ADVICE
SOLUTIONS
LITIGATION

Alfred J. Landegger
Larry C. Baron
Roxana E. Verano
Christopher L. Moriarty
Oscar E. Rivas
Marie D. Davis
Brian E. Ewing
Jennifer R. Komsky
Sumithra R. Roberts
Timothy E. Simmen

Michael S. Lavenant
1970 - 2012

LANDEGGER BARON LAW GROUP, ALC

Exclusively Representing Employers

"You Want to See Something Really Scary This Halloween"?
The Seven Deadly Habits of The Frequently Sued Employer.

You and your colleagues will learn the answers to the following:

- **Salary Exempt:** Avoid misclassifying employees as exempt from overtime.
- **Independent Contractors:** Who is independent, who is not?
- **Outdated handbook:** Quick tips to easily avoid liability.
- **Meals and rest breaks:** What do your timesheets and other records show?
- **At will employment:** You may not fire anyone you want, anytime you want.
- **Disability accommodation:** What are the best practices to properly accommodate disabled workers?
- **Documentation:** Learn the value of proper documentation.

October, 2014

Presented by:

Studio City:	***Camarillo:***
Roxana E. Verano, Esq.	Christopher L. Moriarty, Esq.
Jennifer Raphael Komsky, Esq.	Marie D. Davis, Esq.

This program has been approved for 1.75 hours (California) recertification credit hours toward PHR, SPHR & GPHR through the HR Certification Institute.

"The use of this seal is not an endorsement by the HR Certification Institute of the quality of the program. It means that this program has met the HR Certification Institute's criteria to be pre-approved for recertification credit."

Main Office
15760 Ventura Blvd.
Suite 1200
Encino, CA 91436
(818) 986-7561
Fax (818) 986-5147

Ventura Office
751 Daily Drive
Suite 325
Camarillo, CA 93010
(805) 987-7128
Fax (805) 987-7148

www.landeggeresq.com

Table of Contents

California - Executive Exemption Worksheet

The information provided in these documents is not intended to be a substitute for legal or other professional advice where the facts and circumstances warrant. If the user of this worksheet requires legal advice or other professional services, the user should contact his own legal counsel or other professional advisor to discuss the specific facts and circumstances.

The information provided in these worksheets is based on California state exemption requirements as defined in the Industrial Wage Orders. More information on state guidelines is available on the California Division of Labor Standards Enforcement's Web site at **www.dir.ca.gov/dlse**. For federal regulations (29 CFR Part 541) visit the U.S. Department of Labor's Web site at **www.dol.gov**.

Note: Federal and CA state laws differ. If covered by both FLSA and a CA IWC Order, then employee must qualify under both exemptions to be exempt from overtime.

Check all that apply:

☐ This position is paid on a **salary basis** and earns a monthly salary equivalent of no less than two times the state minimum wage for **full-time employment**.
Note: The current state minimum wage is $9.00 per hour. To determine the minimum monthly salary required, multiply the state minimum wage ($9.00) by 2,080 hours, multiply by two, and divide by 12 months. The current minimum monthly salary is
$3,120.00.

☐ This position is **primarily engaged in** the management of the enterprise or of a customarily recognized department or subdivision.

☐ This position customarily and **regularly** directs the work of **two or more employees (or the equivalent)**.

☐ This position has the authority to hire or fire other employees, or the employee's suggestions and recommendations with respect to hiring, firing, advancement, promotion, or other change of status are given **particular weight**.

☐ This position regularly uses **discretion and independent judgment**.

In order to qualify for the executive exemption, all of the criteria listed above must be satisfied.

California - Administrative Exemption Worksheet

The information provided in these documents is not intended to be a substitute for legal or other professional advice where the facts and circumstances warrant. If the user of this worksheet requires legal advice or other professional services, the user should contact his own legal counsel or other professional advisor to discuss the specific facts and circumstances.

The information provided in these worksheets is based on California state exemption requirements as defined in the Industrial Wage Orders. More information on state guidelines is available on the California Division of Labor Standards Enforcement's Web site at **www.dir.ca.gov/dlse**. For federal regulations (29 CFR Part 541) visit the U.S. Department of Labor's Web site at **www.dol.gov**.

Note: Federal and CA state laws differ. If covered by both FLSA and a CA IWC Order, then employee must qualify under both exemptions to be exempt from overtime.

Check all that apply:

☐ This position is paid on a **salary basis** and earns a monthly salary equivalent of no less than two times the state minimum wage for **full-time employment**.

Note: The current state minimum wage is $9.00 per hour. To determine the minimum monthly salary required, multiply the state minimum wage ($9.00) by 2,080 hours, multiply by two, and divide by 12 months. The current minimum monthly salary is $3120.00.

☐ This individual is **primarily engaged in**:

- office or non-manual work directly related to the **management or general business operations** of the employer or the employer's customers; or
- the administrative functions of a school system or educational establishment, or one of its departments or subdivisions, in work directly related to its academic instruction or training.

☐ The position involves:

- **regularly** and directly assisting a proprietor or an employee in a bona fide executive or administrative capacity; or
- performing work under only general supervision along specialized or technical lines requiring technical training, experience, or knowledge; or
- executing special assignments and tasks under only general supervision.

☐ This position is **primarily engaged in** work requiring the use of **discretion and independent judgment** with respect to **matters of significance**.

In order to qualify for the administrative exemption, all of the criteria listed above must be satisfied, except that only one of the subsections under the third main bullet need be satisfied (hence the use of the word "or").

California - Professional Exemption Worksheet

The information provided in these documents is not intended to be a substitute for legal or other professional advice where the facts and circumstances warrant. If the user of this worksheet requires legal advice or other professional services, the user should contact his own legal counsel or other professional advisor to discuss the specific facts and circumstances.

The information provided in these worksheets is based on California state exemption requirements as defined in the Industrial Wage Orders. More information on state guidelines is available on the California Division of Labor Standards Enforcement's Web site at **www.dir.ca.gov/dlse**. For federal regulations (29 CFR Part 541) visit the U.S. Department of Labor's Web site at **www.dol.gov**.

Note: Federal and CA state laws differ. If covered by both FLSA and a CA IWC Order, then employee must qualify under both exemptions to be exempt from overtime.

Check all that apply:

☐ This position is paid on a **salary basis*** and earns a monthly salary equivalent of no less than two times the state minimum wage for **full-time employment**.

Note: The current state minimum wage is $9.00 per hour. To determine the minimum monthly salary required, multiply the state minimum wage ($9.00) by 2,080 hours, multiply by two, and divide by 12 months. The current minimum monthly salary is $3,120.00.

☐ The employee is licensed or certified by the state of California and is **primarily engaged in** the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; **or** the employee is **primarily engaged in** an occupation commonly recognized as a **learned or artistic profession**.

☐ This position is **primarily engaged in** work requiring the use of **discretion and independent judgment** with respect to **matters of significance**.

In order to qualify for the professional exemption, all of the criteria listed above must be satisfied.

An exception to the salary requirement exists for certain doctors. Licensed physicians or surgeons who are primarily engaged in performing duties for which the license is required are exempt from overtime if paid at least the minimum hourly rate set by the state. **Note:** This rate is generally adjusted annually based on the CA Consumer Price Index for Urban Wage Earners and Clerical Workers. The current rate can be found on the CA Department of Industrial Relations web site (http://www.dir.ca.gov).

California - Computer Employee Exemption Worksheet

The information provided in these documents is not intended to be a substitute for legal or other professional advice where the facts and circumstances warrant. If the user of this worksheet requires legal advice or other professional services, the user should contact his own legal counsel or other professional advisor to discuss the specific facts and circumstances.

The information provided in these worksheets is based on California state exemption requirements as defined in the Industrial Wage Orders. More information on state guidelines is available on the California Division of Labor Standards Enforcement's Web site at **www.dir.ca.gov/dlse**. For federal regulations (29 CFR Part 541) visit the U.S. Department of Labor's Web site at **www.dol.gov**.

Note: Federal and CA state laws differ. If covered by both FLSA and a CA IWC Order, then employee must qualify under both exemptions to be exempt from overtime.

Check all that apply:

☐ This position is paid on an hourly basis not less than the statutorily specified rate.*

or

The position is paid a monthly or annual salary of not less than the statutorily specified rates.*

☐ The employee is **primarily engaged in** work that is intellectual or creative.

☐ This position is **primarily engaged in** work requiring the use of **discretion and independent judgment** with respect to **matters of significance**.

☐ The employee is **primarily engaged in** work involving:

- the application of systems, analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional specifications;
- the design, development, documentation, analysis, creation, testing, or modification of computer software programs, including prototypes based on and related to user or system design specifications;
- the documentation, creation, testing, or modification of computer programs related to the design of software for computer operating systems.

☐ This person is highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

In order to qualify for the computer employee exemption, all of the criteria listed above must be satisfied.

* The hourly statutory rate and the salary statutory rates are generally adjusted annually based on the CA Consumer Price Index for Urban Wage Earners and Clerical Workers. The current rates can be found on the CA Department of Industrial Relations web site (http://www.dir.ca.gov).

California - Outside Sales Exemption Worksheet

The information provided in these documents is not intended to be a substitute for legal or other professional advice where the facts and circumstances warrant. If the user of this worksheet requires legal advice or other professional services, the user should contact his own legal counsel or other professional advisor to discuss the specific facts and circumstances.

The information provided in these worksheets is based on California state exemption requirements as defined in the Industrial Wage Orders. More information on state guidelines is available on the California Division of Labor Standards Enforcement's Web site at **www.dir.ca.gov/dlse**. For federal regulations (29 CFR Part 541) visit the U.S.

Department of Labor's Web site at **www.dol.gov**. Note: federal and CA state laws differ. If covered by both FLSA and a CA IWC Order, then employee must qualify under both exemptions to be exempt from overtime.

Check all that apply:

☐ The employee is at least 18 years of age.

☐ More than 50% of the employee's time is spent working away from the employer's place of business selling tangible or intangible items, or obtaining orders or contracts for products, services, or for the use of facilities.

In order to qualify for the outside sales exemption, all of the criteria listed above must be satisfied.*

*CA law does not allow work performed incidental to and in conjunction with the employee's outside sales work, including incidental deliveries and collections, to be considered exempt work. This is particularly important for route salespeople and others who perform many functions each day other than sales (for example, delivery, repair, maintenance, etc.). To meet the outside sales exemption, such incidental work cannot exceed 50% of the employee's working time.

Definitions

Discretion and Independent Judgment
The person's duties involve comparing and evaluating various courses of action and making a decision after the possibilities have been considered. An employee with discretion and independent judgment must either have the authority to make decisions with respect to matters of significance without immediate supervision; or must be able to make a recommendation for action subject to final approval of a superior, provided the employee has sufficient authority for recommendations to affect matters of significance to the company or its customers.

Full-time Employment
40 hours each week (for these purposes).

Learned or Artistic Profession
An employee who is primarily engaged in the performance of:

☐ Work requiring **advanced knowledge** in a field of science or learning **customarily** acquired by a prolonged course of specialized intellectual instruction and study (or work that is an essential part of or necessarily incident to the work described above); or

Advanced Knowledge
Refers to work that is predominantly intellectual in nature. Generally, the knowledge is used to analyze, interpret, or make decisions based on the facts and circumstances of a particular situation. The level of knowledge cannot be attained at the high school level.

Customarily
Meaning the exemption may also be available to such professionals who may have the same knowledge level and perform substantially the same work as degreed professionals but attained the advanced knowledge through a combination of work experience and intellectual instruction. The regulation clarifies that this particular exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

☐ Work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on invention, imagination, or talent of the employee (or work that is an essential part of or necessarily incident to the work described above); or

☐ Work that is predominantly intellectual in nature and the output produced or the result accomplished cannot be standardized in relation to a given period of time.

Management or General Business Operations
Refers to the type of work performed by the employee. The work must be directly related to running or servicing of the business. It does not include working on a production line or selling a product. Some examples of work that may relate to the management or general business operations include tax, finance, accounting, advertising, research, human resources, legal and regulatory compliance, etc.

Matters of Significance
Refers to the level of work or importance of work performed. Factors to consider include, but are not limited to, authority to develop, interpret, and implement management policies or operating practices; authority to commit the employer in matters that have significant financial impact on the business; authority to deviate from pre-established policies without prior approval; providing expert advice to management; involvement in long- and short-term business planning; investigating and resolving major issues on behalf of the company, etc.

Particular Weight
It is part of the employee's regular job duties to make suggestions. Factors to consider may include how often suggestions are made by this employee and how often the employee's suggestions are relied upon. The employee does not have to have the ultimate authority (in other words, a higher level manager can review the suggestions), but making occasional recommendations generally would not meet the "particular weight" standard.

Primarily Engaged In
More than one half of the employee's work time is spent engaged in exempt work (that is, more than 50% of the employee's time must be spent performing exempt duties, work that is directly and closely related to exempt work, or work that is necessary as a means for carrying out exempt functions).

Regularly
More than occasionally (that is, a function the person would normally do every week). It does not include isolated or one-time tasks.

Salary Basis
Individual receives a predetermined amount of compensation each pay period, and such compensation may not be reduced because of variations in the quantity or quality of work performed. Additionally, certain deductions from this predetermined salary are prohibited.

Two or More Employees
Full-time employees (generally defined as working 40 hours each week) or the equivalent of two full-time employees (for example, one full-time and two part-time employees who each work 20 hours each week).

Employment Development Department
State of California

EMPLOYMENT DETERMINATION GUIDE

Purpose:

This worksheet is to be used by the proprietor of a business to determine whether a worker is most likely an employee or an independent contractor.

General Information:

Generally speaking, whether a worker is an employee or an independent contractor depends on the application of the factors contained in the California common law of employment and statutory provisions of the California Unemployment Insurance Code.

If a worker is an employee under the common law of employment, the business by which the worker is employed must report the worker's earnings to the Employment Development Department (EDD) and must pay employment taxes on those wages. If the worker is an independent contractor and the business pays the worker $600 or more in payments, the business must file a Form 1099-MISC with the Internal Revenue Service (IRS) and must file a *Report of Independent Contractor(s)* (DE 542) with the EDD within 20 days of either making payments totaling $600 or more, or entering into a contract for $600 or more with an independent contractor in any calendar year. For more detailed information regarding your independent contractor reporting requirements, view the latest revision of the *California Employer's Guide* (DE 44) available on the EDD website at **www.edd.ca.gov/Payroll_Taxes/Forms_and_Publications.htm**.

The basic test for determining whether a worker is an independent contractor or an employee is whether the principal has the right to direct and control the manner and means by which the work is performed. When the principal has the "right of control," the worker will be an employee even if the principal never actually exercises the control. If the principal does not have the right of direction and control, the worker will generally be an independent contractor.

If, on the face of the relationship, it is not clear whether the principal has the "right of control," there are secondary factors that are considered to determine the existence or nonexistence of the right of control.

The enclosed worksheet addresses the basic test and secondary factors through a series of questions. If use of the worksheet clearly demonstrates that a worker is an employee, you should contact the EDD and arrange to report the worker and pay the relevant taxes. You may also want to contact the IRS and your workers' compensation insurance carrier to ensure that you are in compliance with federal tax laws and with state workers' compensation statutes.

If after completing the worksheet you are not sure whether the worker is an independent contractor or employee, you may also contact the Taxpayer Assistance Center for advice by calling 1-888-745-3886 or request a written ruling by completing a *Determination of Employment Work Status* (DE 1870). The DE 1870 is designed to analyze a working relationship in detail and serves as the basis for a written determination from the EDD on employment status.

WORKSHEET ON EMPLOYMENT STATUS

Questions 1 – 3 are significant questions. If the answer to any of them is "Yes," it is a strong indication that the worker is an employee.

1. Do you instruct or supervise the person while he or she is working? Yes _____ No _____

   Independent contractors are free to do jobs in their own way, using specific methods they choose. A person or firm engages an independent contractor for the job's end result. When a worker is required to follow company procedure manuals and/or is given specific instructions on how to perform the work, the worker is normally an employee.

2. Can the worker quit or be discharged (fired) at any time? Yes _____ No _____

   If you have the right to fire the worker at will and without cause, it indicates that you have the right to control the worker.

   Independent contractors are engaged to do specific jobs and cannot be fired before the job is complete unless they violate the terms of the contract. They are not free to quit and walk away until the job is complete. For example, if a shoe store owner hires a licensed painter to paint the store, and the work had started, the store owner would not be able to just terminate the painter, without there being a good reason or just cause for doing so.

3. Is the work being performed part of your regular business? Yes _____ No _____

   Work which is a necessary part of the regular trade or business is normally done by employees. For example, a sales clerk is selling shoes in a shoe store. A shoe store owner could not operate without sales clerks to sell shoes. On the other hand, a plumber engaged to fix the pipes in the bathroom of the store is performing a service on a one-time or occasional basis that is not an essential part of the purpose of the business enterprise. A certified public accountant engaged to prepare tax returns and financial statements for the business would also be an example of an independent contractor.

A "No" answer to questions 4 – 6 indicates that the individual is not in a business for himself or herself and would, therefore, normally be an employee.

4. Does the worker have a separately established business? Yes _____ No _____

When individuals hold themselves out to the general public as available to perform services similar to those performed for you, it is evidence that the individuals are operating separately established businesses and would normally be independent contractors. Independent contractors are free to hire employees and assign the work to others in any way they choose. Independent contractors have the authority to fire their employees without your knowledge or consent. Independent contractors can normally advertise their services in newspapers and/or publications, the Internet, yellow page listings, radio, television, and/or seek new customers through the use of business cards.

5. Is the worker free to make business decisions which affect his or her ability to profit from the work? Yes _____ No _____

An individual is normally an independent contractor when he or she is free to make business decisions which impact his or her ability to profit or suffer a loss. This involves real economic risk, not just the risk of not getting paid. These decisions would normally involve the acquisition, use, and/or disposition of equipment, facilities, and stock in trade which are under his or her control. Further examples of the ability to make economic business decisions include the amount and type of advertising for the business, the priority in which assignments are worked, and selection of the types and amounts of insurance coverage for the business.

6. Does the individual have a substantial investment which would subject him or her to a financial risk of loss? Yes _____ No _____

Independent contractors furnish the tools, equipment, and supplies needed to perform the work. Independent contractors normally have an investment in the items needed to complete their tasks. To the extent necessary for the specific type of business, independent contractors provide their own business facility.

Questions 7 – 13 are additional factors that should be considered. A "Yes" answer to any of the questions is an indication the worker may be an employee, but no one factor by itself is deciding. When those factors are considered, a determination of whether an individual is an employee will depend upon a grouping of factors that are significant in relationship to the service being performed. However, the greater the number of "Yes" answers to questions 7 – 13 the greater the likelihood the worker is performing services as an employee.

7. Do you have employees who do the same type of work? Yes _____ No _____

   If the work being done is basically the same as work that is normally done by your employees, it indicates that the worker is an employee. This applies even if the work is being done on a one-time basis. For instance, to handle an extra workload or replace an employee who is on vacation, a worker is hired to fill in on a temporary basis. This worker is a temporary employee, not an independent contractor.

   (Note: If you contract with a temporary agency to provide you with a worker, the worker is normally an employee but may be an employee of the temporary agency. You may refer to the EDD's *Information Sheet: Temporary Services and Employee Leasing Industries* [DE 231F] on the subject of temporary service and leasing employers.)

8. Do you furnish the tools, equipment, or supplies used to perform the work? Yes _____ No _____

   Independent contractors furnish the tools, equipment, and supplies needed to perform the work. Independent contractors normally have an investment in the items needed to complete their tasks.

9. Is the work considered unskilled or semi-skilled labor? Yes _____ No _____

   The courts and the California Unemployment Insurance Appeals Board have held that workers who are considered unskilled or semi-skilled are the type of workers the law is meant to protect and are generally employees.

10. Do you provide training for the worker? Yes _____ No _____

In skilled or semi-skilled work, independent contractors usually do not need training. If training is required to do the task, it is an indication that the worker is an employee.

11. Is the worker paid a fixed salary, an hourly wage, or based on a piece rate basis? Yes _____ No _____

Independent contractors agree to do a job and bill for the service performed. Typically, payments to independent contractors for labor or services are made upon the completion of the project or completion of the performance of specific portions of the project.

12. Did the worker previously perform the same or similar services for you as an employee? Yes _____ No _____

If the worker previously performed the same or similar services for you as an employee, it is an indication that the individual is still an employee.

13. Does the worker believe that he or she is an employee? Yes _____ No _____

Although belief of the parties is not controlling, intent of the parties is a factor to consider when making an employment or independent contractor determination. When both the worker and principal believe the worker is an independent contractor, an argument exists to support an independent contractor relationship between the parties.

Interpretations of Answers

Depending on the services being performed and the type of occupation, this questionnaire may produce a variety of results. There may be some factors which lean toward employment and some which lean toward independence. The answers to questions 1 – 6 provide a strong indication of the presence or absence of direction and control. The answers to questions 7 – 13 when joined with other evidence may carry greater weight when indicating the presence or absence of direction and control.

1. If all of the answers to questions 1 – 3 are "No" and all of the answers to questions 4 – 6 are "Yes," there is an indication of independence. When this is the case, there are likely to be a number of "No" answers to questions 7 – 13 which add to the support of the determination.

2. If all of the answers to questions 1 – 3 are "Yes" and all of the answers to questions 4 – 6 are "No," it is very strong indication that the worker in question is an employee. When this is the case, there are likely to be a number of "Yes" answers to questions 7 – 13 which add to the support of the determination.

3. If the answer to question 1 or 2 is "Yes" or the answer to any one of questions 4 – 6 is "No," there is a likelihood of employment. At the very least, this pattern of answers makes the determination more difficult since the responses to questions 7 – 13 will probably be mixed. In such situations, the business owner would be well advised to complete a DE 1870, giving all of the facts of the working relationship and requesting a ruling from the EDD.

4. If the answer to question 3 is "Yes" and the answer to question 4 is "No," there is a likelihood of employment. Given this pattern of answers, it is probable that the answers to questions 5 and 6 will also be "No." When this happens you may also see more "Yes" answers to the last group of questions (7 – 13). This scenario would support an employment determination.

These four scenarios illustrate only a few combinations of answers that could result from the use of this Employment Determination Guide, depending on the working relationship a principal may have with a worker and the type of occupation. The more the pattern of answers vary from the above four situations, the more difficult it is to interpret them. In situations 1 and 2, there is a greater chance that the interpretation will be accurate, and they present the least risk to the business owner of misclassifying the worker. With other combinations of answers, the EDD recommends that business owners complete a DE 1870, giving a complete description of the working relationship and requesting a ruling from the EDD.

NOTE: Some agent or commission drivers, traveling or city salespeople, homeworkers, artists, authors, and workers in the construction industry are employees by law even if they would otherwise be considered independent contractors under common law. If you are dealing with workers in any of these fields, request *Information Sheet: Statutory Employees* (DE 231SE) from the Taxpayer Assistance Center at 1-888-745-3886 or access the EDD website at **www.edd.ca.gov/Payroll_Taxes/**.

SOME EXAMPLES OF INDEPENDENT CONTRACTORS AND COMMON LAW EMPLOYEES

Independent Contractors	Employees
An attorney or accountant who has his or her own office, advertises in the yellow pages of the phone book under "Attorneys" or "Accountants," bills clients by the hour, is engaged by the job or paid an annual retainer, and can hire a substitute to do the work is an example of an independent contractor.	An attorney or accountant who is employed by a firm to handle their legal affairs or financial records, works in an office at the firm's place of business, attends meetings as needed, and the firm bills the clients and pays the attorney or accountant on a regular basis is an example of an employee.
An auto mechanic who has a station license, a resale license, buys the parts necessary for the repairs, sets his or her own prices, collects from the customer, sets his or her own hours and days of work, and owns or rents the shop from a third party is an example of an independent contractor.	An auto mechanic working in someone's shop who is paid a percentage of the work billed to the customer, where the owner of the shop sets the prices, hours, and days the shop is open, schedules the work, and collects from the customers is an example of an employee.
Dance instructors who select their own dance routines to teach, locate and rent their own facilities, provide their own sound systems, music and clothing, collect fees from customers, and are free to hire assistants are examples of independent contractors.	Dance instructors working in a health club where the club sets hours of work, the routines to be taught and pays the instructors from fees collected by the club are examples of employees.
A repairperson who owns or rents a shop, advertises the services to the public, furnishes all of the tools, equipment, and supplies necessary to make repairs, sets the price for services, and collects from the customers is an example of an independent contractor.	A repairperson working in a shop where the owner sets the prices, the hours and days the shop is open, and the repairperson is paid a percentage of the work done is an example of an employee.

NOTE: Payroll tax audits conducted by the EDD have disclosed misclassified workers in virtually every type and size of business. However, certain industries seem more prone to have a higher number of misclassified workers than others. Historically, industries at higher risk of having misclassified workers include businesses that use:

- Construction workers
- Seasonal workers
- Short-term or "casual" workers
- Outside salespersons

Employment discrimination and harassment based on a person's disability or perceived disability are prohibited.

Department of Fair Employment and Housing

Filing a Complaint

Employees or job applicants who believe that they have been discriminated against or harassed because of a disability may, within **one year** of the alleged discrimination, file a complaint with DFEH by calling (800) 884-1648. DFEH processes complaints filed by persons with terminal illnesses on a priority basis.

DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence of discrimination and settlement efforts fail, the Department may file a formal accusation. The accusation may lead to either a public hearing before the Fair Employment and Housing Commission or a lawsuit filed by DFEH on behalf of the complaining party.

If the Commission or court finds that discrimination has occurred, it can order remedies including:

- Fines or damages for emotional distress from each employer or person found to have violated the law
- Hiring or reinstatement
- Back pay or promotion
- Changes in the policies or practices of the involved employer

Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

For more information, see DFEH publication 159 "Guide for Complainants and Respondents."

For more information, contact DFEH toll free at
(800) 884-1684

TTY number at **(800) 700-2320**
or visit our web site at ***www.dfeh.ca.gov***

In accordance with the California Government Code and ADA requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact DFEH at the numbers above.

State of California
Department of Fair Employment & Housing

DFEH-184 (04/04)

Employment Discrimination Based on Disability

The *Fair Employment and Housing Act* (FEHA), enforced by the California Department of Fair Employment and Housing (DFEH), prohibits employment discrimination and harassment based on a person's disability or perceived disability. It also requires employers to reasonably accommodate individuals with mental or physical disabilities unless the employer can show that to do so would cause an undue hardship.

The law covers mental or physical disabilities (including AIDS/HIV), regardless of whether the conditions are presently disabling. It also covers medical conditions, which are defined as either cancer or genetic characteristics.

Disability does **not** include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance abuse disorders resulting from the current illegal use of drugs.

FEHA vs. the Federal Americans with Disabilities Act

The FEHA provides broader protections for persons with disabilities than federal law. California employers with five or more employees must follow the FEHA. For example, California law has broad definitions of

The mission of the Department of Fair Employment and Housing is to protect the people of California from unlawful discrimination in employment, housing and public accommodations, and from the perpetration of acts of hate violence.

mental disability, physical disability, and medical condition.

Under California law, a disability must only "limit" a major life activity. The disability does not have to involve a "substantial limitation" as under federal law, to be considered a disability. Whether a condition or disability "limits" a major life activity is determined regardless of any mitigating measure, such as medication, prosthesis, etc., unless the mitigating measure itself limits a major life activity.

Employment Inquiries

The FEHA prohibits employers either verbally or in writing from:

- Requiring any medical/psychological examination/inquiry of any applicant or employee prior to making an offer of employment
- Inquiring directly or indirectly as to whether an applicant or employee has a mental/physical disability or medical condition
- Inquiring about the nature and severity of a mental/physical disability or medical condition

However, an employer may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

Once an employment offer has been made to an applicant, but before the start of duties, an employer may require a medical/psychological examination. However, the examination/inquiry must be job related and consistent with business necessity and all entering employees in the same job classification must be subject to the same examination or inquiry.

An employer may also conduct voluntary medical examinations, including medical histories, which are part of an employee health program. This information is retained separate and apart from employment and personnel records.

Reasonable Accommodation

The employer is required to explore with the employee all possible means of reasonably accommodating a person prior to rejecting the person for a job or making any employment-related decision. The accommodation may arise from a mitigating measure, such as medication taken for the primary disability.

An accommodation is reasonable if it does not impose an undue hardship on the employer's business. Reasonable accommodation can include, but is not limited to, changing job duties or work hours, providing leave, relocating the work area, and/or providing mechanical or electrical aids. An employer may obtain help from government agencies and outside experts to determine whether accommodation is possible.

Employees with disabilities may be covered by the *California Family Rights Act* or the federal *Family Medical Leave Act.*

Independent Medical Opinion

An employer must allow an applicant the opportunity to submit an independent medical opinion if there is a dispute as to whether the person can perform the essential functions of a position. Failure to allow the submission of an independent medical opinion may be a separate violation of the law.

Discrimination

Any employment-related or personnel decision based on either of the following reasons is not discriminatory:

- The person is unable to perform the essential functions of the job and no reasonable accommodation exists that would enable the person to perform the "essential functions" of the job.
- The person would create an imminent and substantial danger to self or others by performing the job and no reasonable accommodation exists that would remove or reduce the danger.

The following two reasons commonly raised by employers **are not** legally acceptable excuses for discriminating against persons with disabilities:

- Possibility of future harm to the person or to others
- Employing such individuals will cause an employer's insurance rates to rise

Disability Under the Fair Employment & Housing Act:

What you should know about the law

California Department of Fair Employment & Housing

Disability Under the Fair Employment and Housing Act: What You Should Know About the Law

In 1974, California passed its first law intended to ensure that individuals with disabilities are protected in the workplace. Since then, California has been at the forefront of guaranteeing that persons with disabilities have equal access to employment.

This guide is intended to highlight and summarize workplace disability laws enforced by the California Department of Fair Employment and Housing (DFEH). It will familiarize you with the content of these laws, including recent changes and amendments to state statutes and attendant accommodation responsibilities. It should not be relied upon as a definitive statement of the law. For answers to your particular questions, you should consult an attorney or employment relations specialist for advice. You can also contact DFEH for information at 1-800-884-1684.

California disability laws are intended to allow persons with disabilities the opportunity for employment. To meet this goal, California's laws have historically offered greater protection to employees than federal law. Yet, because most news coverage focuses on actions taken by the U.S. Congress and court decisions interpreting the federal Americans with Disabilities Act (ADA), many employees and employers in California are not aware that California's laws are broader in many aspects. For example, the ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." However, under California law, disability is defined as an impairment that makes performance of a major life activity "difficult." Thus, under California law, persons with a wide variety of diseases, disorders or conditions would be deemed to have a disability who, under the definitions set forth in the ADA and the United States Supreme Court's narrow interpretations of that statute, might not be considered "disabled" and therefore denied protection.

A chart illustrating some of the differences between federal and state law is provided at the back of this guide.

WHAT CHANGES DO I NEED TO KNOW ABOUT?

In 2000, the state legislature passed the Prudence K. Poppink Act that made significant changes to the state's disability laws. It amended existing provisions of law and re-emphasized previous legal and policy positions. These legislative amendments took effect on January 1, 2001. Some of the important changes are as follows:

- The Legislature found and declared that the laws of this state provide protection independent of the 1990 ADA and has always afforded broader protection than federal law.
- The definitions of mental and physical disability were amended to prevent discrimination based on a person's "record or history" of certain impairments.

- Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, multiple sclerosis, and heart disease.
- The Legislature clarified that the definitions of physical and mental disability only require a "limitation" upon a major life activity, not a "substantial limitation" as required by the ADA. They further stated that when determining whether an employee's condition is a limitation, mitigating measures should not be considered, unless the mitigation itself limits a major life activity.
- "Working" is a major life activity regardless of whether the actual or perceived working limitations implicate a specific position or broad class of employment. Whereas, under the ADA, the mental or physical disability must affect a person's ability to obtain a broad class of employment.
- An employer or employment agency cannot ask about a job applicant's medical or psychological condition or disability except under certain circumstances. In addition, it is illegal to ask current employees about these conditions unless the condition is related to the employee's job.

WHAT DOES THE LAW REQUIRE OF EMPLOYERS?

An important aspect of complying with California law is knowing what is required by state law. When it comes to applicants and employees with disabilities, the FEHA generally requires two things of employers. Those requirements are:

1. Employers must provide reasonable accommodation for those applicants and employees who, because of their disability, are unable to perform the essential functions of their job.

2. Employers must engage in a timely, good faith interactive process with applicants or employees in need of reasonable accommodation.

However, before engaging applicants or employees, the employer should have some understanding of what constitutes a "disability" under state law. Before an applicant or employee must be reasonably accommodated, he or she must establish that they have a disability as defined under the Fair Employment and Housing Act.

WHAT IS A DISABILITY UNDER THE LAW?

The Fair Employment and Housing Act basically defines two categories of disability: mental disability and physical disability. Each category contains its own specific definitions. Additionally, under the FEHA, an employee with a "medical condition" is also entitled to accommodation.

The following are the specific definitions of physical disability, mental disability, and medical condition as outlined in the FEHA:

Physical Disability—Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several body systems and

limits a major life activity. The body systems listed include the neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine systems. A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity, such as working, if it makes the achievement of the major life activity difficult.

When determining whether a person has a disability, an employer cannot take into consideration any medication or assistive device, such as wheelchairs, eyeglasses or hearing aids, that an employee may use to accommodate the disability. However, if these devices or mitigating measures "limit a major life activity," they should be taken into consideration.

Physical disability also includes any other health impairment that requires special education or related services; having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment which is known to the employer; and being perceived or treated by the employer as having any of the aforementioned conditions.

Mental Disability—Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity, or having any other mental or psychological disorder or condition that requires special education or related services. An employee who has a record or history of a mental or psychological disorder or condition which is known to the employer, or who is regarded or treated by the employer as having a mental disorder or condition, is also protected.

It should be noted that under **both** physical and mental disability, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, are specifically excluded and are not protected under the FEHA.

Medical Condition—Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer, or a genetic characteristic.

A "genetic characteristic" can be a scientifically or medically identifiable gene or chromosome or an inherited characteristic that could statistically lead to increased development of a disease or disorder. For example, women who carry a gene established to statistically lead to breast cancer are protected under state law.

Keep in mind, however, that Government Code section 12940 (o) makes it an unlawful employment practice for an employer to subject, directly or indirectly, any applicant or employee, to a test for the presence of a genetic characteristic.

In determining a disability, an employer may only request medical records directly related to the disability and need for accommodation. However, an applicant or an employee may submit a report from an independent medical examination before disqualification from employment occurs. The report must be kept separately and confidentially as any other medical records, except when a supervisor or manager

needs to be informed of restrictions for accommodation purposes or for safety reasons when emergency treatment might be required.

WHAT CAN BE DONE FOR AN APPLICANT OR EMPLOYEE WITH A DISABILITY?

Once a disability that is protected under the law is established, an employer is obligated to provide a reasonable accommodation unless the accommodation would represent an undue hardship to the business operation.

In the process of determining a reasonable accommodation, an employer must enter into a good-faith, interactive process to determine if there is a reasonable accommodation that would allow the applicant or employee to obtain or maintain employment. The first step of the "interactive process" is determining the "essential functions" of the position. When determining whether a job function is essential, the following should be taken into consideration: (1) the position exists to perform that function; (2) there are a limited number of employees available to whom the job function can be distributed; or (3) the function is highly specialized.

Evidence of whether a particular function is essential includes the employer's judgment as to which functions are essential; a written job description prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experiences of past incumbents in the job; or the current work experience of incumbents in similar jobs.

Once an employer has evaluated the position and the essential functions of the position, he or she should begin the process of determining reasonable accommodation by engaging in good-faith interaction with the employee.

WHAT IS A REASONABLE ACCOMMODATION?

Reasonable Accommodation

Reasonable accommodation is any appropriate measure that would allow the applicant or employee with a disability to perform the essential functions of the job. It can include making facilities accessible to individuals with disabilities or restructuring jobs, modifying work schedules, buying or modifying equipment, modifying examinations and policies, or other accommodations. For example, providing a keyboard rest for a person with carpal tunnel syndrome may qualify as a reasonable accommodation. A person with asthma may require that the lawn care be rescheduled for a non-business day.

WHAT IS THE INTERACTIVE PROCESS?

Interactive Process

State law incorporates guidelines developed by the Equal Employment Opportunity Commission in defining an "interactive process" between the employer and the applicant or employee with a known disability.

The guidelines include: consulting with the individual to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation; and identifying potential accommodations and assessing their effectiveness.

Although the preferences of the individual in the selection of the accommodation should be considered, the accommodation implemented should be one that is most appropriate for both the employee and the employer.

WHAT IS GOOD FAITH?

Good Faith

Federal courts have provided an interpretation of "good faith," essentially stating that an employer and employee must communicate directly with each other to determine essential information and that neither party can delay or interfere with the process.

To demonstrate good-faith engagement in the interactive process, the employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation.

MUST AN APPLICANT OR EMPLOYEE ALWAYS BE ACCOMMODATED?

The FEHA does provide legal reasons an employer can permissibly refuse to accommodate a request for reasonable accommodation from an applicant or employee. One of the legal reasons is whether the accommodation would present an undue hardship to the operation of the employer's business.

If an employer denies accommodation because it would be an "undue hardship," it must be shown that the accommodation requires significant difficulty or expense, when considered in the light of the following factors:

- The nature and cost of the accommodation needed;
- The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;
- The overall financial resources of the employer, the overall size of the business with respect to the number of employees, and the number, type, and locations of its facilities;
- The type of operations, including the composition, structure, and functions of the workforce of the employer; and
- The geographic separateness, administrative or fiscal relationship of the facility or facilities.

For example, an applicant with a severe vision impairment applies for employment with a small market that has only four other employees. The applicant requires assistance to work the register by having another employee present at all times. The business in

question would not have to provide the accommodation if, for example, it could not afford the cost of the additional staff or could not afford the cost of remodeling to accommodate two employees at the same time.

WHAT QUESTIONS MAY BE ASKED OF AN APPLICANT OR EMPLOYEE?

What questions may be directed to an individual depends, largely, upon whether the individual is an applicant for a position or is currently employed by the employer.

Pre-employment Inquiries

Prior to employment, it is unlawful for an employer to require an applicant to attend a medical/psychological examination, make any medical/psychological inquiry, make any inquiry as to whether an applicant has a mental/physical disability or medical condition, or make any inquiry as to the severity of the disability or medical condition.

However, an employer may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation or require a medical/psychological examination or make an inquiry of a job applicant ***after*** an employment offer has been made but ***prior*** to the the start of employment provided that the examination or inquiry is job-related and consistent with business necessity and all new employees in the same job classification are subject to the same examination or inquiry.

Post-employment Inquiries

If the individual is a current employee, the employer may not require any medical/psychological examination of an employee or make any of the following inquiries:

- Medical or psychological;
- Whether an employee has a mental/physical disability; or
- The nature or severity of a physical disability, mental disability, or medical condition.

However, an employer may require any examinations or inquiries that it can show to be job-related *and* consistent with business necessity. Furthermore, an employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

WHAT ARE THE REMEDIES AVAILABLE UNDER THE FAIR EMPLOYMENT AND HOUSING ACT?

Under the Fair Employment and Housing Act, if an employer fails to reasonably accommodate an applicant or employee, the Fair Employment and Housing Commission can order the employer to cease and desist the discriminatory practice; to hire or reinstate; and award actual damages including, but not limited to, lost wages; emotional distress damages; and administrative fines not to exceed $150,000.00. If the

matter is heard in civil court, the damages would be unlimited.

IF DISCRIMINATION HAS OCCURRED, WHAT CAN BE DONE?

If an applicant or employee believes they have been discriminated against or denied reasonable accommodation for their disability, they should first try to work with the immediate supervisor to resolve the issue. If there is still no resolution, they should contact the employer's reasonable accommodation coordinator, a human resource representative or the person in charge of accommodation issues. Again, both the applicant or employee and the employer must engage in a good-faith interactive process to determine an appropriate resolution.

If the issue is still not resolved, the applicant or employee can contact the Department of Fair Employment and Housing at any time during the process and file a complaint. However, they have only one year from the date of harm (denial of accommodation, discharge, etc.) to file a complaint with the Department.

CONCLUSION

Accommodation of persons with disabilities on the job is important to the maintenance of good employer/employee relations. Understanding the duties and responsibilities of employers and supervisors to provide accessible workplaces is critical to ensuring that physical or mental limitations are not insurmountable barriers to those willing to work.

Comparison of Major Distinctions in California and Federal Employment Disability Provisions

	Provisions included in the CA Fair Employment and Housing Act (FEHA) and Fair Employment & Housing Commission (FEHC) Decisions and Regulations	Provisions included in the ADA, ADA Amendments Act (ADAAA), and Equal Employment Opportunity Commission (EEOC) Regulations
Covered Employers	Having five or more employees for complaints involving physical or mental disability or medical condition. Having one or more employees for complaints involving harassment based on mental or physical disability. Excludes religious associations or corporations not organized for profit.	Private employers with 15 or more employees; state and local governments regardless of size. Nonprofit, religious organizations are covered by the ADA as employers, but they may give employment preference to people of their own religion or religious organization. However, they may not discriminate on the basis of disability against members or nonmembers. Executive agencies of the US government are excluded from the ADA.

Definition of "Disability"	The FEHA forbids employment discrimination against an individual because of his or her physical disability, mental impairment, or medical condition. A person is recognized as "disabled" if he/she: • has a physical or mental disability that limits (i.e., it makes the achievement of the major life activity difficult) one or more major life activities (construed broadly to include physical, mental, and social activities and working); or • has a history of such an impairment known to the employer; or • is incorrectly regarded or treated as having or having had such an impairment; or • is regarded or treated as having or having such an impairment that has no presently disabling effects but may become a qualifying impairment in the future. "Physical disabilities" include, but are not limited to, any physiological disease, disorder, condition, cosmetic disfigurement or anatomical loss that affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine systems. "Medical Condition" is defined as including any health impairment associated with a diagnosis of cancer when competent medical evidence indicates that the cancer victim has been cured or rehabilitated. It also includes certain genetic characteristics as defined in the statute. "Mental disabilities" include, but are not limited to, any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, specific learning disabilities, or any other mental or psychological disorder or condition that requires special education or related services.	The ADA defines "qualified individual with a disability" as an individual with a disability who can perform the essential functions of a job with or without reasonable accommodation. A person is recognized as "disabled" if he/she: • has a physical or mental impairment that substantially limits one or more of his/her major life activities; • has a record of such an impairment; or • is regarded as having such an impairment. Under the ADAAA, "major life activity" includes, but is not limited to: • caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. • Major bodily functions, including but not limited to functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions, are also considered major life activities. An individual is "regarded" as having a disability if he/she has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, regardless whether the impairment limits or is perceived to limit a major life activity. An individual cannot be "regarded" as having a disability if he/she has an impairment that is minor or "transitory" (i.e., having an actual or expected duration of 6 months or less).

Exclusions from Definition of Physical and Mental Disability	• Sexual behavior disorders (e.g. transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments); or • Compulsive gambling, kleptomania, pyromania; or • Psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.	• Persons who currently use drugs illegally (those not currently using illegal drugs but in rehabilitation from such use may be covered); • Homosexuality and bisexuality are not considered "impairments" or "disabilities;" • Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments • Compulsive gambling, kleptomania, or pyromania; or • Psychoactive substance use disorders resulting from current illegal use of drugs.
Mitigating Measures	Mitigating measures, such as assistive devices, prosthesis, medication, etc., are not considered in determining whether a condition "limits" a major life activity, unless the mitigating measure itself limits a major life activity.	Under the ADAAA, mitigating measures (such as medication, prosthetics, hearing or mobility devices, oxygen therapy equipment, assistive technology, reasonable accommodations or learned behavioral, adaptive or neurological modifications) are not considered in determining whether an impairment "substantially limits" a major life activity. The ameliorative effects of ordinary eyeglasses or contact lenses is considered in determining whether an impairment substantially limits a major life activity.
"Working" as a Major Life Activity	• Working is considered a major life activity along with physical, mental and social activities. • To be limited in the major life activity of working, an individual need only be limited in performing the requirements of a single, particular job.	• EEOC regulations state that working is considered a major life activity along with caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning. • To be substantially limited in the major life activity of working, an individual must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity.

Employment Medical or Psychological Inquiries and Examinations	*Pre-Offer:* An employer may not ask or require a job applicant to take a medical examination before making a job offer. Absent a request for reasonable accommodation during the hiring process, it cannot make any pre-employment inquiry about a disability or the nature of the severity of a disability. An employer may inquire into the ability of an applicant to perform job-related functions. *Post Offer:* An employer may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to commencement of employment duties, provided that the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry. *Post-Hire:* An employer may require examinations and inquiries if it can show such to be job-related and consistent with business necessity. An employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.	*Pre-Offer:* An employer may not ask or require a job applicant to take a medical examination before making a job offer. Absent a request for reasonable accommodation during the hiring process, it cannot make any pre-employment inquiry about a disability or the nature of the severity of a disability. An employer may ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how he/she would perform these functions. *Post-Offer:* An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does <u>not</u> have to be job related or consistent with business necessity. However, an employer may not refuse to hire an individual with a disability based on the medical examination results unless the reason for rejection is job-related and justified by business necessity. *Post-Hire:* After a person starts work, a medical examination or inquiry of an employee must be job related and consistent with business necessity. Employers may conduct employee medical examinations where: there is evidence of a job performance or safety problem, required by federal law, necessary to determine fitness to perform a particular job, and where part of a voluntary examination that is part of an employee health program.
Genetic Characteristics	An employer may not test an applicant or employee for the presence of a genetic characteristic.	Not explicitly included as a covered disability. May fall within the category of a “perceived disability” in some cases.

Reasonable Accommodation; Exceptions	Generally, an employer must make reasonable accommodation for an employee or for an applicant with a known physical or mental disability. Requires a "good faith, interactive process" to determine an accommodation. Incorporates the EEOC guidelines for defining an "interactive process." To deny an accommodation, an employer must prove that: 1) the accommodation poses an undue hardship on the employer; or 2) the employee cannot perform the essential job functions even with accommodation; or 3) the accommodation presents a danger to the disabled employee or others; or 4) the employee would not meet a bona fide occupational qualification; or 5) Another statutory requirement (e.g. safety, OSHA, etc.) preempts the FEHA provision; or 6) Another affirmative defense under FEHA applies.	EEOC guidelines outline steps that the employer and employee may take to arrive at an accommodation. "Good faith" is interpreted in a federal court decision as it applies to the EEOC guidelines. Under the ADA, employers will not be liable for compensatory and punitive damages if they have been engaged in "good-faith efforts" to identify a possible accommodation. "Undue hardship" defense provisions to deny an accommodation are generally the same under the ADA. An employer may refuse to hire an employee if the selection standards and criteria are job related and consistent with business necessity and: 1) no accommodation exists that permits the person to perform essential job functions; or 2) the person poses a direct threat to the safety of others.

If you require further information,
please contact the department toll free at:

(800) 884-1684 For Employment

(800) 233-3212 For Housing

TTY (800) 700-2320

Or

Visit our website at:
www.dfeh.ca.gov

CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

CLIENT BULLETIN

Client Bulletin #523

CAN YOUR EMPLOYMENT POLICIES SURVIVE THE NLRB?

By David Phippen
Metro Washington D.C. Office

Recent statements to the legal industry press by Mark Gaston Pearce, Chairman of the National Labor Relations Board, and NLRB General Counsel Robert Griffin should put all private sector employers on notice that the Board, when given the opportunity to investigate any unfair labor practice charge, will continue in 2014 to scrutinize aggressively employer handbooks and policies for "**any**" language that might have a possible chilling effect on employees' exercise of the right to engage in "protected concerted activity" under Section 7 of the National Labor Relations Act.

Employers almost universally publish and enforce policies to advance the laudable business goals of maintaining civil employee relations, providing information, and fostering productive, profitable, and safe workplaces. The policies promote prompt dispute resolution, prevent bullying and harassment, and protect the company from the dissemination of confidential competitive or sensitive information, whether in the workplace or through social media.

No matter, because the NLRB is expansively interpreting what constitutes unlawful "interference" with Section 7 rights and, as noted in **a recent article in *Employment Law360***, finding that many employer policies are unlawful because an employee "might" read policy language and reasonably think that some form of protected concerted activity "might" be restricted. The NLRB construes any ambiguities against the employer, whether or not there is evidence that the policy language, in fact, restricted any employee's actions.

Foreshadowing what is likely to be coming in the next few months, Pearce and Griffin recently commented on the Board's decisions involving social media and class action waivers in arbitration policies and agreements, and neither indicated any concern that the Board might be overreaching. In a report in *Law360* concerning the NLRB's recent treatment of social media policies, Pearce was quoted as saying that the Board "isn't looking to create new standards when it evaluates cases stemming from postings on social media, but is merely trying to keep its jurisprudence up to date with the evolution of the workplace." But Pearce said he was pleased that the social media cases are drawing attention to the NLRB, especially given that federal courts struck down the NLRB's attempt to require all covered employers to post notices of rights under the NLRA. In a separate report in *Bloomberg BNA*, Griffin said he is aware of "concerns" that the NLRB is "parsing every provision of an employer's handbook," but he defensively countered that he simply "would like to put an emphasis on some

of the 'black letter' principles that clearly define violations of the NLRA but are not understood or followed by many employers."

Many employers have been left confused by what they see as the Board's one-sided interpretation of the law and arguably strained, and often wholly out-of-context, "non-real-world" interpretation of employee handbook and policy language. The confusion the NLRB has created is disruptive for employers and their employees. From almost any perspective, the recent comments of Pearce and Griffin demonstrate that the Board's Democrat-Member majority and General Counsel continue to view the "interference" prohibition of the NLRA expansively, and are planning to continue, if not increase, scrutiny of employer policies. The scrutiny will be applied regardless of whether (1) the policies are general, or relate only to social media; and (2) the workforce is union or non-union. Some of the specific types of employer policies that are in the NLRB's target zone are discussed below.

Confidentiality Policies and Agreements

In the view of the Board, employees have the right to talk among themselves about almost any employment-related issue and to communicate about such issues with third parties and the general public. Thus, the Board is likely to find that policies and individual confidentiality agreements violate the law if they label as "confidential" personnel information and other information about wages, benefits, or terms and conditions of employment; or prohibit disparagement of the employer, other employees, and management. Likewise, blanket confidentiality policies applicable to internal corporate investigations are likely to be ruled unlawful employer interference. Here, though, the NLRB has made an exception that allows some employer "interference" on a case-by-case basis, when confidentiality of an investigation is reasonably necessary given the circumstances of the investigation.

Employee Behavior and Conduct Policies

Many employers have policies that require employees to show respect to customers, co-workers, and managers, and to be courteous in their dealings with co-workers, people in the workplace, and third parties when the employees are actually or appear to be representing the employer. For example, it is not unusual for employers to have policies requiring employees to refrain from rudeness, using profanity, or engaging in offensive, intimidating or threatening behavior. Although there is some point at which employee bad behavior is so egregious that it crosses a line even in the view of the NLRB, the line is unclear. Thus, any employee policy or rule intended to track or get close to that line probably will be, at best, ambiguous, and the Board is likely to find that such a rule is overbroad and constitutes unlawful interference. In the NLRB's view, some protected concerted activity might be considered discourteous, disrespectful, offensive, intimidating or threatening – thus, any restriction on that type of activity might constrain employees in the exercise of their Section 7 rights. Indeed, the Board has essentially ruled that some employee annoyance and disturbance is to be expected from protected concerted activity and that employer action to stop it will often be unlawful interference. In other words, the Board has come down squarely on the side of protecting some bullying, harassment, and otherwise uncivil behavior.

Non-Disparagement Policies

Policies and agreements targeted by the NLRB include those that prohibit (1) disparaging the employer, management, co-workers, company products, and others, including suppliers and customers, and (2) misuse of the employer entity name and logo or trademarks. In the NLRB's estimation, such policies are overbroad and likely to be deemed to be a form of unlawful interference. Although the Board might allow an employer to prohibit product

disparagement and commercial use of company intellectual property, including logos and trademarks, the lines are unclear, and any ambiguity in employer policies will be probably be construed against the employer.

Policies on Media Contact

Many employers seek to control communications flowing between employees and the media, and have policies that require employees to refer all media inquiries to management, or to a public relations or communications department. The Board is likely to view such a policy as unlawfully interfering with an employee's right to talk to third parties about employer-related issues that are within the scope of protected concerted activity.

Employee Access Policies

Policies that prohibit employees from staying on or coming back to the workplace premises during non-working time are likewise viewed by the Board as overbroad and unlawful. In the NLRB's view, employees have the right under Section 7 to remain in employer parking lots and external, non-working areas. Moreover, if the employer lets employees come into the facility for some non-work-related purposes, it must allow access to any employee who wants to engage in protected concerted activity of any sort. This highlights the need for employers to become familiar with the NLRB's rulings on disparate enforcement of policies.

Policy Statements About Non-Union Employer Status

The recent article in *Law360* mentioned above indicates that the NLRB General Counsel has taken the position in at least one case that "union-free" policy language is overbroad and thus unlawful interference. The theory apparently is that such a statement tells employees that it would be futile to engage in the protected concerted activity of seeking union representation because of the employer's non-union status. (Whether the General Counsel ultimately will prevail with this theory is uncertain. Arguably, Section 8(c) of the NLRA gives an employer the right to express its opinion on unions and desire to remain union-free.)

Policies on Law Enforcement or Government Agency Contact

For obvious reasons, most employers seek to have some control over communications between the employees and law enforcement or government agency officials. For example, often there is a policy or rule requiring employees to advise management about communications with local or state police, securities regulators, or government inspectors. The Board is likely to consider such a policy as overbroad, because in the Board's view, the policy could be interpreted by employees as preventing them from cooperating with the NLRB, the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, and the host of other agencies that handle employment matters. The Board treats employee cooperation in such investigations as protected concerted activity.

Of course, employer policies on contact with government agencies are almost never intended to discourage these types of contacts. Rather, the policies are intended to ensure that an employee does not inadvertently impair the company's interests in connection with an investigation. The NLRB position, unfortunately, does not recognize this distinction.

Arbitration Policies and Agreements

February 6, 2014

Encouraged by favorable court decisions, a growing number of employers have policies or use agreements that make arbitration of employee disputes, instead of court litigation, mandatory. Some of these policies and agreements expressly include all employment disputes and fail to create exceptions for NLRB unfair labor practice charges, EEOC charges, or other similar agency charges. They also frequently include an express waiver of the employee's right to proceed collectively or on a class or group basis in arbitration, or they preclude the arbitrator from considering a dispute on a class, collective, or group basis.

The NLRB views any arbitration policy or agreement that fails to clearly and expressly make an exception for NLRB charges to be overbroad and thus unlawful interference. (NOTE: the NLRB takes the same view of "open-door" or other dispute resolution procedures that require disputes to "first" be brought to the employer rather than third parties, such a unions, other workers, or agencies). Similarly, the Board views an employee's right to pursue a civil action in court on a class or collective basis as a form of protected concerted activity that an employer may not restrain either through policy or individual employee agreement.

The NLRB's position was recently rejected by a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit (which hears appeals from federal courts in Louisiana, Mississippi, and Texas) in the ***D.R. Horton*** case. But the NLRB is not letting *D.R. Horton* slow it down anywhere except possibly in Fifth Circuit states. (Moreover, the NLRB may petition for rehearing of *D.R. Horton* by the full Fifth Circuit.) According to a recent *Bloomberg BNA* report, Pearce noted that he remained of the opinion that the right of employees to engage in concerted activity through a class or collective action is a right protected by the NLRA, and Griffin said that the Board's Regional offices are continuing to issue unfair labor practice complaints. An NLRB Administrative Law Judge **recommended** last month that the Board find that an employer had unlawfully interfered in employees' Section 7 rights by trying to enforce an arbitration policy to bar a class action that an employee had brought in court. (The policy at issue did not, on its face, bar class action litigation or arbitration.)

Employment-at-Will Disclaimers

"Employment-at-will" statements generally provide clearly that there is no contract of employment for a definite term, and that the employment relationship may be terminated by employer or employee for any lawful reason. (In other words, "just cause" is not required for termination.) To prevent the chaos that can result from actual or alleged "side agreements" to the contrary between employees and company representatives, the policies often provide that the "at-will" provision may not be changed. There has never been any indication that such a statement was intended to deter union activity or ever deterred an employee from pursuing Section 7 activity.

However, the NLRB in several cases has taken the position that such policies are unlawful because employees might think that seeking union representation (and ultimately a collective bargaining agreement with termination only for "just cause") would be futile.

Employers can attempt to counter the NLRB's strained interpretation by amending their policies to say that the "at-will" status of an employee may not be changed "on behalf of the employer" except by means of a writing signed by an employer's agent authorized to make the change.

The Takeaways

- Employers should review their handbooks, policy manuals, social media policies, work rules,

plant rules, and individual employee agreements – including confidentiality and non-disclosure agreements – to determine whether the language could be interpreted as interfering with Section 7 activity, or even having a "chilling effect" on such activity.

- Employers should revise their policies to avoid potential liability for unfair labor practices while still protecting their rights as much as possible. Revisions should be made before the employer has knowledge of any union organizing activity. (Once organizing starts, changes to policies should be made only after consultation with labor counsel.)
- Employers may want to include specific examples and disclaimer language to clarify the type of conduct or activity that is prohibited as well as that which is not.
- Although this approach has costs, employers may want to consider dispensing with rules that attempt to address all possible "bad conduct" scenarios and instead simply take action to deal with egregious conduct.
- In connection with the discipline or discharge of an employee, employers should carefully review in advance the potential for an "interference" claim based on disparate enforcement of a policy.

There is little doubt that the Board will continue to scrutinize employer policies for interference, and give special attention to policies applicable to social media and protected concerted activity. One result of the Board's current positions is that many non-union employers, who considered themselves immune from NLRB matters, are increasingly finding themselves subject to unfair labor practice proceedings before the agency.

For a "labor audit" of your employment policies, please contact any member of Constangy's **Labor Relations Practice Group**, or the Constangy attorney of your choice.

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 140 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.

TABLE OF CONTENTS

SECTION I - Introduction

SECTION II - Benefits for Employees

SECTION III - Personnel Policies

SECTION IV - Employee Statement

MEAL AND REST PERIOD POLICY

Employees that are scheduled to work more than five (5) hours must take a thirty (30) minute uninterrupted meal period, off the clock, no later than the end of the fifth hour of work. Employees are entitled to be relieved of all their duties and free to take care of personal matters during that time. Employees that have a six (6) hour shift may voluntarily waive the meal period if they execute a Six Hour Shift Waiver Form. Please see the Human Resource Department.

The Company provides a paid ten (10) minute rest period for every four (4) hours of work or major fraction thereof. An employee who works between three and a half (3 1/2) to six (6) hours is entitled to one (1) ten minute break, an employee who works over six (6) hours is entitled to a second ten minute break. An employee that works less than three and a half (3 ½) hours is not entitled to receive a paid ten (10) minute rest period. Please check with your supervisor for the appropriate time to take meal and rest breaks.

Meal periods and rest periods may not be waived to leave early nor may they be consolidated for a longer break or meal period.

It is against Company policy for any employee to perform work during meal or rest periods. It is against Company policy to return to work before the end of a 30 minute meal period or ten minute rest break. It is also against Company policy for employees to work "off the clock," that is, perform work without recording it as time worked on their timesheets.

Employees working more than ten (10) hours are entitled to a second meal period before end of the tenth hour of work, unless the employee voluntarily executes a Twelve Hour Shift Waiver Agreement and has taken the first meal period.

The undersigned acknowledges that he or she has read and understands the foregoing Meal and Rest Period Policy.

_____ _____

Employee Signature Date

SEMI-MONTHLY TIME SHEET FOR:

Full Name: _____
Address: _____
_____
Phone No.: _____

Pay Period _____, 20____ through _____, 20____
Soc. Sec. No.: _____

REGULAR TIME (FILL IN TIME IN & OUT)					OVERTIME (FILL IN TIME IN & OUT)		BREAKS (CHECK OFF EACH)		TOTAL HOURS	
Date	**In**	**Out**	**In**	**Out**	**In**	**Out**	✓	✓	**Regular**	**O.T.**
OT Approval:										

TOTALS				
I certify that I have provided complete and accurate information in completing this time sheet. I understand that it is against company policy to provide false or incomplete information on time sheets. I further certify that I have had the opportunity to take my required rest period(s) according to company policy and have taken the required meal period(s) according to company policy.	**Regular/OT Hours**			
	Vacation Hours			
	Holiday Hours			
	Sick Pay Hours			
	TOTAL			

_____ _____
Signature Date

RULES OF DISCIPLINE

1. **FAIRNESS.** Ask yourself the following question: Is it fair to discipline this employee based upon the quality and quantity of the facts before you?

2. **CONSISTENCY.** In the past has the Company imposed the same discipline in similar situations?

3. **UNIFORMITY.** The Company has an employee handbook, so employees know what is to be expected of them and what the Market provides for them for benefits. As a supervisor you must promote the understanding of such policies to each employee.

   Examples: Excessive absenteeism.
   Insubordination.

4. **HONESTY.** During discipline it is essential that you are candid and direct with the employee regarding performance and performance appraisals. Never tell any employee they are being laid off when performance is the real issue.

5. **BE OBJECTIVE.** To demonstrate validity and legality of actions.

6. **FOLLOW RULES 1, 2, 3, 4 and 5.** Be in a position to demonstrate all of the above. Imagine yourself in the witness chair. This is what you want to portray to the judge or the jury.

Record of Supervisory Discussion

Employee Name ..... Position ..... Dept .....

Supervisor ..... Date of occurrence .....

Describe the problem:

Frequency of the problem: ❑ *1st time* ❑ *2nd time* ❑ *3rd time* ❑ *more than 3 times*

Describe employee's response:

Action taken: ❑ *Discussion only* ❑ *Verbal reprimand* ❑ *Written reprimand*

❑ *Suspension:* _____ *days* ❑ *Discharge*

Explain reason for action taken:

Further action(s) of a similar nature will result in additional disciplinary action up to and including termination of employment.

Supervisor's signature ..... Date .....

2nd level Supervisor's signature ..... Date .....

I have read and received a copy of this memo.

Employee's signature ..... Date .....

Record of Disciplinary Action

Employee Name ..... Position ..... Dept .....

Supervisor ..... Date of occurrence .....

Describe the problem:

Frequency of the problem: ☐ *1st time* ☐ *2nd time* ☐ *3rd time* ☐ *More than 3 times*

Describe employee's response:

Action taken: ☐ *Written reprimand* ☐ *Suspension: _____ days* ☐ *Discharge*

Explain reason for action taken:

Further action(s) of a similar nature will result in additional disciplinary action up to and including termination of employment.

Supervisor's signature ..... Date .....

2nd level Supervisor's signature ..... Date .....

I have read and received a copy of this memo.

Employee's signature ..... Date .....