

# Start-Up Essentials: Employment Law

February 4, 2026

# Today's Program

- Wage and Hour Issues
- Contracts, Interns & Volunteers
- Employment Agreements
- Policies, Notices and Postings
- AI in the Workplace
- Employee Mobility
- PTO, Paid Sick Leave, Leaves



# Wage and Hour Issues

# 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.
- Managerial, professional, administrative, computer professionals, inside sales, outside sales.
- Paid on salary basis.
- In California, exempt employees must be paid a salary that equals at least twice the applicable state minimum wage for full-time employees.
  - In 2026, the California state minimum wage will increase to \$16.90 per hour for employers of all sizes. Therefore, two times the California minimum salary is \$70,304 annually for employers of all sizes.
    - Computer Professionals: \$122,573.13 annually, or \$58.85 per hour.

# 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 employer's 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 cellphones, tablets, 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.

# Reimbursement of Business Expenses

- **Labor Code 2802:** Employers must reimburse employees for all necessary, work-related 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.”
  - Mandatory cell phones: a “reasonable percentage” must be reimbursed.
  - May require reimbursement of attorney's fees and costs.
- ***Thai v. IBM, 93 Cal.App.5th 364 (2023)*** : Employers are responsible for reimbursement of all expenses an employee incurs “due to the performance of the employee's duties.”

# Security Screenings and Similar Activities

- **California Law:** Suffered or permitted to work - an employee who is under the control of the employer does not have to perform work for the time to be compensable
  - ***Frlekin v. Apple, Inc. (2020) 8 Cal.5th 1038:*** Employees in security screenings are subject to the employer's control because employees are required to comply, they are confined to the employer's premises, and they are compelled to perform tasks such as locating a manager or security guard, unzipping bags, etc.
  - ***Huerta . CSI Electrical Contractors, 15 Cal. 5<sup>th</sup> 908 (2024):***
    - **Hours worked includes:**
      - Time spent on employer's premises awaiting and undergoing exit procedure, including visual inspection of car
      - Travel time between security gate and parking lot is compensable if presence at security is required for an employment related reason.
        - » BUT imposition of 'ordinary work rules' during the drive is not enough
      - Requiring employee to remain on premises during the meal period, which prevents the employee from engaging in personal activities, is compensable time.

# Rounding Policies

## ***Camp v. Home Depot U.S.A., Inc., 84 Cal.App.5th 638 (2022)***

[Supreme Court Review Pending]:

- Time Rounding: rounding employees' time to the nearest five-minute increment
- Neutral rounding may be rejected where timekeeping systems can and do record exact minutes worked
- Employers generally must pay for exact minutes worked, not rounded time (up or down).
- Supreme Court Review Pending

## ***Woodworth v. Loma Linda Univ. Medical Center., 93 Cal. App. 5th 1038 (2023):***

- Employers may not round time punches where it is feasible for the employer to capture exact time punches.

## ***Donohue v. AMN Services, LLC, 11 Cal.5th 58 (2021):***

- Time rounding for meal periods is not permitted.

# California Private Attorneys General Act (PAGA)

- Gives one employee the ability to bring a “representative action” to recover penalties on behalf of all other “aggrieved employees”
- The Named Plaintiff stands in for the California Labor Commissioner to collect all of the penalties the Commissioner could collect under the Labor Code
- Even where the claim would not normally have a private right of action
- Penalties are either those stated in the statute or, if no penalty is stated, \$100 per employee, per pay period, and \$200 for egregious violations

# Contractors, Volunteers, and Interns

# 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:
  - A. 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
  - B. The worker performs work that is outside the usual course of the hiring entity's business
  - C. 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 employees also serve as unpaid volunteers? Can they be asked to “volunteer” their time?

## 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

# Freelance Worker Protection Act

## **SB 988 – applies to contracts entered into or renewed on or after January 1, 2025:**

- **Minimum requirements** between a hiring party and a “freelance worker”
  - “Freelance Worker” is a person or organization composed of no more than one person, that is hired or retained as a bona fide independent contractor by a hiring party to provide professional services in exchange for an amount equal to or greater than \$250.
  - Note: The professional services being referred to in the FWPA are defined in Labor Code section 2778(b)(2) and include various categories of freelance-style work, including marketing, human resources, graphic design, photography, videography, estheticians, and others.
- Requires a **written contract** be provided to the freelance worker, **containing at a minimum:**
  - Name and mailing address of each party.
  - Itemized list of all services to be provided, including the value and rate of such services and method of compensation.
  - When the hiring party must pay the compensation or the mechanism by which the date of payment is determined, or if unspecified, no later than 30 days after completion of services
  - When the freelance worker must submit a list of services to the hiring party to meet any internal processing deadlines for timely payment.

# Employment Agreements

# Written Agreements for New Hires

- Offer letter
- Employment agreements
  - At-Will Employment
  - Written Commission Sales Agreement (Labor Code 2751)
    - The agreement must define when commissions are earned and payable.
    - Include a method for calculating and paying commissions
    - Signed by Employee
    - Document receipt of the Agreement by Employee
- 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

# Arbitration Agreements:

## ❑ Advantages:

- No runaway juries
- Confidential proceeding
- Limited right of appeal
- Faster process (sometimes)
- Individual cases only (if class action waiver)

## ❑ Disadvantages:

- Costly (arbitrator fees must borne by employer, can be significant)
- May be just as involved as proceeding in court (intense discovery)

## ❑ Other Considerations: Impact on Settlement

# Arbitration Agreements: Requirements

## □ *Armendariz v. Foundation Health Psychcare Services, Inc,* **24 Cal.4th 83:** “minimum standards of fairness”

- Employee only required to bear the same costs they would be required to pay in court
- Adequate discovery
- All types of relief otherwise available outside of arbitration
- Written arbitration award and adequate judicial review
- Neutral arbitrator

## □ **Unconscionability**

- Substantive
- Procedural

# Arbitration Agreements: Requirements

## Cal. Code Civ. Proc. §12981.98:

- Arbitration fees to be paid **within 30 days**.

## *Hohenshelt v. Sup. Ct., 18 Cal. 5th 310 (2025):*

- Employer failed to pay fees on a timely basis
- FAA preemption?
- Cal Supreme Court Holding: No
- BUT: Contract principles apply
- Relief from forfeiture if:
  - Breach is excusable (i.e., no fraud, excusable neglect, etc.)
  - Lack of prejudice

# Arbitration Agreements: PAGA Puzzle

- ❑ Even if an employee's individual PAGA claim goes to arbitration, the employee can still represent the PAGA collective action in court.
- ❑ If an employee's individual PAGA claim, or underlying wage and hour claims, are resolved through settlement, the employee can continue to present the PAGA collective action in court.
- ❑ Only a finding that the employee did not suffer any of the alleged violations underlying PAGA will prevent the employee from representing the PAGA collective action.

# Arbitration Agreements: PAGA

- ❑ *Adolph v. Uber Technologies (2023) 14 Cal.5th 1104*: PAGA waivers are only enforceable as to an employee's individual PAGA claims, but not as to the representative non-individual PAGA claims.
- ❑ An agreement that provides for the waiver of both individual and non-individual PAGA claims can be found to be unconscionable and therefore, void.
- ❑ *DeMarinis v. Heritage Bank of Commerce (2023) 98 Cal.App.5th 776*: PAGA wholesale waiver agreement was unenforceable and the non-severability clause, aka "poison pill" which stated that if any portion of the waiver provision was found to be unenforceable, the entire agreement would be rendered null and void prevented enforcement of the entire arbitration agreement.

# Workplace Notices & Policies

# New Records and Posting Requirements

## **SB 294: Workplace Know Your Rights Notice**

- Provide a stand-alone written notice of employee rights regarding:
  - workers' compensation, immigration, union organizing, law enforcement interactions, and where to file complaints.
  - By February 1, 2026, provide notice to current employees, and annually thereafter. Provide notice to new employees at time of hire.
  - By March 30, 2026, or at time of hire for new employees, allow employees to designate an emergency contact in the event the employee is arrested or detained at work. Employers are tasked with contacting the emergency contact.

## Labor Commissioner template notice: <https://www.dir.ca.gov/dlse/Know-Your-Rights-Notice/Know-Your-Rights-Notice-English.pdf>

- Labor Commissioner or public prosecutors can enforce the law.
- Penalties: per employee (up to \$500, or \$10,000 for certain violations).

# Personnel Files and Payroll Records

- **California Labor Code: allows employees to request their personnel file and payroll records**
  - 30 days to produce personnel file
  - 21 days to produce payroll records
- **SB 513:**
  - Effective January 1, 2026, expands definition of “personnel records” under Labor Code §1198.5 to include education and training records
    - For training records, employers must include the employee’s name, training provider, date/duration of training, core competencies, and resulting certification/qualification
  - Ensures employees have a comprehensive view of their performance related information

# EEO and Harassment Policies

- Are the organization's EEO and Harassment Policies updated?
- FEHA Requirements:
  - Prohibit discrimination based on race or color, religious creed, national origin or ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex (including pregnancy, childbirth, breastfeeding or related medical condition), gender, gender identify or expression, age, sexual orientation, reproductive health decision-making, or veteran or military status.
  - Safeguards employees from harassment due to protected characteristic and retaliation for making discrimination or harassment complaints
  - Include expanded definitions of “national origin” and race
  - Description of age must comport with state law
  - Unpaid interns protected from discrimination and harassment; volunteers protected from harassment

# Intersectionality

## □ Senate Bill 1137: Intersectional Discrimination

- Clarifies that the Fair Employment and Housing Act bars discrimination not only on the basis of individual protected characteristics, but on a combination of two or more protected traits.
  - E.g., Black/Asian + Women
  - Although federal courts are split on the subject of intersectional discrimination, the EEOC recognizes that discrimination motivated by two protected characteristics can violate Title VII (e.g., Black Women, Old Women)
- Also applies to the Unruh Civil Rights Act and provisions of the Education Code
- FEHA now protects employees from discrimination based on protected characteristic, intersectionality/combination of characteristics, or perceived or associated characteristics

# Harassment Training

- ❑ Training requirements for 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
- ❑ Requires the CRD 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.
  - <https://calcivilrights.ca.gov/shpt/>
- ❑ Training records must be maintained for a minimum of two years.

# Pregnant Workers Fairness Act

- Federal Law: Pregnant Workers Fairness Act
- Requires “covered employers” (15 or more employees) to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”
  - Applies only to accommodations.
  - Other existing laws make it unlawful to discriminate on the basis of pregnancy, childbirth or related medical condition.
  - Does not replace federal, state or local laws that are more protective of workers affected by pregnancy, childbirth or related medical condition.
- Went into effect on June 27, 2023.

# California Pregnancy Disability Law (PDL)

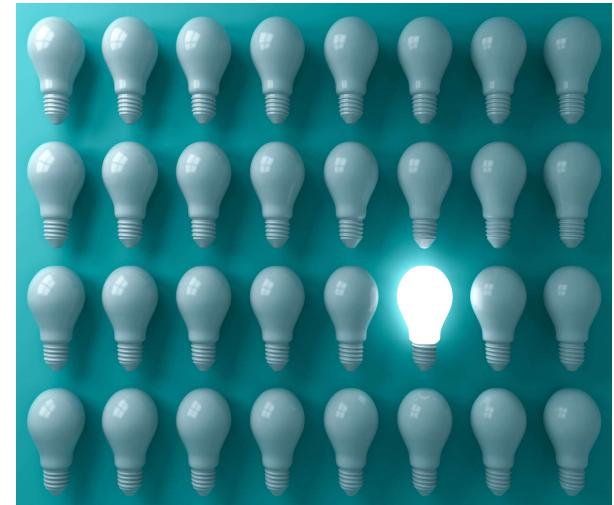
- ❑ No eligibility requirements
- ❑ Covers California employers with 5 or more employees anywhere
- ❑ Provide up to 4 months of PDL per pregnancy for pregnancy-related disability (before/after birth)
- ❑ Engage in the interactive process and provide reasonable accommodations including transfers to a less strenuous or hazardous position or modified duties if medically advisable for the protection of the pregnant worker and/or baby

# Lactation Accommodation

- ❑ 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 Practices:**
  - Review your policy and practice
  - Identify lactation space
  - Make sure it is compliant

# Reasonable Accommodation Policy

- ❑ Allows a qualified individual with a disability to perform the essential functions of the job, unless to do so would pose an “undue hardship” or pose a “direct threat” to health and safety
- ❑ California law requires employers to engage in an interactive process with applicants or employees: requests must be evaluated on an individualized basis – beware of bright line rules!



# CA Equal Pay Act (Labor Code §1197.5)

- ❑ Prohibits employers from paying employees less than those of a different sex, race, or ethnicity for “substantially similar work.”
- ❑ Effective January 1, 2026, expands protections to include non-binary genders and broadens definition of “wages” to include all forms of compensation.
- ❑ Employers cannot pay less for work that is a “composite of skill, effort and responsibility” performed under similar conditions, even if job titles differ.
- ❑ No same establishment requirement.
- ❑ Any pay gap must be justified by bona fide factors like seniority, merit, experience, or in some cases, geographic location.

# California Labor Code §432.3

## Salary History Ban: California Labor Code § 432.3

- 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.
- California employers with 15 or more employees must post pay scales in job postings.

# Pay Transparency: Affirmative Disclosure

- Effective January 1, 2023, Labor Code 432.3 (the Salary History Ban Law) was amended as follows:
  - Private or public-sector employers with 15 or more employees must include a pay scale in all job postings (and must provide that information to third parties who post those jobs).
    - “The salary or hourly wage range that the employer reasonably expects to pay for the position.”
  - All employers, regardless of size, must provide a pay scale for a current employee’s position at the employee’s request.
  - All employers, regardless of size, must disclose the pay scale for the position to applicants upon reasonable request (including those not actually given a job interview).
- The Department of Industrial Relations (DIR) released FAQs ([https://www.dir.ca.gov/dlse/california\\_equal\\_pay\\_act.htm](https://www.dir.ca.gov/dlse/california_equal_pay_act.htm)) for employers regarding compliance with the new pay transparency obligation.

# Pay Equity Enforcement Act

- SB 642 (new for 2026)
- New “pay scale” definition under Labor Code Section 432.3
  - Old Definition: the salary or wage range that the employer expected to pay “for the position” generally.
  - Amended Definition: a “good faith estimate” of the salary or wage range “upon hire.”
- Expanded definition of “sex” and “wages”
  - “opposite sex” >> “another sex”
  - “wages”>> “all forms of pay, including bonuses, stock, stock options, cleaning or gas allowances, hotel accommodations and reimbursements”
- Statute of limitations extended to three years.
- Recovery period increased to up to 6 years.

# Job Protection for Cannabis Use

- ❑ California AB 2188: Discrimination in Employment: Use of Cannabis, effective January 1, 2024
- ❑ Amends the California FEHA to make it unlawful to discriminate against an applicant or employee in hiring, termination or in any term or condition of employment:
  - Based on the use of cannabis off the job and away from the workplace.
  - Based solely on a drug screen test that shows the person has “nonpsychoactive cannabis metabolites” in their urine, hair, or bodily fluids.
- ❑ Employers may still prohibit and discipline on-the-job usage, impairment or possession.
- ❑ Employers who use a scientifically valid test to measure “active THC” are not barred from making employment decisions based on those test results.



# Workplace Violence Prevention Plans

- ❑ As of July 1, 2024, most California employers must have established and provided initial and annual training on a written **Workplace Violence Prevention Plan (WVPP)** to their employees.
  - Must record information about every workplace violence incident in a violent incident log.
  - Must review plans and provide effective training when first established, upon hire, and annually to existing employees.
- ❑ The WVPP must conform with the requirements of new Labor Code §6401.9:
  - The plan must be written – it can be standalone or incorporated into an Injury and Illness Prevention Plan, another required plan under California law.
  - The plan must be easily accessible to employees, their authorized representatives, and Cal/OSHA representatives at all times.
  - Must be specific to the hazards and corrective measures for each work area and operation.
  - Employers must involve employees in creating and implementing the plan.

# Whistleblower Notice

- ❑ As of 1/1/2025, California employers are required to post a model list of employees' rights and responsibilities under California whistleblower laws
- ❑ Template Notice: <https://www.dir.ca.gov/dlse/whistleblowersnotice.pdf>
- ❑ Employers who post the model notice will be considered compliant with the posting requirement
- ❑ The notice describes who is a protected employee under California Labor Code Section 1102.5, what is a “whistleblower,” and the protections afforded to whistleblowers.
- ❑ It also explains how to report improper acts to the Attorney General’s Whistleblower Hotline

# Other Required Notices & Postings

- [Wage Theft Prevention Notice \(New Hire Notice\), Labor Code 2810.5](#)
- [Workers' Compensation Time of Hire Pamphlet](#)
- [EDD's Disability Insurance Provisions Brochure \(DE 2515\)](#)
- [Paid Family Leave brochure \(DE 2511\)](#)
- [Notice of Survivors of Violence and Family Members of Victims Right to Leave and Accommodation](#)
- [Sexual Harassment Information Fact Sheet \(Form CRD-185\)](#)
- [Paid Sick Leave](#)
- [Notice to Employee: Injuries Caused by Work](#)
- [Notice to Employees of Unemployment Insurance, Disability Insurance, and Paid Family Leave Benefits](#)
- [Transgender Rights in the Workplace](#)
- [Family Care and Medical Leave and Pregnancy Disability Leave](#)
- [California Law Prohibits Workplace Discrimination and Harassment](#)

# AI In the Workplace

- ***Mobley v. Workday, Inc. (2024):***
  - On May 16th, 2025, the Court granted conditional certification for the case to proceed as a nationwide collective action under the Age Discrimination in Employment Act (ADEA)
  - The Court rejected Workday's argument that it is just a software provider and does not make the hiring decisions, finding Workday sufficiently involved in the hiring process to be held potentially liable as an 'agent' of the employers
- ***Harper v. Sirius XM Radio, LLC (2025):***
  - On August 4, 2025, plaintiff filed a class action complaint alleging that Sirius' use of a commercial AI hiring tool that screens and analyzes resumes resulted in racial discrimination against him and other similarly situated African American applicants.

# California Civil Rights Council Regulations

Effective 10/1/2025

- ❑ **What employers do these regulations apply to?**
  - Employers of 5 or more people, employment agencies, unions, apprentice programs
    - Includes PT employees, employees on leave; inside/outside California
    - Employer Agents - any person acting on behalf of an employer, directly or indirectly, to exercise a function traditional exercised by the employer- are also an “employers.”
- ❑ **What is an Automated-Decision Systems (“ADS”)?**
  - An ADS is “[a] computational process that makes a decision or facilitates human decision making regarding an employment benefit,” including processes that “may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques.”

# AI in the Workplace

## ***Examples of ADS Use In Employment Settings:***

- ❑ Using computer-based assessments or tests, such as questions, puzzles, games, or other challenges to:
  - Make predictive assessments;
  - Measure skills, dexterity, reaction-time, and/or other abilities or characteristics;
  - Measure personality traits, aptitude, attitude, cultural fit;
  - Screen, evaluate, categorize, make recommendations.
- ❑ Screening resumes for particular terms or patterns.
- ❑ Directing job advertisements or other recruiting materials to targeted groups.
- ❑ Analyzing facial expression, word choice, and/or voice in online interviews.
- ❑ Analyzing employee or applicant data acquired from third parties.



# AI in the Workplace

## □ What Conduct is Targeted?

- Using ADS or selection criteria (including a qualification standard, employment test, or proxy) to discriminate based on a protected class.
- Using ADS to engage in unlawful recruitment practices (e.g., to restrict, exclude, or classify individuals on a protected trait; to engage in unlawful preemployment inquiries, including criminal history).
- Using ADS to screen based on disability, uncorrected vision or hearing, unless:
  - The standard, test, or selection criteria is job related and consistent with business necessity.
  - There is no less effective discriminatory standard, test or other selection criteria.
- Expressing a preference for or advertising employment availability or benefits in a manner intended to discriminate based on a protected trait.
- To conduct an unlawful “medical or psychological examination”
- To aid or abet unlawful employment discrimination.

# AI in the Workplace

## □ Who Can Be Responsible?

- Employers, whether they use their own AI tools or use a third parties AI tools.
- Third parties that design or implement such AI tools may also be held liable under the FEHA's prohibition on aiding and abetting unlawful employment practices .

## □ Are there New Recordkeeping requirements?

- Yes. Employers must keep for **four years** all automated-decision system data created or received by the employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee.
  - Keep for four years (up from two) from the date of the making of the record or the date of the personnel action involved, whichever occurs later.
  - Includes all applications, personnel records, membership records, employment referral records, California employment information reports, selection criteria, automated-decision system data, and other records created or received by the employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee.

# AI in the Workplace

## What you need to do:

- ❑ Identify all AI and ADS tools used in the employment relationship and audit to ensure compliance with antidiscrimination laws.
- ❑ Review vendor relationships and make sure contracts include requirements for transparency, bias testing, data retention and cooperation with audits.
- ❑ Update policies and processes and integrate AI governance as appropriate
- ❑ Ensure that all ADS-related systems include mechanisms for applicants to request accommodations for disabilities, religious practices, or medical conditions.
- ❑ Update retention policies to ensure that all ADS-related employment data is retained for the required four years.
- ❑ Train HR, managers, recruiters and others on AI and the new regulations.

## STAY INFORMED AND UP-TO-DATE

# Employee Mobility

# 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***, 44 Cal. 4th 937 (2008):
  - 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

# 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:
  - 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
- ❑ Trade Secrets Exception?
  - ***Edwards v. Arthur Andersen***: The California Supreme Court avoided answering the question
  - ***Asset Marketing Sys. v. Gagnon*** (9<sup>th</sup> Cir. 2008) 542 F.3d 748: Ninth Circuit interpreted *Edwards* as not applying to restrictive covenants designed to protect employer's trade secrets

# Strategies For 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.

# B & P §16600.5 – Unenforceable Contracts

- Establishes that any contract that is void under the law is unenforceable regardless of where and when the contract was signed
- Prohibits an employer or former employer from attempting to enforce a contract that is void regardless of whether the contract was signed, and the employment was maintained outside of California
- Prohibits an employer from entering into a contract with an employee or prospective employee that includes a provision that is void under the law
- Establishes that an employer who violates the law commits a civil violation
- Authorizes an employee, former employee, or prospective employee to bring an action to enforce the law for injunctive relief or the recovery of actual damages, or both
- Provides that a prevailing employee, former employee, or prospective employee is entitled to recover reasonable attorney's fees and costs

# B & P §16600.1 – Unenforceable Contracts

- Amends Bus. & Prof. Code § 16600, providing that, in accordance with *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, it should be read broadly to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy specified exceptions.
- States that this provision is declaratory of existing law.
- Makes these provisions applicable to contracts where the person being restrained is not a party to the contract.
- Unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy specified exceptions.
- Requires employers to notify current and former employees in writing by February 14, 2024, that the noncompete clause or agreement is void.
- Makes a violation of these provisions an act of unfair competition pursuant to the UCL.

# Prohibitions on Stay or Pay Agreements

- AB 692: Adds Section 16608 to the Business and Professions Code and Section 926 to California Labor Code
- Makes it unlawful to include in any employment contract or require an employee to execute, as a condition of employment, a contract that requires an employee to pay an employer, training provider, or debt collector for a debt if employment terminates, with limited exceptions.
- Applies to contracts entered after January 1, 2026
- Employees may bring action on behalf of themselves or others.
- Liability of actual damages or \$5,000 per worker, plus injunctive relief and attorney's fees and costs.

# Exceptions to Stay or Pay Prohibition

- Contract related to the repayment of the cost of tuition for a transferable credential that meets the following requirements:
  - Contract is separate from any employment contract
  - Contract does not require obtaining transferable credential as a condition of employment.
  - Contract specifies repayment amount before worker agrees to contract.
  - Repayment amount does not exceed the cost to the employer.
  - Contract provides for prorated repayment amount during any required employment period that is proportional to the total repayment amount and the length of the required employment.
  - Does NOT require an accelerated payment
  - Does NOT require repayment unless the employee is terminated for misconduct

# Exceptions to Stay or Pay Prohibition

- Contract for receipt of discretionary or unearned monetary payment at the outset of employment that is not tied to job performance, providing the following requirements are satisfied:
  - Contract is separate from any employment contract
  - Employee is notified of the right to consult an attorney regarding the agreement.
  - Employee provided a reasonable time of no less than 5 business days to review with counsel
  - Any repayment is not subject to interest accrual
  - Any repayment is prorated based on the remaining term of any retention period.
  - Retention period cannot exceed two years from receipt of payment.
  - Option to defer receipt of payment to the end of a fully served retention period without any repayment obligation.
  - Separation from employment is at the sole election of the employee or for misconduct.

# PTO, Paid Sick Leave and Leaves

# 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, applies to all California employers.
- Employees must accrue paid sick leave at the rate of one hour per 30 hours worked, or 5 days of paid sick leave (or 40 hours whichever is more) may be provided up front (but check local rules!)
- Under state law, employer can cap accrual at 80 hours or 10 days (whichever is longer) and can limit annual use to 40 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 required paid sick leave? Yes, if compliant.
- Keep in mind of local Paid Sick Leave Ordinances (Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, Santa Monica).
  - **State** law preempts some local ordinance requirements (pay out, lending sick leave, written notice), but not if a local ordinance requires more sick leave or a different method of accrual or carryover.

# 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; victim of qualifying acts of violence; 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.
- All employers with 5+ employees must provide reasonable accommodations for disabled employees – including leaves or other accommodations.

# The California Family Rights Act [CFRA]

**The CFRA covers employers with 5 or more employees (anywhere). It also:**

- Includes grandparents, grandchildren, parents in law, siblings and designated persons as covered family members.
- Most of the same reasons for leave as the Family and Medical Leave Act (FMLA)
  - Employee or family member's (including a designated person's) serious health condition
  - Leave to care for a new child after birth, adoption or foster care placement
  - Qualifying Military Contingency
  - Does not cover PDL, or Military Caregiver Leaves which are covered by the FMLA.
- No requirement that employees work at a place of employment with 50 employees within a 75-mile radius (but must have worked for the employer for 12 months total [not continuous] and have logged 1,250 hours in the 12 months preceding leave.

# Bereavement Leave

## AB 1949: Bereavement Leave, effective January 1, 2023:

- ❑ Employers with 5 or more employees and all public sector employers are required to provide up to 5 days of unpaid bereavement leave for the death of an employee's family member
  - Leave is unpaid, but employees must be permitted to use available accrued leave or compensatory time off
  - Leave may be taken intermittently
  - Leave must be used within 3 months of death
- ❑ Eligible employees must have at least 30 days of service.
- ❑ Qualifying family members: spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law [note: AB 1949 does not require bereavement leave for a "designated person"].
- ❑ Employers may request confirming documentation of death within 30 days of first day of leave: e.g., death certificate, published obituary, written verification of death, burial, or memorial service from a funeral home, mortuary, crematorium, religious institution or governmental agency.
- ❑ Codified under Section 12945.7 of the California Government Code (not the Labor Code): prohibits discrimination, interference or retaliation against employees who request or take protected bereavement leave.

# Reproductive Loss Leave

- ❑ This law incorporates much of the same framework as for California's bereavement leave:
  - Employers with 5 or more employees
  - Must be employed for 30 days or more
  - Entitled to up to 5 days following a "reproductive loss event"
    - Does not need to be consecutive but must generally be completed within 3 months of qualifying event.
- ❑ Employers may not request supporting documentation.
- ❑ Leave may be capped at 20 days per 12-month period.
- ❑ Time may be unpaid
- ❑ This is separate from any other leave (CFRA, disability, bereavement, etc.)

Thank You