Start-up Businesses and Growing Companies: Key Employment Law Issues

A Lexis Practice Advisor® Practice Note by
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This practice note addresses various employment and labor law issues that may arise when opening a start-up or expanding a business. This practice note covers federal law and highlights California law, particularly in subject areas that federal law does not typically address. This is because so many venture capital-financed start-ups are in California, and because California law generally tends to be more protective of employee rights than the law of other states. Focusing on California law may arm you and the employer against the most adverse scenarios that you might confront. Nonetheless, you must always consult the laws of the jurisdiction relevant to the particular employer and case.

Specific topics include:

- Applicable Employment and Labor Laws
- Hiring Considerations
- Employment Agreements and Offer Letters
- Restrictive Covenants
- Employee Handbooks and Key Workplace Policies
- Using Independent Contractors in Lieu of Employees

For a checklist on employment law issues related to start-up companies, see Start-up Businesses and Growing Companies: Handling Key Employment Law Issues Checklist. Also see Equity and Incentive Compensation Arrangements for Startup Companies.

APPLICABLE EMPLOYMENT AND LABOR LAWS

To help ensure that the start-up or growing company will be able to secure venture capital financing in the future, you should periodically conduct a due diligence review of the employer's compliance with applicable federal and state employment and labor laws. Failing to do so could be extraordinarily costly.

Employment at will is the default in the United States (except in Montana). Where employment is at will, an employer can generally discharge or take other adverse action against an employee for any reason or no reason at all—unless one of the laws below restricts that freedom.

Again, this practice note focuses on federal and California laws. You must consult the laws of the jurisdiction in which the employer is incorporated and doing business.

Consider the following major areas for concern when you draft agreements and policies.

Discrimination

Federal anti-discrimination law prohibits discrimination against employees or job applicants based on race, color, religion, national origin, ancestry, age, sex, pregnancy, citizenship, disability, military or veteran status, and genetic information. The Equal Employment Opportunity Commission (EEOC) has opined that Title VII, in prohibiting sex discrimination, also prohibits discrimination based on sexual orientation and gender identity or expression. See LGBTQ Protections and Best Practices under Title VII and What You Should Know About EEOC Protection and the Enforcement Provision for LGBT Workers. The Second and Seventh Circuit have also found that Title VII prohibits discrimination on the basis of sexual orientation, Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339 (7th Cir. 2017). But other courts have disagreed. See Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017). Federal statutes do not explicitly protect employees based on these characteristics.

The California Fair Employment and Housing Act (FEHA) is more expansive than federal law. For example, FEHA prohibits discrimination based on marital status. FEHA also explicitly prohibits discrimination based on sexual orientation and gender identity or expression. Some municipalities in California have enacted local antibias laws protecting gay, lesbian, bisexual, and transgendered persons.

Under FEHA, if an employee can prove unlawful discrimination, he or she may seek reinstatement and economic damages, as well as potentially significant damages for emotional distress and punitive damages. Such remedies are not currently available for all forms of discrimination under federal law.

For more information on federal discrimination law, see Complying with Title VII, Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations, Addressing the ADEA's Mandates, Heeding the Equal Pay Act, Section 1981 Employment Discrimination Claims, Navigating the Immigration Reform and Control Act of 1986's (IRCA) EEO Provisions, Navigating the Uniformed Services Employment and Reemployment Act (USERRA), Title II of the Genetic Information Nondiscrimination Act (GINA) Requirements, and Protected Classes Chart (Key Federal Anti-discrimination Employment Laws). For more information on FEHA, see California Fair Employment and Housing Act (FEHA). For information on anti-discrimination laws in other states, see Discrimination, Harassment, and Retaliation State Practice Notes Chart.

Retaliation

The federal laws that prohibit discrimination also prohibit retaliation. Similarly, several California laws allow an at-will employee to sue an employer for retaliation based on the following conduct by the employee:

- Reporting information that the employee reasonably believes is a violation of law
- Opposing practices that violate FEHA
- Testifying in a proceeding or filing a complaint under FEHA
- Refusing to participate in illegal activities
- Complaining or testifying about an unsafe work space
- Filing a workers' compensation claim

- Taking time off for family or medical leave, paid sick leave, military service, domestic violence victim leave, crime victim leave, emergency firefighter or rescue leave, jury or witness duty leave, or school leave

For more information on retaliation claims generally, see Understanding the Elements of Retaliation Claims, Evaluating Risks of Potential Retaliation Claims, and Avoiding Retaliation Claims. For more information on retaliation under California laws, see California Fair Employment and Housing Act (FEHA), Understanding Non-FEHA Employment Discrimination Protections and Rules in California, Leave Law (CA) — Family and Medical Leave and Flexible Leave, and Leave Law (CA) — Sick Leave.

Family and Medical Leave

The federal Family and Medical Leave Act (FMLA) and the California Family Rights Act both generally require employers to grant employees up to 12 weeks of unpaid family and medical leave. 29 U.S.C. § 2612; Cal. Gov. Code § 12945.2. These laws require that employers make available to employees returning from that leave the same position or a position comparable to the one they held before taking leave. 29 C.F.R. § 825.300; Cal. Code Regs. tit. 2, §11089.

California law also entitles a pregnant employee to take pregnancy disability leave for up to four calendar months if she is disabled by pregnancy, childbirth, or related medical conditions. Cal. Gov. Code § 12945.

For more information on the FMLA, see FMLA Employer Rights and Obligations. For more information on California's family leave laws, see Leave Law (CA) — Family and Medical Leave and Flexible Leave and Leave Law (CA) — Pregnancy Leave. For information on leave laws in other states, see Attendance, Leaves, and Disabilities State Practice Notes Chart.

Unions

The National Labor Relations Act protects employees' rights to organize and engage in collective bargaining. It also protects employees' rights to refuse to engage in union activity and includes some protections for employers. See 29 U.S.C. §§ 151–169.

Wrongful Discharge

Generally, there are no wrongful discharge claims under federal law unless a specific statute, such as Title VII, applies. Outside of those statutes, employers may discharge at-will employees for any reason or no reason.

California law, in contrast, allows some apparently at-will employees to sue for wrongful discharge even if they do not have an express written contract. California courts have allowed employees to sue employers for breach of implied contracts based on an employer's policies that provide longevity payments or imply job security, or on promotions, pay raises, or commendations. Foley v. Interactive Data Corp., 47 Cal.3d 654, 680 (1988). Note that under California common law, an individual may bring a suit alleging discrimination in violation of public policy without first pursuing administrative remedies under FEHA. See Prue v. Brady Co./San Diego, Inc., 242 Cal. App. 4th 1367, 1383 (2015).

You should advise employers that common measures like requiring employees to sign written acknowledgments that the employer has the power to terminate their employment at will and without cause, or incorporating at-will employment statements in their employee handbooks, may not suffice to persuade a court that the employment is at will. Several California appellate courts have held that an at-will acknowledgment or statement does not necessarily overcome evidence of an implied contract. Guz v. Bechtel National, Inc., 24 Cal. 4th 317, 339 (2000).

If the employment is not at will and the employer discharges the employee, the latter may have a claim for wrongful discharge depending on how the court defines the implied contract.

Workers' Compensation

In all states, employers must provide workers' compensation insurance to cover employees' job-related physical injuries. In California and certain other states, job-related mental or emotional injuries are also compensable.

An employer's workers' compensation insurance carrier will generally cover a workplace injury unless the employee's serious and willful misconduct caused the injury. Courts have broadly construed Cal. Lab. Code § 132a, which prohibits discrimination or retaliation against employees who file workers' compensation claims or participate in the Workers' Compensation System, to protect injured employees. For more information on workers' compensation laws in California, see Understanding Non-FEHA Employment Discrimination Protections and Rules in California. For information on workers' compensation laws in other states, see Workers' Compensation State Practice Notes Chart.

Workplace Safety

A comprehensive federal workplace safety law requires most employers to adopt and communicate detailed employee injury and illness prevention plans. See Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. California's Occupational Safety and Health Act imposes criminal liability on corporate managers who knowingly expose employees to workplace hazards. See Cal. Lab. Code §§ 6423–6436.

HIRING CONSIDERATIONS

The process of hiring new employees can be a legal minefield. You should advise new and growing employers to structure procedures that comply with employment laws in the following areas.

Job Interviews: Avoid Risky Questions

Companies interview job applicants to obtain information that will help them make informed hiring decisions. Employers should structure interviews to elicit that information. You should advise employers to prepare to interview job applicants by identifying the skills and abilities necessary to perform the job, determining the job's minimum qualifications (e.g., education, training, and years of experience), establishing any traveling or scheduling expectations, and setting the salary range for the position. The interviewer should draft interview questions designed to elicit information relevant to those areas.

Interviewers should avoid questions that are not job-related, particularly if the inquiries elicit information relating to the applicant's membership in a legally protected class. Such questions can make it appear that the company is making employment decisions based on an applicant's legally protected characteristics, which could expose the employer to liability for discrimination. For example, a fair employment practice agency investigating a discrimination claim may presume that the purpose of questions about marital status or intentions to have children is to screen out certain women. In addition, many jurisdictions have recently enacted legislation prohibiting employers from asking applicants about their salary history, on the theory that it perpetuates gender-based unequal pay. You should consult the laws of the jurisdiction(s) in which the employer does business.

Disability

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., generally prohibits employers from asking about an applicant's disabilities, asking whether the applicant needs a reasonable accommodation to perform the job, or conducting a medical examination before extending a job offer. If an applicant has an obvious or known

disability, however, an employer can ask if he or she requires an accommodation to perform the job. For example, an employer may ask a blind applicant if he or she requires special software when using a computer.

EEOC Guidance on the ADA: Pre-offer "do's and don'ts"

- An employer can ask the following questions:
  - Do you have the appropriate education, training, and skills for the job?
  - Do you satisfy the job requirements?
  - Can you perform the essential functions of the job?
  - Have you had disciplinary issues in the past?
  - How much time off did you take at your prior job?
  - Why did you leave your prior job?
- An employer **cannot** ask the following questions:
  - What are your physical or mental impairments?
  - Why did you take time off at your prior job?
  - How did you become disabled? (For example, do not ask why the applicant is in a wheelchair.)
  - What types of medications do you take?
  - What is your workers' compensation history?

For more information, see ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

Medical Examinations under the ADA

The ADA establishes certain rules for employers' medical examinations and inquiries of applicants (and employees). Advise the employer of the following:

- **Pre-offer.** An employer may not conduct medical examinations or make medical inquiries of job applicants.
- **Post-offer / pre-employment.** An employer may require a medical examination or make medical inquiries regardless of whether they are related to the job if it makes the same examinations or inquiries of all entering employees in the same job category.
- **Current employees.** Any medical examination or inquiry must be job-related and consistent with business necessity.

Pre-employment Testing

The ADA's rule about medical testing and inquiries of applicants is clear: an employer may not require medical exams or make medical inquiries before it makes an offer of employment. 42 U.S.C. § 12112(d)(2); 29 C.F.R. §§ 1630.13(a), 1630.14(a) and (b). Employers may conduct non-medical testing, such as physical fitness or agility tests that have no medical component, at this stage. See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations. An employer that requires an applicant to take a pre-employment test must administer the same test to all applicants for the position. Id.

Advise employers to use caution when requiring applicants to take personality tests as some of them are designed to discover evidence of mental illness. Employers should thoroughly vet the questions on such tests. See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

Pre-employment / Post-offer Exams

Once an employer has made a conditional job offer to an applicant but before the applicant starts work, the employer may conduct medical testing or make medical inquiries. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b). However, the conditional job offer must be genuine, and you should advise the employer that it needs to take into consideration all non-medical information it could have reasonably obtained before making the hiring decision.

The medical testing or inquiry at this stage does not have to be job-related or consistent with business necessity, but the ADA does impose some limits. For example, an employer must require all applicants in the same job category to take the medical examination or answer the medical inquiries.

One form of examination that employers typically conduct at this stage is drug and alcohol testing. Notably, the EEOC considers alcohol testing, but not testing for current illegal drug use, to be a medical examination under the ADA because that statute does not protect the current use of illegal drugs as a disability.

If the examination or inquiry reveals a concern, the employer may require the applicant to undergo further examination. For example, if an employer asks new hires at the post-offer stage whether they have had back injuries, and some of the new hires say yes, the employer may then require those persons to take a medical examination designed to diagnose back impairments. That examination, however, must be medically related to those injuries. See ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

If the employer rescinds a job offer because of information arising from the medical examination or inquiry, the employer's reason for the rescission must be job-related and consistent with business necessity. 42 U.S.C. § 12113(a). Before the employer rescinds a job offer, advise it to determine whether there is a reasonable accommodation that would enable the individual to perform the job. If the employer rescinds a job offer for safety reasons, the employer must demonstrate that the applicant poses a direct threat (defined as a significant risk of substantial harm to self or others), and that the employer cannot reduce the risk below that level via reasonable accommodations. See 29 C.F.R. § 1630.2(r) and ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

Medical Examinations of Current Employees

If an employer requires a current employee to take a medical examination, the test must be "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.14(c). The employer must reasonably believe that a medical condition impairs the current employee's present ability to perform essential job functions, or that the employee poses a direct threat due to a medical condition. In either case, you should advise the employer to consider whether there are reasonable accommodations that would enable the employee to perform the essential job functions or that would reduce the threat to an acceptable level. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees.

For the employer's belief to be reasonable, it must assess the individual employee and his or her job. The employer must base its belief on objective evidence, not generalized assumptions. This evidence can include a manager's observations of symptoms or conduct suggesting that an employee might have a medical condition

that impairs his ability to perform his essential job functions or that poses a direct threat. It can also include reports by credible third parties such as family members, friends, or co-workers.

The determination of whether the employee poses a direct threat must be based on valid medical analyses or other objective evidence. Advise the employer that the risk must be current and specific, not remote or speculative. For example, an employer's concern about future injury, absenteeism, workers' compensation claims, or increased insurance costs would be speculative.

For more information on the ADA, see Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations. State laws may provide more protections to employees than the ADA does. For information on state law governing disability discrimination in California, see California Fair Employment and Housing Act (FEHA) — Protected Classes and Characteristics and Disability Comparison Chart for ADA and FEHA (CA). For information on disability discrimination laws in other states, see Discrimination, Harassment, and Retaliation State Practice Notes Chart.

Age

An employer should not ask an applicant's age unless age is a bona fide occupational qualification for the position. Advise employers to avoid questions that could indirectly reveal the applicant's age, such as asking for the year the applicant graduated from high school.

For more information on age discrimination under federal law, see Addressing the ADEA's Mandates. For information on California laws governing age discrimination, see California Fair Employment and Housing Act (FEHA). For information on other states' laws governing age discrimination, see Discrimination, Harassment, and Retaliation State Practice Notes Chart.

Legal Claims against Prior Employers

Advise employers not to ask job applicants about legal claims against prior employers. If the employer learns that the applicant sued a previous employer and refuses to hire the applicant, the employee arguably could assert a retaliation claim against that employer. Even if the applicant answers that he or she did not sue a prior employer, the question alone implies an improper motive.

Religion

Make sure the employer understands its obligations to accommodate employees' religious beliefs. Title VII of the Civil Rights Act of 1964 requires employers to make reasonable accommodation for an employee or applicant's sincerely-held religious beliefs. Employers may have to relax their dress and grooming codes to yield to an individual's religious observances in wearing headscarves, yarmulkes, turbans, beards, etc. An employer may have to modify schedules to permit an individual to observe religious obligations and take prayer breaks. An employer should be prepared for requests for accommodation that arise in job interviews.

For more information on religious accommodations, see Examining the Duty to Provide Religious Accommodations.

Accents/Non-English Speakers

When a job does not require fluency in English, an employer that refuses to hire an applicant for lacking English fluency could face a national origin discrimination claim. When the job does require English fluency, and the

applicant is fluent, the employer should not deny employment simply because the applicant has an accent. Advise employers not to require employees to speak only English in conversations that are unrelated to work.

Accessing Social Media

An employer may legally access an applicant's online social media page if the page is accessible to the public. However, you should advise the employer to consider the risks of accessing even public information about an applicant, as it may reveal the applicant's membership in a protected class. The employer must not make decisions based on the applicant's legally protected characteristics, even if the applicant has made that information public, so it is best for the employer not to learn the information. Furthermore, the employer must not gain improper access to the applicant's online accounts.

California employers may not ask or require job applicants or employees to disclose social media log-in credentials, access personal social media in the employer's presence, or divulge any personal social media content. Cal. Lab. Code § 980(b). For information on state laws governing employers' ability to access the social media accounts of employees and applicants, see Social Media: Employer Access to Employees' Accounts State Law Survey.

Arrest and Conviction Records

The EEOC has taken the position that employers should not deny individuals employment based on their arrest records alone. An employer may make an employment decision based on the conduct underlying the arrest if it makes the applicant or employee unfit for the position. EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions.

The EEOC advises against policies that absolutely bar applicants with criminal convictions, and recommends instead that employers consider the nature of the offense, the relationship of the offense to the job duties, and how long ago the offense occurred. Id.

California law prohibits employers from asking employees and applicants about arrests that did not lead to convictions. See Cal. Lab. Code § 432.7. In addition, a California employer may not ask about criminal convictions on job applications and not until after the employer has extended a conditional job offer to the applicant. See Cal. Gov. Code § 12952. See also Ban the Box State and Local Law Survey.

For information on California law governing criminal history inquiries, see Complying with California's Screening and Hiring Laws. For information on the laws governing criminal history inquiries in other states, see the References and Background Checks column of Screening and Hiring State Practice Notes Chart.

Background and Credit Checks

Pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq., employers must comply with extensive notice, consent, and disclosure rules when they use third parties to prepare certain background reports on employees or applicants. For more information on the FCRA, see Understanding Consumer Reports (Including Credit History Checks) under the Fair Credit Reporting Act and Fair Credit Reporting Act (FCRA) and State Mini-FCRAs: Step-by-Step Guidance for Compliance.

California has its own mini-FCRA law that severely restricts how an employer may use an applicant or employee's credit history to make employment-related decisions. Cal. Lab. Code § 1024.5. Private sector employers can obtain consumer credit reports only for individuals who are applying for, or work in, one of the following:

- A managerial position
- A position for which the employer is required by law to consider credit history information
- A position in the state Department of Justice or any other law enforcement position
- A position that affords regular access to bank or credit card account information, Social Security numbers, or dates of birth for broader purposes than routine solicitation and processing of credit card applications in a retail establishment
- A position where the individual is or will be a named signatory on the bank or credit card account of the employer and/or authorized to transfer money or authorized to enter into financial contracts on the employer's behalf
- A position that affords access to confidential or proprietary information
- A position that affords regular access during the workday to the employer's, a customer's, or a client's cash totaling at least $10,000

For more information on California's mini-FCRA, see Complying with California's Screening and Hiring Laws. Many other states also have mini-FCRA statutes. For more information on state mini-FCRA laws, see the References and Background Checks column of Screening and Hiring State Practice Notes Chart.

EMPLOYMENT AGREEMENTS AND OFFER LETTERS

Although offer letters and employment agreements share some characteristics, they are not the same. As counsel to a start-up or growing company, you must understand the legal ramifications of offer letters versus employment agreements so you can prevent unnecessary and unanticipated liability for the employer.

Distinguishing Offer Letters from Employment Agreements

Offer letters typically contain basic employment terms. The most important legal purpose of the offer letter is to state clearly that employment will be at will and the employer will have the right to terminate the employment at any time and without cause. Since employers typically limit offer letters to non-managerial employees, offer letters do not often mention any restrictive covenants such as non-compete, non-solicit, or confidentiality obligations. Most well-drafted offer letters are not vulnerable to attack as binding employment agreements.

Employment agreements spell out an employer's expectations in much greater detail than offer letters. The decision to use an employment agreement rather than an offer letter depends, in large part, on the nature of the position. Typically, only managers, executives, and other high-level employees have employment agreements because they have access to proprietary information such as client lists and business strategies. Adequate legal consideration must support an employment agreement to make it a binding, enforceable contract.

Offer Letter Considerations and Components

Start-ups and growing companies commonly deliver offer letters to successful candidates for non-managerial positions as written confirmations of job offers. While offer letters provide less detail than employment agreements, they should set forth the key terms of employment.

In an offer letter, you should include the following information:

- The proffered job title
- The prospective employee's anticipated starting date

- Compensation, including salary amount, frequency of payment, existing payroll schedule, and whether the position is exempt under the Fair Labor Standards Act
- A general statement about the benefits available to employees of the company and any specific benefits that the prospective employee may have negotiated for himself or herself that deviate from the company's standard package
- Whether there is a qualifying period before the employee can receive benefits
- If the company will reimburse or provide funds for moving expenses, include the specific terms of that arrangement
- A summary of the prospective employee's anticipated duties and expectations
- A disclaimer that the company may change the employee's duties and expectations at any time
- A statement that the offered employment is at will
- A disclaimer that the offer letter does not guarantee employment for a particular length of time or protect the employee from termination without cause
- A disclaimer that the prospective employee must successfully complete a background check or satisfy other conditions
- A description of the company's anti-discrimination policy and a statement that it complies with all applicable state and federal laws
- A list of any non-disclosure, confidentiality, invention, or technology assignment agreements the employee will have to sign and a statement that the employee must execute them before starting employment
- Reference to the company's employee handbook and a statement that the prospective employee will receive a copy of the employee handbook and must acknowledge that he or she has read and understood it
- A deadline by which the prospective employee must accept the offer by signing and dating the letter

Finally, you should advise the employer not to promise raises, bonuses, or other perks that it may not be able to deliver. Misunderstandings due to faulty communications about compensation and perks often give rise to lawsuits. If a bonus is part of the compensation package, the offer letter should clearly and accurately explain the employer's method for calculating it.

Start-ups and growing companies may send formal offer letters because they want prospective employees to take the company seriously and commit to proffered positions. An offer letter with a formal tone that requires the prospective employee's signature reduces the risk that a candidate will renege on a verbal acceptance of a job offer. For an annotated non-jurisdictional form offer letter, see Offer Letter and Employment Agreement (Non-executive, At Will). For state-specific versions, see the Offer Letter, Employment Contracts, and Independent Contractors Agreements column of Screening and Hiring State Expert Forms Chart.

Employment Agreement Considerations and Components

Start-ups and growing companies use formal employment agreements when hiring top managers, important product sales managers, and other highly compensated individuals.

Employment agreements clarify each party's expectations and obligations during and after employment. There is no "one-size fits all" employment agreement. You should advise the employer that if it uses a standard form employment agreement, with a structure and terms that are not adapted to the specific circumstances, it may not

be able to enforce it later. You should tailor an employment agreement to the specific employment relationship and make sure that the agreement contains appropriate provisions under relevant state and federal law.

You should prepare employment agreements for three groups of employees: key employees, employees with complex compensation arrangements, and employees whose compensation arrangements are subject to I.R.C. § 409A.

Key employees include executives and members of upper management, key research and development personnel, high-level information systems personnel, employees who have desired skills, knowledge or abilities, employees who would be difficult to replace, and highly productive sales personnel. When a key employee leaves the company, his or her departure can pose substantial risk and cause serious disruption to the company's business. A key employee provides special benefits to the company or knows the company's business plans, strategy, corporate development plans, or key research results.

It is therefore usually in the employer's interest to have stronger guarantees with these employees than with lower-level hires. In addition, an employment agreement may help persuade a prospective key employee to accept an offer of employment by providing a written assurance of the terms of the employment relationship. For these reasons, you should generally use employment agreements rather than offer letters for key employees.

An employment agreement with a key employee should lock in the minimum duration of the employment, describe financial commitments and obligations of both the employer and the employee, specify under what circumstances the parties can terminate the employment relationship, and provide a minimum notice period prior to termination.

You should also prepare employment agreements for any employees who have complex compensation arrangements. Spell out the terms of commission payments because they often are a point of dispute, particularly at the end of an employment relationship. Specify when a commission is earned, how and when it will be paid, whether the employee may draw against unearned commissions, whether the employee must pay back draws if his or her employment terminates, and what happens to the employee's pending sales when his or her employment ends.

Finally, you should prepare employment agreements for any employees whose compensation arrangements are subject to I.R.C. § 409A, which imposes strict rules on non-qualified deferred compensation arrangements. Section 409A is far-reaching, covering many arrangements that are not traditional deferred compensation plans. It can affect even routine provisions in employment agreements about contract renewal, bonuses, reimbursement of expenses, and severance pay, in addition to provisions about more traditional and recognizable forms of deferred compensation. The company's failure to spot and deal with issues that Section 409A raises could cause the Internal Revenue Service to impose accelerated income taxes, interest, and penalties.

A well-crafted employment agreement contains provisions detailing the following items:

- The employee's salary and other forms of compensation, including bonuses
- The employee's job title and a list of the employee's specific job duties and obligations
- The amount and manner of any severance payments, if the employee is terminated without cause
- The duration of the agreement, if it is not indefinite
- An indication that employment is at will, if appropriate
- If the agreement is for employment that is not at will, terms indicating the permissible grounds for termination

- A non-disclosure clause or agreement preventing the employee from disclosing trade secrets to any third party or using confidential data like customer lists for a competitor's benefit (You can include these sections in the agreement itself, or incorporate them by reference to a separate attachment to the agreement. Note that some of these types of restrictive covenants are unlawful in California. See Restrictive Covenants (CA).)
- A summary of the terms under which the employee may participate in any restricted stock, stock option, or other equity incentive compensation plan sponsored by the company
- In some cases, an arbitration clause pursuant to which the parties agree to arbitrate disputes arising out of the agreement

Any subsequent venture capital investors will scrutinize existing employment agreements. Often founders, executives, and key employees mistakenly believe that subsequent investors cannot request changes to existing employment agreements. To avoid the time and expense of amending those documents later, be sure that any employment arrangements with such employees are commensurate with similar agreements in the relevant market.

A start-up or growing company should use a formal agreement when hiring an independent contractor to provide services for the company. Many of the terms in an independent contractor agreement will mirror those found in an employment agreement, but the independent contractor agreement should clearly state that no employee–employer relationship exists and that the contractor retains control over all aspects of the work. For more information on drafting independent contractor agreements, see Understanding, Drafting, and Negotiating Independent Contractor Agreements.

For more information about drafting employment agreements, see Employment Agreements: Key Legal, Drafting, and Negotiation Issues (Pro-Employer) and 13-12 Current Legal Forms with Tax Analysis FORM 12.01.

RESTRICTIVE COVENANTS

A restrictive covenant, whether it is a stand-alone document or part of an employment agreement, can be an important tool in preventing an employee from working for a competitor, misappropriating a company's trade secrets or other confidential information, soliciting customers, or soliciting other employees to leave the company. State laws govern restrictive covenants, and such laws often differ from state to state. Thus, a restrictive covenant may be enforceable in one state but not in another. For example, California law prohibits most covenants not to compete. See Restrictive Covenants (CA). You should review any restrictive covenant provisions periodically to ensure they remain valid and enforceable in the relevant jurisdiction.

Irrespective of jurisdiction, courts impose significant burdens on employers to show that restrictive covenants are reasonable and truly justified before they will enforce them. You should help employers consider the types of employees for whom restrictive covenants are appropriate and the specific departing activity or activities by those employees that it seeks to deter so that you can draft the appropriate agreement.

For information about drafting and implementing restrictive covenants, see Understanding Restrictive Covenant Basics (Including Adequate Consideration, Protectable Interests, Geographic and Time Restrictions, and Permissible Scope), Understanding and Drafting Common Restrictive Covenant Provisions, Non-compete Agreements Checklist (Best Drafting Practices for Employers), Confidentiality Agreements Checklist (Best Drafting Practices for Employers), and Trade Secrets and Confidential Information Protection upon Hiring Checklist.

For state-specific practice notes on restrictive covenants, see Non-competes and Trade Secret Protection State Practice Notes Chart.

For annotated restrictive covenant agreements and clauses, see Non-competes and Trade Secret Protection State Expert Forms Chart (this chart contains non-jurisdictional and state-specific forms), Restrictive Covenant Provisions, and Restrictive Covenant Clauses (Social Media).

Covenants Not to Compete

California law prohibits virtually all covenants not to compete (commonly called "non-competes"), even if they are standard and enforceable in other states. California courts have consistently ruled that the law protects employee's rights to "engage in businesses and occupations of their choosing." Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 946 (2008). A non-compete clause may also violate California's Unfair Practices Act, Cal. Bus & Prof. Code § 17200. See, e.g., Application Group, Inc. v. Hunter Grp., Inc., 61 Cal. App. 4th 881, 901 (1998). Under California law, individuals may have a cause of action if the employer terminates their employment or denies them employment for refusing to enter into a non-compete agreement. DSa v. Playhut, Inc., 85 Cal. App. 4th 927, 935 (2000). An employee who is discharged because he or she signed a non-compete agreement with a previous employer may have a cause of action for wrongful termination. Silguero v. Creteguard, Inc., 187 Cal. App. 4th 60, 70–71 (2010).

California law has a few exceptions to the general prohibition against covenants not to complete. It allows their enforcement when the contracting party sells or disposes of all of its stock, assets, or other interests in the business and transfers goodwill to the buyer. Cal. Bus. & Prof. Code § 16601. The interests must be substantial, and the sales transaction must clearly indicate that it includes the value of goodwill in the price. California law also allows the enforcement of covenants not to compete in agreements for dissociation of partners and dissolution of partnerships. Cal. Bus. & Prof. Code § 16602. For more information on non-competes in California, see Restrictive Covenants (CA) — Non-compete Agreements.

In states other than California, you should prepare a covenant not to compete for any employee who may pose a competitive threat if he or she were to leave the company, but make sure it is not overbroad. Even outside California, many courts will not enforce broad covenants not to compete because they prevent an employee from earning a living. Some courts begin the analysis with a presumption against enforcing a non-compete. To overcome this presumption, the employer must demonstrate that the covenant is necessary to protect a legitimate interest. A company's legitimate interests may include protecting goodwill or customer relationships, preventing the otherwise inevitable disclosure of customer information or trade secrets, and avoiding unfair competition from a departing employee with unique skills or specialized knowledge. Therefore, you must draft non-competes so that they are no broader or more restrictive than necessary to protect the employer's legitimate interests, reasonably limited in time in space, and consistent with the public interest. A court will balance the business interests of the employer against the employee's interest in being able to earn a living in his or her chosen profession.

For more information on covenants not to compete, see Non-compete Agreements: Key Negotiation, Drafting, and Legal Issues and Non-compete Agreements Checklist (Best Drafting Practices for Employers).

For state-specific practice notes addressing non-compete agreements, see Non-competes and Trade Secret Protection State Practice Notes Chart.

For annotated non-jurisdictional and state-specific non-compete agreements and clauses, see Non-competes and Trade Secret Protection State Expert Forms Chart, Restrictive Covenant Provisions, and Restrictive Covenant Clauses (Social Media).

Customer Non-solicitation Agreements

Customer non-solicitation agreements are sometimes enforceable in California; for example, some courts have held that such agreements are enforceable when they protect trade secrets. For more detail, see Restrictive Covenants (CA) — Customer Non-solicitation Agreements. An employee may bring a wrongful termination suit against an employer that terminates his or her employment for refusing to sign a non-solicitation agreement. Thompson v. Impaxx, Inc., 113 Cal. App. 4th 1425, 1429 (2003).

While courts are more likely to enforce non-solicitation agreements than covenants not to compete, non-solicitation agreements must also be reasonable and no broader than necessary to protect the employer's legitimate business interests. A court is less likely to enforce a non-solicitation agreement that prohibits an employee from soliciting any of the employer's customers regardless of whether the employee ever dealt with them personally. The employer should typically confine the restriction to customers for which the employee was primarily responsible.

You should draft non-solicitation agreements for employees who have developed significant relationships and goodwill with customers that significantly impact the company's business. The purpose of the agreement is to prevent the former employee from siphoning off the company's important and longstanding customers, not to prevent the employee from working for a competitor. A well-drafted non-solicitation agreement will prevent the employee from soliciting specific customers for a limited period.

For more information on customer non-solicitation agreements, see Customer and Employee Non-solicitation Agreements: Key Negotiation, Drafting, and Legal Issues and Non-compete Agreements Checklist (Best Drafting Practices for Employers).

For state-specific practice notes addressing customer non-solicitation agreements, see Non-competes and Trade Secret Protection State Practice Notes Chart.

For annotated non-jurisdictional and state-specific customer non-solicitation provisions, see Non-competes and Trade Secret Protection State Expert Forms Chart, Restrictive Covenant Provisions, and Restrictive Covenant Clauses (Social Media).

Non-piracy / Employee Non-solicitation Agreements

You should draft a non-piracy / employee non-solicitation agreement for any employees who could arrange a mass exodus of employees. Non-piracy (or non-raiding) agreements restricting employees from soliciting other employees are usually straightforward. Generally, courts will enforce non-piracy agreements when the employer has developed a skilled staff through its training or credentialing. Note some California courts have enforced employee non-solicitation agreements, but the California Supreme Court has not yet ruled on this issue. For more detail, see Restrictive Covenants (CA) — Employee Non-solicitation Agreements.

For more information on employee non-solicitation agreements, see Customer and Employee Non-solicitation Agreements: Key Negotiation, Drafting, and Legal Issues and Non-compete Agreements Checklist (Best Drafting Practices for Employers).

For state-specific practice notes addressing employee non-solicitation agreements, see Non-competes and Trade Secret Protection State Practice Notes Chart.

For annotated non-jurisdictional and state-specific employee non-solicitation provisions, see Non-competes and Trade Secret Protection State Expert Forms Chart, Restrictive Covenant Provisions, and Restrictive Covenant Clauses (Social Media).

Non-disclosure and Confidentiality Agreements

Trade Secrets

Courts generally agree that an employer has a legitimate interest in protecting its trade secrets from disclosure, and employees are hard pressed to object to signing a non-disclosure agreement. Employers still must justify the restriction by showing that the information to be protected is confidential and proprietary. Employers typically must show that:

- Competitors or individuals outside the business are unaware of the information
- Employees and others involved in the business have limited access to the information
- The company has taken reasonable internal measures to guard the secrecy of the information
- The company has spent significant effort and/or money to develop the information
- Competitors would value the information –and–
- Competitors would have a difficult time acquiring or duplicating the information

California law permits non-disclosure agreements that prevent the misappropriation of trade secrets and unfair competition. One California appellate court held that Section 16600 does not invalidate an employee's agreement not to disclose his or her former employer's confidential customer lists or other trade secrets. John F. Matull & Assocs., Inc. v. Cloutier, 194 Cal. App. 3d 1049 (1987); Cal. Bus. & Prof. Code § 16600. In that case, the court stated that a former employee's use of confidential information obtained from her former employer was unfair competition.

You should draft non-disclosure agreements for employees who have access to company trade secrets. Trade secrets can be product formulas, patterns, compilations, computer programs, techniques, processes, pricing and financial information, marketing strategies, and methods of conducting business that the employer keeps confidential and uses to its advantage over competitors. Trade secrets need not exist in some tangible format; they can be ideas, theories, or concepts.

For more information on trade secret protection, see Trade Secret Fundamentals. For information on discovery in trade secrets litigation, see Discovery on behalf of Plaintiffs in Trade Secret Misappropriation and Breach of Restrictive Covenant Actions, Deposition Questions (Plaintiff Employer to Defendant) (Trade Secret Misappropriation and Breach of Restrictive Covenant Action), Interrogatories (Plaintiff Employer to Defendant) (Trade Secret Misappropriation and Breach of Restrictive Covenant Action), and Document Requests (Plaintiff Employer to Defendant) (Trade Secret Misappropriation and Breach of Restrictive Covenant Action).

For state-specific practice notes on trade secret protection, see Non-competes and Trade Secret Protection State Practice Notes Chart.

For non-jurisdictional and state-specific annotated agreements and clauses to protect trade secrets, see Non-competes and Trade Secret Protection State Expert Forms Chart.

Confidential and Proprietary Information

Non-disclosure agreements, also known as confidentiality agreements, should prevent employees from using or relying on the employer's confidential and proprietary information. A former employee may not be able to work for a competitor without inevitably using the trade secrets he or she acquired at the company, so a non-disclosure agreement may effectively be a covenant not to compete.

You should draft non-disclosure agreements for employees who have confidential information about the company's customers. While courts usually don't consider the identities of actual customers and concrete prospects to be trade secrets (especially when they are readily ascertainable or known), they may protect information like the identities of the customer's key decision makers, the key provisions of customer contracts, special pricing arrangements, formulations of special products, or specific customer preferences. Note that courts have enforced reasonable, narrowly tailored confidentiality agreements in California. For more detail, see Restrictive Covenants (CA) — Confidentiality Agreements.

For more information on non-disclosure agreements, see Non-disclosure Agreements: Key Negotiation, Drafting, and Legal Issues (Pro-Employer). For practical guidance on drafting and implementing non-disclosure agreements, see Confidentiality Agreements Checklist (Best Drafting Practices for Employers) and Trade Secrets and Confidential Information Protection upon Hiring Checklist.

For state-specific practice notes that address confidentiality agreements, see Non-competes and Trade Secret Protection State Practice Notes Chart.

For annotated non-jurisdictional and state-specific confidentiality agreements, see Non-competes and Trade Secret Protection State Expert Forms Chart.

EMPLOYEE HANDBOOKS AND KEY WORKPLACE POLICIES

Employee Handbooks

Start-ups and growing companies can help avoid misunderstandings about the employer-employee relationship by distributing well-crafted employee handbooks. An employee handbook that contains clear policies can protect the employer from employee allegations of harassment, wrongful termination, and discrimination. It can establish clear expectations for appropriate behavior in the workplace by articulating a code of employee conduct.

A well-drafted, up-to-date employee handbook can provide many benefits:

- **Protection from favoritism and discrimination charges.** Employees may be more likely to believe that the employer is treating them fairly if the handbook provides a sanctioned procedure for complaining about perceived unequal treatment. They may be less likely to bring discrimination claims in the EEOC or the state fair employment practices agency.
- **Protection for managers.** The employee handbook relieves managers from having to decide, on a case-by-case basis, issues such as time off, disability insurance eligibility, and adherence to the company's dress code. Managers may rely on a clear set of written guidelines in the employee handbook, rather than making decisions on an ad-hoc basis.

- **Clear process for resolution of complaints.** Employees understand clearly how the employer will investigate and resolve a complaint.
- **Guarantee that employees understand the rules.** Since employees must acknowledge in writing that they have read and understood the employee handbook, the employer has evidence that the employees know its policies.

For information on drafting and reviewing employee handbooks, see Employee Handbooks: Drafting and Revising Tips, Employee Handbook Policies Checklist, and Employee Handbook Review Checklist. For an annotated employee handbook, see Employee Handbook.

For state-specific employee handbook checklists and annotated employment policies customized by state, see Employment Policies State Expert Forms and Checklists Chart.

Key Workplace Policies

Equal Employment Opportunity/Anti-discrimination Policy

The employer should have an equal opportunity or anti-discrimination policy stating that it is committed to making all employment decisions without regard to any protected classification. This policy should prohibit discrimination based on race, color, religion, sex, pregnancy, national origin, ancestry, age, disability, genetic information, sexual orientation, gender identity or expression, military status, citizenship, and any other classification protected under federal, state, or local law. You should include all of the classes of employees that are protected under either federal or state employment statutes.

The catch-all provision “any other protected classification under federal, state, or local law” will help protect the employer in the event that the policy omits a classification, the law changes and the employer has not amended the policy, or the employer operates in states that protect other classifications of employees.

For more information on drafting equal employment opportunity policies, see Devising Equal Employment Opportunity / Non-discrimination Policies. For a corresponding annotated form, see Equal Employment Opportunity Policy (with Acknowledgment).

Anti-harassment Policy

A comprehensive anti-harassment policy that includes a complaint procedure can help an employer defend against employee allegations of harassment. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). Make sure the policy expressly prohibits not just sexual harassment, but also harassment based on any characteristics protected by applicable discrimination laws.

The anti-harassment policy should:

- State that the company will not tolerate harassment in the workplace by managers, employees, or non-employees
- Provide general guidance on the type of conduct that constitutes harassment, including some examples
- Outline a complaint procedure for reporting allegations of harassment and request that anyone who learns of harassment report it using that procedure
- State that the employer will not retaliate against employees for raising claims of harassment –and–

- Warn that if the employer finds that an employee has engaged in unlawful harassment, that employee will be subject to disciplinary action, up to and including termination

For more information and a sample anti-harassment policy, see Drafting Anti-harassment Policies. For a corresponding annotated form, see Anti-harassment Policy (with Acknowledgment).

Employment at Will Policy

An employment at will policy states that the employer and the employee are both free to terminate the employment relationship at any time for any reason that is not prohibited by law, and that employment is not for a definite period. The policy should state that no oral or written statements will create a contract of employment for a specified period of time, except a written contract of employment signed by an authorized representative of the company and the employee or the employee's authorized representative.

The employment at will policy should not state that employees can never change their at-will status. At least one National Labor Relations Board Administrative Law Judge has found that such a policy violates employees' rights to unionize to change their at-will status. See Am. Red Cross Ariz. Blood Servs. Region, 2012 NLRB LEXIS 43 (Feb. 1, 2012) (finding that employees could reasonably construe acknowledgment form stating "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way," as an unlawful prohibition on Section 7 conduct).

For annotated at-will employment policies, see At-will Employment Disclaimer (Non-union Employees, Standalone Policy) and At-Will Employment Policy (Union Employees, Employee Handbook Disclaimer).

Family and Medical Leave Act Policy

The federal FMLA states that if an employer has an employee handbook, the handbook must include a statement of the employer's policy on FMLA leave. 29 C.F.R. § 825.300. This requirement applies to employers who have fifty or more employees during twenty or more workweeks in the current or preceding calendar year.

The FMLA requires that the handbook policy include all of the information that the Department of Labor's model Notice to Employees of Rights under FMLA contains. Most employers can satisfy this requirement by attaching a copy of this notice to their FMLA policy.

For more information on drafting FMLA policies, see Drafting FMLA Policies, FMLA Employer Rights and Obligations, and FMLA Leave: Employer Coverage, Employee Eligibility, and Qualifying Bases. For an annotated model FMLA policy, see Family and Medical Leave Act (FMLA) Policy and Family and Medical Leave Act Policy (Alternate Version). For annotated state-specific family and medical leave policies, see the Attendance, Leaves, and Disabilities State Expert Forms Chart.

Standards of Conduct Policy

A standards of conduct policy should list common types of misconduct, but it should also state that the list of prohibited conduct is not all-inclusive. The policy should also state that misconduct will result in discipline, up to and including termination.

For an annotated model standards of conduct policy, see Standards of Conduct Policy.

Safe Harbor Policy against Improper Deductions

An employee who is exempt from the FLSA's overtime pay requirements can lose that exempt status because of inadvertent, improper deductions from the employee's pay. Therefore, advise the employer to adopt a policy against improper docking. The policy should state that the employer prohibits improper deductions, that the employee should promptly report any inadvertent deductions, and that the employer will reimburse the employee for any improper deductions.

For more information on policies to protect FLSA exemptions, see Preserving Overtime and Minimum Wage Exemptions Through Handbook Safe Harbor Policies. For an annotated model policy, see Safe Harbor Policy for Exempt Employees.

Attendance and Punctuality Policy

An employer can adopt an attendance and tardiness policy that sets a certain number of days, or portions of days, that an employee may miss work during a given period. As an alternative, a policy can just state generally that attendance and punctuality are important and that tardiness and absenteeism may lead to discipline, up to and including discharge. The more general policy affords managers and supervisors more discretion to respond to individual situations. On the other hand, it exposes the employer to the risk that they may not apply the policy uniformly, possibly resulting in unfair or discriminatory treatment of employees.

Attendance and punctuality policies should state that the employer expects employees to be present and on time, define excused and unexcused absences, and provide guidelines on the amount of notice an employee must give before an absence.

You must take care so that the company's attendance and punctuality policy does not violate federal, state, or local laws that permit employees to take leave for various purposes. The policy should include in the list of excused absences any absence that applicable leave laws require or permit. In addition, the policy should state that an employee may be disciplined for "excessive, unexcused absences," not just for "excessive absences," because those absences may be protected by law.

For information on attendance policies, see Attendance, Time-Off, and Leave of Absence Policies, Drafting Vacation Policies, Formulating Employee Personal Leave Policies, Devising Employee Sick Leave Policies, and Developing Paid Time Off (PTO) Policies.

California's Paid Sick Leave Law requires California employers to accrue paid sick leave for virtually all employees, which they can begin taking after their 90th day of employment. Cal. Lab. Code § 245 et seq. For more information on California's paid sick leave law, see Leave Law (CA) — Sick Leave. For information on leave laws in other states, see Attendance, Leaves, and Disabilities State Practice Notes Chart. For state surveys on leave laws, see Paid Sick Leave State and Local Law Survey (Private Employers) and Paid Vacation and PTO State Law Survey. For annotated state-specific leave policies, see Attendance, Leaves, and Disabilities State Expert Forms Chart.

Classification of Employees Policy

If an employer policy provides for different treatment of different types of employees, it must clearly state which groups of employees the policy covers. Employers typically use the following classifications:

- Exempt or non-exempt
- Full-time or part-time (specify different classes of part-time employees, if applicable)
- Temporary, probationary, or regular (avoid the term “permanent” because it implies that these employees are not at-will employees)

The handbook should clearly define each classification. You should include a provision stating that these classifications do not change the at-will employment status of the company’s employees.

For more information and sample language, see Formulating Policies Regarding Classifications of Employment. For an annotated classification policy, see Employee Classification Policy.

Drug and Alcohol Policy

While workplace drug and alcohol use is often included in the list of prohibited types of employee conduct, you should draft a separate policy on substance abuse. You must be careful to comply with any state or local statutes regarding drug and alcohol testing. Generally, a substance abuse policy should specify what types of substance abuse or use the employer prohibits (for example, illegal drugs, alcohol use on the employer’s premises, and abuse of prescription drugs). In addition, the policy should set forth any standards and processes for testing, such as:

- The types of testing that the employer will perform (e.g., applicant testing, random testing, for-cause testing, or post-rehabilitation testing)
- Details regarding confirmation testing in the event of a positive test
- The consequences of a positive test and of a refusal to be tested
- Confidentiality of test results –and–
- The procedure an employee can use to explain or contest results

California does not have a state law governing pre-employment drug testing, but the California Constitution may provide the basis for a challenge to workplace drug testing.

For more information on workplace drug and alcohol testing and ADA concerns, see Drug and Alcohol Testing Employees Under the ADA Checklist and Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations. For an annotated drug and alcohol testing policy for use in California, see Drug and Alcohol Testing Policy (with Acknowledgment) (CA). For information on drug and alcohol testing in other states, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Practice Notes Chart. See also Medical and Recreational Marijuana State Law Survey. For annotated state-specific drug and alcohol testing policies, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Expert Forms Chart.

Employee Benefit Plans Policy

One common mistake that employers make in drafting employee benefit policies is to include too much information about benefits and eligibility for benefits. A benefits policy must not conflict with the summary plan descriptions or other documents governing the benefit plans. A summary plan description is a summary of the key provisions of an employee benefits plan document and must be in language that the average employee can understand. The policy should simply list the types of employee benefit plans that the company offers to

employees, and refer employees to the plan documents for more information. In addition, you should include a statement that the company reserves the right to modify, add to, or eliminate these benefits at any time.

You should be aware that the federal Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq., requires all companies with more than 50 full-time equivalent employees to offer health benefits to any paid employee who works at least 30 hours per week or 130 hours per month, including paid interns and temporary employees.

For more information on drafting employee benefit plans policies, see Drafting Benefits Policies for the Employee Handbook. For annotated benefits policies, see Benefits Policy and Non-traditional Benefit Policies.

For more information on summary plan descriptions, see Key ERISA Disclosure Issues Including Summary Plan Description (SPD) Requirements and Other Disclosures Concerning Blackout Periods, Participant-Directed Defined Contribution Investments, and Employer Security Investment Alternatives and Prospectus Requirements.

Jury Duty and Subpoenaed Witness Duty Policy

An employee's right to take leave for jury duty and/or subpoenaed witness duty is governed by state and federal law. Federal law prohibits employers from disciplining or terminating an employee for jury duty in federal courts. California and many other states prohibit employers from disciplining or terminating employees for jury duty or subpoenaed witness duty. For more information on California jury duty and witness duty leave laws, see Complying with Other California Leave Laws. For information on jury duty and witness duty leave laws in other states, see the Jury, Witness, and Victim Leave column of the Attendance, Leaves, and Disabilities State Practice Notes Chart. For annotated state-specific jury leave and witness duty policies, see the Other Leaves column of Attendance, Leaves, and Disabilities State Expert Forms Chart.

Military Leave

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 et seq., requires all employers to allow employees time off to perform service in the uniformed services, including the U.S. Army, Navy, Air Force, Marine Corps, Coast Guard, Air National Guard, and Army National Guard. 38 U.S.C. § 4312. USERRA requires employers to reinstate employees returning from military leave and to offer training or other necessary resources to qualify those returning employees for their positions. 38 U.S.C. § 4312. For more information on USERRA, see Uniformed Services Employment and Reemployment Act (USERRA).

Many states have laws requiring employers to provide additional military leave. For example, USERRA does not cover employees on state active duty in the National Guard, but state law may cover them.

An employer's military leave policy should:

- Detail the types of military leave that are permissible
- State whether military leave is paid
- Explain what the employee needs to do exercise his or her reemployment rights

For information on California's military leave laws, see Leave Law (CA) — Military Leave. For information on other states' military leave laws, see the Family, Medical, Sick, Pregnancy, and Military Leave column of the Attendance, Leaves, and Disabilities State Practice Notes Chart. For annotated state-specific military leave policies, see the Family, Medical, Sick, Pregnancy, and Military Leave column of the Attendance, Leaves, and Disabilities State Expert Forms Chart.

Overtime Policy

An employer should have a policy regarding overtime work and pay for employees who are not exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) or state law.

An overtime policy should state that:

- The employer will pay employees one and one-half times their regular rate of pay only for hours they work over 40 in a workweek
- Paid time off for vacation, sick leave, and holidays does not count towards the 40-hour threshold
- All non-exempt employees must get permission from a supervisor before working overtime
- Employees cannot start work early, work through lunch, or work late without prior authorization from a supervisor
- From time to time, the employer will require employees to work overtime, and an individual's repeated refusals to work such overtime may result in discipline

In drafting an overtime policy, it is important to check the wage and hour laws of the states in which the employees will be working.

For California workplaces, the overtime policy should state that the employer will pay one and one-half times an employee's regular rate of pay for:

- Hours he or she works over 8 and up to 12 in a workday
- The first eight hours that an employee works on his or her seventh consecutive day of work in a workweek

California overtime policies should also state that the employer will pay double an employee's regular rate of pay for:

- Hours beyond 12 that he or she works in a workday
- Hours beyond eight that he or she works on the seventh consecutive day of work in a workweek

For more information on the FLSA's overtime provisions, see Complying with the FLSA's Overtime Requirements for Hourly Non-Exempt Employees. For information on creating and implementing FLSA policies, see Developing and Implementing a Comprehensive Wage and Hour Program, Implementing Timekeeping Policies and Practices, Formulating Policies Regarding Classifications of Employment, Drafting Overtime Pay Policies, Drafting Policies on Payroll Corrections and Deductions, Preserving Overtime and Minimum Wage Exemptions Through Handbook Safe Harbor Policies, and Composing Timekeeping and Off-the-Clock Work Policies. For annotated model FLSA policies, see Compensation and Payroll Practices Policy, Timekeeping Policy (Long Form with Acknowledgement), Timekeeping and Off-the-Clock Work Policy, Policy Regarding Pay Periods and Paydays, Overtime Policy, Policy on Payroll Corrections and Deductions, Safe Harbor Policy, and On-Call Policy.

For more information on California's overtime laws, see Wage and Hour (CA) — Overtime. For information on overtime laws in other states, see the Wage and Hour Requirements column of Wage and Hour State Practice Notes Chart. For annotated state-specific wage and hour policies, see Wage and Hour State Expert Forms Chart.

USING INDEPENDENT CONTRACTORS IN LIEU OF EMPLOYEES

You should advise employers of the risks of hiring independent contractors, including that the U.S. Internal Revenue Service (IRS) and/or the state revenue agency may decide that they should be classified as employees, which would result in tax liability for the employer. The U.S. Department of Labor (DOL) could also decide that they should be classified as employees entitled to overtime pay and other benefits. Additionally, the state unemployment agency may decide that they should be classified as employees entitled to unemployment compensation. There is also the risk of worker's compensation coverage should a worker's compensation commission conclude that independent contractor status was unsupported.

For more information on classifying workers as independent contractors, see Independent Contractor Tests and Risks of Worker Misclassification and Understanding, Drafting, and Negotiating Independent Contractor Agreements.

For an annotated independent contractor agreement, see Independent Contractor Agreement (Pro-Service Recipient).

For information on state laws related to independent contractors, see Independent Contractors State Practice Notes Chart.

For annotated state-specific independent contractor agreements, see the Independent Contractors and Interns column of Wage and Hour State Expert Forms Chart.

Independent Contractor IRS Test

Whether a specific individual is an independent contractor or an employee often turns on an analysis under the IRS's test for making such determinations. The IRS test incorporates three categories: behavioral control, financial control, and relationship of the parties. Publication 1779 IRS (Rev. 3-2012); see also IRS 2018 Publication 15-A. The IRS has identified specific facts and circumstances to review for each of those three categories:

(1) **Behavioral Control**

These facts concern whether the business has a right to direct or control how the worker does the work:

a) **Instructions.** Does the business issue extensive instructions on how the worker should do the work? Does the business issue extensive instructions on how the worker should do the work?

b) **Training.** Does the business provide the worker with training about required procedures and methods?

(2) **Financial Control**

These facts pertain to whether the business can control the business part of the individual's work:

a) **Significant Investment.** Does the worker have a significant investment in his/her work (the investment must be substantial)?

b) **Expenses.** Does the business reimburse the worker for some or all business expenses?

c) **Opportunity for Profit or Loss.** Can the worker realize a profit or incur a loss?

(3) **Relationship of the Parties**

These facts demonstrate how the business and the worker view their relationship:

a) **Employee Benefits.** Does the worker receive typical benefits that employees often receive?

b) **Written Contracts.** Is there a written contract between the worker and the business?

The DOL, in enforcing the Fair Labor Standards Act, applies an "economic realities test." See DOL Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA). That test is broader than the common law control test that other federal agencies and many courts apply. You should also consult state laws in the jurisdictions the employer operates in, as many state unemployment compensation agencies use one of the forgoing tests or a hybrid of some of them. See Independent Contractors State Practice Notes Chart.

For more information on these tests and other independent contractor issues, see Independent Contractor Tests and Risks of Worker Misclassification. See also Understanding, Drafting, and Negotiating Independent Contractor Agreements. For information on independent contractor tests in California, see Independent Contractor Tests in California.

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