



## 25 Years Protecting California Employers

Carothers DiSante & Freudenberger LLP ("CDF") is proud to celebrate its 25th anniversary as one of the leading law firms dedicated to providing California employers with practical, cost-effective, and first-rate legal counsel and defense. As an homage and thanks to all the employers who have trusted CDF with their legal needs, CDF offers these 25 tips for California employers based on recent and proposed changes in the law in California:

1. **"ABC" Test for Independent Contractors.** California now applies the "ABC" test for independent contractors, which is substantially different from the federal test and the one used in 47 other states. The most difficult hurdle is that the putative contractor must provide services substantially different from those provided by the company. The contractor must also have an independent business, which preferably includes its own license, marketing and employees.
2. **Background Check Disclosures.** To comply with the federal Fair Credit Reporting Act ("FCRA") and the California Investigative Consumer Reporting Agencies Act ("ICRAA"), employers must distribute two separate consent forms to applicants. They can no longer be combined in one document.
3. **California Consumer Privacy Act ("CCPA").** The law (effective January 1, 2021) requires the disclosure, and, upon request, the deletion, of personal information collected for business purposes (e.g., addresses, social security and drivers' license numbers).
4. **Americans with Disabilities Act ("ADA") Claim for Morbid Obesity Uncertain.** Morbid obesity is not a disability (unless the obesity is caused by an underlying medical condition) under the federal ADA, but in California, it likely is (or is a medical condition requiring the same accommodation).
5. **English-Only Workplace Rules.** Do not impose an "English-only" workplace rule simply to promote "business convenience" or "customer or co-worker preference." There must be a legitimate safety or customer service basis.
6. **Ethnic Hairstyles.** Update any workplace dress code and grooming policies that prohibit natural hairstyles, including afros, braids, twists, and dreadlocks.
7. **FEHA Statute of Limitations.** It is highly likely that California's Fair Employment and Housing Act ("FEHA") will soon provide more time to file a lawsuit against an employer for discrimination (up to four years after the alleged unlawful act).
8. **Lactation Accommodations.** Implement a written lactation accommodation policy, respond to employee requests for lactation accommodations within five days, and provide accessible refrigeration, and a private space for nursing mothers (not a bathroom) with electricity, a table, and a place to sit.
9. **Liability of Payroll Services Providers.** Monitor the services provided to you by third party payroll processing companies, because your employees can sue you (and not them) for any errors caused by the payroll company (i.e., inaccurate wage statements). Require an indemnification agreement from your provider.
10. **Fair Labor Standards Act ("FLSA") Exemption.** Effective January 1, 2020, the minimum salary for a white collar worker to be exempt from overtime compensation under the FLSA will increase to \$35,568 per year. California already requires a higher minimum salary of \$49,920.
11. **Minimum Wage.** Effective January 1, 2020, California's Minimum Wage will increase to \$13.00 per hour (for employers with at least 26 employees).
12. **Eliminate Procedural Unconscionability Claims Against Arbitration Agreements.** Revise arbitration agreements and procedures to ensure that the text is non-complex, clearly visible (8.5 font is too small), and provide employees with a copy of the agreement, opportunity to review, and the ability to ask questions, before signature.
13. **Private Attorneys' General Act ("PAGA").** Relief in a PAGA-only action is now limited to fixed civil penalties. Employees cannot recover individual unpaid wages under *Labor Code* section 558.
14. **Rounding.** For payroll purposes, rounding to the nearest quarter hour is lawful (nearest tenth is preferable), but review your policies and conduct a self-audit to ensure that rounding does not result in loss of wages.

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- 15. Sexual Harassment Prevention Training.** Employers with at least five employees must provide sexual harassment training to all supervisory employees (at least two hours) and nonsupervisory employees (at least one hour) by 2021, and every two years thereafter.
- 16. Non-Solicitation Agreements.** Review and update any trade secret or non-solicitation agreements to ensure they do not restrain employees from engaging in a lawful profession, trade or business.
- 17. Disclosure of Sexual Harassment.** Eliminate language in any contract or settlement agreement that prevents an employee from testifying about criminal conduct or sexual harassment in an administrative, legislative, or judicial proceeding.
- 18. Criminal Background Checks.** Implement procedures for pre-employment but post-offer background checks that include: (a) an individualized assessment of each applicant's criminal conviction history and (b) legally-compliant notice that provides a five-day response period, copy of the report, and explanation of the basis of any decision.
- 19. Employment Arbitration and Opt-Out Provisions.** Consider amendments to existing arbitration agreements to reflect that the agreement is governed by the Federal Arbitration Act ("FAA") given the California Legislature's repeated efforts to eliminate employment arbitration agreements.
- 20. No Rehire Provisions.** Consider amending any standard settlement or severance agreement that states an employee is ineligible for rehire (if pending Legislation is approved by the Governor).
- 21. Sexual Assault Victims.** Implement effective policies and procedures to respond to reports by an employee that he or she is the victim of sexual harassment, domestic violence, sexual assault, or stalking, and ensure no retaliation occurs.
- 22. Class Action Waivers.** Make sure to include a valid class action waiver in arbitration agreements, so any alleged class claims are compelled to individual arbitration.
- 23. Call-In Pay.** Update scheduling policies that require employees to call in prior to the start of their shift to determine if work is available. Even if employees are not required to work, they must receive at least two hours of "call-in" pay.
- 24. Audit Employee Pay.** Perform a self-audit (with counsel) to ensure that employees with similar duties (anywhere in the state) are paid the same regardless of gender or race.
- 25. Marijuana in the Workplace.** Update policies specifically to preclude the possession or use of medical and recreational marijuana (or any product containing THC), in the workplace. California does not require employers to accommodate marijuana use in the workplace (although the underlying medical condition needs to be otherwise accommodated).

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