



Employment Law Essentials for Start Ups

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Employment Law Essentials for Start Ups

- Hiring Inquiries, Background Checks, Offer Letters and Agreements
- Handbook Overview and EEO Update
- Lactation Accommodation
- Wage and Hour
- Contractors Interns and Volunteers
- Leaves of Absence & Reasonable Accommodations
- Returning to the Workplace in the Age of COVID-19



Hiring Inquiries, Background Checks, Offer Letters, and Agreements



Background Checks and References

- Legal limits:
 - o Federal Fair Credit Reporting Act (FCRA) and California consumer report laws
 - California
 - Investigative Consumer Reporting Agencies Act (ICRAA)
 - Background checks
 - Consumer Credit Reporting Agencies Act
 - Credit checks
 - Can only be ordered if employees works in certain positions
 - Megan's law database
- References: Consumer report rules do not apply when checked by employer.
- New cautions: social media



Arrests and Convictions

- Pre-employment inquiries (on applications, interviews, background checks, etc.) do not per se violate Title VII, but USE of criminal record information may violate Title VII.
- Distinction between arrests and convictions
- http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- Be careful - "Ban the Box" laws!



Ban-the Box

- A.B. 1008 effective Jan. 1, 2018
- Amends FEHA to create statewide "Ban-the-Box" law that prohibits public and private employers (with 5+ employees) from asking about criminal convictions on any application for employment
- Cannot inquire about conviction history prior to extending conditional job offer
- Cannot consider, distribute, or disseminate information related to arrests that did not result in convictions, diversion program participation, and/or convictions that were sealed, dismissed, expunged or eradicated
- Must conduct individualized assessment if intend to deny hire solely or in part due to conviction history
- Must follow fair chance process if individualized assessment leads to decision that conviction is disqualifying.
 - Must comply with applicable local Fair Chance Ordinances as well (San Francisco, Los Angeles)



Offer Letters and Required Paperwork

- Are offer letters updated?
- Do new hires get all required notices?
 - California Wage Theft Prevention Act requires written disclosure of wages and terms of employment http://www.dir.ca.gov/dlse/LC 2810.5 Notice.pdf
 - I-9 employment verification process
 - Tax forms (W-4)
 - Required pamphlets: paid family leave, workers' compensation, disability insurance, etc.
 - o 7/1/2017: Notice to new employees, and current employees on request, regarding domestic violence, sexual assault, and stalking protections



AB 51: Arbitration Agreements

- AB 51 applies to agreements "entered into, modified, or extended on or after January 1, 2020."
- Prohibits employers:
 - O From requiring applicants or employees "as a condition of employment, continued employment, or the receipt of any employment-related benefit" to waive any right, forum or procedure for a violation of any provision under the Fair Employment and Housing Act" or the California Labor Code, "including the right to file and pursue a civil action or complaint with ... any court."
 - O Voluntary agreements are permitted, but an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.
 - O Not intended to invalidate a "written arbitration agreement that is enforceable under the Federal Arbitration Act."
 - O From "threatening, retaliating or discriminating" against employees who refuse to enter into such mandatory agreements.
 - O Chamber of Commerce of the United States, et al. v. Becerra, et al., No. 2:19-cv-2456 (E.D. Cal. 2019): On January 31, 2020, the U.S. District Court for the Eastern District Court of California issued a preliminary injunction enjoining the state from enforcing AB 51 agreements covered by the FAA.
 - O Appeal currently pending before the Ninth Circuit



AB 2143- Expansion of No-Rehire Prohibition Exceptions in Settlement Agreements

- AB 749, enacted on January 1, 2020, prohibited no rehire provisions in settlement agreements, **except** where the employer made a good-faith determination that the former employee-complainant engaged in sexual harassment or assault.
- AB 2143 expands the exceptions to the no rehire provision to include an exception when the employer
 makes a good-faith determination that the former employee-complainant has engaged in any criminal
 conduct.
- To be eligible, the employer must make and document a good faith determination of sexual harassment/sexual assault/criminal conduct before the complaint against the employer is filed by the former employee.



Handbook Overview and EEO Update



EEO and Harassment Policies

- Are the organization's EEO and Harassment Policies updated?
- FEHA Requirements:
 - Prohibit discrimination based on breastfeeding and related medical conditions
 - Add military and veteran status to list of protected characteristics
 - 2017- gender identity and expression added to list of protected characteristics
 - Bostock v. Clayton County: 2020 U.S. Supreme Court decision (Title VII protects individuals from discrimination on the basis of sexual orientation or gender identity).
 - Include expanded definition of "national origin"
 - 2019 CROWN Act: Race includes hairstyles, hair texture, and other traits historically associated with race
 - Description of age must comport with state law
 - Unpaid interns protected from discrimination and harassment, volunteers protected from harassment



Harassment Training

- SB 1343: Expanded training requirements to employers with 5 or more employees.
- Requires sexual harassment and abusive conduct prevention training every two years:
 - Two Hours of training for supervisors
 - One Hour of training for non-supervisors
- Required the DFEH to make available a one-hour and a two-hour online training course for employers to use and to make the training videos, existing informational posters, fact sheets, and online training courses available in multiple languages.
 - o https://www.dfeh.ca.gov/shpt/
- Training records must be maintained for a minimum of two years



Lactation Accommodation

- SB 132: Effective January 1, 2020-Requires every California employer to provide "a reasonable amount of time" to accommodate lactation needs and to include a written policy in an existing handbook or policy manual.
- Employer must provide a location, other than a bathroom, to express milk.
 - The space must be clean, free from hazardous materials, contain a surface to place a breast pump or personal items, a place to sit, access to electricity.
 - o Employers must also provide access to a sink with running water and a refrigerator or cooling device
 - Employers with fewer than 50 employees may seek an undue hardship exemption but still must make reasonable efforts to provide a location other than a toilet stall.

Best Practice:

- Review your policy and practice
- Identify lactation space
- Make sure it is compliant



A New Protected Class: Vulnerable Workers?

- CDC has identified the following as members of the Vulnerable Population:
 - Employees 65 or Older
 - o Employees with Compromised Immune Systems
 - Employees with Serious Chronic Health Conditions
- EEOC https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
- California Department of Industrial Relations https://www.dir.ca.gov/dlse/Essential-and-Non-essential-Workers.htm
- California Department of Fair Employment and Housing https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/03/DFEH-Employment-Information-on-COVID-19-FAQ ENG.pdf



Wage and Hour



California Minimum Wage Increase

California minimum wage going up in stages, depending on employer size

1-25 Employees	26+ Employees	
\$13.00 (1/1/21)	\$14.00 (1/1/21)	
\$14.00 (1/1/22)	\$15.00 (1/1/22)	
\$15 00 (1/1/23)	, , , ,	



Exempt v. Non-Exempt

- Are employees properly classified as exempt or non-exempt?
- Exempt employees:
 - Perform "exempt" duties Is the employee engaged in exempt work that meets the requirements for the exemption more than 50 percent of their work time?
 - Exercise discretion and independent judgment
 - Paid on salary basis
 - Paid minimum salary (or hourly rate for computer professionals)
 - o Managerial, professional, administrative, computer professionals, inside sales, outside sales
 - In California, exempt employees must be paid a salary that equals at least twice the applicable state minimum wage for full-time employees
 - o \$4,506.67 per month (or \$54,080.00 annually) if the employee works for an employer w 25 or fewer people
 - o \$4,853.34 per month (or \$58,240.00 annually) if the employee works for an employer w more than 25 people



Meal Periods and Rest Breaks

- Meal periods: Employers must provide non-exempt employees who work 5 hours or more
 with a meal period of at least 30 minutes, and a second meal period of at least 30 minutes for
 employees who work 10 hours or more. The meal period can be unpaid.
 - An employer must relieve the employee of ALL duty for the designated period, but NEED NOT ENSURE that the employee does no work. Meal period must begin before end of 5th hour of work, and a second meal period before end of 10th hour of work
- Rest breaks: Employers must provide non-exempt employees with a paid 10-minute, off-duty, rest break for every 4 hours worked or a major fraction thereof (3.5 hours or more).
 Employees may take a second paid rest period if they work more than 6 hours in a day, and a third paid rest break if they work more than 10 hours in a day.
 - Rest breaks must fall in middle of work periods "insofar as practicable"
- Employers who fail to provide an employee with meal or rest breaks are subject to one hour of
 penalty pay (at employee's regular rate of pay), per day, for missed meal periods and one for
 missed rest breaks

Overtime

- Federal Fair Labor Standards Act (FLSA) requires that non-exempt employees receive an overtime premium for all hours worked over 40 in a week
- California (Labor Code and Wage Orders) requires that non-exempt employees who work more than 8 hours a day or 40 hours in a week receive overtime
- Missteps in calculating overtime pay results in numerous class action and PAGA suits
 - O Employees must be paid 1.5 (or 2) times the "regular rate of pay" for all overtime hours worked
 - O Under FLSA and California law, "regular rate of pay" includes all remuneration not just the employee's hourly rate!
 - O Regular rate of pay could include, for example:
 - O Per diems, if not really tied to business expenses
 - O Non-discretionary bonuses
 - Commissions



What Time is Compensable?

- Employers must compensate employees for all "hours worked"
- FLSA: Hours worked includes all time during which an employee is required to be on duty, whether at employer's premises or a prescribed workplace; and all time during which an employee is permitted to work, whether or not actually required to do so
- California: Hours worked includes the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work, whether or not required to do so
- Courts apply a general rule that an employer is liable for time worked if the employer knew or should have known that the employee was working or whether the time was authorized
- Can certain amounts of employee time be disregarded?



De Minimis Rule

- FLSA Regulations provide that employers may exclude time that is insubstantial or insignificant (a few seconds or minutes), such that it cannot, as a practical administrative matter, be precisely recorded for payroll purposes
- California No similar rule/defense under the Labor Code or Wage Orders . . . but DLSE Enforcement Manual adopts the FLSA de minimis rule
 - Troester v. Starbucks Corp (2018) 5 Cal. 5th 829 Relying on de minimis doctrine, lower court granted summary judgment for Starbucks in suit contending that the company was required to compensate employees for post-closing activities
 - The California Supreme Court Held that the *de minimus* doctrine did not apply to California employers and that even employees who may not be working but who are under the employees control may be compensated even for time that would be considered *de minimus* under the federal standard.



Off-the-Clock

- Do non-exempt employees check work email and voicemail or send text messages after-hours?
 Is the time compensable?
- Best practices:
 - o Pay for all hours worked, even if after hours work
 - Do not issue PDAs, etc. to non-exempt employees but if you do, adopt a policy prohibiting them from performing work after work hours, with disciplinary consequences
 - Educate managers that they should not require/expect non-exempt employees to work "after hours" checking email, voicemail, etc.



Vacation and PTO

- No requirement to provide paid vacation but strict rules if employer chooses to provide it!
- Use-it-or-lose it policies = illegal in California
- Accrual caps permitted but must be reasonable
- Accrued and unused vacation must be paid out on termination (Labor Code section 227.3)
- Vacation accrual and payout rules also apply to:
 - O PTO
 - o "Personal" time
 - "Floating holidays"
- What about "unlimited" vacation policies?



California (and local) Paid Sick Leave

- Is paid sick leave required? Yes
- AB. 2055, effective July 1, 2015
 - Applies to all California employers
- Employees must accrue paid sick leave at the rate of one hour per 30 hours worked, or 3 days of paid sick leave (or 24 hours whichever is longer) may be provided up front (but check local rules!)
- Under state law, employer can cap accrual at 48 hours or 6 days (whichever is longer), and can limit annual use to 24 hours (but again, check the local rules, because the accrual and use caps are higher)
- Accruals must be reported on itemized wage statements (pay stubs)
- Will a vacation or PTO policy satisfy the new law?
- Local Paid Sick Leave Ordinances (Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, Santa Monica)

California Pay Data Reporting

- Government Code section 12999 enacted in SB 973.
- California employers of 100 or more employees must report pay band and hours-worked data by establishment, job category, sex, race, and ethnicity to the Department of Fair Employment and Housing (DFEH) by March 31, 2021 and annually thereafter.
- The DFEH has a pay reporting portal https://pdr.dfeh.ca.gov/Auth/Login?ReturnUrl=%2F
- A user guide is available at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/01/CA-Pay-Data-Reporting-User-Guide.pdf
- Helpful FAQ: https://www.dfeh.ca.gov/paydatareporting/



Contractors, Interns and Volunteers



AB 5: The ABC Test

- Effective January 1, 2020
- Codifies application of the ABC test beyond the Wage Orders applying it to the California Labor Code and Unemployment Insurance Code: a worker is an independent contractor only if the hiring entity can establish ALL THREE of these factors:
 - The worker is free from the control and direction of the hiring entity in connection with the performance of their work, both under the contract for the performance of the work and in fact
 - The worker performs work that is outside the usual course of the hiring entity's business
 - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed
- Presumption that all workers are employees
- Employees are entitled to benefits such as minimum wage, workers' compensation, unemployment insurance, expense reimbursement, paid sick leave and paid family leave and employers pay half of employees' Social Security tax



Volunteers

- Who is a volunteer?
 - A volunteer is an "individual who performs hours of service...for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered"
 - Can a nonprofit's employees also serve as unpaid volunteers?
- California FEHA applies harassment protections to all volunteers



Unpaid Interns

- The California DLSE and U.S. DOL have stepped up enforcement against employers that illegally fail to pay minimum wages to interns
- How to distinguish between an employee and an intern?
 - o DOL issued guidance in 2018 implementing a "primary beneficiary test" to evaluate whether the internship is primarily for the economic benefit of the employer or for the educational benefit of the intern.
 - Seven factors analyzed to identify the "primary beneficiary" including whether the internship is tied to the student's educational program, the duration, and if the intern's work displaces work typically performed by regular employees.
- California businesses seeking to hire interns must submit an outline of the proposed internship
 to the Department of Labor Standards Enforcement. Be aware that stipends paid to interns
 may convert them to employees rather than volunteers!
 - FEHA discrimination and harassment protections apply to paid and unpaid interns



Leaves of Absence



Leaves of Absence

- Do handbook policies cover leaves under federal and California laws?
- Family and Medical Leave Act (FMLA) 50+ employees
- California Family Rights Act (CFRA)-5+ employees
- Temporary Disability Leaves under the ADA (15+) and FEHA (5+ employees)
- Workers' Compensation Act ALL
- Pregnancy Disability Leave (PDL) 5+ employees
- Drug/Alcohol Rehabilitation (Labor Code section 1025) 25+ employees
- Other Labor Code leave provisions: leave for school matters; domestic violence victim; volunteer firefighter; bone marrow and organ donation... number of employees varies
 - Organ Donation Requires employers (15+ employees) to provide a paid leave of absence of up to 30 business days in any one-year period, and an additional unpaid leave of absence, up to 30 business days of unpaid leave in any one-year period for organ donation. (effective 1/1/2020)
- All employers with 5+ employees must provide reasonable accommodations for disabled employees

 including leaves or other accommodations

SB 1383: CFRA Expansion

- Effective January 1, 2021
- Expanded CFRA to apply to California employers who employ 5+ employees
 - o Eliminates eligibility requirement of working at location with 50 (or 20) employees within a 75-mile radius
 - o Retains other eligibility requirements of 12 months, 1,250 hours
 - Repeals the California New Parent Leave Act as of January 1, 2021 (applied to 20+ employees)
- Broadened the definition of family member to include grandparents, grandchildren, siblings. CFRA already applied to registered domestic partners.
- Broadened the definition of child to include adult children (even if not dependent) and children of a domestic partner.
- **Deleted** the provision specifying that if both parents work for the same employers, the employer is not required to provide more than 12 weeks total leave to both in connection with the birth, adoption or foster care placement of a child. Employers are now required to provide 12 weeks to each parent in that situation.

Leaves of Absence (After Jan. 1, 2021)

	FMLA	CFRA	PDL (Pregnancy Disability Leave)
Employers covered?	50 or more employees	5 or more employees	5 or more employees
Employee eligibility	12 months plus 1,250 hours and works at location with 50 employees w/in 75-miles	12 months plus 1,250 hours	None
Duration of leave	12 weeks in a 12-month period	12 weeks in a 12-month period	4 months PER PREGNANCY (runs with FMLA leave)
Reasons for leave	Employee or family member's serious health condition, baby bonding, military contingency leave, military family care leave	Employee or family member's serious health condition, baby bonding, or military contingency leave	Pregnancy and childbirth- related "disability"
Covers pregnancy disability?	YES	NO	YES
Covers baby bonding?	YES	YES	NO



Returning to the Workplace



COVID-19 Emergency Temporary Standards

- Effective November 30, 2020. On February 26, 2021, California updated its guidance regarding the Cal/OSHA emergency temporary standards on COVID-19 infection prevention.
- The updated emergency temporary standards and frequently asked questions are available at: https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html
- The standards apply to all employers, employees, and to all places of employment with three exceptions:
 - Workplaces where there is only one employee who does not have contact with other people
 - Employees who are working from home
 - o Employees who are covered by the <u>Aerosol Transmissible Diseases</u> regulation



Thank You!





Startup Essentials Program

Employee Mobility and Trade Secrets

Presented by: Craig Schloss | John Carrigan





Non-compete Agreements

- Noncompetition agreements are generally unenforceable in California
- Cal Bus. & Prof. Code Section 16600: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void"
- Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937
 - No "narrow limitation" exception
- **Practitioner's Note**: can't require employees to sign unenforceable non-competes
 - California case law basis for wrongful termination claim
 - Labor Code Section 432.5



Other Restrictive Covenants

- Three common types:
 - Customer non-solicitation Generally unenforceable California
 - No-Hire provisions Unenforceable in California
 - Employee non-solicitation no longer enforceable in CA?
- Majority rule outside CA? Restrictions must be:
 - Reasonable in scope (geography, time, subject matter)
 - Narrowly tailored to protect a legitimate business interest



Section 16600 Exceptions

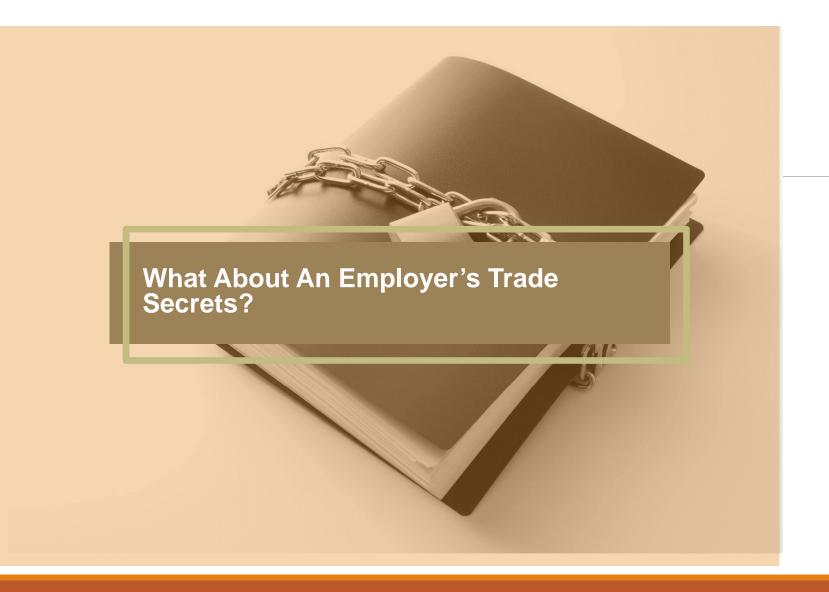
- Section 16600 prohibition on noncompetition agreements contains specific exceptions:
- Person selling a business or substantially all of ownership interest in business (including goodwill) may agree with the buyer to refrain from:
 - o carrying on a like business;
 - within a specified geographic area in which the business sold has been carried on;
 - provided the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein
- Also applies to dissolution of a partnership or a member leaving a limited liability company



Strategies to Get Around California's Rule

- "Garden leave" = Provisions authorizing salary and benefits during a non-solicitation or noncompetition period
- Garden leave provisions have not been tested in California courts
- Such provisions may be of marginal utility:
 - The employee can always leave
 - The employer's option is to cut off payments
- "Employee choice" doctrine
 - Restrictive covenant not subject to the usual reasonableness standard when it is contingent upon an employee's choice between receiving and retaining a benefit - and competing.







Trade Secrets Exception?

- A trade secrets exception is not expressly stated in Section 16600
- Edwards v. Arthur Andersen: The California Supreme Court avoided answering the question
- Asset Marketing Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748: Ninth Circuit interpreted Edwards
 as not applying to restrictive covenants designed to protect employer's trade secrets
- Courts have held that courts may enjoin tortious conduct under the Uniform Trade Secrets Act
 and Unfair Competition Law by banning the use of a former employer's trade secrets to identify,
 solicit or otherwise unfairly compete with the former employer's clients



Cal. Uniform Trade Secrets Act

- Cal. Civil Code section 3426 et seq.
- What's a trade secret?
 - Information that derives economic value from not being generally known to the public or competitors; AND
 - o Reasonable steps must be taken to protect the secrecy of the trade secret information



Defend Trade Secrets Act

- Effective May 2016 created federal cause of action for trade secret misappropriation, but does not preempt state laws
- Similar to UTSA definition of "trade secret" and "misappropriation", remedies, statute of limitations
- AUA Private Equity Partners v. Soto (S.D.N.Y. April 5, 2018) 2018 WL 1684339: Fact that defendant took
 documents was sufficient for DTSA claim; fact that she didn't use them was irrelevant, as the DTSA does not
 require "use" or "disclosure"
- New whistleblower protection:
 - Immunity from liability for disclosure of trade secret if made in confidence to officials solely for purpose of reporting or investigating suspected violation of law
 - o If disclosed in complaint or other document filed in lawsuit or other proceeding if made under seal



Defend Trade Secrets Act - Notice

- Requires employers to provide notice of immunity to employees and contractors, for contracts entered into or updated after May 11, 2016
- Specific language, or cross-reference to policy document
 - Nondisclosure agreements
 - Assignment of inventions agreements
 - Whistleblower policy
 - Handbooks
 - Contractor agreements
- Failure to provide notice? Employer cannot recover attorneys fees or exemplary damages



Tread Carefully

California Civil Code section 3426.4: "If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party."

FLIR Systems, Inc. v. Parrish (2009) 174 Cal.App.4th 1270: Court found that company brought misappropriation claim in bad faith to stifle competition; former employees awarded \$1.6 million in attorneys' fees and costs

SASCO v. Rosendin Electric, Inc. (2012) 207 Cal.App.4th 837: Court affirmed a trial court's order awarding the defendants almost \$485,000 in attorneys' fees and costs pursuant to section 3426.4







Trends

- States are becoming less tolerant of restrictive covenants
- Increase in trade secret litigation
- Remote workforces may be more difficult to monitor for possible trade secret theft
- Jurisdictional issues relating to enforceability of restrictive covenants against remote workforce
- DOJ prosecution of "no-hire" agreements
- Risk of litigation based on presentation of unenforceable restrictive covenants







Precautions in the Hiring Process

- Ascertain whether candidate has knowledge of prior employer's trade secrets
- Remind applicants not to share trade secrets, in writing if of particular concern
- Do not copy or upload/download any files/documents for use at company
- Do not permit new hires to perform work until after departure from prior employer
- Do not move customers/orders over traffic must come from customers to you
- Should employers review agreements before/after hire? Or, avoid reviewing them altogether?



Written Agreements for New Hires

- Offer letter
- Employment agreements
- Handbook provisions
 - Add provisions affirming that prior employments pose no conflicts
 - Specifically inform them NOT to bring/upload information from prior employer



Nondisclosure Agreements

- Have new employee sign a confidentiality and nondisclosure agreement:
- Prior Employment:
 - Has not retained or taken the files/documents/information of the prior company
 - Will not use files/documents/information from the prior company
 - Will not use the trade secrets or confidential and proprietary information of the prior company
- Current Employment:
 - Put an employee on notice regarding the confidential nature of information.
 - Obligation not to use or disclose the information for impermissible purposes.
 - Avoid vague or overly broad language (may not be enforceable).
 - Reasonably identify trade secrets.



Assignment of Inventions

- Assignment of inventions agreements provide that the employer owns any invention created during the course of employment by an employee who is employed to invent
- Provisions to include:
- Employee discloses prior inventions.
- · Assigns inventions under certain circumstances, even post-termination.
- Agrees that all original works of authorship are "works made for hire"
- Agrees that employer has the choice to commercialize or market inventions
- Agrees to assist with securing intellectual property rights



Assignment of Inventions

- "Work Made For Hire"
- Converts freelancers into employees:
 - Workers' compensation
 - Unemployment insurance
 - All other purposes?
- California Labor Code §2870
- Limits assignment of inventions
 - Created during non-working time
 - Not using company's equipment
 - Unrelated to company's business



Hiring from Other States

- Most states other than California allow non-competition agreements if they are reasonable in scope, and sometimes, if they are designed to protect against illegal or unfair conduct
- If individual is moving from a non-California company or worked outside of California, the former employer may try to enforce the non-compete in a non-California court
- Enforceability of venue selection clauses
- Enforceability of choice of law provisions



Labor Code Section 925

- Effective Jan. 1, 2017 enacted in response to agreements containing restrictive covenants and foreign choice of law and forum provisions
- Cannot require California employee to agree to employment provision, as a condition of employment, that contains non-California forum or choice of law
 - Exception: If employee represented by counsel for purposes of negotiating the agreement, including the forum and choice of law provisions – not clear if use of exception gets around B&P 16600
- Mechanix Wear, Inc. v. Performance Fabrics, Inc. (C.D. Cal. Jan. 31, 2017) 2017 WL 417193: Interpreting section 925 as inapplicable because former employee did not "agree to" forum selection clause while a resident of California







Protecting Trade Secrets

Identify trade secrets and document how they were created/obtained
Notify employees regarding what the company considers a trade secret
Mark trade accrete as confidential
Mark trade secrets as confidential
Periodically perform "trade secrets audit" – identify what information may be protected as a trade secret and put security measures in place
Use firewalls, secure systems, and password-protected files
Use double encryption on databases containing trade secrets



Protecting Trade Secrets

Limit access to trade secrets to those employees who are required to use the information for work purposes

Use carefully drafted non-disclosure agreements

Deploy a "banner" setting forth conditions under which an employee may access the company's computer system, containing specific language limiting access to information necessary for their job

Monitor employee computer use for trade secrets and confidentiality breaches

Confidentiality reminders and regular training on policies and practices

Email and data security policies

Passwords







Protecting Trade Secrets - Duty of Loyalty

- Duty of loyalty prevents departing employee from starting work for new employer until termination of employment
- Employees starting their own business:
 - Can incorporate new businesses while employed, can look for office space, purchase or lease space, and furnish new office
 - Can even hire others and make preparations
 - Cannot start operating the new business until termination
 - Aerovironment v. Torres (Cal. Superior Court No. 56-2015-00465460, 2018): Court enforced confidentiality agreements against employees who started competing business before departing current employer; awarded employer \$2.4 million in damages for breach of contract



Policies & Procedures

- Develop process to determine whether employee:
 - o had access to trade secret/confidential information; and
 - o is likely to take such information or use it at new job
- Develop process to capture relevant information on computers or in emails preserve the evidence!
 - Metadata
 - Chain of custody
 - Tampering
- Develop process to ensure restriction of access to company systems immediately upon termination
 - Email access
 - Access to company social media
 - Voicemail access



Exit Interviews

- Remind departing employee of obligation to keep information confidential (in accordance with policy, confidentiality or non-disclosure agreements)
- Ask for return of all company property
- Ensure that employee has taken all company data off of personal devices (iPad, cell phone) and social media accounts/cloud server
- Provide directions or assistance regarding how to dispose of confidential information on personal computers



Termination Certificate

- Certify that all company property has been returned
- Confirm that no copies of documents or other items have been provided to third parties
- Acknowledge obligation to keep information confidential
- Signed by the departing employee



Post-Departure Announcements

- Assuming a solicitation can be prohibited (e.g., because it is based on the use of trade secrets), when does a former employee's post-departure announcement to customers or former coworkers amount to a solicitation?
- Generally, simple announcement of new employment is not a solicitation
- Social media
 - Not Solicitation Invite to connect on LinkedIn
 - o Breach of Solicitation Clause Invitation to request a quote on LinkedIn.



Departing Employees

If theft is suspected or employee is departing...

 Disable access
Preserve data destruction/overwrite protocol
 Conduct exit interviews
 Letter with reminder of NDA obligations
Take swift action against disclosure or misappropriation





Best Practices

Agreements

- Be cautious about restrictive covenants
- Use non-disclosure agreements
- Use assignment of inventions agreements
- Beware "work for hire" language for freelancers

Trade Secrets

- Identify & designate trade secrets
- Limit access
- Take steps to keep confidential

Employment Life Cycle

- Upon hire
 - o Protect against using others' trade secrets
- During employment
 - o Take steps to establish and protect trade secrets
- Termination of Employment
 - Remind employees of their obligations



Thank You



THE REMOTE WORKPLACE: Employment Concerns, Tax, and Licensing and General Business Issues

March 5, 2021

MICHELE BALLARD MILLER, CHERYL A. UPHAM, BARBARA MULLER



Remote Workplace: Employment Law Updates

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Working from Home

 How can we ensure that non-exempt employees who are working from home are adequately tracking and reporting their time?

- Do we have to pay employees who are working from home or working reduced hours the same hourly rate or salary?
- Are businesses required to cover the additional costs that an employee may incur if they work from home (internet access, computer, additional phone line, etc.)?
- What happens when "home" is in another state?





Exempt/Non-Exempt Issues

- Exempt employees are entitled to their full salary when they work any work during a week even if they do not work the entire week because the employer failed to provide work.
 - Reduction of hours: An employer can reduce an exempt employee's hours provided the reduction does not take the employee below the minimum salary level threshold for the exemption.
 - Warning: Be careful of changing an exempt employee's duties as work slows down or as other employees are furloughed – it may alter their exempt status.
- Non-Exempt Employees must be paid for all hours worked.
 - Reduction of hours: An employer can reduce a non-exempt employee's hours provided the employee is still paid for all hours worked.
 - Warning: A non-exempt employee who reports to work but is sent home before working a full shift will be owed reporting time pay.



Reductions in Salary

- Labor Code 2810.5 Employers must inform employees within seven (7) calendar days anytime that rate of pay changes, unless the changes are reflected on a timely wage statement furnished to the employee in accordance with Labor Code section 226. This does not apply to exempt, those under CBAs, or public employees.
- Employers must be careful that any **salary reduction for exempt employees** do not fall below the minimum salary threshold for exempt employees
 - o FLSA: \$684 per week
 - o California: 2x the California minimum wage based on a full-time work week
- Employers also may not pay below the minimum wage for any work performed by non-exempt employees

Non-Exempt: Overtime Basics

- Federal Fair Labor Standards Act (FLSA) requires that non-exempt employees receive an overtime premium for all hours worked over 40 in a week
- California (Labor Code and Wage Orders) requires that non-exempt employees who work more than 8 hours a day or 40 hours in a week receive overtime
- To qualify as exempt from overtime, under state or federal law, the employee must satisfy two general requirements:
 - Salary basis test paid on a salary basis and paid more than a certain minimum amount; AND
 - O Duties test primarily engaged in exempt duties



Other Non-Exempt Concerns

- Record Keeping: must accurately record all hours
- Meal and Rest Periods: uninterrupted and duty free
- Schedule: establish specific workday/set expectations
- No off-the-clock work
- Additional Costs incurred from working at home



Reimbursement of Expenses Associated With Remote Work

- Labor Code 2802 Employers must reimburse employees for all necessary expenditures or losses incurred directly related to the job.
 - This includes expenses as a "direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer."
- California courts have held that reimbursement is required for an employee's personal cell phone and voice and data plan when the phone is required for business purposes.
 - Cochran v. Schwan's Home Services, Inc., 228 Cal.App.4th 1137 (2014) held that
 employers must always reimburse employees for "some reasonable percentage" of their
 cell phone bills if the employer requires them to use their personal cell phones for business
 purposes.
- No clear guidance as to a "reasonable percentage," or what other expenses an employer must reimburse.



Remote Work: What Law Applies?

- California Fair Employment and Housing Act (FEHA):
 - FEHA applies to California-based employers regularly employing five or more employees (Note: one or more for harassment claims)
 - o Employees located inside and outside of California are counted in determining whether employers are covered under the Act. (For example, an out-of-state employer with at least five employees total, and at least one California employee, must adhere to FEHA with respect to the one employee
 - O Does FEHA cover California residents working for a non-California employer?
 - Does FEHA cover employees of a California-based employer working in other states?
 - The 2019 FEHA regulations provide: "Employees located inside and outside California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the ACT if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California."



Remote Work: What Law Applies?

- FEHA laws may apply to out of state workers where there is a sufficient nexus to California
- No Nexus Found:
 - Campbell v. Arco Marine Inc. (1996) 42 Cal.App. 4h 1850 No nexus where a Washington resident claimed FEHA applied simply because the company's headquarters was in California.
 - o *Gonsalves v. Infosys Technologies Ltd. No. C09-04112* (N.D. Cal. May 6, 2010) No nexus where Ohio resident had traveled to California several times during employment and managed clients in California.
- Sufficient Nexus Found:
 - o *Roger-Vasselin v. Marriott International,* No. C04-4027 (N.D. Cal. July 19, 2006)- Sufficient nexus to survive summary judgment where out of state employee's manager was based in California and testified that he had input into the decisions at issue in the case.
 - Sims v. Worldpac Inc., No. C12-05275 (N.D. Cal. Feb. 22, 2013) (unpublished)- Federal court denied motion to dismiss where the decision to terminate was made in California.
- If employment decisions are being made by managers in California, FEHA likely applies.



Remote Work: What Law Applies?

- Wage and Hour Laws:
 - *Sullivan v. Oracle* (2011) 51 Cal.4th 1191: Non-California residents working in California for a California-based employer were subject to California daily overtime laws if they performed their in-state work for whole days.
 - Ward v. United Airlines (2020) 9 Cal.5th 732 and Oman v. Delta Airlines (2020) 9 Cal.5th 762: Labor Code sections 226 and 204 applied to pilots and flight attendants who performed most of their work in airspace outside of California's jurisdiction as their "principal place of work" was California. Two-part analysis:
 - Does the employee work the majority of their time in California? (If yes, then Labor Code 226 and 204 apply)
 - If not, is the employee "based for work purposes in California?" Does California serve as the physical location where the worker presents himself to begin work? (Note: the residency or domicile of the employee is **not** a factor).
- No California case has specifically addressed wage and hour application to completely remote employees as a result of the pandemic -- but, based on the above, if an employee does not live or "work" in California, California wage and hour laws may not apply.



Remote Workplace: Tax Considerations

CHERYL A. UPHAM



Introduction – Leading Issues

- There are two major issues for employers and employees in relation to state and local taxes and employees working remotely during the COVID-19 pandemic:
 - o First, where an employee is now working in a state other than his or her usual place of employment, for which state(s) must an employer withhold income tax?
 - Second, will an employee's presence in a state while working remotely create nexus with that state for the employer, thus subjecting it to the state's income tax, gross receipts tax and/or sales and use tax reporting and remittance requirements?



Employer Withholding Taxes

- The general rule for employer withholding taxes is that an employer must withhold income tax on an employee's wages based on the state in which the employee performs their work.
- There are some regular exceptions, such as where the employee's state of residence and state of employment have a reciprocity agreement. Another exception is where the state in which the employee regularly works has a "convenience of the employer" test for time spent working outside the state.
- New issues have arisen due to the COVID-19 pandemic as employees are now working from home, where such home is located in a state other than the state in which the employee's regular office is located.
- The question becomes for which state(s) must the employer withhold income tax on the employee's wages the employee's state of residence where they are working from home, the state where the employee's regular office is located, or maybe both?



Employer Withholding Taxes (cont.)

- The question becomes even more complicated when other factors come into play. For example, is the employee working from home because (1) of a government stay-at-home order or similar government order limiting the number of people that can be at the employer's office location, (2) the employer's work from home policy, even though not government mandated, or (3) the employee's preference to not be back in the office due to the employee's personal situation?
- Further, the answer can become complex when the two competing states have different rules
 or have not provided any guidance at all, potentially leading to double taxation. While some
 states have provided relief on this issue with respect to COVID-19 induced work from home
 situations, some states have not and some states have provided no guidance at all.



Employer Withholding Taxes - Examples

- Pennsylvania has stated that if a PA-based employee is working from home in another state temporarily due to the COVID-19 pandemic, the PA DOR would not consider that as a change to the sourcing of the employee's compensation. It would remain PA source income for all tax purposes, including employer withholding and three-factor business income apportionment purposes.
- New Jersey has provided that while its sourcing rules generally dictate that income is sourced based on where the service or employment is performed based on a day's method of allocation, during the temporary period of the COVID-19 pandemic, wages will continue to be sourced as determined by the employer in accordance with the employer's home jurisdiction.



Employer Withholding Taxes - Examples

- New York, which has an extremely aggressive convenience of the employer rule, had not until recently provided any guidance on the issue whatsoever. However, in October 2020, New York quietly issued guidance providing that an employee working outside New York during the pandemic would be considered to do so at his/her convenience, and thus, an employee whose principal office is in New York State but who is working outside of the state during the pandemic will generally remain subject to New York State income tax, and the employer should generally continue to withhold New York State tax from the employee's compensation.
- Massachusetts has adopted a regulation that has an effect similar to the convenience of the employer rule and provides that employees who normally work within Massachusetts, but who work remotely outside Massachusetts as a result of the COVID pandemic, will continue to be subject to Massachusetts income tax on their wages. New Hampshire filed a challenge to the Massachusetts regulation with the US Supreme Court, asserting that the regulation violates its state sovereignty by imposing Massachusetts tax on New Hampshire residents who are working within New Hampshire. The Court has asked the Office of the Solicitor General to file a brief setting forth the views of the United States government on the issue.



Income, Gross Receipts and Sales and Use Taxes

- Generally, an entity will be subject to a state's income tax, gross receipts tax and/or sales and use tax reporting and payment requirements where the entity has sufficient nexus with the state under the U.S. Constitution.
- For pass-through entities, the issue of income tax reporting and payment on the company's earnings may be in relation to its owners, as opposed to the entity itself.
- The states vary on what is considered to create nexus for purposes of these taxes, although universally, having a physical presence in a state will be sufficient to create the nexus necessary to be subject to each of these taxes.
- In addition, based on recent U.S. Supreme Court jurisprudence, many states have adopted bright-line nexus standards based on the amount of sales and/or transactions an entity has in a state.



Income, Gross Receipts and Sales and Use Taxes (cont.)

- Accordingly, where an entity does not usually have a physical presence in a state, and does not meet the state's bright line nexus standards, the issue becomes whether an employee's presence in the state due to working from home during the COVID-19 pandemic will be considered a sufficient physical presence in the state to subject an entity to the state's income tax, gross receipts tax and/or sales and use tax requirements.
- Absent specific relief provided by a state on this issue, the general answer is going to be that the entity will have nexus with the state while it has employee(s) working in the state.
- Even where a state has provided relief, that relief may not be available depending on whether the employee(s) are in the state because of a government mandated stay-at-home order, an employer's social distancing policy or the employee's own personal reasons that have arisen due to the pandemic.



Income, Gross Receipts and Sales and Use Taxes - Examples

- Pennsylvania has provided that the PA DOR will not seek to impose Corporate Net Income Tax or Sales and Use Tax nexus solely on the basis of temporary activity by an entity's employees occurring within Pennsylvania during the duration of the COVID-19 emergency.
- New Jersey has provided that it will waive the usual nexus standards for New Jersey income tax and Sales and Use Tax purposes in the case of the temporary presence of employees working from their homes in New Jersey during the pandemic. In the event that employees are working from home solely as a result of closures due to the COVID-19 outbreak and/or the employer's social distancing policy, that activity will not be considered in determining whether the applicable nexus threshold has been met.
- New York has provided no guidance on this issue to-date.



Takeaway...

- The impact of employees working from home during the COVID-19 pandemic is going to have different consequences for each employer based on its individual facts, including where its home office(s) are located, where its employees are working, the reason(s) for an employee to be working from home, the rules and guidance in the relevant states, and the employer's other activities conducted in each state.
- It is important to remember that any determination made is likely fluid and subject to change in the future. As government mandates, employer policies and employee requests change throughout the pandemic, the company's state and local tax compliance issues will have to be re-examined.



Remote Workplace: Licensing and General Business Issues

BARBARA MULLER



General Principles

- Each US entity is organized or incorporated in one specific state.
- In all states other than its state of organization or incorporation, such entity is a "foreign" entity.
- If the entity wants to do business in a state other than its state of organization or incorporation, it has to qualify to do business in that state.
- Failure to qualify may have consequences such as unenforceability of contracts entered into in the other state and/or imposition of taxes, civil penalties and fees.



What does doing business mean?

- US states typically do <u>not</u> have a statutory list of business activities that <u>require</u> registration as a foreign entity.
- Rather, all US states have lists of activities that do <u>not</u> constitute "doing business" and therefore, do not require an entity to qualify as a foreign entity.
- Any determination whether a business entity has to qualify in a state as a foreign entity needs to be made based on all of the facts present in a specific case, and seemingly minor differences may change the outcome.

Examples

Virtual Meetings:

 Most state statutes include a specific provision to the effect that "holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs" does not constitute "doing business."

• Therefore:

 As long as the virtual meetings are internal meetings (checking on well-being of employees, discussing issues such as workload and similar matters), these meetings most likely do <u>not</u> constitute "doing business" for corporate law purposes.

However:

 If virtual meetings are replacing in-person meetings of employees with (potential) customers that are located in a state other than the state of incorporation/organization, these meetings may constitute "doing business" in the state where the customers are located, depending on additional factors such as frequency of meetings, services provided in the meeting etc. (see also next example, "Sales Calls").



Examples

Sales Calls:

- Typically, state statutes list two sales-related activities that do <u>not</u> constitute "doing business" in the state:
 - Sales are effected through independent contractors, i.e. independent sales reps
 - Orders are solicited or procured in a state, by mail or employees or agents or otherwise, but the order requires acceptance outside of the state where the order is solicited or procured
- Another typical exception from "doing business" that could apply to sales call is the
 exception for an isolated transaction that is completed within a period of thirty days and is
 not part of a series of similar transactions in the same state.



Examples

Sales Calls (cont.):

• Therefore:

O An independent sales rep or a sales rep who is an employee calls a customer in a state where the company is <u>not</u> qualified to do business – this does <u>not</u> constitute doing business, either because the sales rep is not an employee and/or the sales rep does not have the authority to enter into the contract with the customer. Rather, the contract is entered into at the headquarters of the company.

However:

• The director of sales has the authority (and the task) to enter into contracts for the company. If this individual works remotely from a state where the company is not qualified to do business, the repeated acceptance of orders at the director's home office may qualify as doing business and may require the company to register as a foreign entity in the state where the director's home office is located.

 An unqualified foreign corporation may be prevented from bringing or maintaining an action in the courts of a state in which it does intrastate business.

• Example:

O In an Alabama case, the plaintiff contracted to provide advertisements to be broadcast in Alabama. The court held that where the primary purpose of a contract between the plaintiff and defendant was for services that had to be performed in Alabama, the unqualified corporate plaintiff could not use Alabama's courts even though the contract was entered into out of state.



Under diversity jurisdiction, a foreign corporation barred by state law from suing in the state
courts would generally find itself barred from the federal courts as well. However, if the
unqualified foreign corporation is attempting to enforce a federal statutory or constitutional
right, so that jurisdiction is based on a federal question, the federal court may allow the action.

• Example:

 A district court in Wyoming held that a corporation's failure to comply with state qualification requirements did not bar a federal copyright infringement action.



 Contracts between a foreign corporation and a state, state agency, or political subdivision may be voidable by that state or state entity.

• Example:

O A Montana statute provides "A contract between the state of Montana, an agency of the state, or a political subdivision of the state and a foreign corporation that has failed to register to do business as required under [section 207(4)] is voidable by the state, the contracting state agency, or the contracting political subdivision."



 Most states impose monetary penalties on foreign corporations that do business without qualifying.

• Examples:

Louisiana has a fine of \$25 to \$500 and, upon failure to pay, the offender may be imprisoned from three days to four months. In Delaware and Oklahoma, the fine ranges from \$100 to \$500 "for each offense." Maryland and Utah impose fines of up to \$1,000.
 Offenders in Virginia may be subject to fines ranging from \$500 to \$5,000.



 In a number of states, liability is not limited to the corporate entity, but is imposed on individuals acting on behalf of the corporation.

• Example:

O In Virginia it is a misdemeanor "for any person to transact business in this Commonwealth as a corporation or to offer or advertise to transact business in this Commonwealth as a corporation unless the alleged corporation is. . .a foreign corporation authorized to transact business in this Commonwealth." Fines are also imposed on each officer, director and employee who transacts business for an unqualified corporation in Virginia, knowing that qualification was required.



Home Occupation / Home Business Permits

- Various counties and/or cities all over the country require permits if residential homes are used for activities that are covered by their definition of "home occupation" or "home business".
- Some state, county and/or local authorities have contacted employers based on their employment related tax filings to find out if rules and regulations regarding home occupation / home business permits were met.



Example: San Francisco

- The San Francisco Planning Code restricts accessory uses of dwellings in Residential and Neighborhood Commercial Zoning Districts. The principal use of the residence must remain the use as a dwelling, and the proposed accessory use has to meet the requirements and restrictions set forth in the Planning Code. If these requirements and restrictions are met, a permit is typically not required.
 - The home must be primarily used for residential purposes, and the business use is clearly incidental or secondary to the residential use.
 - The business must be owned and operated by the person living in the home.
 - In general, no more than 1/3 of the total floor area of the dwelling unit may be used for the accessory purpose.
 - With the exception of domestic servants, gardeners or other persons involved in the operation or maintenance of the dwelling, the accessory use may not require the employment of an individual who is not a resident in the dwelling unit.



Example: San Francisco (cont.)

- Certain businesses are allowed as home businesses:
 - Professional offices
 - OMusic rehearsal studio
 - Fortune Teller or Psychic



Example: San Francisco (cont.)

- General Restrictions for Home Based Businesses, such as:
 - No use of show windows or window displays or advertising to attract customers
 - No exterior renovations not confirming with the residential purpose or the character of a residential area
 - No conduct of a business office open to the public other than for sales related to garden produce or to the finished products of a (permitted) Cottage Food Operation



Example: Oakland

- Oakland has Home Occupation Regulations that prescribe the conditions under which limited nonresidential activities may be conducted when incidental to residential activities. A permit from the Director of City Planning is required that certifies that the use will conform to these home occupation regulations. [There are special regulations for the West Oakland Specific Plan area that are intended to incentivize the preservation of historic homes in West Oakland's neighborhoods.]
 - Home occupation may be performed in a living unit only by a resident thereof.
 - No employees other than the resident (exception: practitioners in the medical arts may employ one assistant who does not reside in the unit)



Example: Oakland (cont.)

- General restrictions:
 - No use of show windows or window displays or advertising to attract customers
 - No generation of pedestrian or vehicular traffic substantially greater than that normally generated by residential activities in the surrounding are.
 - No generation of offensive or objectionable noise, vibration, smoke etc. that
 is perceptible by the average person at or beyond any lot line of the lot
 containing the home occupation.



Professional Licenses

- In general, professional licenses are aimed at the place where the recipient of services is located, not where the licensee is located when providing the services. Examples:
 - An attorney licensed to practice in California may work from Nevada while advising clients located in California; or
 - A professional engineer licensed in Illinois may live and work from Michigan while managing projects in Illinois.



Professional Licenses (cont.)

- States may have facilitated licensing as a result of COVID-19 measures. Examples:
 - Based on the CA Governor's Emergency Proclamation on March 4, 2020, the Emergency Medical Services Authority (EMSA) has been issuing waivers that allow health care providers licensed outside of CA to physically come into CA to assist at CA medical facilities or health care providers who are not physically located in CA to provide telehealth services to clients of a CA medical facility if they have contract to do so.
 - Ounder MN state law, debt collectors are not allowed to work from home unless the home is a licensed branch location. However, as a result of COVID-19, the MN Department of Commerce issued guidance that it would not take action against any licensee who allows individual registered collectors to work from home if (a) the individual is working on behalf of the licensee, (b) works from home as a result of COVID-19 and has informed licensee of such reason, and doesn't conduct any activity in person from the home location, and (b) the licensee supervises the individual debt collector at all times and ensures that appropriate safeguards and controls are in place to protect consumer information and data.



Thank You



EXECUTIVE COMPENSATION AND STOCK OPTIONS: COMPENSATION ISSUES IN A START-UP ENVIRONMENT



<u>Elements of Executive Compensation –</u> Total Rewards

- Base Pay / Deferred Compensation
- Cash Bonus / Commissions
- Equity Compensation (Options, stock or phantom-units)
- Benefits (Medical, 401K, etc.)



Wage and Hour Pitfalls



Executive Pay

- The Good: The Company is prepared to pay you a high salary.
- The Bad: The Company does not have the money to pay you now.
- The Ugly: Failure to satisfy the 'salary basis' test means the executive is non-exempt.
 - Overtime
 - Meal period and rest break penalties
 - Payday rules
 - Inaccurate wage statements
 - Attorneys' fees
 - PAGA (Private Attorney General Act) penalties



Salary Basis

- Exempt employees must be paid on a "salary basis", besides satisfying the minimum salary thresholds (\$54,080.00 for 25 or fewer employees or \$58,240 for 26+ employees)
 - The employee must regularly receive a predetermined amount each pay period
 - The employee must receive the full salary for any week in which any work is performed
 - The employee's pay may not be subject to reduction due to variations in the quality or quantity of work
 - Certain deductions are specifically permitted
 - But...illegal deductions may result in loss of the exemption -- and owing the employee back overtime pay



Salary Basis

- For absences for one or more full days for personal reasons (other than sickness or disability)
- For absences of one or more full days due to sickness or disability, if deduction is made according to a bona fide plan, policy or practice of providing compensation for salary lost due to illness, e.g. sick leave or PTO
- For unpaid leave under the federal Family and Medical Leave Act or California Family Rights
 Act
- To offset jury or witness fees, or temporary military pay
- In the initial or last week of employment if the employee does not work the full week
- Deductions or reductions for any other reason may destroy the salary basis and the exemption may be LOST!



Non-Exempt = Overtime Pay

- Hours worked.
 - All time that the employee is suffered or permitted to work,
 - All time employee is **subject to the employer's control**, whether or not the employee is required to work
 - Engaged to wait vs. waiting to be engaged
- Includes "off-the-clock" work!
 - This could be significant for hard working execs at a start up
 - o Checking work email and voicemail or to send text messages after-hours,



Meal Periods and Rest Breaks

- Required meal period:
 - An unpaid 30-minute meal period no later than the end of the 5th hour of work but can voluntarily waive this meal period if will work no more than 6 hours
 - A second unpaid 30-minute meal period no later than the end of 10th hour of work, but can voluntarily waive this meal period break if will work no more than 12 hours
- Employer must relieve employee of all duty for the designated period.
- Required rest :
 - o One paid 10-minute rest period for every 4 hours or major fraction thereof
 - Must fall in middle of each 4-hour work period insofar as practicable
- Penalty:
 - One hour's pay at regular rate for failure to provide a meal period
 - One hour's pay at regular rate for failure to provide a rest break



Pay Day Rules

- All wages must be paid twice per month, on days designated in advance by the employer as the regular pay days
 - Wages earned between the 1st and 15th of the month must be paid no later than the 26th day of the month work was done, and wages earned between the 16th and last day of the month must be paid by the 10th of the following month
 - Weekly, every two weeks, or twice a month will satisfy pay day requirements provided wages are paid not more than seven calendar days following the close of the payroll period
 - Exempt employees can be paid 1x per month
 - o but entire salary is due on or before the 26th of each month



Wage Statements - - GOTCHA!

- California Labor Code § 226(a) requires employers to provide itemized wage statements with each paycheck:
 - Gross wages earned
 - Total hours worked (not required for salaried exempt employees)
 - Number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate basis
 - All deductions (all deductions made on written orders of the employee may be aggregated and shown as one item)
 - Net wages earned
 - Inclusive dates of the period for which the employee is paid
 - The name of the employee and the last four digits of SSN or an employee identification number other than an SSN
 - Name and address of the legal entity that is the employer
 - All applicable hourly rates in effect during the pay period, and corresponding number of hours worked at each hourly rate



Incentive Compensation

- Avoiding the Pitfalls:
- Earned commission wages are due and payable on the pay day following when they are reasonably calculable
- **Earned** bonuses should be paid on the regular pay day following the date on which the bonus is earned
- Earned commissions cannot be forfeited
 - Don't confuse date of payment with the date the commission is earned
- Cutting off incentive compensation upon termination?
 - "Procuring cause" or "quantum meruit"
- What about retention bonuses?



Incentive Compensation

- Effective January 2, 2013, California law requires that if an employer pays employees on commission, the agreement be in writing
 - The agreement must specify the commission calculation method
 - The employer must provide the employee with a signed copy of the agreement
 - The employer must obtain a signed receipt from the employee indicating he/she has received it
 - Agreements will remain in effect, even if they expire, until superseded by a new agreement or employment terminates
- What about final pay?



Independent Contractors — Not as easy as "ABC"

- A worker is an independent contractor only if the hiring entity can establish ALL THREE of these factors:
 - The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact
 - The worker performs work that is outside the usual course of the hiring entity's business
 - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

Places burden on the hiring entity to establish that worker is an independent contractor



Independent Contractor Misclassification Statutes

- Cal. Labor Code section 226.8: Imposes a fine from \$5000 to \$25,000 on employers that "willfully" misclassify someone as an independent contractor
- Cal. Labor Code section 2753: Imposes joint and several liability on any person who advises an employer to treat an individual as an independent contractor
 - Exempts: 1) anyone advising their employer and 2) any attorney who gave advice in the capacity of legal counsel to the employer or misclassified individual

PLUS:

○ If salary basis test is not met, all of the risks/penalties/remedies mentioned previously



Types of Equity Compensation

- Options:
- Incentive Stock Option (IR (Section 422)
- Nonqualified



Types of Equity Compensation (cont.)

Stock:

- Stock Grant
- Restricted Stock Grant

Phantom:

- Restricted Stock Unit (RSU)
- Performance Stock Unit (PSU)
- Stock Appreciation Right (SAR)



Award Issues to consider

- Employee-ownership
- Independent Contractor classification
- Directors excessive pay
- International employees tax and legal



What is the purpose of the equity compensation award?

- Cash substitute
- Performance/incentive annual
- Long-term incentive or retirement substitute multi-year
- Attraction or hiring incentive
- Retention



How much to Grant?

- Valuation understanding dilution
- Expect turnover



Equity Design Features

- Eligibility can you "discriminate"?
- Exercise price discounts
- Vesting (cliff, time, performance)
- Performance criteria Metrics
- The Big "D"s
 - Death
 - Disability
 - Divorce
- Termination
- Dividends/Dividend Equivalents



Taxes and equity compensation?

- Options grant, vest, exercise
- Capital Gains Treatment Section 83(b) elections
- Employee Stock Purchase plans
- 401(K) matches/Employee Stock Ownership Plans
- Payroll reporting and withholding rules
- Qualified small business stock
- Tax advice pitfalls



Liquidity, Private Company Shareholders Agreement

- Valuation
- Buy back tag along and drag along
- First right of refusal, puts or calls
- SecFi, Inc. private financing contracts for exercising



Planning for Transactions

- Change of Control Acceleration Provisions and Triggers
- Parachute payments Section 280(G) Tax Issues
- Executive loans non-recourse
- Lock up periods



How to communicate/educate employees about equity compensation

- Terminology matters
- Award or Grant Agreements
- Executive financial counseling or education meetings
- Technology



Biden Administration Considerations

- Tax Rates Individual and Corporate and social security
- More active regulatory environment



Keeping Track: Administration/Documentation

- Who needs to be included in plan decisions internally and externally
- Tracking grants and vesting or using outside vendor
- Plan documents and forms



Equity Compensation in Partnerships (LLCs)

- Partner vs employee status
- Profits interest



