



Employment Law Essentials for Start Ups

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Employment Law Issues for Start-Ups: What You Need to Know to Keep Your Company Out of Trouble and to Thrive

PANEL 1

Today's Presenters



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Employment Law Essentials for Start Ups

- Hiring Inquiries and Background Checks
- Documenting the Employment Relationship
- Workplace Policies & Procedures
- Wage and Hour Issues
- Contractors, Interns and Volunteers
- New Laws on the Horizon

A sepia-toned photograph of a clipboard with a checklist and a pen on a wooden surface. The clipboard is held by a silver clip at the top. A black pen lies diagonally across the bottom right of the checklist. The checklist has a title 'Checklist' and a list of nine items, each followed by a small square box. The text 'Hiring Inquiries & Background Checks' is overlaid in a white box with an orange border on the left side of the image.

Hiring Inquiries & Background Checks

Checklist

1. ☐
2. ☐
3. ☐
4. ☐
5. ☐
6. ☐
7. ☐
8. ☐
9. ☐

Background Checks and References

- Legal limits:
 - Federal Fair Credit Reporting Act (FCRA) and California consumer report laws
 - California
 - Investigative Consumer Reporting Agencies Act (ICRAA)
 - 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!

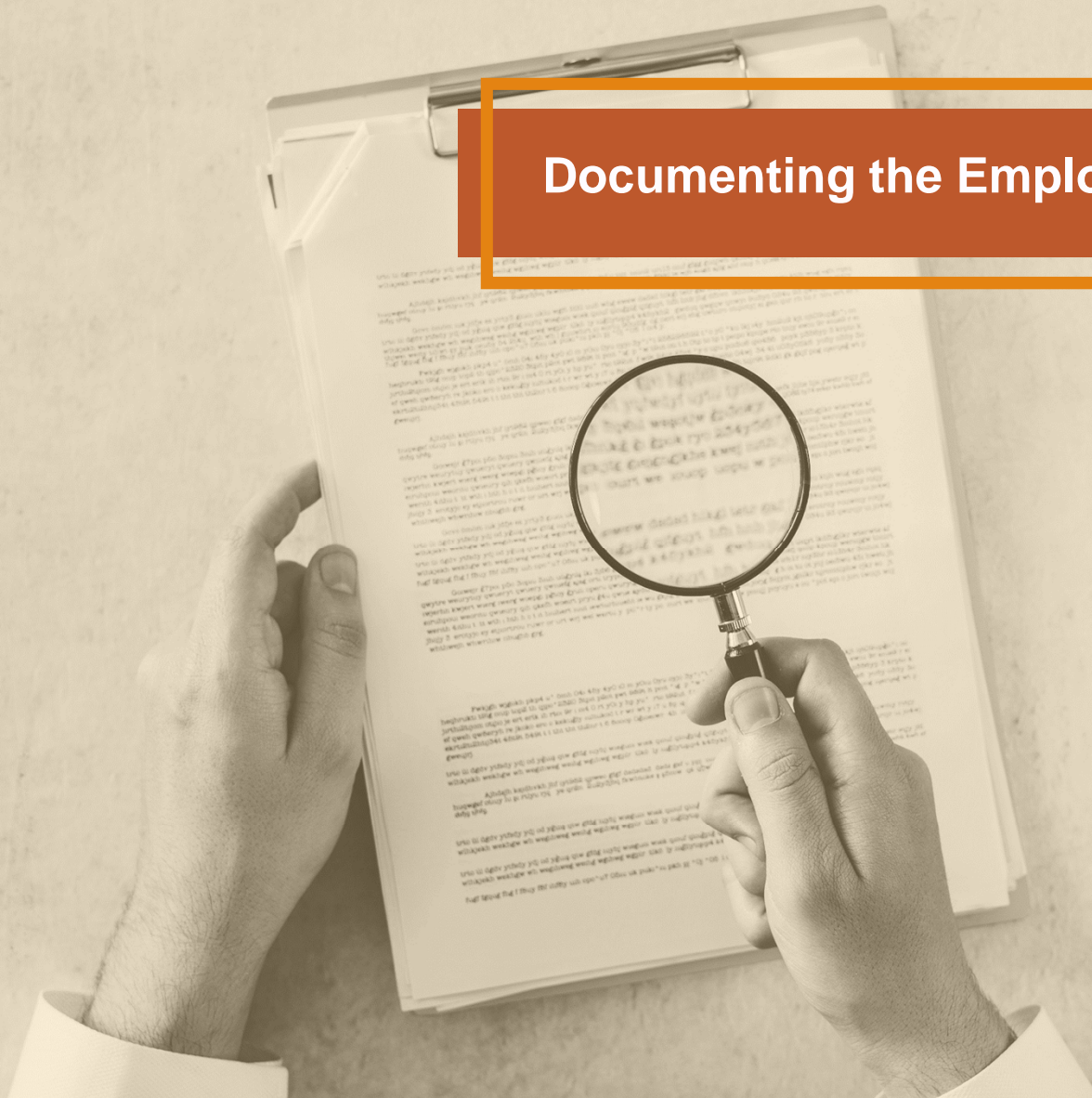
Ban-the Box

- 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)

Salary History Ban

- Cal. Labor Code § 432.3(a, (b), (f), and (k): California employers cannot:
 - seek an applicant's salary history information personally or through an agent, including compensation and benefits
 - rely on an applicant's salary history information as a factor in determining
 - whether to offer employment to an applicant or
 - what salary to offer an applicant
- Exceptions:
 - Employers may consider or rely on voluntarily disclosed salary history information
 - Employers may inquire about the applicant's expected salary in determining the applicant's salary
- On request, employers must provide applicants who have completed an initial interview with the pay scale (a salary or hourly wage range) for the position.

Documenting the Employment Relationship



Offer Letters and Required Paperwork

- Are offer letters updated?
- Do new hires get all required notices and paperwork?
 - 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) and DE4
 - Required pamphlets: sexual harassment, paid family leave, workers' compensation, disability insurance, etc.
 - 7/1/2017: Notice to new employees, and current employees on request, regarding domestic violence, sexual assault, and stalking protections
- Are reporting requirements completed?
 - Child support reporting requirements of new hires and certain independent contractors

Employment Agreements

- At Will Employment Agreement: Cal. Labor Code § 2922
 - The default rule in California and most states is “at will employment”
 - Exception: Montana Wrongful Discharge from Employment Act (WDEA)-limits employee terminations outside of the probationary period for “good cause.” Modified in 2021 to allow employers to extend the probationary period from 6 months up to 18 months.
 - At -Will Agreement: Is new employment sufficient consideration?
- Employment Agreements for specified terms:
 - Employment for a term of years.
 - Notice of termination or garden leave
 - Severance benefits if the executive is terminated without good cause (as defined in the agreement), and a draft Separation Agreement.
 - Bonus compensation.
 - Profit-sharing or equity grants.
 - Accelerated vesting provisions if there is a change of control.

AB 51: Arbitration Agreements

- AB 51 applies to agreements “entered into, modified, or extended on or after January 1, 2020.”
- Reversed case law that allows employers to unilaterally impose pre-dispute arbitration agreements on employees as a condition of hire or continued employment.
- Prohibits employers:
 - 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.”
 - From “threatening, retaliating or discriminating” against employees who refuse to enter into such mandatory agreements.
 - Prohibits arbitration agreements that are not entered into voluntarily— no coercion.
 - But, not intended to invalidate written arbitration agreements that are otherwise enforceable under the FAA.

Current Status of AB 51

- *Chamber of Commerce of the United States, et al. v. Becerra, et al.*, No. 2:19-cv-2456 (E.D. Cal. 2019): On 1/31/2020, 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.
- *Chamber of Commerce v. Bonta*, No. 20-15291 (9/15/2021): The Ninth Circuit in a 2-1 decision reversed in part the District Court's decision and held that the FAA does not fully preempt AB 51.
- Concluded that because AB 51 was focused on the conduct of the employer **prior to** entering into an arbitration agreement, the statute did not conflict with the FAA.
- AB 51 does **not** void any arbitration agreements previously entered into under the FAA, and does **not** prohibit employers from offering arbitration on a voluntary basis.
- AB 51 does **not** void or render unenforceable an arbitration agreement signed by any person going forward under the FAA, even if the agreement had been required as a condition of employment.
- Following the US Supreme Court's decision in *Viking River Cruises*, the Ninth Circuit withdrew its 9/15/21 decision and granted a rehearing by the same 3-judge panel.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

What it does:

- Amends Federal Arbitration Act (FAA) to permit an employee alleging sexual assault or sexual harassment to invalidate a pre-dispute arbitration agreement or collective action waiver.
- “Sexual assault” is defined as a nonconsensual sexual act or sexual contact, as such terms are defined in Section 2246 of Title 18 (the U.S. criminal code) or similar applicable tribal or state law, including when the victim lacks capacity to consent.
- “Sexual harassment” is defined as “conduct that is alleged to constitute sexual harassment under applicable federal, tribal, or state law”—meaning that it covers anything that would qualify as sexual harassment under Title VII or FEHA.
- Requires courts, rather than arbitrators, to determine whether the Act applies to a claim regardless of whether the underlying agreement delegates the authority to an arbitrator
- Signed into law by President Biden on March 3, 2022.

Viking River Cruises, Inc. v. Moriana, No. 20–1573, 56 U.S. ____ (2022)

- The Court examined two key questions relating to the application of the FAA to arbitration agreements seeking to limit PAGA claims:
 - whether the FAA preempts language in the PAGA itself which would prohibit pre-dispute waivers of PAGA claims, and
 - whether PAGA actions may be split via an arbitration agreement between claims brought on behalf of the individual representative plaintiff and the claims of those allegedly “aggrieved employees” that plaintiff would seek to represent.
- Takeaways:
 - Wholesale pre-dispute waivers of an employee’s right to bring PAGA claims will not be enforced.
 - A pre-dispute agreement between an employee and an employer stating that all disputes between them are to be decided on an individual basis in binding arbitration may now compel a representative plaintiff’s PAGA claim to arbitration and claims of other absent employees will not be joined into that arbitration proceeding.
 - It is unclear whether the PAGA representative’s claims proceeding in arbitration on an individual basis would preclude non-individual claims alleged by that representative from proceeding in court.
 - Practical pointer: *Many existing arbitration agreements have PAGA carve outs.....*



Workplace Policies and Procedures

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.
- Training records must be maintained for a minimum of two years
- Link to California Civil Rights Department (formerly the “DFEH”) training must be included in written harassment policies: <https://civildrights.ca.gov/shpt/>

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.
 - 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

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
 - Eliminates eligibility requirement of working at location with 50 (or 20) employees within a 75-mile radius
 - 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, and parent in law. 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

Other Handbook Policies

- At Will Employment Policy
- Disability and Religious Accommodation Policies
- Whistleblower Policy
- Paid Time Off Policies
- Social Media, Use of Company Equipment and Systems, Email Monitoring Policies
- Codes of Conduct, Conflicts of Interest and Ethics Policies
- Health & Safety Policies
 - Injury and Illness Prevention Plan
 - COVID-19 Prevention Plan (Cal OSHA Emergency Temporary Standard)
- Business Expense & Reimbursement Policies
- California Consumer Privacy Act and California Privacy Rights Act policy and a Notice at Collection

Wage and Hour Issues



California Minimum Wage Increase

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

1-25 Employees

\$13.00 (1/1/21)

\$14.00 (1/1/22)

\$15.50 (1/1/23)

26+ Employees

\$14.00 (1/1/21)

\$15.00 (1/1/22)

\$15.50 (1/1/23)

- Many cities require a higher minimum wage
 - Emeryville: \$17.68
 - Mountain View: \$17.10
 - Sunnyvale: \$17.10
 - Palo Alto: \$16.45

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)
 - 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
 - \$4,853.34 per month (or \$58,240.00 annually) if the employee works for an employer w 25 or fewer people
 - \$5,200.00 per month (or \$62,400.00 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
 - Employees must be paid 1.5 (or 2) times the “regular rate of pay” for all overtime hours worked
 - Under FLSA and California law, “regular rate of pay” includes all remuneration – not just the employee’s hourly rate!
 - Regular rate of pay could include, for example:
 - Per diems, if not really tied to business expenses
 - 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:
 - 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:
 - PTO
 - “Personal” time
 - “Floating holidays”
- What about “unlimited” vacation policies?

California (and local) Paid Sick Leave

- Is paid sick leave required? Yes, for full-time, part-time or temporary employees
- 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

- 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.
- Snapshot Period: Employers can choose a single pay period between Oct. 1 and Dec. 31 of the prior year
- The DFEH/California Civil Rights Agency has a pay reporting portal - <https://civildrights.ca.gov/paydatareporting/>
- Helpful FAQ: <https://civildrights.ca.gov/paydatareporting/faqs/>

SB 1162: New CA Pay Transparency Law

- Signed into law by Governor Newsom on September 27, 2022. Effective January 1, 2023.
- Changes to Pay Data Reporting
 - Revises reporting deadline to the second Wednesday of May 2023, and annually thereafter
 - Requires a separate pay data report from employers employing 100 or more employees hired through labor contractors, and requires employers to disclose on the pay data report the ownership names of all labor contractors used to supply employees.
 - Within each job category, requires employers to report the median and mean hourly rate by each combination of race, ethnicity and sex.
- Changes to the “Salary History Ban” law: Labor Code § 432.3
 - Employers with more than 15 employees must include a pay scale in all job postings (and must provide that information to third parties who post those jobs)
 - All employers, regardless of size, must provide a pay scale for a current employee’s position at the employee’s request.
 - Employers must maintain records of a job title and wage rate history for each employee for the duration of employment plus three years.

The background image is a blurred office setting. In the foreground, a document titled "CONTRACT" is visible on a desk, with a pen resting on it. In the background, two people are standing and talking near a large window. An orange rectangular box with a white border is overlaid on the left side of the image, containing the text "Contractors, Interns, and Volunteers".

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? Yes, but...
- 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?
 - 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



New Laws on the Horizon

New Laws in 2023?

- Bills awaiting Governor Newsom's signature-September 30, 2022 deadline.
 - AB 152: COVID-19 Supplemental Sick Leave Extension
 - AB 2693: COVID-19 Exposure Notice requirements
 - AB 1949: Bereavement Leave under the CFRA
 - AB 2188: Off-the-Job Cannabis protections (signed on September 18, 2022)
 - AB 1041: Use of CFRA and Paid Sick Leave to care for a "designated person"
 - SB 1044: Emergency Conditions Justifying Employees Leaving the Workplace

Thank You
