



# Navigating the Murky Waters of Employment/Wage & Hour Laws\*

MPC Legal  
601 S. Glenoaks Blvd., Suite 201  
Burbank, CA 91502  
Tel: (818) 528-8700  
Fax: (818) 528-8704  
[www.mpclegal.com](http://www.mpclegal.com)

**Edgar Martirosyan**, Esq., *Managing Attorney* ([em@mpclegal.com](mailto:em@mpclegal.com))  
**Azniv Ksachikyan**, Esq., *Of Counsel* ([ak@mpclegal.com](mailto:ak@mpclegal.com))

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# OBJECTIVES

- Understand the “at-will” employment relationship
- Understand the “limitations” placed on the “at-will” relationship
  - Statutory schemes; contract and tort laws
- Case studies – how does it all apply in the practical world?
- This presentation barely scratches the surface (e.g., not covered: federal laws, collective bargaining agreements, workers’ compensation, California Unfair Competition Laws, etc.)



# AT-WILL EMPLOYMENT

- In California, employment relationships are presumed to be “**at-will**”
  - Include express provision re “at-will employment” status in handbook or manual (but not conclusive)
- **Contractual employment relationships**
  - **Express Contract (written or oral)**
    - Specified term
      - Can only be terminated for (a) willful breach of duty; (b) habitual neglect of duty; and (c) continued incapacity to perform duty
      - Length of employment must be specified
      - “Good cause” for discharge and mistaken belief of breach are no defense
    - Good cause termination
      - Mutuality not required; for example, contract may allow employee to leave “at will,” but to limit employer’s ability to terminate the relationship to “good cause”
      - “Good Cause” can be determined by the parties themselves – can be broad or narrow
  - **Implied-in-fact-contract:** terms manifested by conduct; limit on at-will termination
    - In absence of express agreement of “at-will” employment, presumption is rebuttable with showing the existence of an implied-in-fact promise not to discharge without good cause
    - Implied-in-fact terms can be developed over the course of the employment relationship and are not necessarily fixed by the parties’ understanding at the time of employment



# FEHA – DISCRIMINATION - PROTECTED CLASSES

- California Fair Employment Housing Act (“FEHA”) applies to public and private employers, labor organizations and employment agencies
- FEHA prohibits an employer from discriminating against a protected individual based on:
  - Race, religious creed (including religious dress and grooming practices), color, national origin, ancestry, physical or mental disability, medical condition (cancer), genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, military and veteran status, age (if 40 or over); or pregnancy, childbirth, breastfeeding or related medical conditions of any female employee
- **Employer** – any person regularly employing **five or more employees**
  - Five or more employees includes part-time employees, but not independent contractors
    - **Exception:** Harassment claims may be asserted against any person or entity employing one or more persons
  - Employees of the entity are not personally liable for FEHA discrimination
    - **Exception:** Employees may be liable for their own acts of proscribed harassment
- **Employee** – any individual under the direction and control of an employer “under any appointment or contract of hire or apprenticeship, express or implied, oral or written”



# FEHA – DISCRIMINATION CLAIMS – BUSINESS PRACTICES

- These state laws barring discrimination apply to all business practices, including:
  - Advertisements
  - Applications, screening, and interviews
  - Hiring, transferring, promoting, termination, or separating employees
  - Working conditions, including compensation
  - Participation in a training or apprenticeship program, employee organization or union
- Any person – employee, intern, volunteer, applicant or former employee
- Out-of-state employees working for a California employer covered by FEHA
- Immigration status is **irrelevant** for purposes of liability under these laws
- Fair Chance Act – prohibits employers with five or more employees from asking about a job applicant's conviction history before making a conditional job offer and requires specific procedures for considering an applicant's criminal history after a conditional job offer. Blanket statements in job advertisements indicating that an employer will not consider anyone with a criminal history, such as “No Felons” or “Must Have Clean Record,” violate the Fair Chance Act's requirement that employers consider an applicant's criminal history on an individual basis, as well as any mitigating information provided by the applicant
  - In 2021 DFEH announced it will identify and correct violations of the FCA, by conducting mass searches of online job advertisements for statements that violate the FCA



# FEHA – DISCRIMINATION CLAIMS

- **Disparate Treatment** – intentional discrimination on prohibited grounds, i.e., treating some people less favorably than others because of a protected characteristic
  - Discrimination must be the “substantial motivating factor” in the employer’s actions towards plaintiff
- **Disparate Impact** – employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by a business necessity
  - Plaintiff is challenging specific personnel practices and policies
  - Not required to show proof of intent to discriminate
- **Failure to Accommodate** – arise out of employers’ statutory duty to accommodate specified characteristics, including religious beliefs, physical and mental disabilities, and certain conditions related to pregnancy and childbirth



# FEHA – DISABILITY DISCRIMINATION CLAIMS (1)

- **Disability**

- FEHA prohibits employment discrimination based on “**physical disability, mental disability [and] medical condition . . .**”
  - Includes employer’s **perception of disability**: employee who is “erroneously or mistakenly believed” to have or have had a physical or mental condition that limits a major life activity
- Disability only need “limit” a major life activity (as opposed to “substantially limit”)
  - Limit = “makes the achievement of the major life activity difficult” compared to a “normal” or “average” person without the impairment
- **Major life activity** – physical, mental and social activities and working
  - Basic life functions, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working (especially activities that affect a person's ability to be employed or promoted)



# FEHA – DISABILITY DISCRIMINATION CLAIMS (2)

- **Physical disability:** any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that both:
  - Affects one or more of the following body systems: neurologic, immunological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine; and
  - Limits an individual's ability to participate in major life activities
  - **Examples:** chronic or episodic conditions such as HIV/AIDS; hepatitis; epilepsy; seizure disorder; diabetes; multiple sclerosis and heart disease
- **Mental disability:** “any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities” that “limits a major life activity”
  - **Examples:** clinical depression; bipolar disorder; emotional or mental illness; intellectual or cognitive disability; specific learning disabilities; autism spectrum disorders; schizophrenia; chronic or episodic conditions (PTSD and OCD)
- **Medical condition**
  - Cancer (health impairments related to or associated with a diagnosis of cancer or a record or history of cancer); or
  - Genetic characteristics





# FEHA – DISABILITY DISCRIMINATION CLAIMS (3)

- **Interactive Process**

- Employer must engage in a “timely, good faith interactive process ... in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.”
- Employer **must initiate** the interactive process when:
  - The employee or applicant with the known physical or mental disability or medical conditions requests a reasonable accommodation;
  - The employer becomes aware of the need for accommodation through observation or third party; or
  - The employer becomes aware of the possible need for accommodation because the disabled employee has exhausted leave under the fed/state laws and the employer’s leave policy, and the employee or employee's health care provider indicates that further accommodation is necessary for recuperative leave or to allow the employee to perform essential job functions



# FEHA – DISABILITY DISCRIMINATION CLAIMS (4)

- **Reasonable Accommodation (affirmative duty to accommodate)**
  - Make reasonable accommodation for the known disabilities of applicants and employees to enable them to perform a position's essential functions, unless doing so would produce undue hardship to the employer's operations
  - **Examples:** Making facilities readily accessible to and usable by disabled individuals (e.g., providing accessible break rooms, restrooms, training rooms or reserved parking places, acquiring or modifying furniture, equipment or devices or other similar adjustments); job restructuring; offer part-time or modified work schedule; reassigning to a vacant position; providing qualified readers; allowing assistive animals at work site; permit employee to work from home; provide unpaid leave for treatment and recovery
- FEHA does not prohibit refusing to hire or discharging an employee with a physical or mental disability who is “unable to perform his or her **essential duties** even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations”



# FEHA – ADVERSE EMPLOYMENT ACTION

- **Adverse Employment Action**– kind, nature or degree of action against an employee that is enough to state a claim
  - The discrimination must adversely and materially affect the terms, conditions or privileges of Plaintiff's employment
  - **Examples:** refusing to hire or employ; refusing to select for a training program leading to employment; discharge from employment; discharge from a training program leading to employment; transfer of job duties and undeserved performance ratings; reducing employee's authority; disadvantageous transfer; refusal to promote; demotion with pay cut; loss of benefits and significantly diminished material responsibilities



# FEHA – REMEDIES IN DISCRIMINATION CASES

- Under FEHA, no caps on the compensatory and punitive damages a plaintiff employee may recover for discrimination and harassment cases
- **Remedies:**
  - Back pay (past lost earnings)
  - Front pay (future lost earnings)
  - Hiring/Reinstatement
  - Promotion
  - Out-of-pocket expenses
  - Policy changes
  - Training
  - Reasonable accommodation(s)
  - Damages for emotional distress
  - Punitive damages
  - Attorney's fees and costs



# FEHA – RETALIATION CLAIMS (1)

- Unlawful employment practice to retaliate against persons who **participate** in FEHA proceedings or **oppose** conduct that FEHA proscribes
  - Elements
    - Plaintiff protected by FEHA
      - Former employees protected
    - Defendant subject to FEHA
    - **Plaintiff engaged in protected activity**
    - Adverse employment action
    - Retaliatory intent
    - Harm
    - Exhaustion of administrative remedies



## FEHA – RETALIATION CLAIMS (2)

- Employee need not prove the employer's practice was in fact illegal. Opposing a practice proscribed by FEHA is protected if the employee reasonably and in good faith believes the practice was unlawful
- Employee must have communicated the belief to the employer (notice)
- Employee must show that the adverse employment action resulted from the protected activity (causation)
- Examples where courts found protected activity:
  - Plaintiff reported that her assistant had complained of sexual harassment and that plaintiff and others had seen inappropriate stares and hand gestures
  - Employee reported that he believed that he was being subjected to "some kind of weird retaliation" submitted a letter
  - Employee told employer that an altered compensation plan discriminated on the basis of age
- Examples of where adverse action (retaliation) was found:
  - Four months after complaining of discrimination, plaintiff was given a negative review that accused her of incompetence, insubordination and dishonesty, the latter of which could be a "career-ender." The adverse action requirements was met, even though plaintiff quit and was not fired



# WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY (“Tameny” Claim) (1)

- Exception to the presumption of “at-will” employment; tort and contract cause of action
- Employee has common law right to sue for wrongful termination he/she is **fired or subjected to other adverse action** for unlawful reason(s) or a purpose that violates public policy
- Public policy: constitutional or statutory provision; “inures to the benefit of the public;” well established at the time of discharge and substantial/fundamental
- Any of the following activities will support a *Tameny* claim if plaintiff was subjected to an adverse employment action as a result:
  - Refusing to violate a statute
  - Performing a statutory obligation
  - Exercising a statutory right
  - Reporting a statutory violation
- The employee need not prove that the employer actually violated the law; but only that adverse employment action was taken against her for reporting her “**reasonably based suspicions**” of illegal activity
- No actual or constructive discharge required; demotions and suspensions without pay are actionable
- Tort damages (not limited to remedies provided in the underlying statute)



# WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY (“Tameny” Claim) (2)

- Examples of policies that are for the benefit of the “public”:
  - Employment discrimination
  - Violation of family or medical leave laws
  - Whistleblowing (reporting unlawful activities by employer)
  - Employee refuses to sign covenant not to compete
  - Terminating employee for breaching noncompete with former employer
  - Refusing to release employer from liability for intentional acts
  - Terminating employee so as to avoid paying accrued commission
  - Advocating appropriate medical care for patient: a physician-employee may not be terminated or otherwise penalized for “advocating for medically appropriate health care” for his or her patient





# CONVENTIONAL TORT CLAIMS

- Employer may be sued based on conventional tort claims (outside of FEHA) with respect to claims arising from workplace disputes
  - Defamation
  - Intentional infliction of emotional distress (limitations – WC)
    - Subject to liability if your extreme and outrageous conduct intentionally or recklessly causes severe emotional distress or bodily harm to another
  - Negligence (negligent infliction of emotional distress) (limitations – WC)
  - Fraud
  - Negligent misrepresentation
  - Assault and battery (respondeat superior liability)
  - False Imprisonment
  - Invasion of privacy (constitutional claim)
- Personal liability: employer, supervisors and coworkers
- Broader remedies: emotional distress and punitive damages



# “WHISTLEBLOWER” STATUTES (1)

- Numerous California statutes protect “whistleblowers” from retaliation
- **LABOR CODE §1102.5**
  - forbids retaliation **if the employee disclosed, or the employer believes he/she disclosed or may disclose**, information to certain government agencies, to those with authority over the employee or authority to investigate, discover, or correct
  - the **employer’s “violation or noncompliance”** or
  - for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry
  - if the employee has **reasonable cause to believe** that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties
- **Whistleblower's motivation for reporting irrelevant:** all the law requires is that the whistleblower have a reasonable suspicion of a violation constitutional, statutory or regulatory provision has occurred
- **Actual violation is irrelevant:** whether employer is actually violating a law is irrelevant
- **Confidential documents:** whistleblower may be entitled to use confidential company documents to expose employer wrongdoing
- **Remedies:** reinstatement with backpay and benefits; pay employee's actual damages; and pay a civil penalty of \$10,000 per employee for each violation
- **Attorneys' Fees**



# “WHISTLEBLOWER” STATUTES (2)

- **False Claims Act: Defrauding the Government**
  - *Quit Tam Action*
  - Private party called a Relator brings an action on the government's behalf. The government is considered the real plaintiff
- **Federal False Claims Act (31 U.S.C. § 3729 et seq.)**
  - **3729(a)(1)(A)** -Any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”
    - Knowingly – the person has actual knowledge, acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information
  - **3729(a)(1)(B)** -Any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”
  - **Liability:** civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person and costs of the civil action
  - **Relator:** If the government succeeds, the relator receives a share of the award.
- **California False Claims Act (Cal. Gov. Code § 12650 et seq.)**
  - Tracks federal statute (MediCal v. Medicare)



# “WHISTLEBLOWER” STATUTES (3)

- **Health & Saf. C. § 1278.5**

- Health care facilities (e.g., hospitals, etc.) may not discriminate or retaliate against any employee (or patient or member of its medical staff) for presenting a grievance or complaint to an accrediting agency or other governmental entity, or for cooperating in an investigation or proceedings related to the quality of care, services or conditions at the facility
- The statute also prohibits retaliation against an employee who complains to an employer or to a government agency about unsafe patient care or conditions
- **Persons protected against discrimination or reprisal:** “patients, nurses, members of the medical staff, and other health care workers” who “notify government entities of suspected unsafe patient care and conditions”
  - Persons who present “a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity”
  - Persons who have “initiated, participated, or cooperated in an investigation or administrative proceeding related to, the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity”
- **Presumption is against the employer:** “rebuttable presumption” that the employer unlawfully retaliated “against an employee ... if responsible staff at the facility” knew that the employee filed a grievance or complaint about healthcare flaws and the employer then executed an adverse employment action against the employee “within 120 days of the filing of the grievance or complaint”



# “WHISTLEBLOWER” STATUTES (4)

- **Labor Code § 6310**

- Prohibits employers from retaliating against employees who:
  - Make oral or written complaints regarding employee safety or health to government agencies, their employer or their representative;
  - Institute or testify in safety or health related proceedings; or
  - Refuse to perform work in an unsafe or unhealthy environment that creates a real or apparent hazard to the employee or the employee's co-workers
- **Remedies:** reinstatement and reimbursement for lost wages and work benefits



# LEAVE LAWS (1)

- These laws are not mutually exclusive
- **Examples of types of leaves guaranteed by statute:**
  - **Illness or injury-based leaves**
    - California Family Rights Act (CFRA)
    - California Pregnancy Disability Leave Law (PDLL)
  - **Leaves to care for family members**
    - California Family Rights Act (CFRA)
    - California Paid Family Leave (PFL)
  - **Labor Code Section 248.6**



# LEAVE LAWS (2)

- **California Family Rights Act (CFRA)**
  - Directly employs 5 or more persons
  - Leave allowed for any combination of the following reasons:
    - a serious health condition of employee
    - a serious health condition of a spouse, domestic partner, parent, minor child, dependent adult child, adult child, child of domestic partner, grandparent, grandchild and/or sibling
    - the birth of a son or daughter
    - the adoption and placement of a son or daughter for foster care
  - “Serious health condition” means “an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse”
  - Eligibility: employed at least 12 months as of the date leave commences and employed at least 1250 hours of service during 12-month period commencing b/f the leave
  - If both parents of a new child work for the same employer, each parent is entitled to up to 12 weeks of leave
  - Employers may pay their employees while taking CFRA leave, but employers are not required to do so
  - Notification and posting requirements explaining family and medical leave rights to employees
  - Unlawful employment practice for a covered employer to interfere with, restrain or deny the exercise of, or the attempt to exercise, any rights under CFRA



## LEAVE LAWS (3)

- **California Pregnancy Disability Leave Law (PDLL)**

- Five or more employees
- Employer is required to provide:
  - leaves of up to four months due to pregnancy, childbirth or related medical condition;
  - transfer affected employees under appropriate circumstances; and
  - reasonably accommodate employees for conditions related to pregnancy, childbirth or related medical condition
- Following PDLL leave, an employee may have a full 12 workweeks of CFRA leave available (e.g., for childcare leave) less any CFRA leave taken for reasons other than pregnancy disability during the leave year in question

- **California Paid Family Leave (PFL)**

- Provides for payments from the State Disability Fund for wage loss of employees who take time off work to care for a seriously ill child, spouse, parent, grandparent, grandchild, sibling or domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption
- Applies regardless of whether employee qualifies for CFRA leave





# LEAVE LAWS (4)

- **Labor Code Section 248.6 – 2022 COVID-19 Supplemental Paid Sick Leave (CPSL)**
  - Applies to employers with 26 or more employees and to certain public entities
  - Covers all employees
  - In effect through September 30, 2022
  - Provides full-time employees up to 80 hours of COVID-19 related paid leave,
    - First Bank of Leave: With up to 40 of those hours if the employee tests positive for or is caring for a family member who tests positive for covid
    - Second Bank of Leave: With up to an additional 40 of those hours available only for other covered reasons (quarantine or isolation, vaccine appointments or recovery, experiencing COVID symptoms and seeking medical diagnosis, closure of school or place of care for reasons related to COVID-19 on the premises)
  - Employee determines how many of the CPSL hours they need to use and whether he/she will use some other paid or unpaid leave
  - Offset; rate of pay calculation; notice, posting and paystub requirements



# WAGE AND HOUR – CLASSIFICATION

- IWC and Labor Commissioner
- Employment Relationship (W2 or 1099)
  - Also applies to nonresidents of CA who perform any work in the state
- Salaried Employees (Exempt)
  - Double state minimum wage
  - Independent judgment
  - Primary duties: executive, administrative or professional tasks
- Other Exemptions
  - Outside salespersons; farm workers; certain categories of drivers; etc.



# WAGE AND HOUR – CLASSIFICATION

- **Independent Contractors**

- AB 5 (AB 2257) – January 1, 2020, worker will be presumed to be an employee unless employer can show that the work meets the requirements of *Dynamex*
- *Dynamex Operations West, Inc. v. Superior Court (Dynamex)* – the ABC Test
  - (A) *Is the worker free from the control and direction of the hiring entity in connection with the performance of the work?*
  - (B) *Does the worker's "job" fall outside the hiring entity's core business?*
  - (c) *Does the worker have an established trade or business?*
- Effects of these requirements for health care entities
  - Doctors (physicians, surgeons, dentists, podiatrists, veterinarians, psychologists) **Exempt** – *Borello* multi-factor test still applies!
    - Right to discharge at will? Whether worker is engaged in a distinct occupation or business? Kind of occupation? Skill required? Who supplies the instrumentalities, tools and place of work? Length of time for which the services are to be performed? Method of payment? Time-based or job-based? Is worker part of the regular business of the principal? Whether the parties believe they are creating an employee-employer relationship?
  - CAUTION: physical therapists, nurses are NOT exempt



# WAGE AND HOUR: KEY TERMS

- Employer
  - Any person, association, organization, partnership, business trust, limited liability company, or corporation who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.
- Wage
  - All amounts for labor performed by employees of every description, whether amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.
- Rate of Pay
  - Compensation an employee normally earns for the work he/she performs.



# WAGE AND HOUR: KEY TOPICS

- Notice (at time of hiring)
  - Rate of pay; frequency of pay; regular pay day; address and phone number of employer; worker's compensation insurance carrier information etc.
- Misclassification
- Minimum Wage
  - Federal, State and Local may (and do) differ
- Overtime
  - Day: 1.5 times regular rate of pay over 8 hours; 2 times regular rate of pay over 12 hours
  - Week: 1.5 times regular rate of pay over 40 hours
  - 7th (Consecutive) Day: 1.5 times regular rate of pay first 8 hours; 2 times regular rate of pay over 8 hours
- Meal and Rest Breaks
  - Rest breaks: on the clock 10-minute rest break for every 4 hours worked or "major fraction" thereof
  - 30-minute uninterrupted, duty-free meal break for every 5-hours worked
  - Can opt-out in writing (**in writing**)
    - Waive 30-minute meal break if employee will complete their work in six hours
    - In limited circumstances, if nature of employee's duties prevent employee from being relieved of all duty, employee may be authorized to take an "on-duty meal period"
  - *Ferra v. Loews Hollywood Hotel, LLC (2021)* - premium pay for noncompliant meal or rest periods is not calculated at the employee's normal "base" hourly rate but must account for other non-discretionary payments for work performed by employees (including shift premiums, commissions, incentive payments, and non-discretionary bonuses)



# WAGE AND HOUR: KEY TOPICS (2)

- Deductions from Wages
  - The usual suspects (payroll deductions)
  - Expressly authorized in writing by the employee to cover insurance premiums, benefit plan contributions or other deductions not amounting to a rebate on the employee's wages
  - Deductions authorized by collective bargaining or wage agreement, specifically to cover health and welfare pension payments
  - What about advances? Just don't!
    - Must be in writing
    - Ensure employee receives at least minimum wage
    - No balloon payments
- Accurate Itemized Wage Statements and Paycheck Requirements
  - Gross wages; total hours; all deductions; net wages; inclusive dates of pay period; employer's full name and address; all applicable hourly rates in effect during pay period and corresponding number of hours worked
- Record keeping
  - Pay stubs and time records – “at least 3 years”
    - However, under certain causes of action may extend limitations period to 4 years
  - “Personnel file” not defined by CA Law
  - KEEP CONFIDENTIAL EMPLOYEE MEDICAL INFORMATION SEPARATE FROM PERSONNEL FILE (both State and Federal Law require this)



# WAGE AND HOUR: KEY TOPICS (3)

- Timely Payment of Wages (Including Final Paycheck)
  - Wages must be paid at least twice in each calendar month on designated days
  - Paid immediately at the time of discharge
  - Paid within 72 hours if employee quits (unless has given notice 72 hours in advance of quitting)
- Vacation Policies
  - NOT required to provide vacation time or PTO
  - But if you provide it, it's considered earned wages
    - Cannot be forfeited – no “use it or lose it”
    - Can be capped
- Private Attorneys General Act (PAGA)
  - Allows employees to bring actions to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations
  - If Labor Code does not provide for a penalty, PAGA imposes a \$100 fine for first violation and \$200 for every subsequent violation of same provision (for example, payday law violations)
- California Paid Sick Leave
  - At a minimum, 24 hours (or 3 days) of paid sick leave per year for full-time employees (1 hour for every 30 hours worked)



# WAGE AND HOUR: WAGE ORDERS

- What YOU need to know:
  - Wage Order 4: Pharmacists and nurses are **not** exempt unless they can meet the criteria established for exemption for executive or administrative employees
    - Field nurses = not exempt
    - Director of Nursing = exempt
    - However, this general rule does not apply to:
      - Certified nurse midwives
      - Certified nurse anesthetists
      - Certified nurse practitioners primarily engaged in duties for which certification is required
  - Wage Order 5:
    - Authorizes **alternative workweek** scheduling for employees in the healthcare industry
      - 10-12 hours a day without incurring overtime in a 40-hour workweek
      - Adoption process is complex – pre-election meeting of affected employees > secret ballot (2/3 vote needed) > notice to employees and DLSE notified





# WAGE AND HOUR: PENALTIES, INTEREST AND ATTORNEYS' FEES

- Missed Meal and Rest Breaks
- Liquidated Damages for Minimum Wage Claims
  - Equal to the amount of your lost wages
- Waiting Time Penalties
  - Full day of wages at regular rate up to 30 days
- Wage Statement Violations
  - \$50 for first violation, \$100 for every subsequent violation, up to a maximum penalty of \$4000
- Interest on unpaid wages: up to 10% per annum
- Attorneys' Fees
  - Non-payment of wages (Labor Code 218.5)
  - Failure to pay minimum wage or overtime (Labor Code 1194)
  - Labor Code 218.5 allows for two-way fee shifting, while Labor Code 1194 only allows a prevailing employee to recover fees
    - However, for employee to recover fees under Labor Code 218.5, must show that claim was made in "bad faith"



# CORPORATE v. INDIVIDUAL LIABILITY

- Labor Code Section 558.1 (The Fair Days Pay Act)
  - Personal liability for owners, directors, officers and managing agents of employers for wage and hour violations
- Piercing the Corporate Veil
  - “Sham” corporation



# **HUMAN RESOURCES (KEEPING YOUR HOUSE IN ORDER)**

- Employee handbooks, policies and procedures manuals, performance reviews, etc.
- Wage and Hour audits
- Sexual harassment training
- Arbitration agreements (pros and cons)
- Confidentiality, non-competition and non-solicitation agreements
- EPLI policies