

Trusted compliance advice for California employers

Editor: Joseph L. Beachboard, Esq., Ogletree Deakins, Los Angeles

In the News . . .

Breaks are required; forcing employees to take them isn't

California employees have a legal right to take regular meal and rest breaks at work. But here's good news for employers: An important California Court of Appeal ruling says you aren't required to make sure employees actually take those breaks. The ruling says that "while employers cannot impede, discourage or dissuade employees from taking rest periods, they need only provide, not ensure, rest periods are taken."

Also, the court said employers aren't necessarily legally responsible if employees work off the clock unless the employer knew or should have known it was happening. That's important because many companies have been blindsided by employees who claim to have been working overtime at home or after hours. (*Brinker Restaurant v. Superior Court of San Diego County*, No. D049331)

Workers' comp may cover injury that occurs on vacation

Could your organization be on the hook for workers' compensation benefits if the employee gets hurt while working out during a vacation? Under

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California Employment Law is published by **HR Specialist** and is edited by Joseph L. Beachboard, a shareholder with the law firm of **Ogletree Deakins** and the former publisher of the *California Labor Letter*. In addition to representing management in employment matters, he speaks regularly before employer groups. Contact him at (310) 217-8191.

Firing workers on FMLA leave: It can be done

The federal FMLA and the California Family Rights Act (CFRA) don't forbid you to fire employees after they return from leave—or even while they're on leave. You're simply prohibited from firing them *because* they took FMLA or CFRA leave.

Advice: Be able to show and document the reasons for the firing (e.g., insubordination, RIF) that occurred *before* the employee requested leave.

Before you terminate on-leave employees, ask yourself three questions:

1. Would the employee be discharged if he or she weren't on FMLA leave?
2. Have other employees been dis-

charged for similar conduct?

3. Does the conduct indicate the employee is a danger to himself or herself and others? (If so, a court probably won't second-guess you.)

The more "yes" answers, the more
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Free report **How to Wipe Out FMLA Fraud and Abuse**

For an 11-step process to help stop employees from "working" the system, download our free white paper, *How to Wipe Out Fraud and Abuse Under FMLA*, at www.theHRSpecialist.com/whitepaper.

Workers gone wild: When is a company liable?

Your organization typically is liable for injuries caused by employees who are acting within the "course and scope of employment." You aren't liable when employees cause injuries on their own free time.

To decide whether employees are "on the clock" when they commit negligent actions, courts will look at specific questions, such as: Was the action within the employee's general authority? And was the employee working in furtherance of the employer's business?

If the negligent act involves a car

accident, courts will consider other factors, such as whether the car was company-owned.

Advice: Draft a clear policy that outlines what employees can and can't do within the scope of their jobs, including whether they're allowed to conduct any personal business on company time.

Recent case: Thomas Robinson took a large plastic storage bin (without permission) from the winery where he worked and drove it home to make wine for himself. The bin

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Firing workers

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likely the firing won't be seen as retaliation.

Recent case: A clerk who suffered from bipolar disorder met with her boss to discuss performance problems. It didn't go well. She cried, screamed obscenities, tossed her improvement plan at the boss and slammed the door. She then threatened suicide. She was hospitalized briefly and took FMLA leave.

The company investigated the incident and fired her. She sued, alleging that firing her while on FMLA leave was illegal. Not so, concluded the 9th Circuit Court of Appeals, which includes California. The firing was related to her behavior, not to FMLA leave. (*Gambini v. Total Renal Care*, No. 05-35209, 9th Cir.)

Workers gone wild

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fell off his truck and struck a motorcycle driver, who suffered injuries in the crash.

The motorcyclist sued the winery for negligence. But the California Court of Appeal tossed out the case, saying Robinson wasn't acting within the scope of his employment when the accident occurred. (*Baptist v. Robinson*, No. H029233, California Court of Appeal)



'Company Records: What to Keep, What to Dump'

Your subscription includes access to several online advisory reports. Our latest report, *Company Records: What to Keep, What to Dump*, explains how long to retain more than 200 different kinds of business records. It's free with your paid subscription at www.theHRSpecialist.com/whitepaper.

Discipline policies: Build an 'escape hatch' that allows for instant terminations

Does your employee handbook outline a progressive discipline process to be followed in cases of employee behavior or performance problems? If so, make sure the policy also includes language allowing you to skip progressive discipline in egregious cases.

Failing to have such an escape clause is a mistake made by many employers ... and it's typically not noticed until it's too late, such as when an employee sues.

Your policy should retain the right to fire employees for serious offenses without having to go through progressive discipline. (*For more on progressive discipline, see page 7.*)

As the following case shows, courts could require you to follow the letter of the discipline language, even if your handbook clearly says it doesn't

constitute a contract.

Recent case: U.S. Bancorp's employee handbook explicitly said that "policies and procedures do not constitute a contractual obligation." Still, after the company fired Susan Messinger for violating a company policy, she sued, claiming the handbook guaranteed her the right to progressive discipline before termination.

The handbook stated that the company's progressive counseling "will provide [the employee] with a reasonable opportunity to make the necessary improvements in order to succeed."

The 9th Circuit Court of Appeals sided with Messinger, saying the handbook's promise to provide a reasonable opportunity to improve negated the contract disclaimer. (*Messinger v. U.S. Bancorp*, No. 04-35548, 9th Cir.)

Supervisors need to know: Don't penalize complainers

Sometimes employees file discrimination complaints just to see if their employers will retaliate in some way. Then they hit back with a retaliation claim. It's a classic trap—and it doesn't matter if the original complaint was weak. *Don't fall for it.*

Instead, make sure you treat the employee exactly as you would have if he hadn't filed the complaint. The test for retaliation is whether the employer's act would deter a reasonable worker from complaining in the first place, so use that as your guide.

Recent case: Abiodun Sodipo, who is black and from Nigeria, complained to the EEOC that his employer was treating him unfairly by not processing his immigration paperwork fast enough. Then, when Sodipo went to the hospital for work-related stress, he was allowed to take a six-week medical leave of absence.

During the leave, his employer banned him from the office and denied him access to his company-issued laptop and work files. He claimed taking the laptop was retaliation for the EEOC complaint.

But the company explained it had banned him from working so he could concentrate on getting better.

The federal judge hearing the case concluded that Sodipo had suffered no adverse employment action—a necessary element in a retaliation case. He was simply banned from working on leave for seemingly legitimate, nondiscriminatory reasons. The judge concluded that being banned from working during a requested medical leave would not dissuade a reasonable employee from filing a discrimination complaint. (*Sodipo v. Caymas Systems*, No. 06-05794, ND CA)

Enforce dress and grooming policies tactfully to avoid legal trouble



Even HR managers may be personally liable for harassment

A federal court interpreting California law has concluded that managers may be personally liable if they condone a hostile work environment or harass a disabled employee.

Recent case: Lisa Beck sued FedEx Ground and HR manager Sandra Williams over Williams' refusal to find Beck a job that matched her medical restrictions. Beck also claimed negligence, alleging that Williams had a duty to protect her from harassment, but instead harassed her because of her disability.

Williams argued that managers can't be held negligent for actions taken within the scope of their employment. But the court concluded that California law didn't preclude personal liability for harassment. The negligence case will go forward. (*Beck v. FedEx Ground, et al.*, No. S-07-0717, ED CA)

Use statistics early to blow shaky lawsuits out of water

Employees who sue for discrimination have to come up with some evidence before the case can advance beyond the initial stages—and before it gets progressively more expensive for employers paying the legal bill.

Employers that fight back right away with statistics showing there was no discrimination can save big bucks in the long run.

Recent case: Fernando Ornelas, who is over age 40, was fired from his production job for taking a longer break than he was entitled to.

He sued, claiming the real reason for his firing was age discrimination.

But the company offered evidence that the average age of plant employees was over 40. It could also show that every other employee it had fired for the same reason was under age 40.

The court said that was enough to prove no discrimination had occurred. (*Ornelas v. Nestle*, No. E047531, Court of Appeal of California, 4th Appellate Division)

You can't legislate good taste. But that shouldn't stop you from having and enforcing dress and grooming rules. Unless your company seeks to cultivate an alternative image, you can and should prohibit sloppy or distracting clothing and outrageous hairstyles and makeup (and outright ban clothing that creates a danger).

How you enforce those rules, however, can make the difference between needless litigation and a productive workplace.

Don't joke about an employee's dress or style. Instead, call the person into a meeting and discuss the problem in private.

Recent case: Veronica Long worked as a records technician for a U.S. Coast Guard clinic. She sued for discrimination, claiming her supervi-

sors hassled her about her dress and grooming.

Long told the court that one supervisor snapped a photo of her wearing one outfit, "looked her over" and complained that her outfits were not appropriate for work. Once a supervisor left a note on her desk telling her, "By the way, nice outfit today. Love the pinstripes. Looks sharp."

The court dismissed her sex discrimination lawsuit, concluding that the comments weren't severe enough to affect her performance or constitute sexual harassment. (*Long v. Columbia-Arora Joint Venture*, No. 06-06545, ND CA)

Advice: This lawsuit could have been avoided if the supervisors hadn't snapped photos or left comments on Long's desk.

Know when you can (and can't) ask employees for more medical info

Both the federal FMLA and the California Family Rights Act (CFRA) restrict how much medical information you can demand from an employee who wants leave. In most cases, you have to be satisfied with the employee's medical certification and can't call the health care provider directly for more information.

You also have to guard the medical information, keeping it confidential.

But there's an exception: If your organization has a short-term disability program through a third-party insurance policy, you can ask the employee to provide additional information if plan administrators need it to determine eligibility.

What's the best way to proceed? Get the employee to sign a medical release as part of the short-term disability application process. That way, the person can't later say your request violated his or her privacy.

Recent case: When a merger meant some Chevron employees would have to relocate from California to Texas, Kiran Pande rejected a relocation offer. She was told she wouldn't have a job when her assignment expired.

She then requested protected leave for a medical condition and submitted a certification to HR. She also applied for temporary disability benefits. When Chevron asked for more information, she bristled.

While on leave, her assignment ended and she was terminated. She filed an FMLA suit and also claimed the company violated her right to medical privacy.

Not so, ruled the court. Because she asked for temporary disability payments, in addition to FMLA and CFRA leave, she opened the door for additional medical questions to see whether she was eligible for benefits. (*Pande v. Chevron*, No. 04-5107, ND CA)



Degrees of separation: 6 terminations, 6 ways to avoid lawsuits

Terminations are the spark to many employment lawsuits. And for each of the six kinds, there are some common steps employers can take to defend themselves if a termination is challenged in court:

1. NEW HIRES. When new employees are dismissed, their legal claims typically assert they didn't know about performance expectations or had no training. Or, they may sue if they know of other employees who didn't perform well yet kept their jobs.

The key to defending such claims: Completely document the training and any failure to meet expectations, while showing that you uniformly applied the rules.

2. ABSENTEEISM. Again, documentation is critical. Document that you notified the employee of the attendance policy and the employee failed to comply. Also be able to show that you uniformly applied the policy.

Make sure managers don't use protected absences (FMLA, ADA or state laws, such as jury-duty absences) as the basis for termination decisions.

3. MISCONDUCT. Employees terminated for violating conduct rules often claim they were "found guilty" based entirely on management's report to HR.

It's too late to get the worker's side after termination. So always get the employee to provide an explanation before a decision is made. During the investigation, you have the legitimate option of placing the employee on a leave of absence.

4. SUDDENLY DECLINING PERFORMANCE. The employee's performance actually may be deteriorating—or management's perception of the performance may have changed. Sometimes it's both.

For example, a stressful family situation may distract the employee. On the other hand, a new supervisor or different job duties may lead to a different judgment.

In these cases, it's prudent to go slowly. Include the employee in your discussions about the cause and look for ways to improve. Document those discussions.

If performance doesn't improve, you will want to be able to show you made a reasonable effort to help the employee keep his or her job.

Finally, employers should try to develop objective evaluation systems that don't rely solely on any one supervisor's subjective opinion.

5. RESIGNATIONS. *The risk:* Employees can claim they were

"constructively discharged." If the former employee can show that conditions were so intolerable that a reasonable person would feel there was no alternative but to resign, then the resignation is equivalent to a termination.

So, when employees quit, it may be tempting to tell them, "Good riddance!" But a safer strategy is to do the opposite: Ask them to reconsider. Doing so may preclude a constructive-discharge claim.

6. THE DANGEROUS "NO REASON" TERMINATION. In at-will states, employers that have done what is necessary to retain employees' at-will status don't need a good reason (or any reason at all) to fire them. However, employers rely on this rule at their peril.

Everyone expects some reasonable explanation for a termination, especially if the employee is a member of a protected class (e.g., race, gender, age, religion, disability).

To defend against a discrimination claim, always be able to articulate a legitimate, nondiscriminatory reason. And always have the decision-maker document the reason. (If the decision-maker leaves the company, you'll want to be able to explain to a jury why the employee was fired.)

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Review policy on cell phone usage to comply with California law

If your employees use cell phones for company business while driving, make sure your policy requires hands-free devices. Then educate employees about the policy.

Reason: California law bans the use of hand-held cell phones while driving a motor vehicle. The law carries a \$20 fine for a first offense and a \$50 fine for all subsequent offenses. The law does allow hand-held phones to be used to contact police or fire departments.

Even though the California Highway Patrol (CHP) used a PR blitz to publicize the change, many employers have overlooked the law.

Don't waste money buying government forms and posters

Several government agencies are alerting business owners that they don't need to pay for most forms and posters they're required to use and post in

Workers' comp

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California law, the answer is "yes."

Recent case: While on vacation, a member of the Beverly Hills SWAT team was jogging to prepare for a fitness exam. He broke his ankle and filed for workers' comp. The city objected, but the court agreed with the employee.

Reason: To be covered by workers' comp for off-duty and unpaid physical activity, an employee has to show:

1. That he subjectively believed his employer expected him to participate in the activity that caused the injury.
2. That the belief is objectively reasonable.

It's irrelevant whether the activity occurred on vacation or at home. (*Tomlin v. WCAB and Beverly Hills*, No. B199429, Court of Appeal of California)

"What's the biggest employment law issue you face today?"

This question was asked of California HR professionals at a recent Society for Human Resource Management conference. Here are some responses:

Family leave. "The biggest issue for me is trying to comply with the FMLA and all the California add-ons, like the CFRA (California Family Rights Act). It takes a lot of time to track it and make sure you're doing it correctly. I've only been in HR a year-and-a-half and it takes a lot to learn all the nooks and crannies of those laws."

— Lauren, San Jose

* * *

Wage lawsuits. "The wage-and-hour lawsuit problem is horrendous. Class actions are so hot right now. There are so many ways to hit employers if they're not 100% complying with the law."

— Margaret, San Diego

* * *

Immigration. "We're reading and hearing a lot about the immigration raids around the country. The current laws really put HR in a 'no-win' situation. I don't know what the answer is. I don't want total amnesty, but Congress needs to do something."

— Pat, Fallbrook

their workplaces. Those documents are often available free on government web sites.

Web sites ending in .gov are the only official government sites. Some private companies try to sell government documents using official-looking web sites.

Advice: You can download most required federal posters free at the U.S. Department of Labor's main poster page, www.dol.gov/osbp/sbrefa/poster. Download mandatory California posters at www.dir.ca.gov/wpnodb.html.

Beware legal risks of jotting nasty notes in customers' files

In a classic *Seinfeld* episode, Elaine's doctor made a note on her medical chart that said she was "difficult." Do your employees make similar editorial comments about customers' quirks in your internal files? If so, be careful of the legal risks. A recent lawsuit shows the potential legal dangers.

The case: A drugstore customer asked the pharmacist not to mention the types of drugs she was picking up. The pharmacist made note of her request in the internal computer system, but added in his notes: "CrAZY!!" and "She's really a psycho!!"

When a friend picked up the woman's prescription, the printout receipt accidentally included these comments. The woman sued for libel, noting that the comments were available to every pharmacist in the drugstore's chain.

Trying to save on workers' comp, temp firm now owes \$20 million

Staffing Services, a temp agency, must pay \$20 million in restitution to resolve a workers' compensation insurance fraud case recently heard in a Los Angeles court. The repayment is one of the terms of the settlement reached between the Bellflower-based company and the state.

The California Department of Insurance (CDI) originally accused Staffing Services, its owner and chief financial officer of attempting to defraud California's workers' compensation fund for more than \$18 million in insurance premiums. The criminal complaint said the company purposely misrepresented the types and number of workers it employed in order to pay smaller workers' comp premiums.

The \$20 million was a bargain. The defendants originally faced up to 24 years in state prison, in addition to another \$40 million in fines.

California's sexual harassment training requirements: How to comply

If you've been looking for definitive guidance on California's Sexual Harassment Training Law (AB 1825), it's here. The Fair Employment and Housing Commission has issued final regulations implementing this first-in-the-nation law.

The regulations include specific direction on the type, length and frequency of harassment training that California employers must provide to their employees. Specifically, all covered employers must provide two hours of training to all supervisory personnel every two years.

Who must train (and be trained)

The law covers employers with 50 or more employees or contractors. There is no requirement that the 50 employees or contractors work at the same location or that they all work or reside in California.

The law requires covered employers to provide at least two hours of training to supervisors every two years.

Newly hired or newly promoted supervisors must be trained within six months of assuming a supervisory position.

What counts as 'training'?

The law specifies that the training must be conveyed via "classroom or other effective interactive training and education." The training must include:

- Information and practical guidance regarding the federal and state statutory laws prohibiting sexual harassment
- Information about the prevention and correction of sexual harassment in the workplace
- The remedies available to victims of sexual harassment
- Practical examples aimed at instructing supervisors how to prevent harassment, discrimination and retaliation.

Requirements for documenting your sexual harassment training

California's Sexual Harassment Training Law requires employers to provide supervisors with two hours of harassment training every two years. Employers can use one of two methods to keep track of that training:

- **Under the individual tracking method**, an employer may track its training requirement for each supervisor, measured two years from the date of completion of the last training of the individual supervisor.
- **Under the training-year tracking method**, an employer may designate a "training year" in which it will train some or all its supervisors. Thereafter, the employer must train those supervisors by the end of the next "training year," two years later. For newly hired or promoted supervisors, who must receive training within six months of assuming their supervisory positions, the employer may include them in the next training year (even if that occurs sooner than two years).

Employers must maintain training records for a minimum of two years. The documentation must include: (1) the supervisor's name; (2) the type of training; (3) the training date; and (4) the trainer's name.

The commission envisions more than just lectures. Instead, the training must incorporate "questions that assess learning" and "skill-building activities that assess the supervisor's application and understanding of" the material. The training should include hypothetical situations that stimulate discussion among the participants and familiarize supervisors with sexual harassment issues.

Online training

Employers can use online or web-based training to satisfy their obligations under the law. However, the training must be "individualized, interactive, computer-based training created by a [qualified] trainer and an instructional designer." When reviewing the training materials, employers should ask themselves:

- ✓ Does the training ask for significant feedback to demonstrate that the supervisor understands the concepts being taught?
- ✓ Does the training make supervisors go over areas in which they have trouble before moving on?
- ✓ Does the training provide a link to or directions on how to contact a trainer who will be available to an-

swer questions and provide guidance about the training within a reasonable period of time?

How your policy fits in

In addition to training, employers should have an anti-harassment policy in place. It should include a definition of harassment and instructions about how to report harassment.

Employees who feel they have been harassed should report the harassment to their immediate supervisor. However, if the supervisor is the one being accused of harassment (or the alleged victim simply does not feel comfortable broaching the subject with his or her supervisor), the employer should provide another point of contact for the employee.

Best practice: Export CA training

Multistate employers that operate in California and other states can leverage California training in their other operations. Other states do not yet require this kind of training. But employers that implement the training in their locations outside California can make the new standards de facto for training companywide. That will look better in a California court if a supervisor is ever accused of harassment.

Progressive discipline: How to apply a fair and firm policy

THE LAW While no federal or state law requires you to create and follow a progressive-discipline policy, courts often come down hard on employers that promise progressive discipline but fail to deliver it.

That's why the most reliable way to protect your organization from wrongful termination charges is to establish and enforce a progressive-discipline system.

WHAT'S NEW An increasing number of lawsuits have been filed in which terminated employees complain that employers have violated their own progressive-discipline policies by firing the employee before working through all the rungs on the progressive-discipline ladder.

Tip: Include language allowing you to skip progressive discipline and fire right away for particularly egregious behavior.

HOW TO COMPLY While it's your right to terminate at-will employees at any time for misconduct or lax performance, a progressive-discipline policy lets you make clear that problems exist and need improvement.

How it works: Your policy simply increases the severity of a penalty each time an employee breaks a rule. Typically, a policy progresses from oral warnings to written warnings, suspensions and then termination.

That way, employees won't be surprised when they reach the end and are fired. By taking the surprise out of the firing, you lessen your exposure to a wrongful-termination lawsuit. Before drafting a discipline policy, make sure employees possess clear job descriptions and an employee code of conduct. It's critical that they know exactly what's expected of them.

Five-step model policy

Here are the five standard pieces of progressive discipline:

1. Oral warning/reprimand. As

Is your discipline fair? A 5-question self-exam

The perception that management is "against" the workers, once established, is hard to shake. That's why it's vital to ensure that you treat employees fairly during disciplinary investigations. To make sure supervisors (or you) play fairly, ask these five questions before handing down discipline:

- 1. Does the punishment fit the crime (or is the employee being singled out)?
- 2. Is the discipline consistent with what other supervisors have done?
- 3. Has the discipline been administered after a proper investigation of the facts? Be a neutral fact-finder until you gather all the facts.
- 4. Is the discipline being taken quickly? A simple investigation that takes weeks could be interpreted as though your organization is trying to find problems. Tell the employee the steps you're going through and when you'll respond.
- 5. Is the discipline confidential? Warn everyone involved that speaking about disciplinary investigations or actions is strictly on a need-to-know basis.

soon as supervisors perceive performance or behavior problems, they should issue oral reprimands. Ask the worker whether any long-term problems need correcting.

Make sure the supervisor keeps detailed (and dated) notes on the reason for the warning and the response. Don't assume they'll remember disciplinary specifics—or even remain employed by your organization—when a complaint gets to court.

2. Written warning/reprimand.

If the problem persists (or more problems emerge), supervisors should meet with the worker and provide a written warning that details the problem and the steps needed to improve. If possible, ask another person—a management-level employee or HR rep—to sit in on the meeting.

The written warning should summarize the issues discussed, set a timeline for action and describe in detail the corrective steps agreed upon. Explain the standards that will be used to judge the employee.

Also explain the consequences of continued poor performance, including termination. Require employees to sign this form, acknowledging that they've received it. Place the document in the employee's personnel file.

3. Final written warning. If the

performance doesn't improve, deliver a final written warning, possibly including a "last chance agreement." Show the worker copies of previous warnings, illustrating specific areas in which he or she must improve. Specify the time period and, again, obtain the employee's signature.

4. Termination review. If problems continue, supervisors should notify HR. In general, supervisors shouldn't hold solo firing authority. However, to preserve supervisors' exempt status under the Fair Labor Standards Act and state law, they should have significant say in hiring and firing decisions.

Some organizations suspend employees while they investigate and decide whether to terminate. Before acting, make sure your disciplinary measures are consistent with those you've taken in other similar situations. If you don't, a court could say illegal age, sex or race discrimination was the true reason for your actions. Document your action and reasoning.

5. Termination. If you decide to terminate, meet with the employee and deliver a termination letter.

Next Nuts & Bolts: *Personnel files*
Coming soon: *Attendance policies*



Can we pay for OT hours in a later pay period?

Q Our company was unable to obtain the number of overtime hours worked by an employee in time to include payment for those hours in the current payroll period. We're aware that untimely payment of wages could expose us to penalties. Can we issue a paycheck to the employee for his regular hours worked and include his overtime payment in the following pay period?

A Yes. Section 204 of the California Labor Code provides specific time periods in which nonexempt employees must be paid. Under this section, compensation for labor performed between the first and 15th of the month must be paid between the 16th and 26th day of the month during which the labor was performed. Moreover, compensation for labor performed between the 16th and the last day of the month must be paid between the first and 10th day of the following month. That requirement is satisfied if wages are paid weekly, biweekly or semimonthly, as long as the wages are paid within seven calendar days of the close of the payroll period.

This provision includes a specific exception for the payment of overtime. Under Section 204, "all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period." Thus, the law provides a limited grace period for the payment of overtime.

Saying 'no thanks' to two weeks' notice

Q An employee recently provided two weeks' notice of his intent to leave the company. Can I tell the worker that he is not needed for the two weeks and avoid paying him for that time?

A Generally, yes. However, the answer may be different if you have a policy "requiring" two weeks' notice prior to resignation. If such a policy exists, you've arguably established a contractual obligation.

Even if no such policy exists, consider the impact that your action might have on other employees. When others see that this employee was told to leave upon providing two weeks' notice, they're not likely to give notice themselves if they resign.

Replacing pregnant worker: When is it legal?

Q One of our employees is on pregnancy disability leave. We are a small company and it will be difficult for us to keep her position open. May we hire another worker to replace her based on this hardship?

A California law prohibits most employers from discriminating against female employees "because of pregnancy." Moreover, you must provide up to four months of leave for a worker who is "disabled" by her pregnancy (and an additional 12 weeks for bonding with the child under the California Family Rights Act, assuming the company

has 50 employees).

At the end of a pregnancy disability leave, the employee is entitled to be reinstated to the position previously held. The Fair Employment and Housing Commission (FEHC) has said employers may be excused from returning the worker to the same position if: (1) she would not otherwise be employed in that job for legitimate business reasons unrelated to the leave (such as a plant closure); or (2) preserving the employee's job would "substantially undermine the employer's ability to operate the business safely and efficiently." You must show that preserving the job created more than just an inconvenience.

Even if your company is excused from keeping the employee's job open, it may be obligated to reinstate the worker in a comparable position.

Also, note that pregnancy, childbirth and caring for a new child may be covered under the federal FMLA. Eligible employees are entitled to up to 12 weeks of unpaid leave, plus reinstatement to the same or a substantially similar position.

Can we punish staff for false harassment claims?

Q We are revising our sexual harassment policy. Can we include a provision that imposes discipline on employees who bring false harassment claims?

A Including such a statement does not violate state or federal law. However, one purpose of a sexual harassment policy is to encourage employees to bring complaints of inappropriate behavior to the company's attention. Some contend that promising to punish workers who bring "false" claims will discourage legitimate complaints and increase the employer's liability for harassment.

For example, the U.S. Supreme Court has held that employers can avoid strict liability for harassment by supervisors (when they take no adverse employment action) if: (1) the employer exercised reasonable care to prevent and correct the harassment; and (2) the employee unreasonably failed to take advantage of those preventive or corrective opportunities. If your sexual harassment policy includes sanctions for employees who bring false claims, a worker may be able to dodge the affirmative defense by contending that he or she did not complain about the inappropriate conduct out of fear.



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