Quick Checklist Of California Workplace Rights

10 Things Every California Employee Needs To Know To Better Understand His Workplace Rights And Avoid Common Mistakes

1. **At-Will Employment Explained**

In California, you are generally presumed to be an "at-will" employee, unless specifically agreed upon otherwise. Being at-will means that you can be terminated for any reason, fair or unfair, or no reason with or without notice, except for illegal reasons (such as discrimination based on being a member of a "protected" class or retaliation based on engaging in a "protected" activity). At the same time, as an at-will employee, you can also quit your job at any time for any reason or no reason with or without notice. The terms of employment of an at-will employee can also be changed at any time and for any reason. This includes schedule, job duties and job description, and compensation.

There are three main groups of employees who are *not* considered at-will employees:

(a) *Union Members* - this is because a union agreement usually limits the employer's right to terminate an employee and requires "just cause" for termination. This has to be something relatively serious, i.e. serious and / repeated violation or insubordination or persistently bad performance. A union agreement (known as "Collective Bargaining Agreement" or CBA) may also require the employee to provide notice to employer when resigning, typically being a 30-day or 60-day notice.

(b) *Contract Employees* - employees who work pursuant to an agreement that promises to employ the worker through a specific date. Just cause is also usually required to terminate that employee before that contract expires. The employee also must give the employer a certain amount of notice before resigning early.

(c) *Government Employees*. This usually includes city, county, state and federal workers. These employees usually obtain a permanent civil servant status upon completion of a probationary period. In addition to having a union member protection, terminating a civil servant typically requires some sort of due process, such as Cal HR hearing with regard to state workers, PERB, Coleman, Skelly, or SPB hearing and other disciplinary hearings before that employee's termination can be final.

* One of the more important things that government employees need to be aware of is the fact that in some cases an adverse decision in an administrative hearing regarding termination can have a binding, preclusive effect on any subsequent civil case. In other words, losing at the Skelly or SPB hearing in some cases means that you cannot bring a wrongful termination case in court. Therefore, if you are a government employee facing termination proceedings, you should review your legal options with an experienced attorney before you attend any administrative hearings to challenge your termination.

2. Exempt / Non-Exempt from Overtime Pay Status Distinction Explained

The law allows the employer to classify certain employees as salaried and exempt from being paid overtime. There is a set of requirements that must be met before an

employee can be classified as exempt. Even though there many rules and exceptions that have to be considered before determining whether an employee can be properly classified as exempt, the most important thing to remember is that to be exempt, (i) you must be making at least twice the minimum wage, and (ii) most of your duties must be those of some type of manager, i.e. performing managerial work and/or supervising at least two other employees. If only one of those requirements is met, then you are not exempt and you should be entitled to overtime, as well as meal and rest breaks.

A classic example of misclassification is a grocery store manager who makes more than twice the minimum wage, but spends more than 50% of his time doing non-managerial work, such as working the cashier, restocking, etc… That employee must be paid overtime and he is entitled to meal break and rest break (unlike exempt managers).

* One of hte most common mistakes that employers make that leads to misclassification is simply giving an hourly employee a title of a manager and assuming that this actually makes him exempt from overtime pay. Under the law, however, an employee's title is of very little relevance to making the exemption determination. The actual nature of his job duties is what determines whether he can be classified as salaried-exempt and not the title of his job.

3. Employee / Independent Contractor Distinction Explained

There is a multi-factor test for determining whether a worker should be classified as an employee or an independent contractor. But, the essence of the test is this: whether you are an employee depends on *the degree of control that the employer exercises over the manner in which you perform the work*. The more control there is, the more likely you are to be an employee and not a contractor. The factors that need to be considered are whether you are required to work from the office rather than remotely, whether the employer sets your hours, whether you are compensate per time worked or per project, whether you are using your

computer and other equipment or the employer is providing that equipment, and whether someone is regularly supervising your work.

* A common mistake that employers make is assuming that simply making a worker sign an independent contractor agreement makes that worker a contractor. However, under the law the existence of such agreement is just one (and not the most significant) factor to be considered in making this determination. Just like with exempt v non-exempt employee, a title here doesn't make much of a difference.

This distinction between an employee and an independent contractor is significant primarily for three reasons: (a) an hourly employee, as opposed to a contractor, is entitled to overtime pay, meals and rest breaks, and common benefits providers to other employees; (b) an employee is covered by workers comp insurance; (c) a terminated employee is covered by EDD unemployment insurance benefits.

An employer's liability for misclassifying an employee as a contractor can be significant, and it can include being liable for paying overtime wages and penalties, and having to back pay EDD for all unpaid contributions to that worker's unemployment benefits fund, that should have been paid, if he had been correctly classified as an employee.

4. Overtime Pay Eligibility Explained

If you are a non-exempt, hourly employee, you should be paid 1.5 times of your regular hourly rate for 9, 10, 11, and 12th hour of your work and 2 times your hourly rate for any hours in excess of a 12 hour shift. This is regardless of how many days per week you work. This means that even if you worked just one day during that week or month, the same calculation applies to you. Thus, if you worked a 13 hour work day, and your regular rate of pay is $20 / hour, your total daily compensation for that day should be 20 x 8 + 20x1.5x4 + 20x2x1 = $320.

* One common mistake that employer often make with regard to calculating an hourly employee's pay is assuming that just because a worker didn't work 40 or more hours during

that week, he is not entitled to overtime. While this is correct under Federal FLSA law, under California law the worker is entitled to overtime pay as illustrated above *regardless* of how many hours he works that week.

5. Your Basic Workplace Disability Rights Explained

The most important and the most liberal disability rights legislation in California is known as FEHA - California Fair Employment and Housing Act, and it's codified in Government Code 12900. This law applies to employers who employ five or more employees, and it covers pretty much all employees. FEHA requires that employees with qualifying disabilities are "reasonably accommodated", unless providing an accommodation imposes an "undue hardship" on the employer's operations. Reasonableness of an accommodation is of course an inherently vague term and it has to be determined case by case, considering the nature of disability, the nature of employer's business and their resources, etc. There is no specific list of possible accommodations, and employees and employers are encouraged to exercises flexibility and creativity when searching for an accommodation that works for everyone. These accommodations may include a wide range of adjustments - from ergonomic chairs and keyboards, to modified schedule, full or partial telecommute, lifting / pushing / pulling restrictions, disability leave of a certain duration or extension to previously granted disability leave, and transfer to a different position as per restrictions. The definition of disability under California FEHA is very broad and it includes pretty much any physical or mental condition that affects a person's daily life activities. The most common but not necessarily obvious examples of these disabilities are diabetes, high blood pressure, sleep apnea, carpal tunnel syndrome, PTSD, depression, and OCD. Other important, related medical condition rights to be aware of are FMLA, CFRA, Pregnancy Disability Leave, And California Paid Sick Leave.

* One common mistake that many employers make is assuming that just because an employee's FMLA or CFRA medical leave has exhausted, that employee can be terminated. In many cases, the employer must also consider whether that employee's disability can be

accommodated by extending medical leave for a certain period of time beyond FMLA / CFRA, and failure to do so may form the basis for a disability discrimination and wrongful termination case.

6. Harassment / Hostile Work Environment Explained

Illegal harassment and hostile work environment are some of the most commonly misunderstood terms in employment law. In everyday language, harassing someone means just bothering them or annoying them (repeatedly). However, legally harassment occurs when the employer treats you badly f*or discriminatory reason*, i.e. due to your age, race, disability, religion, sexual orientation, familial status, etc… This treatment has to be *sufficiently severe and pervasive* in order to form a basis for an unlawful harassment claim in court. Isolated jokes and comments are often insufficient to make a case, even though it depends on who has been making those comments, and under what circumstances. Generally, a single egregious comment by a manager, who is in a position of power over the victim of harassment, is much more legally significant that the same comment by a co-worker. The most common example of actionable harassing comments are racial slur, including the “n” word, calling someone a fag or a dyke, referring to an employee as “old man” or telling someone that it’s time to retire because they are too slow, making fun of someone’s disability, etc.

However, most other types of unfair and hurtful treatment are not illegal, however frustrating they might be. This includes being yelled at by a boss, being micromanaged, receiving unfair performance review, being assigned tasks that are not in a job description, etc…, unless again there is specific evidence that the real reason for that treatment is discriminatory or retaliatory, or unless there is evidence of violence real threats of violence.

7. Illegal Discrimination Explained

Illegal discrimination occurs when an employer takes adverse action against an employee (such as demotion or termination) *because* of that employee’s age, race, disability,

religion, sexual orientation and other protected categories. Simply being black, or jewish, or over 40, or gay and being terminated is not enough to make a claim against the employer. There has to be some evidence that the reason for termination was that protected category and not some other reason, fair or unfair. There are different ways to prove that illegal discrimination played a role in the termination decision, and an experienced employment attorney should be able to determine whether that type of evidence exists in a specific situation.

8. Illegal Retaliation Explained

Retaliation occurs when your employer takes an adverse employment action against you, such as terminating or demoting you or transferring you to a far less desirable or location because you engage in a “protected” activity. Protected activities include complaining about unlawful discrimination, unlawful harassment, safety violations including patient safety, fraud, or criminal activity.

To have a viable retaliation claim in court, your complaints *do not necessarily have to turn out to be true*. As long as you, in good faith, believed that an impropriety took place and you disclosed it, terminating you for that disclosure would be illegal and give rise to a wrongful termination case. A typical example is an accountant who is terminated shortly after reporting to his management that he suspects that there is potential corporate tax evasion going on. His retaliation claim will still stand, even if his suspicions turn out to be incorrect, if he had reasonable basis for making that complaint. This is one reason that many claimants end up winning a retaliation case, even after losing their discrimination claim or even having it dismissed, when it turns that there is insufficient evidence to prove their discrimination allegations.

Most complaints, however, are not considered “protected”, and therefore are not covered by anti-retaliation laws. Complaining about insufficient training, bad management, unfair evaluations, or otherwise not being treated fairly are not protected by anti-retaliation

laws. Thus, if you make such a complaint, and the employer decides to fire you and openly admits that they fire you because of that type of complaint, no retaliation / wrongful termination case can be made based on these facts. That's why it's a very good idea to check whether your potential complain would be considered a "protected" activity ***before*** making that complaint. Even though the employer can choose to terminate you regardless of the type of complaint you are making, making this assessment will help you make a better decision about whether taking the risk and making that complaint is worthwhile in any specific situation.

9. Defamation Explained

There are two types of defamation - written (libel) or verbal (slander). Making a defamation claim requires (a) evidence of false statement of fact (as opposed to opinion) that (b) damages an employee's reputation and (c) published to someone outside of the "group of interest" or published internally with malice, i.e. for improper purpose. The most common statements that may give rise to a defamation claim against the employer are false accusation of theft, fraud, overbilling, or committing some other type of crime.

10. PIP - The Truth About Performance Improvement Plans

Our experience clearly indicates that in the vast majority of cases by the time an employee is placed on a PIP, the decision to terminate him has already been made, and the employer, for reasons reasons, is just trying to make it look like they are giving that employee a chance to improve.

There are no laws that govern performance improvement plans or any other discipline for that matter, unless, again, there is evidence that the true reason for discipline is discriminatory or retaliatory. Therefore, in most cases, writing rebuttals to performance improvement plans is a total waste of time, as it's not going to change the employer's plan to terminate you. Your time might just be better spent looking for another job while you are still employed. And if you believe that your employer has put you on PIP for unlawful

discriminatory or retaliatory reasons, this might just be a great time to take certain steps to enhance your potential case (i.e. make copies of important documents and e-mails, secure contact information of potential witnesses of unlawful conduct toward you, etc…).

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I hope you find this brief guide handy and useful for initial analysis and assessment of the most common issues and situations at work. If you have any questions, feel free to e-mail us at arkady@arkaydlaw.com or call 415-295-4730.

Sincerely,

Arkady Itkin