Employment Law Basics & COVID-19 Reopening Regulations

Note: This guide provides some general guidance. Each business owner must consider whether any given option is appropriate for them and carefully review the terms of any loan or other agreement. This document does not constitute legal advice and cannot substitute for expert consultation.

Discrimination and Harassment Prevention

The Fair Employment and Housing Act (FEHA) prohibits discrimination and harassment based on a protected category. It applies to public and private employers, labor organizations, and employment agencies with five or more employees. Below is chart that includes the various protected categories.

<table>
<thead>
<tr>
<th>Age (over 40)</th>
<th>Marital status</th>
<th>Sex</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>• including pregnancy, childbirth, breastfeeding and related medical conditions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• male or female</td>
</tr>
<tr>
<td>Ancestry</td>
<td>Genetic information</td>
<td>Gender identity</td>
</tr>
<tr>
<td>Color</td>
<td>Military and/or veteran status, includes federal reserve</td>
<td>General Expression</td>
</tr>
<tr>
<td>Religious creed</td>
<td>National origin</td>
<td>Sexual orientation</td>
</tr>
<tr>
<td>• including religious dress and grooming practices</td>
<td>• including language use restrictions</td>
<td></td>
</tr>
<tr>
<td>• includes one who requests an accommodation</td>
<td>• including non-citizen driver’s license</td>
<td></td>
</tr>
<tr>
<td>Disability (mental and/or physical)</td>
<td>Race</td>
<td>Victims of domestic violence or sexual assault, stalking</td>
</tr>
<tr>
<td>• Includes protected hairstyles</td>
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</tr>
</tbody>
</table>

What does the Fair Employment and Housing Act (FEHA) require?
- FEHA requires employers to conduct harassment prevention training. All employers with **5 or more employees** must provide at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all non-supervisory employees and at least 2 hours of classroom or other effective interactive training and education regarding harassment to supervisory employees and managers within six months of their assumption of the position. Also, the training must be provided once every two years.
What constitutes discrimination?
- Discrimination under the FEHA is established when an employee can show that an employee’s membership in a protected class was a substantial motivating factor in denying a benefit. This can be as extreme as termination of an employee, to something like giving an employee a less desirable shift.

What is a “whistleblower”?
- Under CA law, a whistleblower is “An employee [who] discloses information to a government or law enforcement agency, person with authority over the employee, or to another employee with authority to investigate, discover, or correct the violation or noncompliance, or who provides information to or testifies before a public body conducting an investigation, hearing or inquiry.
- In CA, a whistleblower is protected if the employee has reasonable cause to believe that the information discloses:
  - A violation or non-compliance with a state or federal statute
  - A violation/noncompliance with a local, state or federal rule or regulation, or
  - Unsafe working conditions or work practices in employment or place of employment.
- Employers are prohibited from retaliating against whistleblowers.

What is the California Equal Pay Act?
- Prohibits an employer from paying an employee a wage rate that is less than what it pays employees of the opposite sex, or of another race/ethnicity for “substantially similar work”.
  - A composite of skill, effort, and responsibility performed under similar working conditions.
  - Does not require the employee work at the “same establishment.”
  - Prohibits wage differences based on race, ethnicity, or sex
- Prohibits retaliation against employees who seek to enforce the law.
- Prohibits employers from making policies that employees cannot disclose, discuss, or inquire about their co-worker’s wages.
- Prohibits employers from relying on an employee’s prior salary to justify sex, race, or ethnicity-based pay difference.
- Employers are required to maintain wage and employment-related records for three years.
  - Note: It is important to keep wage and employment related documents for three years under the Equal Pay Act.
**Wage and Hour Basics**

What is the California minimum wage?

<table>
<thead>
<tr>
<th>Date of Increase</th>
<th>Employers with 25 Employees or Less</th>
<th>Employers with 26 Employees or More</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 2021</td>
<td>$13.00/hour</td>
<td>$14.00/hour</td>
</tr>
<tr>
<td>January 1, 2022</td>
<td>$14.00/hour</td>
<td>$15.00/hour</td>
</tr>
<tr>
<td>January 1, 2023</td>
<td>$15.00/hour</td>
<td></td>
</tr>
</tbody>
</table>

*Note: Many localities around California, counties and cities have their own higher minimum wage. If your employees work in a particular city, you should verify what minimum wage applies. Local minimum wages do not apply to exempt employee’s salary requirements.*

What is a wage statement?
- California requires that all employees receive itemized pay statements (pay stubs) for each pay period. These are all the items that need to be included on a wage statement. Even if you use a third-party payroll company, you should review the wage statements to verify all the information required is included and accurate. Please review [Labor Code Section 226](https://www.labor.ca.gov/inforesources/compensation/minimumwage/minimumwage.htm) for the wage statement requirements, Labor Code 204 for the pay period requirements, and Labor Code 201.3 for regulations regarding temporary services employers.

What are the rest break requirements?
- Employers must “authorize and permit” rest breaks of:
  - “Net” 10-minute rest break for each four hours worked “or major fraction thereof”
  - “Major fraction” means a fraction greater than one half, that is, any amount of time in excess of two hours
  - No rest break is owed for workdays less than three and one-half hours in length
- Rest breaks are paid time
- Employees must not be “on call” in any manner.

What are the meal break requirements?
- Employer must provide 30-minute duty free meal periods.
- You cannot employ someone for a work period of more than 5 hours without providing a 300-minute free meal period.
- Employer must not impede or discourage employees from using an uninterrupted 30 minutes for the employee’s own purpose.
• Meal periods are UNPAID. Employees must clock out.
• Employers must provide a second 30-minute meal break to employees who have worked in excess of 10 hours in a workday.

<table>
<thead>
<tr>
<th>Hours of Work</th>
<th>Meal Periods and Rest Breaks</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 3.4 (less than 3.5)</td>
<td>0</td>
</tr>
<tr>
<td>3.5 to 4.0</td>
<td>One 10-minute paid rest break</td>
</tr>
<tr>
<td>More than 4.0 (i.e. 4.1) up to 5.0</td>
<td>One 10-minute paid rest break</td>
</tr>
<tr>
<td>More than 5.0 (i.e. 5.1) up to 6.0</td>
<td>One 10-minute paid rest break and one 30-minute unpaid meal period (unless first meal period is mutually waived)</td>
</tr>
<tr>
<td>More than 6.0 (i.e. 6.1) up to 10.0</td>
<td>Two 10-minute paid rest breaks and one 30-minute unpaid meal period</td>
</tr>
<tr>
<td>More than 10.0 (i.e. 10.1) up to 12.0</td>
<td>Three 10-minute paid rest breaks and two 30-minute unpaid meal periods (unless second meal period is mutually waived)</td>
</tr>
<tr>
<td>More than 12.0 (i.e. 12.1) up to 14.0</td>
<td>Three 10-minute paid rest breaks and two 30-minute unpaid meal periods</td>
</tr>
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**Leave Laws**

**What are the Leave Laws in California?**

- Family and Medical Leave Act (FMLA)
- Emergency Rescue Personnel Leave
- California Family Rights Act (CFRA)
- Bone Marrow and Organ Donation Leave
- Pregnancy Disability Leave Law (PDL)
- School Activities Leave
- Paid Sick Leave
- Military Leave
- Leave of Victims of Domestic Violence and Sexual Assault
- Leave to Vote
- Leaves for Victims of Certain Crime Jury Duty/Subpoena Leave

**What is the California Family Rights Act?**

- Part of California’s Fair Employment and Housing Act (FEHA).
- Applies to employers with 5 or more employees.
- Allows eligible employees to take up to 12 work weeks of job-protected leave.
- CFRA expressly prohibits an employer from refusing to hire, discharging, suspending, or discriminating against an employee in any manner for requesting CFRA leave.
- Like federal Family Medical Leave Act, but more expansive.
• Eligible employees can take the leave for one or more of the following reasons:
  o The birth of a child or adoption or foster care placement of a child
  o To care for an immediate family member with a serious health condition
  o When the employee is unable to work because of a serious health condition

**COVID-19: Reopening California**

What are the new workplace requirements?
• Cal/OSHA COVID-19 Emergency Temporary Standards
  o Establish, implement and maintain an effective written COVID-19 Prevention Program
  o Provide training and instruction pertaining to COVID-19
  o Report COVID-19 outbreaks
  o Maintain certain records of and track all COVID-19 cases in the workplace.
• Sets forth requirements for when employees need to wear masks and related COVID-19 protocols
• **The basic rule** under the ETS is vaccinated employees do not have to wear masks and vaccinated employees do, though there are exceptions to both. But per the ETS, if an employer is going to allow an employee to not wear a mask, then the employer must confirm the employee’s vaccination status.
  o ETS requires employers to provide employees who are not fully vaccinated with face coverings of at least 2 layers or more and ensure they are worn over the nose and mouth when indoors, in vehicles and when required by orders from the CDPH.

What are acceptable options for vaccination documentation under the ETS?
• Employees provide proof of vaccination, including a vaccine card or health care document showing vaccination status, and the employer maintains a copy.
• Employees provide proof of vaccination and the employer maintains a record of the employees who presented proof but not the vaccine record itself.
• Employees self-attest to vaccination status and the employer maintains a record of who self-attests.
  o Note: Some of the options for documentation have additional compliance obligations related to confidential medical information.
• **Alternative**: require all employees to comply with requirements such as face coverings and not request vaccination status.

Can an employer require employees to receive the FDA-approved COVID-19 vaccine?
• Yes, if certain criteria are met, including:
  o The employer may not discriminate against or harass employees or job applicants on the basis of protected characteristics.
  o The employer must provide reasonable accommodations as required by applicable law.
The employer may not retaliate against anyone for engaging in protected activity such as requesting a reasonable accommodation

Can an employer ask about an employee’s vaccination status?

- Department of Fair Employment and Housing (“DFEH”) has provided guidance about obtaining proof of an employee’s vaccination status:
  - May ask for proof of vaccination if using a third-party administrator.
  - Requests should instruct employees or applicants to omit any medical information from such documentation.
  - Information on regarding vaccination status must be kept confidential.

Issues with Return to Worksite

What if an employee refuses to return?

- Request the employee provide reason(s), in writing.
- Consider the reason.
- Determine whether any state/local or federal leave laws would apply.
  - FMLA/CFRA, Families First Leave, Sick Leave, local leaves
- If protected leave is not applicable, should you consider a disability accommodation analysis?
- If so, engage in the interactive process.
- Consider an unpaid leave of absence, may be eligible for benefits administered by the EDD.
- If there are safety concerns, discuss concerns with the employee and advise of all safety protocols and policies the company has put in place

Are temperature checks and medical inquiries permitted?

- The EEOC has indicated that temperature checks and medical inquiries such as whether an employee has been exposed to someone with COVID-19 may be acceptable in limited circumstances to ensure the safety of the workplace. The Department of Fair Employment and Housing has provided similar guidance.
- Employees who are not fully vaccinated and exhibit COVID-19 symptoms must be offered testing by their employer.

Compensation for medical injuries?

- Compensation for undergoing medical inquiries or temperature checks
  - Reevaluate timekeeping protocols
- Reporting time pay for employees sent home after medical inquiries or temperature checks
General Employer Resources

Labor Commissioner’s Office – Frequently Asked Questions
   – https://www.dir.ca.gov/dlse/dlse-faqs.htm

DFEH Fair Chance Act: Criminal History and Employment FAQ

DFEH Posters, Guides and Fact Sheets
   – https://www.dfeh.ca.gov/Posters/?openTab=1

Jackson Lewis California Workplace Law Blog
   – https://www.californiaworkplacelawblog.com/

COVID-19 Employer Resources

LWDA Resources for Employers and Workers

EDD Coronavirus 2019 Web Page:

Cal OSHA COVID-19 Guidance and Resources
   – https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html

Jackson Lewis COVID-19 Workplace Law Advisor
   – https://www.covid19workplacelawjl.com