

Carothers DiSante & Freudenberger LLP Employment Law Guide for California Businesses¹

This Guide summarizes the essential employment law considerations that a business in California should evaluate and policies that should be implemented. Each concept, although summarized here, is complex and deserves careful consideration and adaptation to your particular needs. Also, laws vary depending on your particular industry, locations within California, and number of employees. If you do or intend to do business with public (i.e. governmental) entities, additional requirements apply.

WORKPLACE CONSIDERATIONS

- Post Required Workplace Notices²
 - There are many notices that employers must post for its employees. These notices should be physically posted at the Company's offices. Many of these are available as pre-made posters. The list of required workplace notices can be found at the California Department of Industrial Relation's website at www.dir.ca.gov. In short, the required notices cover:
 - Minimum wage, applicable wage orders that regulate wages hours and working conditions, and paydays
 - Paid sick leave, unemployment insurance, disability insurance and paid family leave insurance benefits and polygraph protection
 - Safety rules and regulations, emergency phone numbers, no smoking,
 - Worker injuries and workers' compensation
 - Whistleblower protections
 - Discrimination and Harassment and equal employment opportunity
 - Leave laws³

¹ This is provided as a courtesy to friends and clients of CDF and is intended solely to assist business owners in California identify various significant legal obligations in the employment area. It is not to be considered legal advice. We advise consulting an employment law specialist to further asses how these laws apply to your business and to adopt appropriate policies.

² Required postings can be obtained from California's Chamber of Commerce.

³ Employers need only post the notices for the leave laws that are applicable. For example, the poster for FMLA and CFRA leave must only posted by employers with 50 or more employees. More information regarding whether and when specific leave laws apply to a Company is below.

- Injury and Illness Prevention Program

INSURANCE CONSIDERATIONS

- Workers Compensation Insurance
 - Required by the law
 - Workers compensation is a specialized field. Have a contact for an attorney specializing in the area
- Unemployment Insurance
 - Required by the law
- Health Insurance
 - Depending on its number of employees, Companies may have to provide health insurance to its employees or the Company may be assessed a fee.
- Employment Practices Liability Insurance
 - Insurance coverage against discrimination, harassment and retaliation claims
 - These claims make up a substantial number of the kind of lawsuits filed by employees. They typically involve litigation risk often exceeding \$100,000 for each lawsuit
 - Tend to have high premiums, high deductibles and multiple exclusions

HIRING CONSIDERATIONS:

- Consider Background Checks
 - May reveal information that helps hiring/promotion decisions
 - Employees and applicants have many legal protections in this area. Work with experienced employment counsel to understand when and how to use background checks
 - At minimum, carefully check all references and popular social media sites

- Create Job Descriptions
 - These summarize an employee's general duties, mental/physical job requirements, frame how employees will be evaluated, and guide internal training and development
 - Helpful in training, counseling, interviewing and terminating an employee because they identify and clearly communicate the expectations for the job
 - State whether the position is paid on hourly or salaried basis. This decision involves a complex analysis of the person's duties and compensation structure. . Misclassifying an employee as salaried instead of hourly is one the largest litigation risks in employment law

- Employment Contracts and Commission Plans
 - Consider employment contracts for anyone with access to confidential business information
 - If you use an employment contract consider including the following provisions: a defined duration for the employment relationship; a clause that states clearly the consequences and conditions of termination by both sides; a merger and integration clause that states that the written document constitutes the entire agreement between the parties; non-disclosure obligations; an arbitration agreement; and a defined severance amount in exchange for a release of claims.⁴
 - Draft commission plans for employees that the Company plans to pay in part or in whole by commission. Each commission plan must be in writing and should specifically state how an employee earns a commission, when an employee earns a commission, whether there are chargebacks and the conditions under which they will happen, and when the commission will be paid. It is acceptable to refer to a separate document that lists various commissions if the value of a particular type of sale will change often

- Draft Job Application
 - Helpful to evaluate to provide a uniform way to evaluate a candidate's experience, skills and training
 - Ok to use a form approved by the California Chamber of Commerce
 - Do not ask for employment eligibility or pre-employment physical (or use E-Verify to check legal status) until an offer of employment has been made
 - Consider the impact of federal and state disability laws

⁴ Note that non-competition agreements are generally unenforceable in California.

- Do not ask about criminal history unless your question has been approved by counsel (especially if in San Francisco where there are more specific legal requirements)
- Drug Testing (only after making an offer of employment and before work begins). Testing based on a reasonable belief of drug use/intoxication at work is permitted although we advise that Companies have a policy regarding “for cause” testing. Random drug testing is generally not permitted
- Employment Offers
 - The interviewer or another Company representative should tell applicants how the Company makes offers of employment. For example, that the Company will make written employment offers by letter
 - Offer letters should contain: job title; whether the person will work in an exempt or non-exempt position; starting salary or wage; work schedule; full-time or part-time designation for benefits purposes; start date; any conditions to which the offer is subject (post-offer medical exam, post-offer drug test, or reference or background check for example); a statement of the at-will basis of employment; and a deadline by which you expect a decision
 - Non-disclosure/Confidentiality agreements
 - No use of prior employer’s information. Also ask prospective employees for any non-disclosure/confidentiality agreements they may have signed with prior employers
- Provide Employees With Labor Code 2810.5 Notice
 - California law requires Companies to provide each new employee with a notice that states, among other things, the legal name of the employer; the employer’s mailing address, the address of its physical main office, and telephone number; the employee’s wage information; workers’ compensation information; and notice of paid sick leave rights.
 - The California Department of Industrial Relations has a form notice that Companies may use. The form is found at:
https://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf

MANAGING CURRENT EMPLOYEES

- Employee Orientation
 - Safety training

- Policies and work rules
- Benefits availability and eligibility
- Emergency procedures*
- At-will employment
- Anti-discrimination and harassment training*
- Confidentiality
- Internet and electronic communications usage
- Employer property and equipment
- Receipt of employee handbook
- *Legally Required
- Keep/Retain Accurate Records
 - Pre-employment records (job applications and resumes; referrals; inquiries about employment opportunities) for employment duration plus 4 years
 - Timekeeping records (records showing hours and days of work and schedules) for employment duration plus 5 years
 - Payroll records for employment duration plus 4 years
 - Employment eligibility forms duration of employment plus 4 years
 - Personnel files (performance evaluations; promotions and demotions; disciplinary notices; discharge, layoff and transfer records; training and testing records) for duration of employment plus 4 years
 - First aid records for duration of employment plus 5 years
 - Employee benefits information including Summary Plan Descriptions for 6 years from the filing of the Plan Year Report
- Wage and Hour Law Compliance
 - Non-compliance with wage/hour laws is among the most significant risks faced by CA employees wage and hour laws. Companies must take great care to ensure that their policies and practices are consistent with the law in this area, some of which change from city to city.

- Minimum wage. Every employee must be paid at least the state minimum wage for all of the time they work. As of January 1, 2016 the minimum wage is \$10.00 per hour. The minimum wage will increase by \$1.00 per hour each January 1 until it reaches \$15.00 per hour on January 1, 2021. The minimum wage varies however from city to city and may be more where the Company's employees work. For example, the minimum wage in Los Angeles is \$10.50 per hour as of July 1, 2016. In San Francisco as of July 1, 2016 the minimum wage is \$13.00 per hour. We strongly recommend researching the minimum wage rate in the locality where your employees work.
- Ensure that hourly employees accurately track the time they work and that they understand that they must record all the time that they work
- Pay hourly employees overtime at the appropriate rate. In California overtime must be paid to hourly (non-exempt) workers at 1.5x their regular rate of pay (the regular rate of pay may need to account for bonuses and commissions paid to the employee) for working over 8 hours in any day or 40 hours in a week or the first 8 hours worked on the seventh consecutive day worked in a single workweek. Double time must be paid for any work over 12 hours in a day and work over 8 hours on the seventh consecutive day worked in a single workweek
- Carefully analyze whether an employee should be classified as an exempt, or non-hourly paid employee. Misclassifying employees as exempt creates a substantial risk. Employees may be exempt if they spend over 50% of their actual work time on duties considered to be executive, administrative, professional, and as a commissioned salespeople working outside of the office. This decision involves a complex analysis of the person's actual work duties and compensation structure
- Ensure that employees are provided the opportunity to take meal and rest breaks. Companies must give non-exempt employees (hourly paid) an opportunity to take a 10 minute paid rest break for every four hours worked, or major fraction thereof. Companies must give non-exempt employees an opportunity to take an off-duty 30 minute meal period when the work period is more than five hours. Another 30 minute meal period must also be provided if the work period exceeds 10 hours. In specific limited situations there are exemptions and waivers for the requirement to provide a meal period. Different rules may apply in a unionized environment.
- Wages, with some exceptions, must be paid at least twice during each calendar month. The Company must establish a regular payday and must post a notice showing the day, time and location of payment. Wages earned between the 1st and 15th days of any calendar month must be paid no later than the 26th day of the month during which the labor was performed and wages earned between the 16th and last day of the month must be paid by the 10th day of the following month. Companies can use other payroll periods, such as weekly, biweekly or semimonthly must pay employees within seven calendar days of the end of the payroll period within which the wages were earned

- An employee that is terminated must be paid all of his or her wages, included any accrued vacation or PTO, immediately at the time of termination. An employee that resigns from employment must be paid within 72 hours of the resignation
- Employee paystubs must contain the following information: (1) gross wages earned; (2) total hours worked by the employee for non-exempt employees; (3) any piece-rate units earned; (4) all deductions; (5) net wages earned; (6) the dates of the applicable pay period; (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number; (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate by the employee
- Contingent Workforce
 - Independent Contractors
 - Misclassifying a worker as an independent contractor when he or she should be an employee is a source of substantial potential liability
 - Generally a worker should not be classified as an independent contractor if the Company controls when, where, and how the worker does the job or otherwise manages the worker's performance; This is highly fact specific inquiry. Employers cannot contract around this issue.
 - If the person's work qualifies them as a contractor, then use an independent contractor agreement
 - The State of California and federal government have recently emphasized pursuing these misclassification cases and it is increasingly difficult to defend a contractor misclassification case. Converting a former employee to a contractor raises a major red flag.
 - Temporary/Leased Employees
 - To fill seasonal or other short term needs employers often turn to employee leasing agencies. If a company leases an employee from an agency it generally creates a "joint employer" relationship with the agency. This relationship makes the company legally obligated to the contingent (leased) employee. It is critical for companies to have strong agreements in place with leasing agencies which should include an indemnity provision.
- Develop Handbook
 - Legally Required Policies

- Anti-Discrimination, Retaliation and Harassment Policy, including how to make a complaint (applies to companies with 5 or more employees)⁵
- Leaves of Absence. There are a wide range of situations where law requires employees be provided time off from work. The most common are: paid sick leave [provides at least three days of paid leave]; pregnancy disability leave [provides 4 months of unpaid job protected leave that may be taken intermittently] only applies to companies with 5 or more employees; the Family Medical Leave Act/California Family Rights Act [provides 12 weeks of unpaid job protected leave per year that may be taken intermittently] only applies to companies with 50 or more employees within a 75 mile radius⁶; voting time leave [provides up to 2 hours of paid time off to vote]; domestic violence leave [provides unpaid time off for victims of domestic violence or sexual assault] only applies to companies with 25 or more employees; jury duty leave [provides unpaid leave to serve as jurors or witnesses in court]; military spouse leave [provides 10 days of unpaid job protected leave if military spouse is on leave from a deployment] only applies to companies with 25 or more employees; ; and school activity leave [provides 40 hours of unpaid leave to find, enroll, or reenroll his or her child in a school or child care provider or participate in school activities or address a child care provider or school emergency] only applies to companies with 25 or more employees at working at the same location.⁷
- Timekeeping
- Meal Periods and Rest Breaks
- Workplace injuries
- Workplace violence
- Policies You Should Have
 - Social Media Policy

⁵ The California Fair Employment and Housing Act prohibits harassment, retaliation and discrimination based on sex (which includes pregnancy, childbirth, breastfeeding and medical conditions related to pregnancy, childbirth or breastfeeding), gender, gender identity, gender expression, sexual orientation, age, disability (including HIV and AIDS), race, religion, national origin, sexual orientation, marital status, ancestry, color, denial of leave under the Family and Medical Care Act, medical condition, genetic information, and military and veteran status. In addition to this California law, federal anti-discrimination laws are applicable to employers with 15 or more employees.

⁶ There are other conditions for FMLA eligibility, including how many hours the employee has worked over the past year and tenure.

⁷ There are many situations where employers are required to consider a leave of absence as an accommodation for a legally protected disability.

- At-will Employment
- Company property/no right to privacy regarding work spaces and property
- Electronic device/system use
- Confidentiality/Non-Disclosure
- Conduct
- Definitions of full and part-time employee status
- Benefits, including vacation and holidays
- Pay days
- Expense reimbursement
- Anti-Alcohol and Drugs
- Develop Disability/Injury Evaluation Process
 - Application of disability or illness related leave laws and reasonable accommodation issues are one of the largest sources of litigation risk
 - Plan process for ensuring employees report work injuries for workers' compensation purposes
 - Develop a plan for evaluating whether employee injuries, illnesses, or other ailments qualify as disabilities and whether any protected leave is available or if the Company can reasonably accommodate the employee's disability or injury
 - Ensure prompt and diligent reporting of work-related injuries and provision of claim forms to injured workers
- Arbitration Agreements
 - Evaluate whether the Company wants to reduce risk of litigation with an arbitration agreement. Arbitration agreements preclude employees from pursuing a lawsuit in court and generally reduce the costs and time associated with litigation
 - Draft and implement a separate arbitration agreement
 - Rapidly changing area of law - strongly advise seeking legal advice before implementing arbitration agreements

- Responding to Complaints
 - California law requires employers to investigate complaints of discrimination, harassment and retaliation
 - Investigations must include interviewing the complainant employee to learn the facts behind the complaint - who, what and where? Then the investigation must proceed to interview any witnesses to the alleged events. The Company must evaluate the facts and determine whether the alleged conduct violated its policies and, if so, whether and what type of discipline should be given and report back the results to the complainant
- Consider EPLI Insurance
 - Insurance coverage against discrimination, harassment and retaliation claims
 - These claims make up a substantial number of the kind of lawsuits filed by employees. They typically involve litigation risk often exceeding \$100,000 for each lawsuit
 - Tend to have high premiums, high deductibles and multiple exclusions

TERMINATION OF EMPLOYMENT CONSIDERATIONS

- Despite at-will employment, 3 valid reasons for termination: lack of work; violation of Company rule; or poor performance
- Documentation of issues above is critical
- Consistent treatment with other similarly situated employees is critical
- Seek advice of counsel before terminating an employee that is unable to work due to a medical condition
- Release or no release: unwaivable claims include earned wages, workers' compensation, and unemployment benefits. Strongly advise seeking advice of counsel to draft the release
- Final payment of wages. If employee is terminated then they must be paid all wages owed and any PTO or vacation pay on the day of termination
- Seek advice of counsel before terminating an employee that has made a prior complaint, no matter how unfounded, of harassment, discrimination, or illegal activity
- Final Pay. Ensure that you pay an employee all of the wages owed to them, including vacation and PTO, on the day they are terminated. Give the check to them in person.

- Companies with 20 or more employees that provide group health coverage may have to provide continuing health coverage to terminated employees. If covered by this requirement, employers must provide employees with notice of this right at the time of termination. Strongly advise seeking advice of counsel regarding whether the company is covered by this requirement.
- Employers are required to provide terminated employees with a pamphlet from the State of California's Employment Development Department outlining unemployment at job service benefits. The pamphlet may be obtained at:
www.edd.ca.gov/payroll_taxes/required_notices_and_pamphlets.htm

We hope this has been helpful.

For further questions:

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