eight hours on the seventh day of the workweek. IWC Order §3(A)⁵⁶
- (2) **ALTERNATIVE WORKWEEK SCHEDULES** · Alternative workweeks of four-day ten-hour shifts without daily overtime may be voted in by employees provided detailed election procedures are observed. Employees who cannot work the

52 Wage Order 16 is valid. Small v. Superior Court, 148 Cal. App 4th 222 (2007)

53 No. 17 is a miscellaneous order.

54 The California Supreme Court limited the scope of this exemption in Ramirez v. Yosemite Water Co., 20 Cal.4th 785 (1999)

55 Nurses are no longer professional.

56 There are additional exemptions contained in the wage orders such as drivers governed by DOT regulations, employees engaged in transportation and others. Agricultural employees must be paid overtime after 10 hours, not 8 hours in a day.

alternative schedule are entitled to reasonable accommodation. IWC Order §3(B)⁵⁷

- (3) **HOT MEALS FOR CERTAIN SHIFTS** · Where a shift ends or begins between 10:00 p.m. and 6:00 a.m. and a meal period occurs on that shift, the employer must make available hot food or drink or a place to heat food or drink and a suitable sheltered place to eat. IWC Order §3(F)
- (4) **ONE DAY'S REST IN SEVEN** · One day in seven must be a rest day. Rest days may be accumulated during a one-month period. IWC Order §3(G)
- (5) **AT LEAST MINIMUM WAGE MUST BE PAID ON ESTABLISHED PAYDAY** · Each employee must be paid on payday not less than the applicable minimum wage. IWC Order §4(B)
- (6) **SPLIT SHIFT REQUIRES ONE HOUR'S PAY AT MINIMUM WAGE** · If employee works split shift, he/she must be paid one-hour's extra pay at minimum wage in addition to the minimum wage. IWC Order §4(C)
- (7) **REPORTING PAY** · When an employee reports to work and is not put to work or works for less than a full day, employee must be paid at least two hours' pay. IWC Order §5(A)
- (8) **RECORDS MAINTAINED BY EMPLOYER** · Employer must keep the following accurate records: (1) Full name, home address, occupation and social security number; (2) Birth date if under eighteen years old and designation that employee is a minor; (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked must be recorded. Meal periods need not be recorded if operations cease; (4) Total wages paid each payroll period; (5) Total hours worked in the payroll period and applicable rates of pay, and (6) Production record and formula if piece rates in effect. This information must be made readily available to the employee upon reasonable request.⁵⁸ IWC Order §7(A)
- (9) **INFORMATION TO BE SUPPLIED AS PART OF PAYROLL STUB** · Semi-monthly or at time paycheck is furnished, employer must give to employee an itemized statement showing: (1) All deductions; (2) The inclusive dates of the period for which the employee is paid; (3) The name of the employee or the employee's social security number; and (4) The name of the employer. IWC Order §7(B)⁵⁹
- (10) **MAINTENANCE OF RECORDS** · Every employer must maintain all required

⁵⁷ Health care institutions may implement different alternative work schedules.

⁵⁸ In the non-union situation, arguably a union organizer can assist any employee exercise this and other rights mentioned in this paper.

⁵⁹ Labor Code §226 requires additional information on the stub. The IWC Order and Section 226 are not consistent.

records in English and in ink or other indelible form; must be properly dated showing month, day and year. The records must be kept at the place of employment or at a central location and must be available to the employee upon request. The records must be kept three years. IWC Order §7(C)

- (11) **CLOCKS MUST BE FURNISHED** · Clocks must be provided in all major work areas or within reasonable distance. IWC Order §7(D)
- (12) **NO DEDUCTIONS FOR CASH SHORTAGE, BREAKAGE, OR LOSS OF EQUIPMENT** Employers may not make deductions for cash shortage, breakage, or loss of equipment unless shortage, breakage or loss of equipment was caused by a dishonest or willful act or gross negligence of the employee. IWC Order §8
- (13) **UNIFORMS AND EQUIPMENT** · When an employer requires uniforms as a condition of employment, the uniforms must be provided and maintained by the employer. IWC Order §9(A)
- (14) **HAND TOOLS AND EQUIPMENT** · Required tools and equipment must be furnished by the employer unless the employee earns more than twice the minimum wage. The employee may be required to furnish hand tools and equipment customarily required by the trade or craft. IWC Order §9(B)⁶⁰
- (15) **REASONABLE DEPOSIT MAY BE REQUIRED** · An employer may require a reasonable deposit for items mentioned in 9(A) and 9(B) above. Section 400 of the Labor Code applies. The employer may deduct costs of items not returned from final paycheck only if employee gives prior authorization for such deduction. No deduction may be made for normal wear and tear. IWC Order §9(C)
- (16) **MEAL PERIOD MUST BE PROVIDED AFTER FIVE HOURS.** · Employer must provide a meal period after five hours of work unless work can be finished within six hours. Another lunch period must be provided after 10 hours. The second lunch period may be waived but only if the employee takes the first lunch period. On-duty, paid lunch hour may be provided in limited circumstances. Failure to provide lunch period results in payment of one hour's pay. IWC Order §11
- (17) **MEALS AND LODGING AS CREDIT AGAINST MINIMUM WAGE** · An employer may not credit meals and lodging against the minimum wage unless there is a voluntary, written agreement between the employer and the employee. The Wage Order establishes a schedule of the amount that may be credited. Meals mean a bona fide meal consistent with the work shift and an adequate, well-balanced serving of a variety of wholesome, nutritious foods. Lodging means living accommodations available to the employee for full-time occupancy that are adequate, decent and sanitary according to usual and customary standards. Employees may not be

⁶⁰ Wage Order 16 requires that the employer provide the hand tools for all employees except employees who earn more than twice minimum wage may provide hand tools but cannot be required to do so.

required to share a bed. IWC Order §10

- (18) **REST PERIODS** · A ten-minute rest period is required for four hours' work or major fraction thereof. In so far as practical, rest period shall be during middle of shift. IWC Order §12 Failure to provide both rest breaks results in payment of one hour's pay.
- (19) **CHANGE ROOMS AND RESTING FACILITIES** · Employers must provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required for their work clothing during non-working hours. When a change of clothing is required, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean. Suitable resting facilities must be provided in an area separate from the toilet rooms and must be available to employees during work hours. IWC Order §13
- (20) **SEATS** · Employer must provide working employees suitable seats when the nature of the work reasonably permits the use of seats. When employees are not engaged in active duties where the nature of their work requires standing, an adequate number of suitable seats must be placed in reasonable proximity to the work area and employees must be permitted to use such seats when it does not interfere with performance of their duties. IWC Order §14
- (21) **TEMPERATURE** · Employer must maintain a work area with a temperature that provides reasonable comfort and is consistent with industry-wide standards. Where work requires temperature of less than 60 degrees, a heated room must also be provided. Temperature of not less than 68 degrees must be maintained in toilet rooms, resting rooms and change rooms. IWC Order §15
- (22) **ADDITIONAL PENALTIES** · Employer is fined \$50 for each underpaid employee for each pay period; \$100 for subsequent violations. IWC Order §20
- (23) **POSTING** · Employers must post appropriate IWC notice at all work sites. IWC Order §22

VII. ADDITIONAL STATE LAWS THAT CREATE RIGHTS FOR EMPLOYEES

- (1) **PREGNANCY AND CHILDBEARING DISABILITY LEAVE** • Female employees are entitled to up to four months of leave for pregnancy or childbearing-related disabilities. Gov. Code 12945(b)(2). This is different from leave required by the California Family Rights Act and the Federal Family and Medical Leave Act.
- (2) **CALIFORNIA FAMILY RIGHTS ACT** • Employees of eligible employers may take up to four months of unpaid leave for birth, adoption, foster care placement of child, serious health condition of family member or the employee. Gov. Code 12945.2.

This leave is generally the same guaranteed by the Federal Family and Medical Leave Act. It applies to domestic partners. 29 U.S.C. §2601 et. seq.

- (3) **EMPLOYER LEAVE POLICIES** • Some employers have established leave policies that are more generous than those guaranteed by law. Such policies are enforceable as part of the employee's employment contract to the extent any handbook or personnel rule is enforceable.
- (4) **VOTING LEAVE** • Employer must allow employee to take up to two hours off work to vote. Election Code §§14350, 14352.
- (5) **MILITARY LEAVES** • Employees are entitled to leave for purposes of service in any ordered military training or duty. Military and Veterans Code §394. Federal law provides additional protection. Employers with 25 or more employees must provide 10 days unpaid leave to employees while spouse is home on leave.
- (6) **WORK-RELATED INJURIES AND ILLNESS** • Workers may file claims arising out of any workplace injury or illness through the state Workers' Compensation system. In some cases employers have implemented alternative dispute resolution mechanism to resolve claims. Labor Code 3201 et. seq. This is the exclusive remedy for such injuries or illnesses. Certain employees are governed by federal laws. Federal Employers' Liability Act, 45 U.S.C. §51 et seq. applicable to railroad workers and the Jones Act 46 U.S.C. §688 for workers on the high seas or the Longshore and Harbor Workers' Compensation Act 33 U.S.C. §901 et seq. for waterfront areas.
- (7) **NON-DISCRIMINATION FOR FILING OR PURSUING WORKERS' COMPENSATION CLAIM** • Employer may not terminate or otherwise discriminate against employee for filing or pursuing a workers compensation claim. Increased benefits and wages as penalty. Labor Code §132a
- (8) **CIVIL SUITS WHERE EXCLUSIVE REMEDY OF WORKERS' COMPENSATION NOT APPLICABLE** • There are statutory exemptions to the exclusive remedy doctrine. In those cases an employee may initiate a suit in court. These circumstances are narrowly applied and very limited. Some examples are: (1) Assault by the employer; (2) Aggravation of the injury caused by the employer's fraudulent concealment of the injury or its relationship to employment; (3) Where employer is also the manufacturer of the product that causes injury dual capacity doctrine applies; and (4) Knowing removal of or failure to install point of operation guard to a power press. Labor Code §3602(b).
- (9) **CIVIL SUITS AGAINST THIRD PARTIES** • Injured workers may sue third parties who are not their employers for damages without invoking workers compensation remedies. Labor Code §3852

- (10) CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH ACT (CAL OSHA) • Employees may file claims with OSHA about unsafe working conditions or discrimination in enforcing OSHA. Labor Code §§6300 et seq.
- (11) TUNNEL AND MINE SAFETY ACT • Specific safety procedures and protections apply to mining and tunneling work. Labor Code §§7950 et seq.
- (12) SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT (PROPOSITION 65) • Employer may not expose employees to chemicals known to cause cancer or reproductive toxicity. Health & Safety Code §§ 25249.5-25249.13.
- (13) HAZARDOUS SUBSTANCES INFORMATION AND TRAINING ACT • Employers must provide information to employees regarding hazardous substances generally in the form of Material Safety Data Sheets. Labor Code §§6360 through 6399.7
- (14) FAIR EMPLOYMENT AND HOUSING ACT • Discrimination prohibited based on the following:
 - 1. Race
 - 2. Color
 - 3. Religious creed
 - 4. National Origin
 - 5. Ancestry
 - 6. Physical and mental disability
 - 7. Medical condition (including genetic characteristics)
 - 8. Marital Status
 - 9. Gender or sexual orientation
 - 10. Age (applies to employees 40 years of age or older)
 - 11. Pregnancy, childbirth or related condition.

The law prohibits discrimination in hiring, selection for training, discharge, compensation, or any terms of employment. Gov. Code §§12900 et. seq. State law is similar to federal anti-discrimination laws, including Title VII and the Americans with Disabilities Act. The law also requires employers to protect employees from sexual harassment by clients and customers as well as other employees.⁶¹

Employer may not require employees to speak in English only unless there is a business justification. Gov. Code §12951 Employer cannot forbid employees from wearing pants in most situations. §12947.5 Employers with 50 or more employees must provide supervisors and managers two hours of mandatory sexual harassment training every two years. Gov. Code § 12950.1

- (15) UNRUH CIVIL RIGHTS ACT • Requires equal accommodations, advantages, facilities, privileges and services in business establishments. Does not apply to

⁶¹ Government Code § 12940(j).

employment relationship but applies to those doing business with all businesses.
Civil Code §51

- (16) **RALPH CIVIL RIGHTS ACT** • All persons are to be free from violence or intimidation through threat of violence because of race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation or position in a labor dispute. The statute imposes a \$25,000 penalty for violation in addition to other damages. Enforced through lawsuit. Civil Code §§51.7 and 52.
- (17) **EMPLOYERS WHO UNDERTAKE STATE PROGRAMS OR WHO RECEIVE STATE FUNDS MAY NOT DISCRIMINATE** • Employers who undertake programs or activities funded directly by the state or who receive assistance from the state may not discriminate on the basis of ethnic group identification, religion, age, sex, color or physical or mental disability. Government Code §11135
- (18) **DISCRIMINATION ON PUBLIC WORKS PROJECTS** • Contractors on public works projects may not discriminate on the basis of race, religious creed, color, national origin, ancestry, physical and mental disability, medical condition, marital status and sex. Labor Code §1777.6
- (19) **TESTING FOR HIV; USE OF HIV IN EMPLOYMENT DECISIONS** • Unlawful to test for HIV without written consent of individual. Unlawful to use result of HIV test for determining suitability for employment. Unlawful to disclose results of HIV test. Health & Safety Code §§120980, 120990, 12115 and 121025.
- (20) **USE OF CONSUMER INFORMATION IN EMPLOYMENT DECISIONS** • California law limits use of consumer information such as credit reports in employment decisions. Employer must notify employee or applicant of intent to use consumer information. Employer must provide a copy of any report from third party service if requested. If employment is denied on basis of information received, employer must advise applicant and disclose name of consumer information agency that provided information. The consumer (employee) may obtain a free copy of the report if it is used in employment decision. Civil Code §§1786-1786.56 Overlaps with federal Fair Credit Reporting Act of 1970. 15 U.S.C. §§1681-1681t. Caveat: There are many technical requirements regarding the contents and use of such reports.
- (21) **WIRETAPPING, RECORDING AND UNAUTHORIZED LISTENING INTO PRIVATE COMMUNICATIONS** • Unlawful to tap or make unauthorized connection with any telephone including internal telephone communication system. Unlawful to attempt to learn or to learn contents of confidential communication without authorization of all parties to the communication. Unlawful to use any information obtained by means of prohibited wiretap. Unlawful to intentionally and without consent of all parties eavesdrop or record contents of confidential communications where electronic device used to eavesdrop or record. Penal Code §§630-637.5 In addition to penal sanctions, statutory damages available, such as

attorneys fees in civil suits. California law is broader than the federal rules regarding wiretapping. 18 U.S.C. §2510 et seq.

- (22) **CONSTITUTIONAL RIGHT OF PRIVACY** • California Constitution, Article I, Section 1, includes an express right of privacy among the “inalienable rights of the people.” This right will be enforced upon a showing that the employee had a legally protected privacy interest, a reasonable expectation of privacy and a serious invasion of that privacy right. Hill v. National Collegiate Athletic Ass’n, 7 Cal. 4th 1 (1994).
- (23) **COMMON LAW RIGHT OF PRIVACY** • There are four varieties of invasion of privacy: (1) Invasion of employee’s seclusion or solitude. (2) Public disclosure of embarrassing private facts. (3) Publicity that puts the employee in a false light in public (4) Use of employee’s name or picture for employer’s benefit. These are all common law torts enforced through civil actions. Examples are drug and alcohol testing; disclosure of private information to third parties; employer searches of employee’s persons or property; observing employees through two-way mirrors, investigations of employee’s conduct. Not all of this conduct is illegal, it depends on the facts of each case. An employer may not knowingly use an employee’s name, signature, photo or likeness in any manner without that employee’s consent. Civil Code §3344
- (24) **BOOKKEEPING SERVICES MAY NOT DISCLOSE RECORDS** • California has established specific prohibition against anyone who matins bookkeeping information from disclosing it without express written consent of person for whom the records are maintained. This may apply to bookkeeping records maintained by employer. Civil Code §1799-1799.2
- (25) **CONFIDENTIALITY OF MEDICAL RECORDS** • Employer must establish procedures to insure that medical information remains confidential. Employer may not allow medical information to be disclosed to third parties without employee’s written consent. Exceptions exist in limited circumstances, such as in response to subpoena. Federal HIPAA rules are also in effect. Confidentiality of Medical Records Act. Civil Code §§56 et seq.
- (26) **SUBPOENA FOR EMPLOYMENT RECORDS MUST NOTIFY EMPLOYEE OF EXISTENCE OF SUBPOENA AND A CHANCE TO OPPOSE** • If a subpoena is served on an employer for employment records, the person whose records are being subpoenaed must be given notice of the subpoena and an opportunity to oppose that subpoena. Civil Code §1985.6

(27) **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS** • Employer is prohibited from engaging in outrageous conduct with the intention of causing severe emotional distress. This requires the showing of very severe conduct beyond the bounds of the employment relationship; otherwise the exclusive remedy is through Workers' Compensation. Examples include repeated racial epithets and physical assaults. Harassment on the job does not rise to the level of "outrageous" conduct necessary for this tort.

(28) **WRONGFUL TERMINATION** • Under California law and Labor Code 2922, employment is "at will," which means that an employer can fire an employee at any time and the employee can quit at any time. There are limited exceptions to this doctrine:

1. Where there is a statutory prohibition against termination for a specific reason such as race, sex, or political affiliation. We have listed most of them above.
2. Where any employee has a written or oral contract of employment for a period of time (such as one year) or where the oral or written contract puts other limits on the right of the employer to terminate.
3. Where the termination violates federal laws such as termination for union activities or in violation of Title VII which prohibits various forms of discrimination.
4. Where an employee is terminated in violation of public policy such as terminating an employee for reporting illegal conduct to the appropriate authorities, or terminating an employee for refusing to commit perjury, or to avoid paying wages earned.
5. Where there is an employer-employee agreement not to terminate except for just cause; such an agreement may arise from personnel policies or practices, the employee's longevity, statements of the employer, or the practices of the employer or industry.

Warning: Most employees do not have an express or implied contract of employment. Most non-union employers have issued handbooks or policies that expressly state that "employment is at will."

(29) **DEFAMATION** • False statements to third parties about an employee's work history or reasons for termination constitute defamation. Normally the employee must show that the statement was made knowing it to be false or with reckless disregard for whether it was false. The employee must usually show that the statement was made with malice to third persons. Civil Code §47(c)

(30) **RESTRICTIVE COVENANTS** • Generally employers may not forbid employees from working for competitors. Business and Professions Code §16600

- (31) DRUG-FREE WORKPLACE • Government contractors must take steps to insure no employees use drugs. Government Code §8350
- (32) PROHIBITED USE OF STATE FUNDS FOR OPPOSING UNIONS • State contractors may not use any portion of site funds to oppose or support unions. Government Code §16645 –16649.⁶²
- (33) PAID FAMILY LEAVE • Employees may take up to six weeks of paid time off for family leave to care for family members and receive up 55% of their wages. This program the first of its kind in the nation is called Family Temporary Disability Insurance. Unemployment Insurance Code 3300 et. seq.⁶³
- (34) Local Ordinances • Some cities and districts have enacted local living wage and other ordinances which govern workplaces. They provide for such minimum requirements as a living wage, worker retention, workplace standards, paid sick leave (San Francisco) and other benefits. Any employee who works in an area governed by any of these local ordinances should check to see if his/her workplace is governed by the local law and how it is enforced.

NOTE: THIS PAPER DOES NOT DESCRIBE THE FULL EXTENT OF THESE LAWS. THESE LAW MAY BE APPLIED IN NUMEROUS WAYS IN NUMEROUS SETTINGS TO HELP WORKERS AND TO OPPOSE UNFAIR EMPLOYERS. It is important to seek advice if there are any questions as to whether a practice or specific incident may be a violation of these laws in any given situation.

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62 This statute is not being enforced while an appeal is being heard by the United State Supreme Court. A decision should issue by June, 2008, whether it is preempted by Federal law.

63 San Francisco has now enacted a paid sick leave ordinance requiring employers to provide paid sick leave. Chapter 12W of the Administrative Code.