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Going to California? What Every Employer Needs to Know

By some estimates, California's economy is now the fourth largest in the world, having recently overtaken Germany, and is surpassed only by the United States, China, and Japan. With favorable weather, a skilled workforce, and a large market (over 40 million residents), California today seems just as enticing as it was to the '49ers who came here during the California Gold Rush.

On the flip side, housing costs are pricing out many Californians, homelessness and crime are an issue in the state's urban cores, public schools are struggling, and the state's finances are stressed.

Despite these headwinds, however, California continues to present a golden opportunity for businesses savvy enough to separate the paydirt from the slag. Becoming an employer in California means taking on some significant responsibilities. What follows is a summary of the most important of those legal responsibilities as you enter the California market:

California Assembly Bill 5 (AB5)

Employers who think to themselves, "We'll just make everyone independent contractors and avoid California's employment laws," should think again. In recent years, California has passed a series of laws (most notably, AB5) meant to discourage employers from classifying workers as independent contractors.

Simply put, if your worker is performing work that is similar to what your business already does, and if your worker doesn't have an independently established trade or business, that worker is an employee and not a contractor. For example, whereas a plumber hired by an engineering firm to fix the toilet in the restroom is a contractor, a "contract" engineer hired by that same firm to provide overflow support on a project is not a contractor.

Overtime

Federal law (the Fair Labor Standards Act (FLSA)) generally only requires overtime when an employee works over 40 hours in a workweek. Not California law. In California, employees are entitled to overtime (time-and-a-half) whenever they work over eight hours in a workday or over 40 hours in a workweek—and for the first eight hours worked on the seventh consecutive day of work in a workweek.

Moreover, employees must receive double-time pay for all hours worked over 12 hours in any workday and for all hours worked in excess of eight hours on the seventh consecutive day of work in a workweek.

Salary Exemptions

Businesses seeking to avoid overtime liability by classifying employees as salary-exempt must contend with California's exemption rules, which are much more stringent than the FLSA. Generally speaking, a position must meet both a minimum salary and minimum duties test to qualify as exempt. California's minimum salary requirement is set at two times the state's minimum wage for full-time employment. Currently, that number is \$64,480, and it is subject to annual adjustment based on changes in California's minimum wage (which, as of 2024, will adjust annually for inflation).

As for the minimum duties requirement, California requires that an exempt employee spend more than half his time performing exempt duties in order to qualify as exempt. In other words, a filing clerk paid a salary of \$75,000 cannot be treated as exempt from overtime in California.

Meal and Rest Breaks

California has specific meal and rest period rules that have become the source of constant—and lucrative—class action litigation for plaintiffs' attorneys. In brief, nonexempt employees are entitled to one unpaid, duty-free meal period of at least 30 minutes for every five hours worked. In addition, nonexempt employees are entitled to one 10-minute paid rest break for every four hours worked or a major fraction thereof. Employers must completely relinquish

control of employees on a break (i.e., even employees on a 10-minute rest break must be permitted to leave the premises), and these breaks cannot be combined with one another.

An employee who does not receive a mandated meal or rest period is entitled to a statutory penalty equal to one hour's pay for each day the meal or rest break is denied. There are exceptions to these rules, but they are narrow, and employers who do not ensure strict compliance can open themselves up to costly litigation.

Drug Testing

Pre-employment drug screening is permitted, provided a conditional offer of employment has been made. In almost all instances, California prohibits random drug testing of employees and requires employers to have "reasonable suspicion" of impairment due to drugs or alcohol before requiring current employees to submit to a test. California now prohibits employers from testing for nonpsychoactive cannabis metabolites, and employers may not terminate or otherwise discriminate against an employee for off-duty use of marijuana.

Paid Sick Leave

California has a statewide paid sick leave law which generally requires employers to provide either a lump sum of three days of paid sick leave per year or at least one hour of paid sick leave for every 30 hours worked, up to a minimum cap set by law. In addition, California cities and counties are authorized to establish their own, more generous paid sick leave rules, as many already have. Employers operating in California should carefully check which rules they are subject to based on their location and where their employees are performing work.

Paid Vacation

While California does not (yet) mandate paid vacation for employees, companies that offer this benefit must comply with state law. Specifically, paid vacation benefits constitute "wages," must accrue over time (i.e., no "lump sum" accruals), and any

accrued but unused vacation must be paid out at termination of employment. Employers may cap accruals, but such caps generally cannot be lower than 1.25 to 1.5 times an employee's annual vacation entitlement.

"Unlimited" paid vacation policies are starting to appear in some workplaces, but employers are strongly urged to avoid these policies as they have not been explicitly sanctioned by California's labor commissioner or the courts, and they very likely violate California's strict accrual and pay-out rules.

Workplace Harassment

California has some of the strictest workplace harassment laws in the country. "Stray remarks" or "harmless jokes" that under federal law or in other states might not create an unlawful hostile work environment can create liability in California. If the alleged harasser's conduct simply makes it "more difficult" for the complaining employee to perform his job, that can be sufficient to support a workplace harassment claim. Moreover, unlike federal law, California laws make employees individually liable for their harassing conduct.

Covenants Not to Compete

Outside of very limited circumstances (involving the sale of a business), employee noncompete and customer non-solicitation agreements are per se unenforceable. Moreover, the simple act of demanding an applicant or employee sign such an agreement as a condition of employment is itself unlawful. California employers can protect their proprietary information and trade secrets by having employees sign nondisclosure agreements, but such documents must be carefully drafted so as not to violate California's strict rules against noncompete agreements.

California Family Rights Act (CFRA)

Similar to the federal Family and Medical Leave Act (FMLA), the CFRA provides eligible employees with up to 12 weeks of unpaid, job-protected leave to care for their own serious health condition,

to care for a family member with a serious health condition, or to bond with a new child. Whereas the federal FMLA applies to any employer with 50 or more employees within a 75-mile radius, the CFRA applies to any employer with five or more employees, period. In other words, if you are an out-of-state business with 10 employees that opens a two-employee outpost in California, those California employees are covered by the CFRA.

“Small Necessities” Leaves

If your employees need time away from work other than for sickness or vacation, there’s a good chance California has a law covering it. California has a variety of “small necessities” leave laws providing job-protected leave (generally unpaid) for reasons ranging from school activities and voting to volunteer civil service and bereavement. California also requires employers to provide generous paid leaves to employees who are bone marrow or organ donors (up to 30 days in some circumstances).

Pay Transparency

Seeking to eliminate pay disparities based on race, ethnicity, and sex, beginning in 2023, California will require that employers with at least 15 workers include pay ranges in all job postings, whether external or internal. Moreover, employers of any size must provide pay scale information to applicants upon request, and must also upon request provide employees with the pay scale for their current position. Similar to federal EEO-1 reporting requirements, larger companies (100 or more employees) will have to annually provide detailed pay data to California’s Civil Rights Department, breaking down pay by race, ethnicity, and sex.

Final Pay Rules

Finally, in California if you fire an employee, you must pay them their final pay immediately (including all accrued but unused vacation). In other words, when you terminate an employee, have their final paycheck in hand. Employees who resign and give at least 72 hours prior notice must be paid at the time of quitting. Otherwise, they must be paid within 72 hours of quitting.

These are just some of the many employment rules and regulations facing businesses that choose to enter the California market. While it may seem daunting, with cautious planning and an assist from competent legal counsel, companies entering the California market can thrive in the Golden State. For more information on California employment law or any other labor and employment law issue, please contact the author of this article or any attorney with Frost Brown Todd's [Labor and Employment](#) practice group.

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