THE LAW AT WORK | 2017

Daniel E. Eaton

70 YEARS

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INTRODUCTION

Happy New Year!

On October 3, 2016, the first of my bi-weekly "Law at Work" columns was published in the Business section of the *San Diego Union-Tribune.* The columns have provided guidance to California managers on a range of issues, from politics in the workplace to the loyalty an employee owes his employer to the scope of an employer's right to terminate an employee. At the suggestion of a reader, I even wrote a column on who gets to keep the tips and service surcharges paid by restaurant patrons.

This collection compiles all of the columns published from the first column through the end of December of 2017. Some columns focus on a single new case or law. Others focus on a concept. By collecting these columns, and including an index, I hope this yearbook of sorts will serve as a desk reference for the challenges managers and employers will inevitably face in the year ahead.

A word of caution: These columns, by their nature, are snapshots; they reflect the law at the time of publication. While many principles are durable, the law of the workplace in California as a whole is dynamic, not static. Even within this volume, a principle explained in one column subsequently may have been revised or reinterpreted by the legislature or courts in a way significant enough for the principle to be revisited in a column published months later. Check with counsel to ensure that you are applying current law.

And at the end of this year, expect a new compilation pulling together some of the as-yet unknowable new challenges that California employers will have faced.

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ABOUT DAN EATON

Dan Eaton is a partner in the Litigation Department of the San Diego law firm of Seltzer Caplan McMahon Vitek. He concentrates his practice on defending and advising San Diego employers on a full range of employment issues. Dan received his Bachelor of Science Degree from Georgetown University in 1984. After working in Washington, DC for U.S. Senator Arlen Specter (R-PA), he attended Harvard Law School and received his degree, cum laude, in 1989. On July 1, 2017, he was named President-Elect of the Harvard Law School Association, the worldwide organization of Harvard Law alumni.

In the nearly 30 years he has been practicing law, Dan has produced consistently solid results for his clients. He also has done extensive work in the field of legal ethics, serving on local, state and federal committees addressing the law of lawyering.

For about a decade, Dan has taught classes in business ethics and in employment law to upper level undergraduate students at the San Diego State University Fowler College of Business.

Among the numerous non-profit and government boards on which he has served since coming to San Diego following law school, Dan served for 10 years on the City of San Diego Civil Service Commission, deciding appeals from, and helping to set policy for, the City's 10,000+ employees.

Dan has given numerous seminars, and authored numerous articles, on employment law and other issues, including his biweekly Law at Work column in the *San Diego Union-Tribune* and occasional columns on CNBC.com. Dan has also made numerous appearances as a legal analyst on San Diego radio and television stations, including KPBS and KNSD.

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POLITICS AT WORK

Published: October 3, 2016

You are a top manager at a San Diego company. The day after the first presidential debate, one of your subordinates comes to you very upset. Earlier that morning, a co-worker had demeaned his intelligence and ethics in an aggressive and angry way when he disclosed his preferred candidate for President. You favor the opponent of the complaining worker's candidate.

May you share your political views with the complaining subordinate? May you send out an email prohibiting all talk of politics in the workplace? Should you investigate the complaint and then discipline the aggressor if you find that the complaint is valid? Must you do nothing?

A California employer may require its employees to focus on work in the workplace during working hours. A common misconception is that employees in the private workplace have a First Amendment right to air their political views at work. Well, no they don't.

And yet there are laws passed by the California legislature that limit how much influence a private employer may exert over its employees' political views and activities. No California employer may adopt a "rule, regulation, or policy" that prohibits an employee from "engaging or participating in politics" or running for public office. Also off-limits is any rule that tends to control or direct the "political activities or affiliations of employees." In addition, a California employer may not threaten to fire any employee who adopts or refuses to adopt "any particular course or line of political action or political activity."

All of this law provides only limited help to the San Diego manager wondering what to do in response to the angry employee in her office just now. The one thing the manager should not do is send an email barring all talk of "political activity" in the workplace. That is not only unrealistic these days, it also could be considered a policy statement that discourages employees from "engaging in politics." In addition, the National Labor Relations Board may well consider that an unlawful attempt to suppress employees from taking collective actions to improve their wages or working conditions. That is true even in a non-union workplace.

It also is unwise, though not illegal, for those in authority to share their political views with a subordinate who is feeling aggrieved, especially if those views are not solicited. If the views of the boss clash with the subordinate, an employee who is later fired may point to that disagreement as an unlawful contributing factor in the discharge.

Going to the employee who is the subject of the complaint to express sympathy with the person's political views — and a shared disdain for the complaining employee's politics — is no answer either. Word will get out. Bet on it.

THREE REASONS EMPLOYERS SHOULD BE SCARED OF HALLOWEEN

Published: October 17, 2016

In a little over a month, prepare to see a sleigh full of articles from employment experts warning of the legal perils of holiday parties in the workplace. Managers will be warned about the risk of allowing their employees to drink too much – or at all – at such gatherings. You will be told that inhibitions may fall and inappropriate verbal and physical impulses unleashed. Mistletoe is as toxic to eat – really – as it may be to display at any work function. And gift exchanges without guidelines may be an invitation to the office lech to play bad Santa.

All of that advice is sound.

But office misconduct never takes a holiday. Halloween falls on a Monday this year, a workday. Here are three ways allowing too much Halloween into the office may result in workplace legal complications well before Santa makes his first appearance.

The first way Halloween may cause legal problems is costumes that offend. If an employee wears a costume that may be perceived as insulting a racial or ethnic group – blackface, for example – a manager should be prepared to take action even before another employee complains. That is not to say that a single outrageous costume is likely to be enough to constitute the workplace-altering conditions someone must prove to show unlawful workplace harassment. But such a costume may be part of a broader series of acts that are sufficiently pervasive to be illegal.

All of that is to say that the best form of action a manager can take is preventative in the form of a reminder that rules prohibiting harassment apply just as much on Halloween as any other day. A California employer is legally entitled to require employees to follow "reasonable workplace appearance, grooming, and dress standards." The employer's discretion, if not unlimited, is fairly broad. The safest course is to prohibit dressing up altogether on Halloween. But the culture of a particular workplace may make such an outright ban odd.

The second, related way Halloween may cause legal problems is where a worker uses the occasion to make inappropriate suggestions about the costume another worker should wear. In one Detroit case about ten years ago, an employee suggested that a Pakistani Muslim employee dress as Osama bin laden for Halloween. It is easy to imagine a subordinate suggesting that a demanding female supervisor dress as a witch — or worse. An employer should address even isolated comments that are not themselves enough to constitute unlawful harassment through some kind of discipline, making it clear to the offending employee and others that the employer does not approve.

Third, the alert manager should watch for provocative decorations. One case of unlawful harassment out of Maryland a few years ago included a claim that a worker had repeatedly placed a screwdriver in a Jack o' Lantern in a sexually suggestive way. Removing the object was not enough for the employer to avoid a trial on the harassment claim based on this and other misconduct.

Most workplaces have elements of fun. The law does not require workplaces to be stripped of anything that the most hypersensitive employee would find upsetting. Fun in the workplace, however, should be broadly appealing. Preventative steps should be taken to make sure of that. The employer's response should be firm and clear when those steps prove inadequate. Happy Halloween.

PAID VACATION TIME IS CONSIDERED WAGES — EXCEPT WHEN IT'S NOT

Published: October 31, 2016

Just in time for the coming holiday vacation season, the San Diego division of the California Court of Appeal issued a ruling on October 20, 2016, holding that the value of earned but unused vacation time need not be itemized on an employee's pay stub. State law generally requires other aspects of compensation be reflected on an employee's pay stub, such as gross wages earned, hours worked, and deductions. That law is designed to enable employees to determine whether they have been compensated properly.

California law does not require a private employer to give its employees vacation time at all. Unlike legally mandated paid sick leave, such time off is a matter of employer policy or employer-employee contract.

When such time off is offered, however, the California Supreme Court has held that it is a form of deferred compensation that cannot be taken away from the employee once it is earned. That court concluded that "vacation pay is not a gratuity or a gift, but is, in effect, additional wages for services performed."

Because vacation pay is treated as a kind of earnings, "use-it-or-lose it" vacation leave policies are illegal in this state. An employer may not require its employees to take all of their unused vacation time by the end of the year or forfeit any balance.

Employers understandably don't want their employees to carry ballooning balances of unused vacation time. That is because the most important consequence of earned vacation leave being treated as a form of unpaid wages is that California law requires employers to pay employees the value of their earned but unused vacation leave at the rate of the employee's final pay upon termination of employment. If an employee is allowed to accumulate unlimited vacation leave without taking it, such banked vacation leave may result in a large payout upon termination.

It is partially because the employer need not pay out the value of unused vacation time until termination, and because the value of that time cannot be determined until termination since it is based on the employee's final pay rate, that the Court of Appeal concluded in its recent ruling that the value of such leave need not be itemized on each employee paycheck along with other compensation.

An employer nonetheless need not permit its employees to accumulate unlimited vacation leave. An employer may cap how much unused vacation leave an employee may have at any point before more is accrued. Once that limit is reached under such a policy, an employee earns no more vacation time until the employee spends down the existing balance.

That is not the only way an employer may control how vacation leave may be "spent" in a way the employer may not control how other forms of compensation are spent. An employer also may limit how and when its employees take their vacations. For example, an employer may limit the number of employees who take time off during the employer's busy season. Think farming companies during planting and harvest seasons and retailers in the period between Thanksgiving and Christmas. The employer also may restrict its employees from taking large blocks of accumulated time off all at once.

Studies have shown that workers who use their vacation leave are happier and more productive than those who do not. The great Supreme Court Justice Louis Brandeis explained that, when he was a busy practicing lawyer, he insisted on an annual one-month vacation because he had found that he could do the work of 12 months in 11 months, but not in 12. A profound insight to consider as employers and employees finalize schedules for the upcoming year, even as they are mindful of the ways the law treats vacation leave as wages, and the ways it does not.

WHAT DO EMPLOYERS OWE RETURNING SERVICEMEMBERS BESIDES HONOR AND THANKS?

Published: November 14, 2016

This is the season of honoring veterans and the season of thanksgiving. San Diegans have special reason to give thanks to the honorable men and women who serve in the armed forces. There are large numbers of residents in every part of San Diego county who are serving or have served in the military. What beside honor and thanks do private employers owe employees who leave their jobs to fulfill a military commitment and then return?

The federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) generally requires that servicemembers called away to military service be promptly reemployed by their employers upon honorable discharge if the servicemembers apply for reinstatement. The law applies to employers of any size.

A critical difference between USERRA reinstatement rights and the right to reinstatement under other leave laws is that a returning servicemember "is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that [he] would have attained if the person had remained continuously employed."

This provision means that "the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service," i.e., reemploying the servicemember "in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service." This is called "the escalator principle" because the servicemember's career is deemed to have progressed as it would have even during his or her absence. The Supreme Court has interpreted this principle to mean that a returning servicemember cannot receive a job upon his return that is inferior to the one he held when he left.

If the returning servicemember is not qualified to perform the position it is reasonably certain he would have attained had he been continuously employed, he is entitled to be employed in the position he held before leaving for military duty or a position of like seniority, status, or pay.

That's not all. Most private sector employees in California are employed at-will, meaning their employment may be ended at any time for any reason that does not violate fundamental public policy, such as because of their race, religion, etc. A returning servicemember who is reemployed, however, may not be discharged except for cause: (1) within one year if the pre-reemployment period of such military service is more than 180 days; or (2) within 180 days if the period of pre-reemployment military service is between 31-180 days.

There are bound to be disputes between returning servicemembers and their employers about, among other things, the kind of job to which they are entitled upon their return. While the USERRA authorizes servicemembers to "commence an action for relief" in federal court, the Ninth Circuit Court of Appeals recently ruled that a returning servicemember may be required to submit his or her claim to a private arbitrator rather than to a federal jury if the employee signed a contract agreeing to resolve employment disputes through arbitration. A recent survey by the management side law firm Carlton Fields found that about two-thirds of the almost four hundred large employers surveyed require their employees to sign such a mandatory arbitration clause as a condition of employment, presumably to limit the risk of a huge jury award to a sympathetic plaintiff.

The U.S. Supreme Court has held that the protections of federal reemployment rights laws for military members must be interpreted expansively "for the benefit of those who left private life to serve their country in its hour of great need." Private employers welcoming back those who have served their country for a time should keep that in mind in deciding how to reintegrate these men and women into their companies.

REQUIRING EMPLOYEES TO SAY "MERRY CHRISTMAS" COULD MEAN LEGAL TROUBLE

Published: November 28, 2016

Much attention will be focused in the coming weeks on whether it is appropriate for employers to require their employees to greet customers and others exclusively with "Happy Holidays." A Christian employee may strongly prefer offering a more specific "Merry Christmas" to those he or she encounters in the course of the workday. But a religiously-inspired preference is not a religious mandate. An employer must reasonably accommodate the demands of its employees' sincerely-held faith unless doing so would cause the employer undue hardship. There is no such duty to accommodate an employee preference that touches religion in any way.

Two cases illustrate this demand/preference distinction.

May an employer insist that all of its employees answer company phones "Merry Christmas?" As to any employees whose religion prohibits them in any way from celebrating or observing Christmas, the answer is no. That is the lesson one Kentucky manufacturing and design firm learned when it fired a payroll clerk/back-up receptionist after she informed the company president that greeting callers with "Merry Christmas" would compromise her beliefs as a Jehovah's Witness.

The court in the Kentucky case found that the company could have accommodated the receptionist's religious objections without undue hardship either by having her not answer the company phones during the Christmas season or by answering with the greeting "Good Morning" and the company name.

There are very few religions that prohibit its adherents from even acknowledging Christmas. Where an employer is informed that the employee's bona fide religious beliefs preclude him or her from doing so, that request should be reasonably accommodated.

And yet matters of conscience are one thing; matters of preference are another. Is a Catholic employee entitled, for example, to walk off her shift many hours early on Christmas Eve day to volunteer in getting children, including her daughter, ready for a church Christmas play later that night? A federal court answered that question no and further held that the employer had the right to fire the employee when she left early, knowing that her request for the extra time off had been denied three days before.

The distinction the court drew was between a basically social obligation and a fundamentally religious duty. The employee's "request to appear at the church hall to set up for the church play, receive the children, and decorate was not a religious observance" protected by laws requiring employers to accommodate their employees' religious beliefs. The employee's "early attendance at the church hall was social in nature. It was far more extensive in time than necessary for religion. It was family oriented, a family obligation, not a religious obligation."

The employee's desire to help with her daughter's play "involved the natural family interest of a good parent." "Extraordinarily harsh" though the Court believed the employer's response was, nothing in the law prohibited the employee from being fired for walking off the job.

This is treacherous legal territory for an employer. It is a bad idea to require an employee to provide documented proof that a requested accommodation – for time off, to be excused from participation in religiously-touched practices or celebrations – is driven by religion rather than by social preference. These cases and others show the employer is on firmest ground in rejecting such a request when the employee indicates that the requested accommodation is not at its core religious. Giving the employee's asserted faith the benefit of the doubt otherwise will avoid expensive legal trouble long after the holidays are over.

TWO CHANGES TO THE CALIFORNIA EQUAL PAY LAW COMING IN 2017 THAT ALL EMPLOYERS NEED TO KNOW

Published: December 12, 2016

The Fair Pay Act that went into effect on January 1, 2016 bars California employers from paying workers of one sex more than the workers of the opposite sex for "substantially similar" work unless the employer can show that any pay gap is justified by a factor other than sex, such as a system that determines pay based on quantity or quality of production or that resulted from differences in education, training, or experience.

The 2016 law was designed to close the asserted 16-cent pay gap between what California men and women are paid in similar jobs. Unlike some employment laws, such as the general employment anti-discrimination law and family leave law, the Fair Pay Act applies to employers of any size.

The first big change in California equal pay law that goes into effect on January 1, 2017 is that the principles of the Fair Pay Act will be expanded to compensation differences between members of one race or ethnicity and those of another. Supporters of the new measure argued that women of color who are paid less than white women should also be able to make a claim under the law.

The bottom line is that all California employers should review the compensation of their work force as the year comes to a close to make sure that workers of one gender, race, or ethnicity are not being paid more for substantially similar work than those of another gender, race or ethnicity unless such a gap can be fully justified by factors unrelated to membership in the protected class. Remember also that the law prohibits retaliating against an employee for discussing his or her salary or the salary of others or for asking about the salary of others.

The second big change in California equal pay law enacted by the California legislature now explicitly prohibits an employer from justifying an otherwise unlawful difference in pay on an employee's or applicant's prior salary alone. The sponsors of this measure asserted that such a clarification in the law will avoid perpetuating the effect of lower prior salaries that may themselves have been discriminatory.

The original version of this second measure would have prohibited employers even from asking applicants about their salary history. Governor Jerry Brown vetoed a similar bill last year, saying it went too far. The sponsor of the new law dropped that part of it in the face of broad opposition. Opponents argued that employers legitimately request the salary history of applicants to enable the employers to adjust salary ranges of a given position to match the current market rate, particularly in competitive industries in which employers do not advertise salaries.

Importantly, then, employers may still use prior salary as a factor justifying a gender, race, or ethnicity wage differential as long as the pay gap also is based on at least one of the other legitimate factors, such as a difference in applicants' or employees' experience.

Even as the focus is on brand new laws in the new year, employers also should ensure that their handbooks and policies reflect other recent changes in the law of the workplace, such as the recently enacted California and San Diego paid sick leave laws. Consulting with counsel, and accessing the excellent resources available from the California Chamber of Commerce and the San Diego Society for Human Resource Management, may prevent a multitude of legal problems in the coming year.

FIVE PREDICTIONS FOR CHANGES IN THE LAW AT WORK IN 2017

Published: December 26, 2016

A new year brings the prospect of change. That feels especially true as we look forward to 2017 and the start of the administration of President Donald J. Trump and his Labor Secretary-designee, Carl's Jr. CEO Andrew Puzder. What changes are in store in the law of the workplace?

No. 1: No increase in federal minimum wage. On January 1, 2017, the minimum hourly wage in California will go up to $10.50. The same day, the minimum wage in San Diego will jump to $11.50. On January 1, 2017, the federal minimum hourly wage will be $7.25, as it has been since 2009. On December 31, 2017, the federal minimum wage will be $7.25. Period.

No. 2: No federal paid sick leave law. According to The Work and Family Legal Center, as of last month, there are seven states, and about 30 cities that require private employers to provide paid sick leave to their workers. California alone has seven cities, including San Diego, that have enacted paid sick leave ordinances that are broader than California's state law. Some see it as inevitable that Congress will enact a similar law. No, it isn't.

No. 3: No California law prohibiting bullying in the workplace. California law prohibits harassment because of such things as race and gender, or because an employee blew the whistle. But an employee who is subject to general bullying has no claim under the law of California – or any other state, according to the Workplace Bullying Institute. California does require that employers of 50 or more address generalized "abusive conduct" in periodic mandatory sexual harassment training of their supervisors. But many argue that a legal claim of bullying would be too easy to make and too hard to define. An effort nonetheless will be made in the new year to authorize such claims. And that effort will fail.

No. 4: The U.S. Department of Labor will abandon defense of a new federal regulation expanding overtime eligibility. A new rule developed by Obama's Labor Department would have required that those exempt from overtime pay for more than 40 hours a week of work be paid a salary of at least $47,476, up from the current minimum of $23,660 effective December 1. Over four million workers would have been affected. Last month, a Texas federal judge appointed by Obama issued a preliminary nationwide order blocking the new rule, pending further order of the court. The judge concluded that the Labor Department had exceeded its authority under the federal wage law. The Labor Department naturally filed a quick appeal. But look for incoming Labor Secretary Puzder to order the appeal dropped, leaving the original order intact. It could have taken years to unravel the rule through the ordinary process of new rule-making, more precisely un-rule-making. Abandoning the appeal supplies a quick escape from a rule business fiercely opposed.

No. 5: Major court ruling defining the scope of California's Fair Pay Act. In 2015, the California legislature passed a law prohibiting employers from paying men and women different wages for "substantially similar work," unless the employer could show that any difference was justified by a factor other than sex, such as a system that determines pay based on quantity or quality of production or that resulted from differences in education, training, or experience. This past year, the provisions of that law were extended to wage differences traceable to workers' race and ethnicity. Watch for a major court ruling in 2017 in a California state or federal court making it clear just how hard it is for an employer to meet that burden.

Watch this space in the coming year as these predictions come — or don't come — to pass.

FOUR RESOLUTIONS EVERY CALIFORNIA MANAGER SHOULD MAKE IN THE NEW YEAR TO LIMIT LEGAL TROUBLE

Published: January 9, 2017

The first weekday of the first full work week of the new year is an ideal time to commit to workplace-related resolutions. Here are four resolutions California managers should make that will reduce the risk of legal trouble in the workplace in 2017.

Resolution 1: I will treat all incidents of harassment seriously. When a manager observes or hears about an employee abusing another employee for no apparent business reason, the manager should refer the matter to human resources. Generally for workplace harassment to be legally actionable, it must, first, be based on the harassed individual's race, sex, or other protected status or based on the harassed individual having engaged in protected conduct such as whistleblowing. Second, the conduct must be severe or pervasive. But workplace harassment does not need to be legally actionable to trigger an internal investigation and punishment if the accusation is substantiated. A manager's swift and appropriate response to an initial report or observation of abusive conduct of any kind may avoid legal complications down the road.

Resolution 2: I will appropriately accommodate the needs of subordinates with disabilities. A California employer with five or more employees must reasonably accommodate an employee with a disability, unless accommodating the employee would cause the business undue hardship. That means a manager who becomes aware that one of her subordinates has a disability that may affect the employee's ability to perform the essential functions of the job may be obligated to reconfigure existing facilities to make them more accessible or restructure the job, modify the work schedule, reassign the employee to a vacant position, or acquire equipment or devices that will enable the employee to do the job. The size of the business and its financial resources matter in determining what reasonable accommodation is required. Also, where there is a choice among multiple accommodations, an employer may select the less expensive one or the one that is easier to provide. And there is no obligation for an employer to create an entirely new position to accommodate a disabled employee.

Resolution 3: I will do nothing to prohibit or discourage those I supervise from taking meal and rest breaks. Every non-exempt California employee is entitled to two paid 10-minute breaks and one unpaid 30-minute meal break in an 8-hour shift. The California Supreme Court ruled in late December that during all of those breaks, the employee must be relieved of all work duties and not subject to employer control. Employees are entitled to one hour of additional pay at their regular rate for missed breaks. Those breaks are provided to make employees more productive. By treating breaks that way rather than as an annoying obligation, managers may prevent legal action later.

Resolution 4: I will both pay for and discipline unauthorized overtime. For cost-control purposes, most employers require that overtime work be pre-approved by a manager. But if the time is worked – even without proper pre-authorization — it must be paid at time-and-a-half. California law requires that an employee be compensated for all hours he or she is "suffered or permitted to work, whether or not required to do so." Courts have interpreted "suffer or permit" to encompass work about which the employer knew or should have known. California law also is clear, however, that an employer may take disciplinary action against an employee who works overtime without the required authorization. And disciplinary action should be taken, even if only by way of oral or written reprimand, because the failure to discipline may be taken as silent authorization of the overtime worked.

We wax and wane over the course of the year in sticking to our individual new year's resolutions. The consequences of occasional lapses are not dire. By making and sticking to these workplace resolutions, however, a manager will reduce the risks of costly legal consequences over the coming year. Vigilance will pay dividends.

WHOSE TIP IS IT ANYWAY?

Published: January 23, 2017

You are the salaried manager of a busy, high-end San Diego restaurant. A large, obviously well-heeled party walks into the restaurant on a Friday night. You assign your three best people – two servers and a busboy – to take care of the table. You provide occasional guidance to the crew over the course of the three-hour meal about how to maximize the table's enjoyment of the evening and, therefore, the restaurant's revenue.

Your suggestions had an impact: the total check was over $1,000. The host leaves a $150 gratuity on top of the 10% mandatory service charge for parties of eight or more and the 3% surcharge many restaurants, including yours, started charging this year when San Diego's minimum wage jumped to $11.50 per hour. Whose tip is it anyway?

California law prohibits an employer or agent of an employer from collecting, taking, or receiving any part of a gratuity that is "paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer." Unlike federal law, California law prohibits an employer from using tips to offset the employer's obligation to pay employees at least the minimum wage. By law, every gratuity is "the sole property of the employee or employees to whom it was paid, given, or left for."

But what is a gratuity? A gratuity is voluntary. In our example, it is not either the 10% mandatory service charge or the 3% surcharge. By definition, a gratuity is "any tip, gratuity, money, or part thereof that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to the patron." The restaurant may share those charges with its staff – and many do – but it is not required to do so.

The San Diego division of the California Court of Appeal addressed this very issue in a 2002 ruling concerning hotel room service surcharges. The court observed that an establishment is legally free to retain for itself mandatory service charges "or to remit all or some of the revenue to its employees. Because the service charge is mandatory and because the [establishment] is free to do with the charge as it pleases, the service charge is simply not a gratuity which is subject to the discretion of the individual patron."

So what about the $150 the host of the party left over and above the mandatory charges? You, the manager, are entitled to none of it, notwithstanding your role in the quality of the service the customers received that night. That is because an "agent" prohibited from sharing in tips includes anyone "having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees."

But nor is the $150 tip necessarily "the sole property" of the servers who serviced the table alone, regardless of what the customer may have intended. California courts and labor regulators have held that tip-pooling policies in effect in many service establishments that are fair and reasonable are legal. Such a policy would entitle the servers, the busboy and anyone else in the "chain of service" that contributed to the customers' overall experience, such as the bartender, to a share of the $150 tip. The same concept permits spas to require masseuses to share their tips with locker attendants and gaming establishments to require dealers to split their tips with porters and runners.

In San Diego's vast service industry, a tip is of interest to the server, the patron, and the employer. California law determines who may — and may not — ultimately pocket it.

DON'T GO THERE ON JOB APPLICATIONS

Published: February 6, 2017

Most employers use a written job application as the first step in the hiring process. California law gives employers wide, but not unlimited, latitude in the kinds of questions that may be asked. Here are four job application "don'ts".

Don't ask a job applicant to identify any disabilities. That suggests the employer disfavors the disabled and is unwilling to provide reasonable accommodations for a disability if the applicant is otherwise qualified. If the applicant is rejected, such an application question may be the basis of a disability discrimination lawsuit. Ask instead whether the applicant would be able to perform the essential functions of the job for which he or she is applying.

Don't ask for information related to the applicant's country of origin. Avoid even the seemingly innocent and conversational application query "Tell us where you are from." Ask instead whether the applicant is legally eligible to work in this country.

The California Department of Corrections and Rehabilitation got in recent legal trouble for asking applicants "Have you ever had or used a social security number other than the one you used on this questionnaire?" and disqualifying all applicants who answered that question "yes." A northern California federal judge found that the use of this "showstopper question" violated the federal employment discrimination law by disproportionately disqualifying Latino applicants. That ruling is now on appeal.

Don't ask for a credit report from every job applicant. California law limits the use of credit reports in hiring decisions to eight categories of jobs. Three of those categories are executive jobs, jobs that involve access to trade secrets, and jobs that involve regular access to cash totaling $10,000 or more of an employer, customer, or client during the workday. California law further requires that, prior to requesting a credit report, the employer give written notice to the applicant that the report will be used and the specific category of job authorizing use of the report.

Don't ask an applicant to disclose arrests or detentions that did not result in convictions, referral to or participation in a pre-trial or post-trial deferral programs, or about minor marijuana-related convictions more than two years old.

An employer that operates in California in addition to other states should be careful about using one-size-fits-all applications. Starbucks' nationwide application asked all applicants whether they had ever been convicted of any crime within the last seven years. On the reverse side of the application, there was a 346-word paragraph excusing California applicants from disclosing information covered by the law, as well as disclaimers for applicants from three other jurisdictions.

A trial judge rebuffed Starbucks's motion to dismiss a lawsuit brought by two unsuccessful applicants on behalf of about 135,000 unsuccessful applicants that could have resulted in a judgment of over $25 million, $200 per applicant. Plaintiffs claimed the California disclaimer was buried too deeply in the application. The Court of Appeal reversed that order, but only because the applicants who brought the case: (1) had read and understood the California disclaimer; and (2) had no prior marijuana convictions. The applicants' efforts to recover millions from Starbucks under the circumstances, said the appellate court, gave "a bizarre new dimension to the everyday expressions 'coffee joint' and 'coffee pot.'"

The federal Equal Employment Opportunity Commission has issued guidance suggesting that an employer that uses criminal convictions to screen applicants without being able to explain why such an inquiry is directly relevant to assessing the applicant's fitness for the particular job may be unlawfully discriminating based on race or national origin.

Carefully scrutinizing your job application now for these and other legal prohibitions may avoid having a judge or regulator scrutinize your job application later.

THEY ASKED YOU *WHAT* IN YOUR JOB INTERVIEW?

Published: February 20, 2017

What is the most bizarre question you have ever been asked in a job interview? Take your time. I'll wait.

While you think about it, consider one of the "Top 10 Oddball Questions of 2016," published by job website Glassdoor.com. This one comes from Trader Joe's: "What would you do if you found a penguin in the freezer?" My favorite response posted online: "Close the door and stop drinking."

OK, you've had enough time. What did you come up with?

Have you ever asked yourself whether that question or others like it was illegal? After all, shouldn't prospective employers be limited to asking interview questions focused on the ability of the applicant to perform the job being filled?

The answer is no. Yes, there are legal limits on interview questions. Those limits are set out in a California Department of Fair Employment and Housing fact sheet and similar guidance from the federal Equal Employment Opportunity Commission. For example, an interviewer can't ask questions, even indirectly, about an applicant's age, race, ethnicity, religion, mental or physical disabilities, child-bearing plans, or sexual orientation. If the applicant is rejected and challenges the decision, those questions will be evidence that the answers unlawfully and materially influenced the decision not to hire.

And an interviewer shouldn't try to be clever about questions that may touch on these areas. A law firm interviewer asked one of my law school classmates, who clearly was an older student, when she graduated from high school. A lawyer asked that question – of a budding lawyer. Uh, no.

But beyond these off-limit areas, someone interviewing a job applicant may ask creative, even bizarre, questions. Such a question, framed by a skilled and experienced interviewer, may reveal something useful to the attentive applicant about the kind of workplace he is considering joining. The answer to such a question almost surely will reveal something useful to the attentive interviewer about the applicant the employer is considering hiring.

The Employer's Legal Handbook, published by legal publisher Nolo, advises interviewers that "To avoid improper inquiries, stay focused on job requirements and company policies." That certainly limits the legal risk of the interview, but at what cost? An overly literal application of that advice could lead an interviewer to avoid questions that would help evaluate whether the applicant is the kind of person who would make the company better, who would fit in with the company or clash with it instead.

A job applicant is a human being that is being considered by the employer to relate to other human beings, such as managers, co-workers, customers, and others. An applicant, even for an entry-level job, is not a robot without the ability to affect, or be affected by, the unique human dynamic of any given workplace.

Questions an employer can't raise legally in a job application an employer also can't raise legally in a job interview. Questions that are too off-the-wall may hurt a company's reputation as an employer, and its reputation with other stakeholders as well. In the age of social media, word will get out.

Large companies understandably tend to standardize their interview process so that applicant answers may be compared. In addition, the interview is a time-constrained opportunity whose core purpose is to learn whether an applicant can perform a particular position on the team with excellence; interview time should never be wasted.

But an employer that is too cautious in its interviewing process, relying on interviewers to use their guts to fill in the gaps left by strictly limited questioning, may find itself with avoidable legal and managerial troubles down the road. Perhaps just as bad, it may result in the employer missing out on an applicant with an unprobed dimension that made that person, and not the one hired, the right person for the job.

ESPN COMMENTATOR SAYS HE WAS FIRED FOR SOMETHING HE DIDN'T SAY. COULD YOU?

Published: March 6, 2017

On January 18, 2017, ESPN commentator Doug Adler was calling an Australian Open tennis match between Venus Williams, who is African-American, and Swiss player Stefanie Voegele. Williams dominated. At one point, Adler observed that Williams was attacking Voegele's relatively weak second serve, saying "and you see Venus move in and put the guerilla effect on . . . charging."

Or so he says he said. . . .

Many viewers understood him to say "gorilla effect" and took to social media with accusations of racism. ESPN officials ordered Adler to apologize on-air, which he did the next day, explaining what he says was the word he actually used. The following day, Adler was fired.

ESPN's posted announcement about the termination said that it was "impossible" for the network to tell whether Adler had used the word "guerilla" or "gorilla". On February 14, Adler sued ESPN in California state court for wrongful termination, citing the network's "admission" that it could not tell which word Adler had used as evidence that the firing was without good cause and in bad faith.

In his complaint, Adler claims the phrase "guerilla tennis" is "widely used" by those who actually understand tennis vernacular and follow the sport closely. Not tennis legend Martina Navratilova, who tweeted "there is no such thing in tennis lingo as a guerilla effect, charging, etc. And as far as I know, gorillas charge, not guerillas."

Let's assume ESPN fired Adler for that single remark about Williams's style of play in that match. Let's also assume that ESPN could not be certain when it dismissed Adler whether he had used the word "guerilla" or "gorilla."

The fight in this case, then, will be over whether ESPN could fire Adler only if it had good cause. If Adler loses on this point, he will lose his lawsuit. He has an uphill legal battle. You probably would, too, if you were fired for something your employer wrongly perceived you to have said. Here's why.

If Adler was employed at will, as ESPN is sure to contend and as most Californians in the private sector are, he could be fired for any reason that did not offend fundamental public policy, such as the law against racial discrimination. An at-will employer may fire an employee for what the employer believes the employee may have said – even if the employer is wrong or has doubts – as long as that is the real reason for the termination and not a pretext for an unlawful reason.

It will be tough for Adler to show he could be fired only for good cause. California law presumes that employment is at-will absent solid evidence to the contrary. Adler's complaint does not specify the "words and conduct" that required ESPN to have good cause to fire him; his complaint says nothing about any written contract to that effect. Adler's nine-year tenure with the network or past praise he may have been given won't be enough.

Adler may lose even if he can show ESPN needed good cause to fire him. ESPN officials will insist that they genuinely believed that Adler may have made – or was perceived by his television audience to have made – a racist comment about a star in the sport he was paid to cover. That may suffice to show ESPN's reason for firing Adler was fair and honest, regulated by good faith, and not trivial, capricious, unrelated to business needs, or pretextual.

In short, Adler's attorneys will be fighting in challenging legal terrain. To prevail, they may have to employ an unconventional – guerilla, you might say – legal strategy.

AN EMPLOYER MUST TAKE CORRECTIVE ACTION WHEN A CUSTOMER SEXUALLY HARASSES AN EMPLOYEE

Published: March 20, 2017

Pharmaceutical giant Astrazeneca takes the prevention of sexual harassment in its workplace seriously. The company provides mandatory sexual harassment training to all of its employees. It has a written sexual harassment policy that defines sexual harassment. Company policy tells employees how and to whom to report such conduct. The policy explains that employees who violate the policy will be disciplined and assures employees that they will not be punished for making a complaint under the policy.

But when a Fresno-area sales representative made a routine sales call at the office of a family doctor to whom she was assigned, the doctor allegedly sexually assaulted her by forcibly kissing her and rubbing himself against her body. The assault resulted in the sales rep, according to her complaint, suffering from post-traumatic stress disorder and ultimately losing her job.

Pause: The assault was tragic, but how was it Astrazeneca's fault legally? The doctor was a customer of the company, not one of its employees. What was Astrazeneca supposed to do when the sales rep complained about the assault that the company policies had not already done to prevent it?

Under California law, an employer of even a single employee may be liable for unlawful harassment — whether sexual, racial, or otherwise based on a protected class — that occurs at work. If the harasser is a supervisor, it doesn't matter if the company knew or should have known about the unlawful harassment. Putting someone in a position of authority exposes the employer to virtually automatic liability if that person engages in unlawful harassment. If the harasser is a lower level co-worker, the employer is responsible only if it knew or should have known of the harassment and failed to take prompt and effective action to correct and deter the harassment.

In 2004, California made employers liable for unlawful harassment committed by a third party of which the employee was aware or should have been aware if the employer fails to take appropriate corrective action. The extent of the required response depends in part on the amount of control the employer has over the offender.

An employer may be separately liable if unlawful harassment is found to have occurred and it is further found that the company failed to take reasonable steps to prevent and correct the harassment. It is in fulfilling that duty to prevent and correct, said the federal judge considering the sales representative's claim against Astrazeneca, where the company appears to have fallen short.

The federal judge found that Astrazeneca had done enough to prevent harassment from occurring by taking the steps that it did – all of which were directed at its own workers.

What the company hadn't done, according to the court, was to take steps to correct the doctor's assault of the sales representative.

What the company should have done, and what other companies faced with these kinds of employee claims should consider doing upon learning of an employee's complaint of third-party unlawful harassment, was to: (1) question the harasser (in this case, the doctor) about the incident; (2) admonish him to change his behavior; (3) at least consider discontinuing any business relationship with the harasser; and (4) stop requiring its employees to deal with the harasser, at least in person.

The drug company's apparent failure to do any of that kept the company from getting the sales representative's case dismissed.

Last fall, according to court records, Astrazeneca paid a court-recommended undisclosed sum to settle the matter. Lesson learned. Lesson taught.

WHEN EMPLOYER SECRETS AREN'T REALLY SECRET

Published: April 3, 2017

A recent California appeals court ruling demonstrates the gap between what a company and what the law may consider a violation of a nondisclosure agreement. An NDA is not violated if what is disclosed: (1) is too vague to be competitively useful, (2) was publicly disclosed by the company, or (3) is false.

Software developer Machine Zone sued a former employee who, in an anonymous post on workplace review site Glassdoor.com, complained about the lack of work-life balance at the company, except for those on the company's "platform team." The post further asserted the company had invested heavily in the platform team for a year with nothing to show for it. The post also quoted the CEO – falsely, Machine Zone contended – as saying that he expected no revenue from the platform, and that the platform team should focus on developing a demo, as the platform was designed to attract venture capitalist investments.

Machine Zone's NDA had typical language: "In the course of my Company employment, I will learn of or have disclosed to me various 'Confidential Information'. Confidential Information is any information designated or labeled as 'confidential' or 'proprietary' . . . . During and after the term of my employment, I will not disclose . . . any Confidential Information which I learn or receive in my employment without the written consent" of the company. The NDA did not cover information first disclosed publicly by someone other than the employee.

Machine Zone contended the former employee's mention of the platform violated the NDA because the post disclosed the company's development of a "real-time data transmission platform" outside of its public product, the game "Game of War." Since the post was anonymous, Machine Zone sued the former employee as "John Doe" and sought an order forcing Glassdoor to reveal the person's identity.

The court of appeal reversed the trial court's order in Machine Zone's favor. Three principles emerge from the court of appeal's ruling.

First principle: A disclosure does not violate an NDA if it is too vague to be useful to a competitor. The court of appeal concluded that the anonymous post's mere references to a "platform team" did not effectively disclose the company's secret development of a "stand-alone real-time platform technology." Nothing more could be read into the post "than that a group of MZ workers were charged with developing the infrastructure for future games, or perhaps for some application or family of applications of unknown type."

Second principle: A disclosure does not violate an NDA if the company has itself disclosed the gist of the information publicly. Among other things, the court pointed to media interviews in which the CEO "made no secret of [Machine Zone's] intention to extend its technology beyond gaming."

Third principle: A disclosure does not violate an NDA if the information disclosed is false. That is why the post's inaccurate report of the CEO's instructions about development of the platform to attract VC money did not violate the NDA. "[C]onfidential information consists of facts that have been communicated with an expectation of non-disclosure. False statements do not convey 'facts' or 'knowledge,' but the opposite."

Glassdoor was excused from revealing to Machine Zone the name of the former employee who posted the comments that so troubled the company. The anonymity of the former employee did not end up mattering because the court of appeal found the comments did not breach the NDA. The ruling provides critical instruction about the kinds of disclosures that are – and are not – covered by an NDA. Nothing in the ruling, however, diminishes the legal peril to those who would publicly disclose the confidential information of their current or former employers, online or otherwise, anonymously or not.

WHAT TO SAY – AND NOT TO SAY – ABOUT AN EMPLOYEE'S TERMINATION

Published: April 17, 2017

My last column addressed challenges an employer faces in establishing that a former employee violated a non-disclosure agreement by making anonymous general comments about the employer's plans on social media. This column focuses on a recent case that demonstrates challenges an individual faces in suing his former employer over a post-termination announcement.

Dov Charney, the founder and then-CEO of American Apparel, was dismissed by the company's board following an investigation into aspects of Charney's conduct. Investment firm Standard General issued a press release supporting what the firm called the "independent, third-party and very thorough investigation into the allegations against Mr. Charney" and expressing "respect" for the board's decision to dismiss Charney "based on the results of that investigation."

Charney sued Standard General asserting several claims, all of which depended on the press release being defamatory. Defamation is the utterance or publication to others of a false, unprivileged statement of fact about a person that has a tendency to harm the person's reputation. Charney asserted that the press release falsely stated that the investigation had been "independent" and had suggested that Charney had committed specific kinds of misconduct.

The trial court and then the court of appeal dismissed Charney's lawsuit, finding that there was not even "a minimal chance" his claims ultimately would succeed. The court of appeal concluded that the statement in the release about the independent nature of the investigation could not be defamatory because the statement was not about Charney, but about the investigation. Anyway, it was a statement of opinion, not fact.

The court rejected Charney's allegation that the press release falsely suggested he had engaged in specific kinds of misconduct. The release said nothing specific about why Charney was terminated, though it did say that certain "allegations" were made about him, investigated, and that he was thereafter terminated. The court of appeal added that, even if the press release could be interpreted as saying Charney was fired for unidentified misconduct, a dispute over whether "improper" conduct justified his termination was a matter of opinion, not a matter of provably false fact.

Just as an employer suing a former employee for post-termination disclosure of company secrets must prove that what was disclosed was legally a trade secret, an individual suing over post-termination public statements his former employer made were defamatory must show that the statements were at least: (1) about the individual and (2) a matter of fact, not of opinion.

The takeaway from this is not that an employer may say anything about the circumstances of an employee's departure as long as the statement is framed as opinion rather than fact. For one thing, the line between fact and opinion is not always clear.

Instead, the prudent employer will be careful about: (1) who is told anything other than that the employee is no longer with the company; (2) what information is conveyed; and (3) how the information is conveyed. Generally, the fewest number of people should be told why an employee left and should be told in a way that makes it least likely the information will spread. When a key operational employee leaves, the employer should focus the message on the future: who will be responsible going forward and how the operation will change.

That guidance will not always apply. Sometimes, particularly in the aftermath of dismissals for ethical misdeeds, it may be appropriate to send a general reminder about the policy violated and the consequences for violating it. Assuming that the former employee will learn whatever is said, however, naturally will focus the messenger on limiting the message and the recipients. And that in turn will limit the risk.

EMPLOYER MAY GENERALLY REFUSE TO ALLOW EMPLOYEE TO RESCIND VOLUNTARY RESIGNATION EMPLOYER HAS ACCEPTED

Published: May 1, 2017

Must an employer allow an at-will employee who voluntarily resigned to rescind her resignation when she claims her resignation resulted from a temporarily "altered mental state" caused by medicine she was taking to address a disability?

In the first case of its kind in California, the court of appeal ruled recently that an employer's refusal to allow an employee to withdraw a voluntary resignation was not an "adverse employment action" that triggers the protections of California's employment discrimination law.

The case involved Southern California Permanente Medical Group employee Ruth Featherstone. On December 16, 2013, Featherstone returned to work from an extended medical leave for sinus surgery with no work restrictions.

On the morning of December 23, Featherstone called her boss, Vicky Sheppard, to inform her she was resigning effective immediately. According to Sheppard, Featherstone told her that "God had told [her] to do something else." Later that day, Sheppard noticed a Facebook post by Featherstone that seemed a little "out of the blue" — though not out of character – that indicated that Featherstone had resigned to "do God's work."

Human resources staff immediately processed Featherstone's separation paperwork so that Featherstone could receive her final paycheck within 72 hours as required by law.

On December 31, 2013, Featherstone informed SCPMG's HR department that, at the time of her resignation, she was suffering from a side effect of medication she had been taking; she wanted to rescind her resignation. After reviewing documents Featherstone submitted, and conferring with legal counsel, SCPMG declined Featherstone's request.

Featherstone sued, claiming that by failing to allow her to rescind her medication-induced resignation, SCPMG had wrongfully discriminated against her based on her disability.

The protections of the disability discrimination law are triggered when an employer takes an "adverse employment action" motivated by the employee's disability. The court of appeal assumed with some skepticism that a temporarily altered mental state could qualify as a disability.

An "adverse employment action" is an employer action that materially affects any aspect of employment, including actions that may not harm the employee financially or in a concrete psychological way. Relying on cases applying federal employment discrimination laws, the court of appeal concluded that "refusing to allow a former employee to rescind a voluntary discharge – that is, a resignation free of employer coercion or misconduct – is not an adverse employment action."

Featherstone had the right to rescind her resignation before SCPMG accepted it. Once SCPMG accepted the resignation, Featherstone had no right to withdraw it and SCPMG had no duty to allow her to do so. SCPMG had the right to take Featherstone at her word, without further investigation, that she wanted out and not to reinstate her when she changed her mind.

Featherstone also could not show that SCPMG's refusal to allow her to rescind her resignation was motivated by her claimed medication-induced temporary mental disability, or that SCPMG had any duty to accommodate the disability by taking her back. SCPMG did not know and had no reason to know that Featherstone was suffering from an "altered mental state" when she resigned and SCPMG employees processed it. Her disability could not have motivated SCPMG's actions at that time.

What are the takeaways? On the one hand, an employer generally need not allow an employee to rescind a voluntary resignation, even a resignation induced by mental instability of which the employer had no reason to be aware. On the other hand, if an employer has reason to suspect that medication or mental disability are factors in an employee's abrupt resignation, the employer may have a duty to confirm the resignation is truly voluntary to avoid a later discrimination claim if a request to rescind is rejected.

COULD A PROGRESSIVE DISCIPLINE POLICY UNDERMINE AN EMPLOYER'S RIGHT TO FIRE AT WILL?

Published: May 15, 2017

Most employee handbooks say — in multiple places — that employment is at-will, meaning that the employer or the employee has the right to end the relationship at any time for any reason.

Handbooks also often say that behavioral or performance problems generally will be addressed through progressive discipline, meaning counseling or lesser discipline will be used before employment is terminated.

Could an employer give up its right to terminate employment at will by having its managers consistently administer progressive discipline before any termination? The California court of appeal recently ruled that, at least when dealing with a long-term employee, the answer is yes.

The case involved Christine Oakes, a Barnes & Noble store manager who had been employed for 22 years. After years of solid performance reviews and raises, Oakes was sharply criticized by her latest manager, Lori Schmit, for performance deficiencies. Schmit and other company officials decided to terminate Oakes's employment.

Barnes & Noble's employee handbook declared that employment was at-will. "Just as [the employee] has the right to terminate his/her employment for any reason, the company retains the absolute power to discharge anyone at any time, with or without cause and without prior notice."

The same handbook had a progressive discipline policy. And a separate manual made it standard operating procedure for managers to use "progressive measures" prior to termination. Management reserved the right to skip a step in process, such as where an employee had committed serious misconduct.

Managers, including Oakes, were told to apply progressive discipline uniformly. Indeed, Schmit could think of no instance where progressive discipline had not been followed.

In determining whether an employer may exercise its presumptive right to dismiss an employee at will, a California court will consider whether: (1) the employer adopted and applied policies limiting its right to terminate at will; (2) the employee served a long time; (3) an employer gave assurances, by word or deed, of continued employment; and (4) other employers in the same industry terminate employees at will.

Oakes's lengthy, generally satisfactory service plus both the written progressive discipline policy and evidence that Barnes & Noble "had a consistent unwritten practice of applying some form of discipline to all employees" enabled her to defeat the company's effort to have the case dismissed by a judge before a jury trial.

How can an employer move toward preserving disciplinary flexibility without sacrificing disciplinary fairness?

First, consider whether a progressive discipline policy is necessary. What every employer of any size needs is management's commitment to make all hiring, firing, and promotion decisions fairly.

Second, clearly state that any progressive discipline policy cannot address every reason an employee is no longer right for a particular job. Even absent serious misconduct, an employee's personality or other subjective, uncorrectable attributes or other circumstances (such as layoffs) may make progressive discipline in a particular case pointless. Accordingly, progressive discipline policies should state – and managers should be told — that progressive discipline is not warranted in every situation before employment is terminated. This is more than just reserving the right to "skip a step" in the process.

A clear at-will policy still provides employers with some measure of legal protection. Even the most clearly stated at-will policy, however, is not a license to make employment decisions arbitrarily or inexplicably. Avoiding a claim of an implied limitation on the right to terminate at will is not worth heightened exposure to a claim that the real reason for a particular termination was unlawful discrimination or retaliation.

The useful guidance an employer may take from the Barnes & Noble opinion is that, as a management tool, progressive discipline is warranted in some situations and not in others. And any such policy should say so.

SHIFTING REASONS FOR DISMISSING EMPLOYEE CAN CAUSE EMPLOYER LEGAL HEADACHES

Published: May 29, 2017

President Trump faces continuing political complications from the shifting explanations he and his staff have given for the recent termination of F.B.I. Director James Comey, even though Comey correctly has conceded that the President had the right to fire him "for any reason or for no reason at all."

Employers other than the President who provide shifting explanations for an at-will employee's termination cause themselves avoidable legal problems by giving the dismissed employee ammunition to claim that the decision was unlawfully motivated.

Consider the California timeshare company that decided to terminate an employee after discovering the employee was making plans to compete with the employer. The company thought the decision would be reinforced by papering the employee's file with a series of infractions occurring long after the termination decision was made. That didn't work.

These kinds of efforts to preempt or defeat an employee's later challenge to the termination actually strengthen the employee's challenge by undermining the credibility of otherwise defensible reasons for the decision. One federal appeals court has written that an employer's multiple, implausible explanations for terminating an employee may justify a judge or jury's finding that "the employer is hiding something – that is, that the true explanation is unlawful discrimination" or otherwise illegal.

To be sure, courts have distinguished between an employer who offers contradictory reasons for a termination and an employer who elaborates on the reason given for a termination. For example, an employer properly may tell an employee he is being dismissed for "performance reasons" and then identify the specific performance deficiencies if the employee challenges the decision. And yet the line between a contradictory and a supplemental explanation may be unclear.

To avoid this self-inflicted legal wound, an employer's initial and subsequent explanation for a termination decision should be honest, consistent, and well-framed.

First, honesty is essential no matter how much an employee is told about the reason for dismissal. In an article last year, attorney Ricardo Granderson advised employers terminating at-will employees to say only "six magic words:" "Your services are no longer needed." An employer may limit its risk honestly without embracing that one-size-fits-all approach. An employee laid off due to a drop in business who was selected as part of the layoff group because of unsatisfactory performance should be told so. The law considers a decline in business and unsatisfactory performance to be independently acceptable reasons to dismiss an employee, even where the employee disputes the employer's assessment of his job performance relative to that of those spared from the layoff.

Second, an employer should be consistent in communicating the reason for dismissal. The decision-maker should not communicate one reason for termination to the employee and a lower-level manager or human resources official communicate a contradictory reason for termination internally or externally. Courts generally will focus on the consistency of the decision-makers' explanation and motive, not the explanation and motive of those not involved in the decision. A court's view of those in the decision-making chain, however, may differ from the employer's. And that difference may have legal consequences.

Third, the decision should not be framed as being motivated "exclusively" by a single specific aspect of conduct or performance, unless the dismissal is triggered by specific and serious misconduct. This needlessly boxes an employer in if the decision is challenged. Better to frame the explanation in terms that are sufficiently specific to be understandable (for example, "performance reasons that include . . ."), yet not so specific to preclude later amplification.

All but the most reckless employers make termination decisions carefully. The most well-considered decision to terminate may be challenged successfully if the rationale for the decision is communicated dishonestly, inconsistently, or too narrowly.

UNLIMITED VACATION POLICIES: REWARDS AND RISKS

Published: June 12, 2017

Ah, summer! Imagine a job with unlimited vacation days. An employee's dream and an employer's nightmare, right? Yet according to a 2016 study published by the Society for Human Resource Management, 1-2% of employers nationwide have adopted unlimited vacation policies, including LinkedIn, Netflix, and other California-based innovators. Why? And are they legal?

As I explained in a previous column, California law considers accrued vacation time a form of deferred compensation. No use-it-or-lose-it. Consequently, an employer must pay a departing employee the value of unused vacation time at the employee's pay rate at the time of departure.

Even where an employer caps the number of vacation days an employee can have "banked" at any time, the payout for highly-compensated employees may reach five figures. According to research by travel advocacy group Project: Time-Off, in 2014 over 40% of American workers planned to take less than all their vacation time that year. That's a lot of bank.

An unlimited vacation policy eliminates those payments. Since there is no fixed number of earned vacation days, there is no value to any unused vacation days to pay out at termination. Such policies also do not eliminate the employer's right to manage vacations, for example by requiring prior management approval.

Employees benefit, too. According to an article published by SHRM in March, leaders at companies that have adopted such a policy consider it a perk. "They say there's no more pressure on workers to plan and save days. . . ."

And yet adopting an unlimited vacation policy carries legal risk. The legality of the concept hasn't been examined in any reported court decision I could find — anywhere. Even regulatory guidance is scant, though the California Labor Commissioner opined in a short 1987 letter that an "unlimited" vacation policy is a sham when employees also are told they have a "basic entitlement" to four weeks of vacation and may take vacations longer than one week only with approval.

Employee advocate Sebastian Miller has argued there are five ways an unlimited vacation policy could offend California law. The first way: such a policy may be a use-it-or-lose-it policy in disguise in the sense that any day worked theoretically is a vacation day lost.

Still, there are at least two reasons to believe that genuine unlimited vacation policies are lawful in California.

First, the law does not require employers to offer paid vacation time at all. It is a matter of contract between employer and employee; the parties set the terms. The law doesn't favor any particular kind of vacation policy.

Second, the California Supreme Court concluded in 2010 that employees with unlimited sick days have different rights from those with a fixed number of sick days. The court unanimously held that an employer with an uncapped sick leave policy has no obligations under California's kin care law, which requires employers to let their employees use at least half of their unused sick days to care for a close relative. That the kin care law "defines sick leave as 'accrued increments of compensated leave' . . . indicates that the reach of the statute is limited to employers that provide a measurable, banked amount of sick leave."

Similar reasoning would appear to distinguish the right of a departing employee with "a measurable, banked amount" of vacation leave to be paid the value of such leave upon termination from a departing employee who had enjoyed unlimited vacation leave. California law requires immediate payment of compensation, including the value of vacation time, "earned but unpaid at the time of discharge." No unused fixed vacation days equals no "earned but unpaid" vacation time upon discharge.

Unlimited vacation policies at some point may become widespread. The law at some point will have its say. It always does.

EMPLOYERS ARE ENTITLED TO THEIR EMPLOYEES' LOYALTY – TO A POINT

Published: June 26, 2017

How much loyalty do California employees owe their employer? The question is prompted by former FBI Director James Comey's recent testimony that, at a one-on-one White House dinner in connection with a discussion about whether Comey wished to keep his job, President Donald J. Trump told Comey "I need loyalty, I expect loyalty."

The President could not have been referring to Cold War loyalty oaths, which courts struck down as unconstitutional, by which public employees were required to swear they were not "subversive persons". Let's also set aside whether the loyalty of an FBI Director is owed to an individual, an institution, or an ideal. The President, were he a California employer, nonetheless would have had a point if he said this to Comey.

Under California law, an employee owes "undivided loyalty" to his employer. According to a leading ruling, this duty is breached when the employee takes action against the best interests of the employer. But how far does that go?

There are three aspects to an employee's duty of loyalty. First, while employed, an employee may not compete against his employer. Second, an employee may not use her job to enrich herself from a vendor or other third party. Think kickbacks, for example. Third, an employee may not use the employer's confidential information for the employee's own benefit or for the benefit of anyone other than the employer. The last of these duties survives termination of employment. Employers have brought numerous lawsuits against former employees for violating one or more of these duties, particularly the duty not to exploit employer secrets for a new employer.

And yet there are legal limits to the employee's duty of loyalty. An employer has no claim for disloyalty against an employee who, on the employee's own time and using the employee's own resources, seeks another job or even takes preparatory steps to compete against his current employer.

Under California's whistleblower law, an employer may not prohibit an employee from reporting to internal or external officials employer activity the employee reasonably believes violates a law or regulation or punish an employee for doing so. The same law bars an employer, or anyone acting on its behalf, from punishing an employee for disobeying an order that would result in violation of a law or violation of or noncompliance with a regulation.

The state's employment discrimination law prohibits punishment of an employee for opposing or refusing to engage in conduct the employee reasonably believes violates that law. For example, an employer may not fire an employee for refusing to fire a female

salesperson the employee's superior thinks is unattractive if the employee reasonably believes that following such an order would be unlawful sex discrimination.

Federal labor law even prohibits an employer from punishing an employee for badmouthing her employer publicly, such as on social media, if such activity was part of a concerted effort with other employees to improve the employees' wages, hours, or working conditions. Overbroad employer rules prohibiting employees from criticizing their employer, called non-disparagement rules, may violate this law by chilling such speech.

An employer may, however, punish an employee who insults the employer's clientele, even if the employee also complains about his compensation. A National Labor Relations Board official concluded that the law provided no protection to a bartender fired for posting on Facebook his wish that the restaurant's patrons choke on glass as they drove home drunk, even where the same post complained about the bartender's personal disgust at how tips were distributed and about not having gotten a raise.

The prudent employee generally will avoid biting the hand that feeds him. The prudent employer generally will refrain from punishing an employee at the sound of the first bark.

THE RISKY BUSINESS OF EMPLOYER DEDUCTIONS FROM FINAL PAY

Published: July 10, 2017

Imagine you are a senior official at a San Diego biotech. An engineer just told you that an expensive company-issued laptop he briefly left unattended at a coffee shop had been stolen. You decide to fire the employee.

At the time of termination, you will have to give the engineer his final paycheck. But you want to deduct the cost of the laptop. May you?

No. Here's why.

As debts go, the wages owed an employee enjoy a special status under California law. The only authorized deductions are those required or permitted by state or federal law, such as for taxes, and "when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions" for the employee's benefit "not amounting to a rebate or deduction" from the agreed upon compensation.

Accordingly, California wage orders prohibit an employer from deducting from an employee's wages the cost of the loss of equipment unless the employer can prove the loss was caused by the employee's dishonesty, willful misconduct, or gross negligence. Gross negligence is conscious indifference to the consequences of one's actions.

The California Supreme Court has observed "some . . . loss[es] of equipment are inevitable in almost any business operation. It does not seem unjust to require the employer to bear such losses" as a cost of doing business rather than effectively making employees insurers of these losses.

Suppose the engineer told you he actually had left the laptop unattended for 45 minutes while he ran errands. Could you then deduct the cost of the laptop from his final paycheck?

There's risk. Maybe leaving the laptop unattended for 45 minutes is gross negligence, maybe it's simple negligence. A court, not the company, has the final say on that and the company, not the engineer, has to prove the kind of negligence the engineer's conduct was. If you are wrong, the company will have to pay the wrongfully withheld wages – that is, the value of the laptop — plus 30 days of wages for willful failure to pay all wages due at termination.

Well, what if the engineer, at the beginning of his employment, had authorized the company in writing to deduct the cost of any unreturned company equipment from his final paycheck? California wage orders say that "an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of" unreturned company equipment.

That would present a different kind of risk. If the employee challenges the deduction before the Labor Board, he'll likely lose because the wage order permits the deduction. The Labor Board itself, however, has questioned whether courts ultimately will uphold this deduction given that prior court rulings allow deductions only in narrow circumstances. Courts also may disallow such a deduction because the law and the wage orders authorize employers to require employees to provide a reasonable deposit as a bond for the return of company equipment.

The California Chamber of Commerce underscores that an employer may discipline an employee whose "simple negligence results in business losses." And an employer that believes an employee has stolen company property or engaged in gross negligence may sue the employee for the cost of the equipment. The Chamber suggests that "[a]ny doubt as to [the employer's] ability to prove misconduct is . . . best resolved in a small claims or other court proceeding against the employee, rather than a deduction from wages owed that employee."

An employer should resist the temptation to deduct the cost of unreturned company property from an employee's final paycheck. An employee bond, employee discipline, or post-termination legal action each avoids the risk of a penalty that may exceed the value of the unreturned property.

EXPENSE CHECK: ANSWER THESE THREE QUESTIONS TO DETERMINE WHETHER TO REIMBURSE AN EMPLOYEE'S CLAIMED WORK EXPENSE

Published: July 24, 2017

Since 1872, California employers have been required fully to reimburse their employees for "necessary" expenses employees incurred "in "direct" consequence of employees carrying out their duties. Necessary expenses include "all reasonable costs." The California Supreme Court has said that whether a cost is necessary therefore "depends on the reasonableness of the employee's choices."

An employer also must reimburse expenses an employee incurs in obeying an employer's orders — even unlawful orders — unless the employee, at the time of obeying the orders, believed the orders were unlawful and obeyed them anyway. A federal judge recently rejected an employee's claim for reimbursement of speeding and parking tickets received on company business which resulted from the employee's "knowing" illegal conduct.

An employee's express or implied agreement to give up his right to reimbursement is void under California law.

But what kind of expense is directly related to an employee's duties? And when is an employee expense reasonably necessary for the performance of those duties? Considering three questions may help answer those two.

Was the employee directed to incur the expense? Where an employer requires an employee to use his personal vehicle for business, for example, the employer must reimburse the employee for the associated operating costs. An employee may seek reimbursement for the actual expenses of using his or her vehicle for business, but that requires an employee to keep a detailed log of such things as fuel, maintenance, repairs, insurance, registration, and depreciation and then obtaining the information needed to apportion those expenses between business and personal use.

The California Supreme Court has said an employer satisfies the reimbursement law by the more common practice of providing mileage reimbursement based on the IRS's automobile mileage rate for federal income tax purposes. The court also approved the employer paying a lump sum for such expenses either as a car allowance or as an increase in the employee's pay. If an employee can show that the chosen approximating method is less than the employee's actual expenses, the employer must make up the difference to ensure that the employee is fully reimbursed.

Similarly, the California Court of Appeal has held that an employer that requires an employee to use her personal cellphone for business must pay "some reasonable percentage" of the cost of the employee's cellphone plan, even if the employee has an unlimited data plan.

Did the employer have reason to know the employee would incur the expense? San Diego federal judge Gonzalo Curiel concluded in a 2014 ruling that an employer is not required to reimburse a business expense the employer had no reason to know the employee incurred. Judge Curiel rejected a store manager's claim for certain unreimbursed driving expenses where the manager: (1) previously had submitted numerous requests for reimbursement, pursuant to the company's "clear written policies," for the employees he managed; and (2) voluntarily chose not to submit the expenses he now was claiming for himself.

That does not mean that an employee is entitled to reimbursement only for expenses submitted according to the employer's reimbursement policies. As then-Magistrate Judge Edward Chen explained in an earlier ruling on which Judge Curiel relied, the right to reimbursement does not depend "on whether an employee makes a request for reimbursement but rather on whether the employer either knows or has reason to know that the employee has incurred a reimbursable expense. If it does, it must exercise due diligence to ensure that each employee is reimbursed."

Did other employees doing the same job as the employee seeking reimbursement incur similar expenses in doing their job? One federal judge rejected an outside sales representative's claim for reimbursement for the cost of client meals and entertainment the salesman voluntarily incurred where other sales representatives incurred no such expenses. That suggested those expenses were not "necessary" for the performance of the employee's job duties, even as the judge acknowledged that the employer may have received "a residual benefit" from those expenses.

The law requires an employer to reimburse its employees for some expenses but not others. Courts have provided employers with limited guidance in how to determine which is which.

WHAT IS A WORK UNIFORM AND WHY DOES IT MATTER?

Published: August 7, 2017

Pop quiz: Which of the following does the law consider all or part of a uniform? A. A fast casual restaurant's slip-resistant shoes. B. A tropical-themed restaurant waiter's floral shirt and rugby pants. C. A nurse's white uniform. D. A video store worker's blue shirt and khaki pants.

This is an open-book quiz. Here's the law that governs the answer to the question.

California law requires an employer to pay the cost and maintenance of an employee's work clothes not generally usable in the employee's occupation. The duty comes from Labor Code section 2802, which requires an employer to pay expenses an employee incurs "in direct consequence" of performing his or her job.

The wage orders that guide enforcement of California wage and hour laws require employers to provide and maintain any "uniform" an employee is required to wear as part of the job. "The term 'uniform' includes wearing apparel and accessories of distinctive design or color." It is not the employer's responsibility to provide items of clothing that are "usual and generally usable" in the employee's occupation. An employer is entitled to set general "dress standards" without paying for what its workers wear.

So what's the answer to the quiz question?

The answer is "B." Courts or regulators have concluded that the other three are not uniforms. That includes the nurse's white uniform because, according to a 1991 advice letter from a California regulator, "nurses can wear their white uniforms wherever they work, and the employer, consequently, need not pay for them." The same is true for slip-resistant shoes worn by Denny's workers and the blue shirt and khaki pants that used to be worn by employees of Blockbuster Video.

By contrast, a restaurant owner who wants to create a tropical theme must pay for his employees' flowery shirts and rugby shorts, even if such attire is currently in fashion, because servers at other restaurants don't typically dress that way. A regulator observed in a 1990 advice letter that "most restaurants would look askance at waiters or waitresses who came to work in 'tropical attire' which included floral shirts and rugby pants."

Some clothing retailers, such as Abercrombie & Fitch, have a written "look" policy that requires sales staff to dress in the style of the employer-retailer's clothing, though explicitly not requiring that employees exclusively wear the retailer's own clothes at work. Written policies of non-exclusivity are undercut where the employer pressures its employees to buy the retailer's clothes. Such unwritten policies violate Labor Code section 450, which bars an employer from coercing or compelling "any employee, or applicant . . . to patronize his or her employer, or any other person, in the purchase of any thing of value."

Employers that violate these uniform rules must repay the employees for the out-of-pocket cost of the clothing plus the cost of maintaining it. Where the violation results from a formal, or widespread informal, company policy, an employer may face a suit by a class of numerous employees seeking compensation.

Employers also may have to pay each employee a penalty of 30 days' wages. That is because the California court of appeal has ruled that payment for employee work uniforms "is a part of the employees' compensation and should be considered like any other payment of wages, compensation or benefits." Willful failure to pay such costs is the equivalent of failing to make timely payment of any other form of compensation.

Every employee wears a workplace uniform of sorts, even the informal get-up of the entrepreneurial workplace or the business suit of the professional services firm. If that uniform is suited only for the workplace, the employer must pay for it.

MAY AN EMPLOYER DELAY START OF PAID VACATION BENEFIT?

Published: August 21, 2017

If an employee quits or is fired shortly after he started working, must an employer pay part of the value of vacation time the employee would have earned had he lasted beyond a clearly stated time period? The answer is no, the San Diego division of the California Court of Appeal recently ruled, if the employer's policy clearly says an employee earns no vacation time unless he remains employed beyond a waiting period.

California employers are not required to provide paid vacation at all. If an employer does provide paid vacation, California treats earned paid vacation as a form of deferred wages.

That means once an employee earns paid vacation time, that time off may never be forfeited; no use-it or-lose-it. An employer may, however, cap the total amount of vacation time an employee may have in his bank before more is earned.

Another effect of treating vacation time as deferred compensation is that, upon termination, the employee must be paid the value any unused vacation time at the employee's last rate of pay.

But may an employer require an employee to work for the company for a certain length of time before the right to take any vacation kicks in? If so, what kind of language in a vacation policy is sufficient to inform employees that vacation time is not earned from day one?

The court of appeal addressed these questions in *Minnick v. Automotive Creations, Inc.,* decided in late July. Nathan Minnick worked for Automotive Creations for six months. Minnick claimed he was entitled, when he left, to be paid the value of half of the one week of vacation time employees earned after working for the company for one year.

Under the company's written vacation policy, an employee became eligible for paid vacation only after completing a full year of employment. "All employees earn 1 week of vacation after completion of one year service… This means that after you have completed your first year anniversary with the company, you are entitled to take one week of paid vacation…This does not mean that you earn 1/12th of one week's vacation accrual each month during your first year. You must complete one year of service with the company to be entitled to one week vacation."

In rejecting Minnick's claim, the court of appeal confirmed that an "employer may provide a waiting period before the employee becomes eligible to earn vacation, and if the employer's policy is clearly stated, the waiting period is enforceable." Because an employer may lawfully decide to provide no paid vacation, an employer logically may delay when an employee's right to paid vacation begins. And just as an employer may lawfully cap the amount of vacation time an employee may have in his bank at the back end, an employee may impose a waiting period at the front end.

Automotive Creations's policy, "viewed in a commonsense and reasonable manner," was sufficiently clear that employees earned no vacation time until after an employee had been with the company a year. Consequently, Minnick was entitled to no vacation payout when he left during his first year of employment.

A clear policy delaying an employee's eligibility for paid vacation will save an employer from adding vacation pay to a short-term employee's final paycheck. Such a policy should be drafted carefully though, with redundancy better than ambiguity. If the policy is not clear about whether an employee must wait before earning vacation time, the labor commissioner ultimately may order the employer to pay a former employee both the value of unpaid vacation time and up to 30 days of penalty wages for improperly withholding that earned compensation upon termination.

WHEN ACCOMMODATING ONE EMPLOYEE'S DISABILITY TRIGGERS ANOTHER EMPLOYEE'S ALLERGIES

Published: September 4, 2017

You are operations manager at a 25-employee financial services firm. The firm is on a single floor with a series of cubicles. One day, an employee informs you that, because he is subject to disabling panic attacks, his doctor has advised him to bring a comfort dog to the office. Realizing your duty to reasonably accommodate employees under the disabilities law, you approve the request.

The next day, a different employee who works on the other end of the office space informs you that the presence of the other employee's comfort animal is causing her to have asthma attacks.

What should you do? The short answer is you should accommodate both employees if it can be done without hardship to your business.

California law prohibits employers with at least five employees from discriminating against an otherwise qualified applicant and employee because of their physical or mental disability or medical condition. An employer must "engage in a timely, good faith interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or a medical condition."

An employer need not hire or retain an employee who cannot perform the essential duties of the job even with reasonable accommodations or who "cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations."

Taking a pause, the employer cannot simply decline to accommodate the employee's request for a comfort animal because the presence of the animal would endanger the health of the employee with asthma any more than the employer could reject the asthmatic employee's request that even service animals be banned from the workplace because it would endanger the health of the employee who needs a comfort animal.

If there are several options that would reasonably and effectively accommodate an employee's disability, the employer need not choose the one the employee prefers. Instead, the California court of appeal has ruled that the employer "has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide."

An employer is required only to provide a disabled employee with a reasonable accommodation and is not required to accommodate the employee at all if doing so would pose an undue hardship, meaning "a significant difficulty or expense." Courts decide undue hardship on a case-by-case basis, taking into account the nature and cost of the required accommodation, the impact of the accommodation on the employer's operation, and the employer's overall financial resources and the number of employees it has. "Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business."

To recap, employers with fewer than five employees are exempt from the disability law entirely. Smaller employers are required to do less than larger employers to accommodate disabled employees. And all covered employers must nonetheless try to work with the disabled employee to find a way for the employee to do the essential functions of the job.

The employee with the anxiety disorder would prefer to bring her comfort animal to work. The employee with asthma would prefer an animal-free workplace. The employer trying to accommodate both employees should work with the employees to identify available alternatives to the employees' preferred accommodations. Examples of accommodations that may accommodate both employees may include having the employees work different shifts, installing an air filter, regular deep cleaning of the office, isolating the work space of one of the employees, allowing the employees time to get medical treatments to control panic or asthma attacks, or allowing one of them to work from home.

But, notwithstanding the employer's discretion in choosing among available accommodations, be careful before

WHEN ACCOMMODATING ONE EMPLOYEE'S DISABILITY TRIGGERS ANOTHER EMPLOYEE'S ALLERGIES - cont.

proposing an alternative accommodation to an employee on a take-it-or-leave-it basis.

In a case decided this past March, a federal judge ruled that a teacher who developed panic attacks after being trapped with her family in a hurricane was entitled to have a jury decide whether having a comfort animal was the only accommodation that would enable her to do her job. The school district rejected her request to bring a comfort dog to school because it was concerned that some students would be allergic to, or afraid of, dogs. The school suggested that the teacher wear a weighted vest to provide her with the deep pressure to her body that the dog provided to quell the teacher's panic attacks. The judge concluded that maybe the weighted vest was a reasonable accommodation, maybe it wasn't. A jury would have to decide.

When confronted with disabled employees making conflicting demands for accommodation, an employer should work creatively with the employees and their health care providers to identify ways that will enable both to do their jobs without straining the employer's budget or otherwise disrupting the workplace.

WHAT DOES THE LAW REQUIRE OF YOU?: ACCOMMODATING EMPLOYEE'S RELIGIOUS PRACTICES AND BELIEFS

Published: September 18, 2017

With the Jewish High Holidays upon us and Christmas not far off, it is a good time to address the duty of California employers with five or more employees to accommodate their employees' religious practices and beliefs.

California law generally prohibits an employer from discriminating against an employee "because of a conflict between the person's religious belief or observance and any employment requirement." A religious belief or observance includes observance of a religious holy day and religious dress and grooming practices.

To be protected, a religious creed must be more than a personal philosophy, though belief in a supreme being is not essential. While veganism governs the food a person eats, the clothes the person wears, and the products the person uses, the California court of appeal has ruled veganism "is not sufficiently comprehensive in nature to" be a religion.

Once an employer learns of a conflict between an employee's sincerely held religious belief and the employee's job duties, the employer must explore in good faith "reasonable alternative means of accommodating the religious belief or observance," such as excusing the employee from performing duties that conflict with her religious beliefs or observances or permitting those duties to be performed at another time or by another person.

An employer that has offered a reasonable accommodation that meets the employee's religious needs need not show that each of the employee's alternatives would be unduly burdensome. Also, as with accommodations for disabled employees, an employer is not required to provide the employee's preferred accommodation.

An employer also is not required to accommodate an employee's "personal preference" to engage in a particular activity just because it touches on an employee's religious beliefs, though the line between a personal preference and a sincerely held religious belief is not always clear.

A federal court of appeals ruled that an employer that restricted a Jewish employee from leaving more than two hours early on Fridays did not create a conflict with the employee's religious beliefs. The employee wanted additional time to buy or make challah bread, but the employee conceded she did not consider challah mandatory for her Sabbath observance. Similarly, a federal judge ruled that a grocer was not required to release an employee three hours before her church's Christmas worship service so she could volunteer in the church's pre-service Christmas pageant.

An employee is entitled to accommodation of a sincerely held religious belief, however, even if she cannot show that the tenets of her chosen religion mandate or prohibit what the employee seeks to have accommodated. Thus, the California court of appeal concluded that an employer was required to allow an employee who was a Jehovah's witness to attend a religious convention he sincerely believed it was his religious responsibility to attend, even though the convention was held at a particularly busy time for the employer and even though adherents could attend other conventions held at other times. It is the business of neither the courts nor employers to determine the tenets of the employee's religion, only the sincerity of the employee's religious belief.

An employer is not excused altogether from accommodating an employee's sincerely held religious belief unless the employer can demonstrate that doing so would cause the employer "undue hardship". California law requires a showing that accommodating the employee's religion would cause the same kind of burden that accommodating an employee's disability would cause. That means any accommodation must impose "significant difficulty or expense" on the employer in light of the employer's resources and number of employees.

An employer's respect for its employees' sincerely held religious beliefs, and employees' restraint in seeking accommodation only for matters of faith and not convenience, will help make for a peaceful holiday season for all. Happy Holidays.

IS FIRING AN IN-LAW MARITAL DISCRIMINATION?

Published: October 2, 2017

You are CEO of a company. A woman you know well calls to inform you that her husband, an at-will company employee for over 20 years, has a gun and has told her that he is angry at his co-workers. Without investigating the woman's claims, you put the employee on paid administrative leave. Based on your review of a restraining order the woman obtained against her husband — whom you are aware she is in the process of divorcing — you soon thereafter fire the employee.

The twist: the caller is your daughter, making the worker you just fired your son-in-law. Did you commit unlawful discrimination "because of marital status" by firing him? Did you at least have an obligation to investigate your daughter's allegations before firing the man?

Those were the questions the San Francisco division of the California court of appeal addressed in its recent ruling in *Nakai v. Friendship House Association of American Indians, Inc.* The court answered both questions no. Here's why.

In concluding that there had been no marital status discrimination, the court observed that Orlando Nakai did not allege he had been fired because he was a married man, "but because he happened to be married to the CEO's daughter – a political problem, not a marital discrimination problem." Nakai's claim that the CEO terminated him to help her daughter gain an edge in a battle with Nakai over custody of their daughter, the CEO's granddaughter, raised "a family dynamics problem, not a marital discrimination problem."

Even if Nakai could show his termination on its face had constituted marital status discrimination, the court found that the employer had articulated a non-discriminatory reason for the termination. The CEO had been told that Nakai had a gun, was angry at his fellow employees, and had relapsed into substance abuse. "[G]iven the number of workplace shootings in our day and age," it was "entirely reasonable" for the CEO to fire Nakai on this basis. Nakai could not show that the stated reason was a pretext for marital status discrimination.

The court further held that Nakai was not entitled to contractual due process, including the right to have his employer investigate his wife's accusations before firing him. As an at-will employee, Nakai legally could be discharged for any reason "so long as it was not a prohibited discriminatory reason."

Moreover, the employer's duty to investigate under California law protects the alleged *victim* of discrimination or harassment, not the alleged *perpetrator*. An employer that does not investigate an alleged threat of workplace violence breaches no duty to the person who poses the alleged threat by summarily dismissing him.

The court noted that the outcome may have been different if Nakai's employment had been subject to termination only for good cause. Even in that case, however, Friendship House would not have had to show that Nakai posed an actual threat to other employees. Instead, the employer would have to have shown only that it had come to a reasoned conclusion that he posed such a threat "supported by an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."

The prohibition on marital status discrimination protects classes of people, such as unwed mothers because they are unwed or single people because they are single. That protection does not extend to the status of being married to a particular person. And while the prudent employer will do some form of investigation before firing even an at-will employee based on unconfirmed accusations of misconduct or the threat of misconduct alone — regardless of the source — there is no duty for the employer to do so. Even where the accuser is the decision-maker's daughter and the accused is, for now, the decision-maker's son-in-law.

DISTINGUISHING BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS

Published: October 16, 2017

How does a court determine whether a worker is an employee or an independent contractor?

The San Francisco division of the court of appeal earlier this month addressed that question in a case involving taxi driver Darnice Linton, who drove cabs for the DeSoto Cab Company. At the beginning of the relationship, Linton signed a DeSoto taxicab lease agreement that affirmed he was not a company employee. An orientation Linton attended gave advice about how drivers should treat customers.

At the beginning of each shift, a cashier assigned Linton a cab, a taxi medallion, and gave him a "waybill" which said at the bottom: "DRIVE CAREFULLY. DRESS NEATLY. BE COURTEOUS."

Linton could reject calls from dispatch and was not required to check in during his shift. The cab was equipped, however, with GPS tracking and had devices that recorded video inside and outside the cab.

At the end of each shift, Linton returned the cab and paid the cashier a roughly $100 "gate fee" for the leasing of the vehicle. Linton kept the fares and tips he received from his passengers; DeSoto's only income was the gate fee.

DeSoto terminated Linton's agreement after a passenger accused Linton of making repeated unauthorized charges on the credit card she had used to pay her fare. Linton later filed a claim with the Labor Commissioner, asserting DeSoto had misclassified him as an independent contractor. He sought, among other things, to recover the $50,000-plus in gate fees he had paid the company, plus interest and penalties.

The Labor Commissioner sided with Linton. The trial judge reversed that order, finding that Linton was an independent contractor. The court of appeal reversed.

The court of appeal concluded that the trial judge was wrong to disregard as inapplicable leading prior rulings applying a multi-part test, in claims for workers' compensation and unemployment benefits, to evaluate whether a worker had been improperly classified as an independent contractor.

That test requires the court to consider, first and foremost, the degree of control exercised over the worker. Eight secondary factors include whether: (a) the worker is engaged in a distinct business; (b) the work is highly skilled; (c) the company provides the tools (such as a taxi); (d) the work is part of the company's regular business; and (e) the parties believe they are creating an employer-employee relationship.

The court of appeal directed the trial court to reconsider its conclusion using the proper test to determine whether Linton was entitled to get his gate fees back.

The most important takeaways from this ruling are:

A worker is an employee unless the company can prove he is an independent contractor. Under the worker's compensation statute, a person "rendering service for another" is presumed to be an employee unless proven otherwise. The court of appeal extended this principle to wage claims. The court rejected as "weak" DeSoto's contention that Linton provided no service to the company, only the passengers. No taxicab drivers, no taxicab company.

The more control a company exercises over a worker, the more likely the worker is an employee. The degree of a company's control over the worker is the most important factor in determining whether an individual is an employee. A worker may be an employee even where the company does not control all details of the work. "That a degree of freedom is permitted to a worker, or is inherent in the nature of the work involved, does not automatically lead to the conclusion that a worker is an independent contractor. The key is how much retained control the employer has the right to exercise in the work relationship."

The company's right to end the relationship at will is strong evidence of the company's ultimate control over the worker. Linton asserted that he was terminated based on a customer's accusation that he contended DeSoto never fully investigated and that Linton was not allowed to challenge. "This factor alone presents strong evidence of an employment relationship."

Requiring a worker to comply with government regulations doesn't make an independent contractor an employee. But requiring a worker to follow company rules beyond those regulations, including mandating training, suggests control over the worker.

A written contract expressly establishing an independent contractor relationship will be given little weight. A court will not assume an independent contractor relationship just because a company-drafted agreement says so. Instead, a court will "delve deeper into the parties' actual conduct and the economic realities of their relationship."

WHAT EMPLOYERS NEED TO KNOW ABOUT NEW BAN THE BOX LAW

Published: October 30, 2017

In January, the so-called "ban the box" measure, which applies to virtually all California public and private employers, goes into effect. Here's what the law prohibits, requires, and permits.

The law **prohibits** an employer from including on an application a question (such as a box to be checked) concerning an applicant's criminal convictions until the applicant has received a conditional employment offer. The law further prohibits inquiry about, or consideration of, such convictions in deciding whether to extend such a job offer. These prohibitions are designed to avoid summary disqualification of an applicant with a criminal record.

The new law **permits** an employer to conduct a criminal background check after extending a conditional job offer. If, after reviewing the background report, the employer is inclined to reject the applicant "solely or in part" because of the applicant's criminal record, the law requires the employer to make an "individualized assessment," which need not be in writing, of whether the applicant's conviction(s) have a direct, negative relationship to the "specific duties" of the job. In making that assessment, the law requires the employer to consider: (1) the nature and gravity of the crime; (2) the passage of time since the offense and completed sentence; and (3) the nature of the job.

A legislative analyst observed that "as a practical matter, th[is] requirement will act as more of a guideline. There is no indication of how long or thoughtful the employer's assessment must be and no obvious way to prove whether or not the employer actually undertook it. However, wise human resource managers may very well take up a practice of" putting the assessment in writing to avoid later speculation about the "content of that assessment". Beware: that writing will be scrutinized if a disappointed applicant later sues.

This law **requires** an employer to give written notice of a "preliminary decision" to disqualify an applicant based on his conviction history. The law **permits,** but **does not require,** that notice to include an explanation of the employer's reasoning. The law does **require** the notice to include: (1) the conviction(s) that are the basis for the decision; (2) a copy of any conviction history report used to make that decision; and (3) an explanation of the applicant's right to respond to the preliminary decision and the response deadline, at least five business days from the notice, to submit the response before a final decision is made. The explanation must advise the applicant that the response may include evidence challenging the conviction history report, evidence of the applicant's rehabilitation or mitigating circumstances, or both a challenge to the report's accuracy and evidence of rehabilitation or mitigation.

If the applicant sends the employer written notice within five business days disputing the accuracy of the report and identifies "specific steps" being taken to obtain supporting evidence, the law requires the employer to give the applicant five more business days to respond.

The law **requires** the employer to consider whatever additional information the applicant submits before making a final decision. Note: During this entire period, the employer may not offer the job to someone else.

If the employer finally rejects the applicant "solely or in part because of the applicant's" criminal record, the law **requires** the applicant be notified of: (1) the final decision, with or without an explanation of the employer's reasoning; (2) any procedure the employer has for contesting the decision; and (3) the applicant's right to file a complaint with the Department of Fair Employment & Housing.

Nothing in the law prohibits an employer from rejecting an applicant because of prior criminal convictions. The law does not make prior criminal conviction a protected classification under discrimination law the way race and gender are.

What the law does do is mandate a series of procedural steps and delays in the hiring process, with uncertain remedies against the unwary employer that misses a step and peril to the employer and society alike if a member of this unique class of employees commits a crime on the job. The law provides no immunity from civil liability for an employer in such circumstances.

The legislature is betting that these and other risks will be outweighed by the benefits of increased "prosocial behavior" by employed ex-convicts and by reduced recidivism. We'll see.

NEW LAW TO BAN INQUIRIES INTO SALARY HISTORY

Published: November 13, 2017

My most recent column discussed a new law that will bar California employers from seeking or considering an applicant's record of criminal conviction before making a conditional offer of employment. In the new year California employers also will be prohibited from considering, or inquiring into, an applicant's salary history unless the applicant discloses that information "voluntarily and without prompting" from the employer.

The new law bars an employer from relying on an applicant's pay history in deciding both what salary to offer the applicant and whether to offer the applicant a job at all. Employers also will be barred from seeking an applicant's salary history information "orally or in writing, personally or through an agent."

An employer must provide the applicant with the pay scale for the position "upon reasonable request." An employer may be able to satisfy this obligation by including the salary range in posted or published announcements of the job opening.

If an applicant voluntarily discloses his or her salary history, the employer may consider that information "in determining the salary for that applicant," though probably not as a baseline for the salary offered to other applicants.

This is the latest legislative effort toward closing the gender gap in wages. According to the author of the measure, closing that gap "starts with barring employers from asking questions about salary history so that previous salary discrimination is not perpetuated."

Employers should do four things no later than January 1. First, employers should remove any question on their job applications or online postings seeking an applicant's salary history. California employers operating in additional states should revise their application forms to excuse California applicants (and those in other states and cities with similar laws) from responding to any such prompt.

Second, employers should establish a salary range, or fixed salary, for every position for which they are hiring. Information about the salary range by location for categories of positions is available from the federal Bureau of Labor Statistics and the Society for Human Resource Management. Armed with that information, the employer may set a salary range for the particular position based on the unique features of the job being filled and based on what the employer is willing and able to pay. Employers should avoid posting or publishing a salary range that would "artificially limit an applicant's interest in a position," as opponents of the measure warned that it could.

Third, employers should ensure that salaries are negotiated within the framework of the new law. Opponents of the salary range provision argued that the appropriate "salary to pay an applicant is based upon various factors and employers may feel compelled to enlarge the pay scale in order to create sufficient room to adjust the rate depending on these factors and varied candidates for the job." Now that the measure is law, the important point is that negotiation over salary still will be allowed, but open-ended salary negotiations, if the applicant exercises her right to request the salary range, will not.

Fourth, employers should train those who interview job applicants not to prompt applicants to disclose their salary history. Opponents of the measure suggested that an employer could be subject to penalties and attorney's fees for asking about an applicant's prior salary, even if the employer, say, ultimately pays a female applicant more than any of her male colleagues.

The new law enters uncharted territory with no certainty it will work as intended. That's why Governor Jerry Brown vetoed a similar measure two years ago. It may take years to evaluate the law's effectiveness. Now is the time for California employers to take steps to prepare to comply with the new law to avoid missteps in the new year.

HOLIDAY PARTY RULES FOR MANAGERS

Published: November 27, 2017

As we enter the season of company-sponsored holiday parties, the country finds itself in the midst of a teachable moment about sexual harassment across a range of industries. Some companies are opting to forego the morale-boosting benefits of a year-end celebration rather than assume the legal risk that comes with a workforce gathering with flowing alcohol and lowered inhibitions. The informal setting does not mean that no rules apply. The rules that should guide the behavior of managers in such a setting come down to a single word: mindfulness.

Rule No. 1: Just don't do it. To be legally actionable, sexually harassing behavior must be severe or pervasive. That means it must be bad enough to alter the complaining person's work environment, such as unwelcome conduct of a sexual nature or a drumbeat of inappropriate comments, gestures, or images directed at (as opposed to being merely witnessed by) the person over a sustained or compressed time period. Individual employees found to have engaged in unlawful sexual harassment may be liable for harm caused to their victims.

The California Court of Appeal has ruled that isolated sexually suggestive acts or comments at a company holiday party – a Santa's hat with a gender-specific epithet, an invitation to female employees to sit on "Santa's" lap where Santa is a male executive – do not satisfy this test. But just because the person engaging in such limited behavior can't be sued for it doesn't mean he can't be fired or otherwise disciplined for it. In the age of social media, there may be significant reputational consequences, for the individual and his employer, of behavior that is bad, but not bad enough to be illegal.

Managers need to stay away from the line. Be mindful of your conduct.

Rule No. 2: If you see something, say something. An employer may face legal consequences if a supervisor sees something, yet says nothing. An employer is automatically liable if severe or pervasive sexual harassment is committed by a supervisor, thus Rule No. 1. In addition, though, an employer may be held legally responsible for such misconduct that is directed at an employee by a rank-and-file co-worker or by a client or other third party of which the employer knew or should have known. If a supervisor or manager witnessed misbehavior, it probably will be treated as though the company saw it, too. The law won't hold a manager personally responsible for failing to intervene when she was in a position to do so, but an employer might and probably should.

If a manager observes behavior at a holiday party that causes the manager to think "Thank God HR isn't seeing this" – for example, a male employee pressing against a female employee who shows signs of discomfort or a male client guiding a female employee toward the mistletoe – the manager should consider approaching the pair and joining their conversation. The approach should be made in the spirit of getting to know fellow employees better and more informally, the very purpose of such parties, and not in the spirit of the disapproving faculty chaperone. The mere insertion of the manager into the encounter may keep an awkward situation from turning into an unlawful one. Company roles are not shed at company functions simply because the functions are held outside company facilities. Be mindful of what is going on around you.

Rule No 3: Take any post-party complaints seriously. A manager's party-related responsibilities do not end when the party does. The law requires employers to investigate complaints of unlawful harassment and then take action to punish and deter misconduct that is found to have occurred.

If a manager receives a complaint of sexually-related misbehavior in the days and weeks after the holiday party, the manager should report the matter to someone in the organization to begin an investigation of the matter. That should be done even for incidents that the manager did not witness personally and even for incidents that do not appear to rise to the level of legally actionable sexual harassment. Investigation of what appears to be a single incident of misconduct may uncover an individual's broader pattern of misbehavior. The wave of news reports teaches us at least that. Be mindful of the party's aftermath.

In controlling workplace behavior, especially in party and other unconventional settings, the law can only do so much. The rest is judgment. Cheers.

COURT: PILOT-EMPLOYEE RETURNING FROM SERVICE DESERVED BIGGER BONUS FROM FEDERAL EXPRESS

Published: December 11, 2017

The Ninth Circuit recently upheld the ruling of a San Diego federal judge who found that Federal Express paid one of its pilot-employees a bonus that was $10,300 less than he deserved after returning from three-and-a-half years of Air Force duty. The underpayment of a bonus it is reasonably certain the airman would have received had he continued to work for the company instead of serving his country during those years violated his rights under the Uniformed Services Employment and Reemployment Rights Act.

The ruling matters to San Diego employers because of the large number of military reservists subject to redeployment while holding jobs in the civilian workforce here.

In 2001, Federal Express hired Dale Huhmann to pilot a narrow-body aircraft. Huhmann then also was an officer in the U.S. Air Force Reserve. Huhmann was selected for training for a higher-paying first officer position on a wide-body aircraft. The training was to begin on February 19, 2003, but on February 7, Huhmann was mobilized for active duty and was deployed overseas until August 31, 2006.

On August 26, 2006, days before Huhmann was released from active duty, Federal Express sent a letter to Huhmann's union offering a bonus if crewmembers ratified a proposed collective bargaining agreement. Pilots employed on the day the CBA was signed, including those on military leave, were entitled to a bonus of $7,400 for pilots of narrow-body planes and $17,700 for pilots of wide-body planes.

Huhmann, then a narrow-body plane pilot, received the $7,400 bonus upon his return to Federal Express in December. On December 1, 2006, days after his return to active pay status at Federal Express, Huhmann opted to train to become a first officer on the wide-body aircraft, the training he was to have undergone before his mobilization. Huhmann successfully completed the rigorous training and was activated as a wide-body aircraft pilot in February of 2007.

Huhmann contended that, under USERRA, he should have received the $17,700 bonus upon his return from duty since it was reasonably certain he would have become a wide-body plane pilot had he not left. San Diego federal judge Cynthia Bashant agreed and so did the Ninth Circuit.

Under the "escalator principle" that applies to claims under USERRA, a servicemember returning to a job in the civilian workforce is entitled to receive the job and benefits he would have had if military service had not interrupted his employment. The court is required to use foresight to determine if, but for his military leave, it is reasonably certain the servicemember would have attained the status entitling him to benefits he was denied and to use hindsight to determine if the servicemember did attain that status.

Federal Express conceded that Huhmann satisfied the hindsight test because he successfully completed the wide-body pilot training. The Ninth Circuit found that Judge Bashant's conclusion that, at the time he returned to Federal Express, Huhmann was reasonably certain to complete the wide-body training was "cogent and logical," even though Huhmann's successful completion of the demanding training program was not guaranteed. That was because, among other things, he was a seasoned military and civilian pilot and he had been scheduled to begin the training before being mobilized.

I emailed Huhmann's San Diego attorney Brian Lawler to ask why the parties had fought so hard over the $10,300 difference between the bonus Huhmann received upon his return and the bonus to which he was found to have been entitled. Lawler said that, for his part, USERRA's requirement that Federal Express pay Huhmann's over $250,000 in attorney's fees when he won made it worthwhile for Lawler, a national authority in USERRA litigation, to take this case.

Lawler believes the Ninth Circuit sent a loud message to servicemembers and their employers, one with particular resonance in San Diego. "[T]he Court's ruling makes it clear that Congress' intent that USERRA be broadly interpreted in favor of the servicemember still holds. . . . [I] t would behoove employers to make sure that their human resources and general counsel are well-versed in the statute and aware of their obligations to returning servicemembers."

A prudent employer will take a realistic view that tilts optimistic in determining the status and benefits a servicemember would have attained had he not been called away to serve and to which he therefore is entitled upon his return.

THINGS EVERY CALIFORNIA EMPLOYER SHOULD DO BEFORE JANUARY 1, 2018

Published: December 25, 2017

Merry Christmas! Hope you are enjoying a day off with family and friends. In exactly one week, 2018 begins. Those who manage California businesses should take the following steps during this shortened last workweek of the year.

1. Remove references to salary history and criminal convictions from employment applications

Starting January 1, 2018, applications for employment in California may no longer ask applicants to disclose their criminal history or their salary history. The reason to "ban the box" asking whether an applicant has a criminal record is to avoid perpetuating the stigma of prior convictions and the premature disqualification of applicants who otherwise may have the right credentials for a particular job. The reason to ban discussion of an applicant's prior salary, unless the applicant volunteers the information, is to avoid perpetuating past salary levels that may have been influenced by gender.

Employers should remove these inquiries from paper and online application forms. Employers also should instruct those who interview applicants, by phone or in person, not to solicit this information. The consequences for violating these new prohibitions are unclear. But no employer wants to be the first to find out.

2. Make sure employees doing equivalent work are receiving equivalent pay.

A California employer is prohibited from paying men and women and whites and racial and ethnic minorities different wages for "substantially similar work" unless the employer can show that any differences are justified by a factor other than sex, race, or ethnicity. That imposes a duty on employers to ensure that any gaps are closed or justifiable.

In this space about a year ago, I predicted that a California court would issue a "major" ruling this year on these requirements of the state Fair Pay Act. It was the only one of the five predictions I made that was wrong. But several Fair Pay Act cases were filed this year in California trial courts, including against high profile California employers. Don't make your workplace the one that belatedly fulfills my prediction.

3. Schedule sexual harassment training for your supervisors

California employers with 50 or more employers must provide "classroom or other effective interactive" training in the prevention and correction of sexual harassment no later than six months after an employee assumes, or is hired to perform, supervisory duties and to all supervisors every two years. Recent changes in this law require that the training cover general workplace bullying and harassment based on gender identity.

According to a recent story in the business section of The New York Times, "[t]he most effective training, researchers say, is at least four hours, in person, interactive and tailored for the particular workplace – a restaurant's training would differ from a law firm's."

With the intense recent attention to sexual harassment across industries, and given that California law imposes liability for sexual harassment even on employers with a single employee, the wise employer will go beyond the bare requirements of the training law. The state law itself underscores that it is only a "minimum" and does not discourage an employer from providing "longer, more frequent, or more elaborate" training to "meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination." Training is not sufficient to address the persistent problem of workplace harassment, but it is necessary.

4. Update your employee handbook

Because every year brings new workplace laws, make it an annual practice to revise your handbook to reflect current law. Out-of-date policies may be used against your company if a dispute ripens into a lawsuit. The San Diego Society for Human Resource Management and the California Chamber of Commerce both provide their members with suggested handbook revisions each new year.

Have a great 2018, San Diego.

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