



## Eight Things Employers Need to Know About Our Employment Laws

*Employer Beware! California's employment laws are full of strange twists, turns and bumps. Consider the following eight pitfalls awaiting the unwary:*



### 1. Watch What You Say!

In the case of Foley v. Interactive Data Corp., the California Supreme Court strengthened the legal principle that an employer may be held to what it writes or says to its employees. This principle includes statements by supervisors, who are considered "agents" of the employer. The employer who does not keep its word may be sued for a breach of contract. The employee may recover past *and future* lost earnings, including benefits, resulting from the breach of contract.

The California Supreme Court held in Asmus v. Pacific Bell that while an employer may modify unilateral contracts of employment, it may do so only after providing reasonable advance notice of the change and so long as vested benefits are not lost. Accordingly, reductions in compensation and employee benefits should be reviewed to ensure compliance with California law.

One preventive approach is simply to think before you write. Important writings, such as handbooks and personnel guides, should be reviewed by labor counsel before issuance. Supervisors should be instructed to avoid any statements that might be construed as a promise of continued employment

### 2. Watch What You Do!

The Foley decision also held employees may sue if the employer violates some established, yet unwritten, personnel practice that has developed. If the employee "reasonably expects" to be treated in a certain way because of the employer's past practice, an implied contract may have arisen. Under this law, an employee may argue that he or she was singled out for "special treatment."

Of course, a claim of disparate treatment may also arise if the employee belongs to some religious or ethnic group or other classification state and federal anti-discrimination laws are designed to protect. While these laws are fairly consistent among the states, California, as you might guess, provides extra protection. In addition to the traditional non-discrimination criteria (*i.e.*, age,

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race, color, sex, religion, veteran status, physical or mental disability, and national origin), California employers may not discriminate on the basis of pregnancy, marital status, sexual orientation, perceived gender, or medical condition, defined as cancer. Disability has been held to include such ailments as cancer, obesity caused by an underlying medical condition, high blood pressure, epilepsy, back conditions, and AIDS.

In recent years, the California Legislature has enacted several statutes that collectively require both public and private employers to extend to registered domestic partners state-mandated benefits provided to spouses. The California Supreme Court held in a landmark decision that the state's Constitution guarantees the right to marry to same-sex couples as well as to couples of the opposite sex, but the voters subsequently overturned that ruling by voting to amend the state constitution. The issue remains in litigation. Whatever its state, California law does not affect ERISA benefits or the federal tax treatment of employment benefits because the federal Defense of Marriage Act (DOMA) limits marriage recognized under federal law to a legal union between one man and one woman.

California discrimination statutes have long prohibited discrimination on the basis of sexual orientation and marital status, and the California Supreme

Court previously ruled in a public accommodations case that these laws prohibit discrimination against domestic partners.

And don't forget the ever-popular issue of sexual harassment. California law says employers must do everything possible to prevent it from occurring. Not surprisingly, California law requires employers to distribute the California Department of Fair Employment and Housing's Sexual Harassment Information Sheet to all employees — a pamphlet describing what is sexual harassment *and* how to file a charge with the EEOC or the DFEH— or include similar provisions in employee handbooks. California employers should also be aware that independent contractors have standing to sue for unlawful harassment under the state Fair Employment and Housing Act (FEHA) and employers may be held liable for the acts of non-employees depending upon the relationship between the employer and the third party. California employers with 50 or more employees are also legally obligated to provide two hours of sexual harassment training to all supervisors in the state; the training must meet a number of requirements.

#### Disability management

The recent amendments to the federal Americans With Disabilities Act brings the rest of the country in line with California's broad protections for the disabled in

employment. California state law does not require an employee or applicant to prove the medical condition substantially impairs a major life activity. Rather, the standard is simply whether the major life activity is impaired. Like the newly revised ADA, California law also does not take mitigating measures into account when analyzing whether a disability exists.

A Ninth Circuit opinion, Barnett v. U.S. Air, Inc., held an employer must initiate the interactive process required under the ADA when: (1) the employer knows the employee has a disability, (2) knows or has reason to know the employee is experiencing workplace problems because of the disability, and (3) knows or has reason to know that the disability prevents the employee from requesting a reasonable accommodation. California law requires by statute the interactive process between the employer and a disabled employee or applicant requesting accommodation. Not only are the interactive process and reasonable accommodation required for employees who are actually disabled, one California court has held the state Fair Employment and Housing Act requires them for applicants and employees who are perceived or regarded as being disabled. Under state law, a leave of absence with job protection is recognized as a form of reasonable accommodation for disabled employees where the leave will enable the employee to return from leave in the foreseeable

future. California law imposes separate liability for failing to engage in the interactive process and not providing a reasonable accommodation. A 2009 state court decision held that an employer can be held liable for failing to provide a reasonable accommodation on a single occasion even if the evidence shows accommodations were provided to the disabled employee numerous other times.

The Ninth Circuit held in a 2005 case that post-offer medical examinations must truly be conducted on a post-offer basis, after any other condition to holding employment has been satisfied. Employers therefore should not schedule

post-offer medical examinations until all other conditions to holding employment, including background checks, reference checks and the like are completed.

#### Unfair competition; arbitration agreements

California law generally prohibits an employer from requiring employees to refrain from competing following termination of employment. Employers who terminate employees for failing to sign impermissible covenants not to compete have been found liable for wrongful termination in violation of public policy, which allows for recovery of economic and emotional distress damages. Requiring employees to sign unlawful covenants not to compete is also actionable as an unfair business practice, which courts enforce through equitable means, that is, by injunctions or restitution orders, no jury required.



*Jackson Lewis offers clients the necessary sexual harassment prevention training required by State Assembly Bill 1825*  
*See page 7 for training details*

State law, however, does prohibit employees from misappropriating trade secret information. Prohibitions against soliciting customers may be enforceable where necessary to protect the employer's trade secret information, but the courts will not enjoin a former employee from accepting business from a customer where there is no improper solicitation.

Employment arbitration agreements are usually enforceable under state law so long as they are not "unconscionable." To be enforceable the agreements must (1) provide for a neutral arbitrator; (2) allow for the same type and extent of damages and other relief that the employee could obtain in court; (3) permit "adequate" discovery; (4) provide for the issuance of a written arbitration award sufficient to permit "a limited form of judicial review"; (5) require the employer to pay the costs of the arbitration; and (6) require that claims brought by the employer also be subject to arbitration.

#### Background checks and employee privacy

Employers generally cannot rely upon or inquire about criminal arrests that did not lead to a conviction. Any inquiry about convictions must also exclude certain marijuana related offenses.

Employers who seek criminal conviction records or other forms of credit information from third parties must comply not only with the federal Fair Credit Reporting Act, but also with California statutes.

Chief among the differences between the statutes are that California deems *any* investigation – not merely those conducted through personal interviews – pertaining to a consumer's character, general reputation, personal characteristics, or mode of living to be one seeking an "investigative consumer credit report." A consumer is entitled to receive a copy of any investigative consumer report within three days of the employer's receipt of the report if

the employee requests the report by checking a box required to appear on the mandated authorization form. The employer may contract with a third party, such as an investigative consumer reporting agency, to provide the report. California also requires that an employee or applicant be able to check a box on a consumer credit report authorization form to have a copy of the credit report sent to him or her by the credit reporting agency at the same time it is sent to the employer. Employment applications or another form provided to new hires must include a disclosure statement advising the employee of the right to receive background information the employer obtains without using a third party consumer reporting agency.

Employers should know that employee medical information is protected by the California Constitution's right to privacy and the state Confidentiality of Medical Information Act. Employers should not inquire about the nature of an employee's medical condition. Medical certification forms provided by the employer for family medical leave should not include any inquiry into diagnosis or medical facts supporting the need for leave (in other words, in California you may *not* use the U.S. Department of Labor's FMLA certification forms). Nor can an employer require an employee to have the employee's physician release medical information to the employer.

Both federal and state laws restrict employers from using electronic surveillance in the workplace. Under the federal wiretapping law, employers are prevented from intercepting or taping phone calls or other private communication, including electronic mail, without the consent of one party to the communication. The California statute is even more restrictive, requiring the consent of all parties to confidential communications. Discussions with and between employees should never be tape recorded without their explicit consent.

### 3. Watch How You Pay!

California has adopted a state minimum wage, which is currently \$8.00 per hour. In addition, employees who work in the City and County of San Francisco must receive a local minimum wage which is adjusted annually. The San Francisco minimum wage for 2009 and 2010 is \$9.79 per hour.

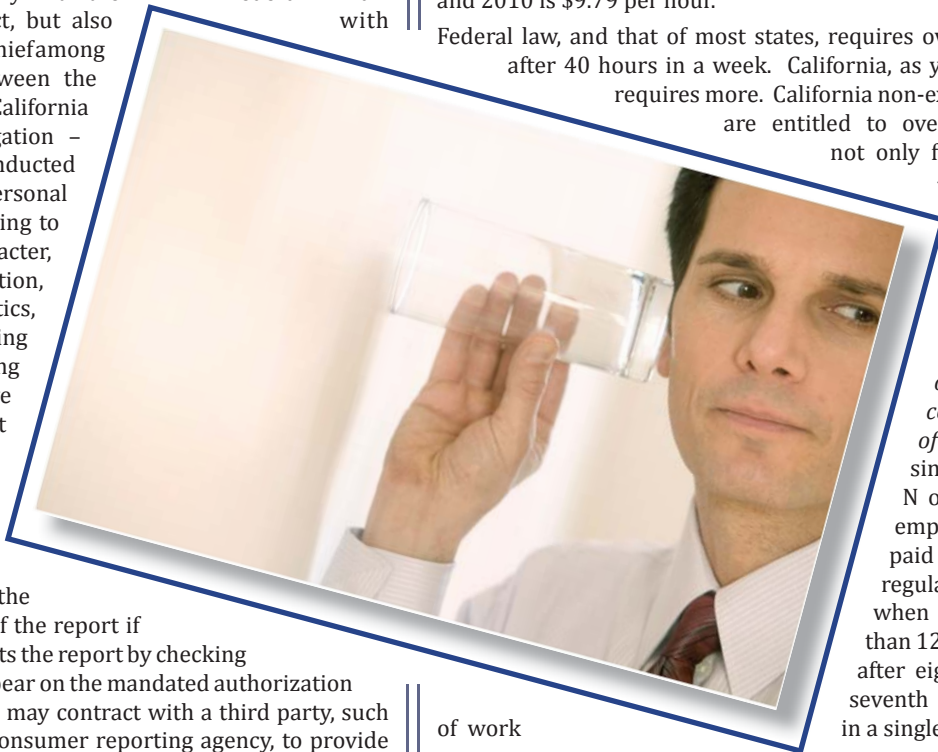
Federal law, and that of most states, requires overtime for work after 40 hours in a week. California, as you might expect, requires more. California non-exempt employees are entitled to overtime premiums

not only for working over 40 hours in a workweek, but also *after eight hours in a day or the first eight hours of work on the seventh consecutive day of work* during a single workweek.

**N o n - e x e m p t** employees must be paid double their regular rate of pay when they work more than 12 hours in a day or after eight hours on the seventh consecutive day in a single workweek.

of work

California's method for calculating the regular rate of pay also differs from federal law. Under state law, the regular rate of pay generally should be calculated by dividing the gross compensation for the week by the number of hours the employee is regularly scheduled to work, up to the legal maximum of 40 hours per week. Remember that certain forms of supplemental compensation, such as non-discretionary bonuses, commissions and the like should be included in calculating the regular rate of pay.



Use-it-or-lose-it vacation policies are not permitted. Employers may, however, cap the amount of vacation time an employee may accrue. Any cap must be "reasonable." The California Labor Commissioner historically has frowned on plans that require employees to use accrued vacation time within the year it is earned or within a short period thereafter. At one time the Labor Commissioner opined the accrual cap must allow an employee at least nine months to use vacation, meaning any cap should be at least 1.75 times the annual accrual rate. While the Labor Commissioner no longer follows this rule, the Commissioner's current interpretation demonstrates the need for a "reasonable" accrual ceiling.

#### When and how wages must be paid

California law sets strict limits on when wages must be paid. Generally, for work performed between the first and 15<sup>th</sup> of a month, wages of non-exempt employees must be paid by the 26<sup>th</sup>. Wages for work performed between the 16<sup>th</sup> and the end of the month must be paid by the 10<sup>th</sup> of the following month. California law permits weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

Check with labor and employment counsel for other related issues.

If you use a check or other "instrument" to pay California employees, those employees must be able to cash that check without having to pay any fee at some place of business in the state—and the name and address of that business must appear on the face of the check (not on the pay stub, but on the check). Be careful even if you use a California bank to issue payroll; many banks will charge a fee to cash a paycheck on an account with that bank even if drawn if the person cashing the check does not have an account with that bank. Direct deposit agreements may be the way to go, but they must be voluntary.

If an employee quits without notice, all accrued wages are due within 72 hours. Employees who provide notice are entitled to receive pay at the time of termination or within 72 hours after notice, whichever occurs later. Fired employees are entitled to their pay check immediately. "Accrued wages" include earned but unused vacation and personal time and maybe so-called floating holidays. It may also include bonus, profit-sharing, or commission payments depending upon the particular arrangement between the employer and the employee.

It is illegal to dock an employee's pay for mistakes or inadvertence causing a monetary loss unless the employer is prepared to prove "gross negligence." The employer who

fails to pay wages when due at termination may also be liable to the employee for "waiting time penalties" — a day's wages for every day the employee has to wait to get paid, to a maximum of 30 days. Nor may an employer unilaterally offset debts owed by an employee to the employer. Stringent requirements must be met before an employer may make any deduction from wages.

#### Meal and rest periods; exempt employees

Non-exempt California employees are entitled to mandatory rest breaks and meal periods. Employees who work 3½ or more hours per day are entitled to a rest break of 10 minutes for each four hours (or major fraction thereof) worked. Employees who work five hours per day are entitled to an uninterrupted meal period of at least thirty minutes duration. Employees who work six or fewer hours per day may waive their right to a meal period. Employees who work between 10 and 12 hours may waive their right to a second meal period only if the first meal period was not waived. Rest periods are considered time worked and must be paid. Meal periods may be unpaid so long as employees are relieved of all work.



Employees who are not provided required rest periods or receive timely (no later than 5 hours) uninterrupted off-duty meal periods are entitled to receive one hour's additional pay for each day the required rest period or meal period is not provided. Thus, employees are entitled to receive two hours additional pay per day if they do not receive both a meal period and required rest period(s).

The California Labor Commissioner historically has taken the position that employers are obligated to ensure non-exempt employees receive the required off duty meal periods. In contrast, under current DLSE enforcement practices an employer is not responsible if a non-exempt employee elects not to take a rest period where one has been authorized or permitted by the employer. The California Labor Commissioner has traditionally required the meal period to commence before the fifth hour of work begins. Two California court of appeal decisions overruled the Labor Commissioner's position and held employers need not police employees to make sure they take their meal periods; these cases are now pending on appeal to the California Supreme Court. The California Supreme Court decided in 2007 that the additional hour of pay is a form of wages so that failure to provide a required meal period or rest period is subject to a three-year statute of limitation.

Determining whether an employee is exempt under California law differs from federal law. Exempt professional, executive or administrative employees must be paid a monthly salary of at least two times the state minimum wage for full-time employment (in 2009, at least \$33,280 per year) and devote more than one-half of their time to performing exempt duties. To qualify as an exempt computer professional, an employee in 2009 must earn at least \$37.94 per hour (this figure changes annually), must be paid on an hourly basis or a corresponding salary so long as overtime hours are paid in addition to the salary, and the employee must meet a stringent duties test.

#### 4. Feeling Stressed? So Do Your Employees.

It is the current anthem of many California employees -- I'll sue you for job stress! In reality, successful private lawsuits by employees for "emotional distress" resulting from the job are rare. The employee must prove that the employer engaged in "extreme and outrageous conduct."

However, most job-stress claims are brought under the employer's workers' compensation insurance. Under workers' compensation law, an employee must show that job-related stress accounts for 51% or more of the employee's disabling psychiatric condition. This criterion leaves plenty of room for employees to prevail on these claims, resulting in escalating insurance premiums for employers. Therefore, California employers should develop preventive strategies for dealing with stress claims.

Speaking of preventive strategies and employee health and safety, California law requires employers to develop and implement an "Injury and Illness Prevention Plan" or IIPP. Cal/OSHA has a good website "Guide to Developing Your Workplace Injury and Illness Prevention Program with checklists for self-inspection" that includes model policy statements at [http://www.dir.ca.gov/dosh/dosh\\_publications/iipp.html](http://www.dir.ca.gov/dosh/dosh_publications/iipp.html).

#### 5. Third Parties Are Prepared To "Help" You.

California is not a "right to work" state. Unions may lawfully negotiate labor agreements requiring employees to pay union dues, a powerful organizing device. Union organizing appears to be on an upswing in the State. The union-free employer must take advantage of its right to lawfully communicate with employees regarding its position on unions, before the unions do the talking.

#### 6. Problems with Drugs and Alcohol.

Unfortunately, California has a huge drug-use problem. When drug users go to work, it becomes the employer's problem. Drug and alcohol abuse cost California employers millions of dollars in diminished productivity, lost time accidents, and even theft. Again, some type of preventive strategy is essential.

It is permissible for an employer to enforce a policy prohibiting the use, sale, possession, or being under the influence of drugs or alcohol while at work. Violators may be subject to discharge. A more difficult question is whether the employer may conduct drug testing to monitor compliance with its drug-free policy.

The employer should be aware that whenever it requires drug testing, it comes face-to-face with the personal lives of its employees. The California Constitution specifically protects the privacy of its citizens. The right to privacy does restrict, in certain respects, the gathering of personal information by private employers. All aspects of drug testing have come under legal scrutiny, including the testing of applicants and

challenges to whether an employer had reasonable suspicion to require substance abuse testing. Therefore, the employer should consult with labor counsel before implementing any drug and alcohol policy.

Pre-employment drug testing generally is lawful if applicants have notice of the testing policy and no medical information revealed during the test is reported to the employer. Additionally, the drug testing program must be justified by a legitimate interest on the part of the employer.<sup>1</sup> Despite California's Compassionate Use Act, which allows the use of medical marijuana, an employer may decline to hire applicants who use marijuana in violation of federal law, even if that use would not be a violation of state criminal law.

Random drug testing is probably not permitted, except of employees who perform safety-sensitive jobs. Absent a compelling interest on the part of the employer, off-duty drug testing also is probably not permitted, especially if the employer's drug testing policy states employees will be tested while on duty. Within the above parameters, all types of drug testing (pre-employment, for-cause, periodic announced, post-accident, rehabilitation, etc.) and testing procedures are allowed under California state law, although some local jurisdictions, such as San Francisco, may have regulations applicable to employees working in the particular jurisdiction. Employers should ensure that any drug-testing policy undergoes review for legal compliance.

Contractors with the State of California must certify that they will provide a drug-free workplace. The contractor must notify all of its employees in writing that the unlawful manufacture, distribution, possession, or use of a controlled substance is prohibited in the contractor's workplace. The contractor must also establish a drug-free awareness program so employees will be informed of the dangers of drug abuse, the consequences for violating the contractor's drug-free workplace policies, and any counseling or rehabilitation programs that are available to employees.

In addition, employees who voluntarily come forward with drug and alcohol problems are entitled to a reasonable leave of absence (which, under the law, need not be paid) to participate

in a bona fide rehabilitation program if they are employed by employer with 25 or more employees. The request for rehabilitation must be made before the employee exhibits job performance problems warranting discharge. And the employer must take steps to safeguard the privacy of an employee who seeks such a leave. Employers should also recognize that employees with alcohol-related issues may be entitled to reasonable accommodation under federal or state disability law.

#### 7. Mandatory Leaves of Absence.

In addition to the rehabilitation leave described above, California employers must provide employees time off for a variety of other purposes. Failure to provide mandatory leaves is unlawful, and may result in significant liability to the employer.

Employees have the right to take time off from work to vote, to serve as a juror, or to be a witness in legal proceedings.

<sup>1</sup> An employee or applicant may not be required to pay the cost of a medical examination required as a condition of employment.





In addition, a pregnant employee must be allowed time off from work for the duration of any disability resulting from pregnancy, childbirth or a related medical condition for a period of up to four months (defined in the regulations as 88 work days for full-time employment). If an employee is disabled by pregnancy or related condition, state law may require her transfer to less strenuous or hazardous positions and/or duties. Time off for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, and recovery from childbirth is covered by California's Pregnancy Disability Leave law ("PDL"). No tenure or length of service requirements exist for pregnancy disability leave, and such leave cannot be counted as California Family Rights Act (CFRA) leave.

Employers of 50 or more full- or part-time employees within a 75-mile radius must comply with the leave provisions of the federal Family Medical Leave Act (FMLA) and the CFRA. California employers may not inquire about the nature or prognosis of the serious health condition necessitating an FMLA-CFRA leave. Under the California Pregnancy Disability Leave law and the CFRA, employees may be entitled to a combined total leave period of up to four months pregnancy disability leave (during which they must be disabled as certified by a doctor) *plus* up to 12 weeks CFRA bonding leave. Unlike the FMLA, California law expressly requires that at the time it approves a CFRA leave request an employer must provide an employee going on CFRA leave with a guarantee of reinstatement to the same or a comparable position at the conclusion of the leave.

Employees must be allowed to use one-half of their sick time accrued during one year to care for an ill parent, spouse or child. Domestic partners and children of domestic partners are also covered by this requirement. Time off for such absences cannot be counted in an absence control policy.

California Labor Code §230.8 mandates employers with 25 or more employees at the same location to provide up to 40 hours per year for parents to visit or participate in school activities, not to exceed 8 hours in any calendar month of the year. All employers, no matter what size, must provide time off for parents of suspended children who are requested to

appear at the school.

Employers with 25 or more employees should also be aware that leave is required for victims (meaning either the employee or his or her immediate family member) of domestic violence or sexual assault who take time off work to obtain help from a court; to seek medical attention; to obtain services from an appropriate shelter, program or crisis center; to obtain psychological counseling; or to participate in safety planning, such as permanent or temporary relocation.

Employers may not discriminate against employees who engage in emergency duty as a volunteer firefighter, a reserve police officer or emergency rescue personnel. Employers with 50 or more employees must allow such personnel to take up to 14 days of leave per year to receive fire or law enforcement training.

Employers must provide a reasonable amount of break time to lactating employees desiring to express milk. The break time is required to run concurrently, if possible, with any break time already provided. In the event it is not possible for the break time for expressing milk to run concurrently with the break time that is already provided to the employee, the break time for expressing milk is unpaid. Employers also are required to provide the use of a room or other location, other than a toilet stall, in close proximity to the employees' work area. The room or other location may include the place where the employee normally works as long as that location meets the law's other requirements. Employers are exempt from the requirements if the employer's operations would be seriously disrupted by providing break time to employees desiring to express milk.

Employees must be granted a leave for official military duty, up to a maximum of 17 days per year. This leave typically covers service in the California National Guard. In addition, employee spouses of military service members may also have leave rights when the service member obtains a furlough from duty. Employers should be mindful that military spouse leave may also be an FMLA-qualifying event although it will not count against an employee's CFRA leave entitlement.

Generally, none of these leaves must be paid unless the employee is exempt. Depending upon the type of leave, employers **may** be able to require an employee to substitute vacation or sick pay for unpaid leave. Employers should consult with legal counsel before making deductions from an exempt employee's salary since doing so could adversely affect exempt status.

Employees and employers often become confused by California's Paid Family Leave program. "Paid family leave" is a misnomer; the program actually provides insurance benefits through the state disability insurance program to employees who take time off from work for specified reasons. The program does not independently provide a right to any form of leave of absence.

#### **8. Paid Sick Leave—San Francisco Employers**

All employees who are employed in the City and County of San Francisco and work more than 56 hours per year, and who have completed 90 days of employment are eligible to accrue paid sick leave under a San Francisco municipal ordinance. Sick leave will accumulate at the rate of one hour of paid sick leave for every 30 hours worked, up to a maximum of 72 accrued hours of sick leave.<sup>2</sup> Accrued paid sick leave carries over from year to year, but is subject

<sup>2</sup> Note: There is a 40 hour accrual cap for employees of small businesses, defined as businesses with fewer than 10 persons working for compensation.

to the 72 hour cap. Once an employee reaches the accrual cap, he or she will not accrue further paid sick leave until some paid sick time is used.

Sick leave may be used for the employee's own illness, injury or medical condition, or the employee may take such leave to provide care or assistance to his or her spouse, registered domestic partner or "designated person," child, parent, legal guardian or ward, sibling, grandparent, or grandchild who has an illness, injury, medical condition, need for medical diagnosis or treatment or other medical condition.

Employees who do not have a spouse or registered domestic partner may designate, in writing and in advance, one person for whom the employee may use paid sick leave when providing aid or care consistent with the policy outlined above.

\* \* \*

#### Do Employers Have Any Rights?

So long as there is not a law or policy to the contrary, the employer may conduct its business in any way it sees fit. As a general rule, it may hire and fire at will, so long as it does so in a non-discriminatory manner, does not violate public policy, and acts according to its personnel policies and practices.

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## Jackson Lewis AB 1825 Training

Since January 1, 2005, California employers with 50 or more employees have been required to provide at least two hours of sexual harassment prevention training to supervisory employees every two years. AB 1825 also requires that California supervisors receive the training within six months of their hire or promotion to supervisor.

Jackson Lewis offers on-site training in our California offices, our client's office or at an alternative location convenient for the client; we also provide electronic, web-based training through our strategic partnership with *Workplace Answers, Inc.* Our comprehensive two-hour program is designed to meet the requirements of AB 1825. All "supervisors," as broadly defined in the law, should attend. (If you have any questions how the definition applies to your workforce, please contact the Firm's California office nearest you.) Certification of attendance will be provided on-site. Training content will include:

- A definition of unlawful sexual harassment under FEHA and Title VII
- FEHA and Title VII statutory provisions and case law principles concerning the prohibition against, and the prevention of, unlawful sexual harassment in employment;
- Types of conduct that constitute sexual harassment;
- Strategies to prevent sexual harassment in the workplace;
- Practical examples, factual scenarios, and hypotheticals based on workplace situations which illustrate sexual harassment, discrimination and retaliation;
- The limited confidentiality of the complaint process;
- Resources for victims of unlawful sexual harassment;
- The employer's obligation to conduct an effective workplace investigation of a harassment complaint;
- Training on what to do if a supervisor is accused of harassment; and
- The essentials of an anti-harassment policy.

Attendees will receive written materials and a certificate of attendance onsite.

For a current list of scheduled AB 1825 training courses visit [www.jacksonlewis.com](http://www.jacksonlewis.com) "Events" or contact your Jackson Lewis attorney for customized training options.

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