

Onboarding and Separating Employees: Best Practices

Presented by:

Sharilyn R. Payne

Attorney

Noland, Hamerly, Etienne & Hoss

Jacqueline Rios

Director of Human Resources

Fowler Packing

January 25, 2024

Onboarding

Job Postings

Job Applications

Job Descriptions

Employee Classifications

Documentation

Background Checks

Orientation

Training

Compensation

Onboarding: Job Postings

Pay Scale Information

- Effective as of January 1, 2023, employers, both private and public, with 15 or more employees must include the pay scale for a position in any job posting. (California Labor Code section 432.3.)
- Employers using a third party for job postings must provide the third party with the pay scale for the position, and the third party must include the pay scale in the job posting.
- “Pay scale” is defined as the salary or hourly wage range that the employer “reasonably expects to pay for the position.”
 - Per the Labor Commissioner, if the hourly or salary wage is based on piece rate or commission, then the piece rate or commission range the employer reasonably expects to pay for the position must be included in the job posting.

Onboarding: Job Postings

Pay Scale Information

- Complaints of a violation of this law must be filed with the Labor Commissioner within one year of the person learning of the alleged violation.
- The civil penalty for a violation is between \$100 and \$10,000 per violation.
- This statute can be the basis for a PAGA claim.
- There is no penalty for first time violations if the employer can show all job postings for open positions have been updated to include the pay scale.

Onboarding: Job Postings

Wording

- No discriminatory language, i.e.,
 - ✗ Seeking male candidate;
 - ✗ Driver's license required (unless position involves driving);
 - ✗ Must be a U.S. citizen;
 - ✗ Looking for recent graduate;
 - ✗ Singles preferred;
 - ✗ Must be able bodied;
 - ✗ Must be 6 feet or taller.
- Pursuant to the Fair Chance Act, “[e]mployers are prohibited from including statements in job advertisements, postings, applications, or other materials that no persons with criminal history will be considered for hire, such as “No Felons” or “Must Have Clean Record.” (2 California Code of Regulations section 11017.1)

Onboarding: Job Postings

Wording

- If position is seasonal, be clear about limited duration of position in job posting.
 - Notice requirements under federal and California WARN Acts do not apply to employees involved in seasonal employment where employees were hired with the understanding that their employment was seasonal and temporary. (California Labor Code section 1400.5(g)(2).)
- Avoid language that contradicts at-will nature of employment.
- If you use a third party for job postings, check the job posting once it has been published.

Onboarding: Applications

- Under the Fair Chance Act, employers are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant.
 - Do not inquire about criminal history through an employment application.
 - Do not state on job applications that no persons with criminal history will be considered for hire.
 - Employers who violate this prohibition on inquiring into criminal history prior to making a conditional offer of employment “may not, after extending a conditional offer of employment, use an applicant's failure to disclose criminal history prior to the conditional offer as a factor in subsequent employment decisions, including denial of the position conditionally offered.”

Onboarding: Applications

- Effective January 1, 2024, SB 700 modifies Government Code Section 12954:
 - Prohibits employers from requesting information from an applicant for employment relating to the applicant's prior use of cannabis.
 - Prohibits employer from using criminal history information regarding an applicant's prior cannabis use.

Onboarding: Applications

- Double check your job applications.
- Make sure there is no longer a question about criminal convictions.

Onboarding: Job Descriptions

- Job description can help show employer's non-discriminatory intent by focusing on appropriate, objective criteria for evaluating applicants for a specific position.
- Job description should identify essential functions of a position.
 - Important in assessing requests for accommodations.
- Ensure job description is accurate and does not overstate requirements and essential functions.
- If position is seasonal, clearly state that in job description.
- Job descriptions should be reviewed and updated as essential functions change.

Onboarding: Classification

Independent Contractor

- Independent contractor?
 - Individuals must meet three factors to be classified as an independent contractor:
 - Be free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
 - Perform work that is outside the usual course of the hiring entity's business; and
 - Be customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Onboarding: Classification

Exempt or Non-Exempt

- Exempt or Non-Exempt?
 - Federal and state laws exempt certain employees from certain wage and hour requirements, including overtime pay and meal and rest break requirements.
 - Threshold salary requirement: \$66,560 in 2024.
 - Duties requirement.
 - Job titles alone do not determine whether an employee is exempt or non-exempt.
 - Consequences of misclassification can be severe.

Onboarding: Classification

Exempt or Non-Exempt

- Executive Exemption
- Administrative Exemption
- Professional Exemption
- Outside Salespersons
- Inside Sales
- Computer Software Field Employees

Onboarding: Classification

Executive Exemption

- Paid at least \$66,560 per year (changes with change in minimum wage).
- Has duties and responsibilities involving management of enterprise or customarily recognized department or subdivision;
- Customarily and regularly directs work of 2 or more;
- Has authority to hire or fire or give meaningful input;
- Customarily and regularly exercises independent judgment;
- Primarily engaged in these duties (i.e., more than 50% of work time).
- If title is “manager,” “supervisor,” “Vice President,” but primarily engaged in non-exempt duties, then is non-exempt.

Onboarding: Classification

Administrative Exemption

- Paid at least \$66,560 per year (changes with change in minimum wage).
- Has duties and responsibilities involving office or non-manual work directly related to employer's management policies or general business operations;
- Customarily and regularly exercises discretion and independent judgment;
- Regularly and directly assists an employee employed in executive or administrative capacity under only general supervision, performs work along specialized or technical lines requiring special training, experience or knowledge, or executes special assignments and tasks.
- Primarily engaged in these duties.
- If title is "Administrative Assistant," "Administrator," etc., but is not primarily engaged in these duties, employee is non-exempt.

Onboarding: Classification

Professional Exemption

- Employees who are
 - Paid at least \$66,560 per year (changes with change in minimum wage).
 - Licensed or certified by the State of California and are primarily engaged in practice of a recognized profession;
 - Primarily engaged in occupation commonly recognized as learned or artistic profession;
 - Customarily and regularly exercises discretion and independent judgment;
 - Primarily engaged in these duties.
 - If employee is a “professional” engaging in duties not within that profession, employee does not fit under the professional exemption.

Onboarding: Classification

Computer Professional Exemption

- Earns \$55.58 per hour or annual salary of \$115,763.35 (changes each year).
- Primarily engaged in work that is intellectual or creative;
- Primarily engaged in
 - Applying systems analysis techniques and procedures to determine hardware, software;
 - Designing, developing, analyzing, creating, testing computer systems or programs;
 - Documenting, testing, creating, modifying computer programs related to design of software or hardware for computer operating systems.
- Highly skilled and proficient in theoretical and practical application of highly specialized information to computer systems and analysis, programming, and software engineering;
- Primarily engaged in work that requires exercise of discretion and independent judgment;
- These are skilled computer programmers, computer systems analysts.
- If employee does not meet this exemption, could meet another.

Onboarding: Classification

Outside Sales Exemption

- Primarily engaged in sales;
- Customarily and regularly spends more than 50% of working time away from employer's place of business;
- Sells tangible or intangible goods or obtains orders or contracts for products, services, or use of facilities.

Onboarding: Classification

Inside Sales Exemption

California Requirements

- Employee must earn more than 150% of the minimum wage;
- More than 50% of employee's compensation must be derived from commissions;
 - Employee must fall under Wage Order 4 (professional, technical, clerical, mechanical or similar occupation) or Wage Order 7 (mercantile industry).

Federal Requirements

- Employee must earn more than 150% of the minimum wage;
- More than 50% of employee's compensation must be derived from commissions;
- Must work in the “retail and service industry.”
 - Employer derives at least 75% of annual sales revenue from goods or services not for resale and recognized as retail or service establishment in their industry.

Onboarding: Classification

Inside Sales

- To qualify as a “commission” under the inside sales exemption, incentive-based compensation must be roughly proportional to employee’s sales productivity. If the incentive compensation is a fixed amount for reaching a milestone, that is not considered a “commission.”
- Under California law, commission agreements must be in writing explaining computation and when paid.
- Earnings requirements must be satisfied each workweek. Could be exempt one pay period and not the next.
- No allocation of wages paid in one pay period to prior pay period to cure shortfall.
- **Inside sales exemption is for overtime only.**
- Meal and rest period requirements still apply.
 - Clocking-in and out still required.

Onboarding: Background Checks

- 2 CCR section 11017.1 modifies California Fair Chance Act (background check law) effective October 1, 2023.
- Applies to employers of 5+ employees.
- Expands definition of “employer” to include joint employers, entities that evaluate an applicant’s criminal history on an employer’s behalf or as the employer’s agent, staffing agencies, and entities that procure workers from pools or availability lists.
- Expands definition of “applicant” to include existing employees applying for a different position and existing employees subject to review and consideration of criminal history due to a change in ownership.
- Expands items to consider in “individualized” assessment.

Onboarding: Background Checks

Individualized Assessment

- Whether the harm was to property or people;
- The degree of harm (e.g., amount of loss in theft);
- The permanence of the harm;
- The context in which the offense occurred;
- Whether a disability contributed to the offense or conduct;
- Whether trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct;
- The age of the applicant when the conduct occurred;
- The amount of time that has passed since the underlying conviction;
- The amount of time that has passed since the applicant's release from incarceration;
- The specific duties of the job, including whether the context in which the conviction occurred is likely to arise in the workplace and whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace;
- Evidence of rehabilitation or mitigating circumstances.

Onboarding: Background Checks

Employee Response

- Length and consistency of employment before and after offense;
- Facts or circumstances surrounding offense;
- Current/former participation in self improvement efforts;
- Whether trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense;
- Age of the applicant at time of conduct;
- Whether disability, including past drug addiction or mental impairment, contributed to offense;
- Likelihood of recurrence;
- The fact applicant is seeking employment;
- Successful completion or compliance with probation or parole.

Onboarding: Background Checks

Employee Response

- Applicants may voluntarily provide documentary evidence including:
 - Certificates or other documentation of participation in, enrollment in, or completion of educational, vocational, training, counseling, community service, or rehabilitation programs, including in-custody programs;
 - Letters from current or former teachers, counselors, supervisors, co-workers, parole or probation officers, or others who know the applicant;
 - Police reports, protective orders, documentation from healthcare providers, counselors, case managers, or victim advocates;
 - Documentation confirming the existence of a disability; and/or
 - Any other document demonstrating rehabilitation or mitigating circumstances.

Onboarding: Background Checks

- Employers may not:
 - Refuse to accept additional evidence voluntarily provided by an applicant or another party at the applicant's request at any stage of the hiring process;
 - Require an applicant to submit additional evidence or specific types of documentary evidence or disqualify an applicant for failing to provide any specific type of documents or evidence;
 - Require an applicant to disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable statuses; and/or
 - Require an applicant to produce medical records and/or disclose the existence of a disability or diagnosis.

Onboarding: Background Checks

- Employers must consider any information submitted by the applicant before making a final decision regarding whether or not to rescind the conditional offer of employment.
- Employers may consider:
 - When the conviction occurred and the applicant's conduct during incarceration;
 - The applicant's employment history since the conviction or completion of sentence;
 - The applicant's community service and engagement since the conviction or completion of sentence;
 - The applicant's other rehabilitative efforts since completion of sentence or conviction.

Onboarding: Documentation

- W-4
- I-9*
- Notice to Employee (Labor Code section 2810.5)*
(https://www.dir.ca.gov/dlse/lc_2810.5_notice.pdf)
- Paid Family Leave Insurance Pamphlet
(https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2511.pdf)
- Disability Insurance Pamphlet
(https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2515d.pdf)
- Time of Hire Pamphlet re Workers' Compensation
(<https://www.dir.ca.gov/dwc/DWCPamphlets/TimeOfHirePamphlet.pdf>)
- Notice About COBRA Coverage
- Sexual Harassment Fact Sheet (https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2020/03/Sexual-Harassment-Fact-Sheet_ENG.pdf)
- Harassment, Discrimination and Retaliation Prevention Policy - (with confirmation of receipt)
- Lactation Accommodation Policy
- Rights of Victims of Domestic Violence, Sexual Assault, and Stalking
(https://www.dir.ca.gov/dlse/victims_of_domestic_violence_leave_notice.pdf)
- Family Care and Medical Leave Fact Sheet (https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/12/Family-Care-and-Medical-Leave-Fact-Sheet_ENG.pdf);
(<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fmlaen.pdf>).
- Consumer Privacy Act Rights Notice.

Onboarding: Documentation - What's New?

- I-9 has been revised (dated 08/01/2023)
 - Reduces Sections 1 and 2 to a single-sided sheet;
 - Designed to be a fillable form on tablets and mobile devices;
 - Moves Section 1 Preparer/Translator Certification area to a separate, standalone supplement that employers can provide to employees when necessary;
 - Moves Section 3, Reverification and Rehire, to a standalone supplement that employers can print if or when rehire occurs or reverification is required;
 - Revises the Lists of Acceptable Documents page to include some acceptable receipts as well as guidance and links to information on automatic extensions of employment authorization documentation;
 - Reduces Form instructions from 15 pages to 8 pages; and
 - Includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a DHS-authorized alternative procedure rather than via physical examination.

Onboarding: Documentation - What's New?

- 2810.5 Notice to Employees has been revised pursuant to AB 636.
- Pursuant to Labor Code section 2810.5, employers are required to provide a written notice at the time of hire, in the language the employer normally uses to communicate employment-related information to the employee, containing the following:
 - Rate or rates of pay, including any rates for overtime;
 - Allowances, if any, claimed as part of the minimum wage;
 - Regular payday;
 - Name of the employer including dba's;
 - Physical address of employer's main office or principal place of business and mailing address, if different;

Onboarding: Documentation – What's New?

- Telephone number of employer;
- Name, address, and telephone number of employer's workers' compensation insurance carrier;
- That an employee
 - may accrue and use sick leave,
 - has a right to request and use accrued paid sick leave,
 - may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and
 - has the right to file a complaint against an employer who retaliates.

Onboarding: Documentation – What’s New?

- Effective January 1, 2024, the notice must include the existence of federal or state emergency or disaster declarations that are:
 - Applicable to the county or counties where the employee is employed;
 - Issued within 30 days before the employee’s first day of employment; and
 - May affect the employee’s health and safety during their employment.
- Effective January 1, 2024, the notice must reflect the changes in paid sick leave law to 5 days/40 hours per year of paid sick leave.
- Form 2810.5 now includes “Emergency or Disaster Disclosure” section on page 2, and updated paid sick leave information.
- https://www.dir.ca.gov/dlse/lc_2810.5_notice.pdf

2810.5 Notice

| NOTICE TO EMPLOYEE <i>Labor Code section 2810.5</i> | |
|--|--|
| EMPLOYEE | |
| Employee Name: _____ | |
| Start Date: _____ | |
| EMPLOYER | |
| Legal Name of Hiring Employer: _____ | |
| Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? <input type="checkbox"/> Yes <input type="checkbox"/> No | |
| Other Names Hiring Employer is "doing business as" (if applicable): _____ | |
| Physical Address of Hiring Employer's Main Office: _____ | |
| Hiring Employer's Mailing Address (if different than above): _____ | |
| Hiring Employer's Telephone Number: _____ | |
| If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work: | |
| Name: _____ | |
| Physical Address of Main Office: _____ | |
| Mailing Address: _____ | |
| Telephone Number: _____ | |
| WAGE INFORMATION | |
| Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____ | |
| Rate by (check box): <input type="checkbox"/> Hour <input type="checkbox"/> Shift <input type="checkbox"/> Day <input type="checkbox"/> Week <input type="checkbox"/> Salary <input type="checkbox"/> Piece rate <input type="checkbox"/> Commission | |
| <input type="checkbox"/> Other (provide specifics): _____ | |
| Does a written agreement exist providing the rate(s) of pay? (check box) <input type="checkbox"/> Yes <input type="checkbox"/> No | |
| If yes, are all rate(s) of pay and bases thereof contained in that written agreement? <input type="checkbox"/> Yes <input type="checkbox"/> No | |
| Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances): _____ | |
| <small>(If the employee has signed the acknowledgment of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)</small> | |
| Regular Payday: _____ | |

| WORKERS' COMPENSATION |
|---|
| Insurance Carrier's Name: _____ |
| Address: _____ |
| Telephone Number: _____ |
| Policy No.: _____ |
| <input type="checkbox"/> Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure: _____ |
| PAID SICK LEAVE |
| Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee: |
| a. May accrue paid sick leave and may request and use up to 5 days or 40 hours, whichever is greater, of accrued paid sick leave per year; |
| b. May not be terminated or retaliated against for using or requesting the use of paid sick leave; and |
| c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for |
| 1. requesting or using sick days; |
| 2. attempting to exercise the right to use paid sick days; |
| 3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code; and |
| 4. cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor Code. |
| The following applies to the employee identified on this notice: <i>(Check one box)</i> |
| <input type="checkbox"/> 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave. |
| <input type="checkbox"/> 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246. |
| <input type="checkbox"/> 3. Employer provides no less than 40 hours (or 5 days) of paid sick leave at the beginning of each 12-month period. |
| <input type="checkbox"/> 4. The employee is exempt or partially exempt from paid sick leave by Labor Code §245.5. (State exemption and subsection for exemption): _____ |

| EMERGENCY OR DISASTER DISCLOSURE | |
|--|-----------------------------------|
| <input type="checkbox"/> If there is a state or federal emergency or disaster declaration applicable to the county or counties where I will be working, I will be notified in writing at least 72 hours before the employer's first day of employment and that may affect their health and safety during employment. (State emergency or disaster declaration and how it may affect health or safety): _____ | |
| ACKNOWLEDGEMENT OF RECEIPT | |
| _____ (PRINT NAME of Employer representative) | _____ (PRINT NAME of Employee) |
| _____ (SIGNATURE of Employer Representative) | _____ (SIGNATURE of Employee) |
| _____ (Date) | _____ (Date) |
| The employee's signature on this notice merely constitutes acknowledgment of receipt. | |

Onboarding: Documentation – What's New?

- Furthermore, if an employee is admitted under the federal H-2A agricultural visa program, the notice must include a separate and distinct section in Spanish, and in English if requested, with additional information.
- The notice must be provided on the day that the H-2A employee begins work in the state or on the first day that the employee begins work for another H-2A employer.
- This requirement goes into effect March 15, 2024.

Onboarding: Documentation – What’s New?

- This additional notice must include non-duplicative information “**succinctly**” describing an agricultural employee’s additional rights and protections under California law and regulations, including, but not limited to:

- Information regarding the federal H-2A program wage rate required to be paid during the contract period;
- Overtime wage rates;
- Frequency of pay;
- Pay for piece rate workers;
- Meal and rest periods;
- Transportation travel time compensation, including from housing to work sites;
- Employee housing rights;
- Protections against retaliation for complaints or organizing;
- Contents of wage statements;
- Sexual harassment prohibition;
- Toilets;
- Requirements about availability of potable water and handwashing facilities;
- Requirements regarding hot weather working conditions and the availability of shade;
- Pesticide exposure protections;
- Workplace safety requirements;
- Training and correction of hazards;
- Transportation in defined farm labor vehicles;
- Prohibitions against tool or equipment charges;
- Prohibitions against deductions for meals not taken;
- Training and necessary equipment and lighting for night work;
- Prohibitions against use of short-handled hoes and limits on hand weeding;
- Employee-paid health insurance;
- Sick leave;
- Workers’ compensation coverage;
- Disability pay;
- Medical care for injuries;
- Right to complain to state/federal agencies and seek advice from collective bargaining representatives or legal assistance organizations.

Onboarding: Documentation – What's New?

- Labor Commissioner will post template for new requirements by March 1, 2024.

Onboarding: Documentation

Arbitration Agreements

- ▶ In 2019, AB 51 was enacted to protect employees from forced arbitration by making it a misdemeanor for an employer to require an existing employee or an applicant for employment to consent to arbitrate specified claims as a condition of employment.
- In 2019, the U.S. and California Chambers of Commerce and others filed a lawsuit against the California Attorney General, the Labor Commissioner, the Director of the Civil Rights Department, and others seeking declaratory and injunctive relief related to AB 51. The district court granted a preliminary injunction prohibiting these California officials from enforcing AB 51 on grounds that it was preempted by the Federal Arbitration Act (“FAA”).

Onboarding: Documentation

Arbitration Agreements

- On February 15, 2023, the Ninth Circuit affirmed the district court's ruling holding that prior U.S. Supreme Court rulings made clear that state laws that burden the formation of arbitration agreements conflict with the FAA. The Court stated that even though "AB 51 does not expressly bar arbitration agreements," it "disfavors the formation of agreements that have the essential terms of an arbitration agreement." The Court also found that AB 51 imposed a severe burden on the formation of arbitration agreements by imposing civil and criminal sanctions on any employer who violated its terms. (*Chamber of Commerce v. Bonta* (9th Cir., February 15, 2023) 62 F.4th 473.)
- ▶ Therefore, employers can have arbitration agreements that state that signing the agreement is a condition of employment.

Onboarding: Documentation

Arbitration Agreements

- Should the arbitration agreement be a separate document or part of the employee handbook?
- Should seasonal employees sign the arbitration agreement each time they are rehired?

Onboarding: Documentation

Arbitration Agreements: Signature

- ▶ If employer is seeking to compel arbitration, the court must determine whether the parties entered a binding agreement to arbitrate.
- ▶ Employee signature is key, whether wet or electronic signature.

Onboarding: Documentation

Arbitration Agreements: Signature

- ▶ Electronic signature: Employer can show the electronic signature belongs to the employee “in any manner.” This includes
 - ▶ Showing of efficacy of any security procedure applied to determine the person to which the electronic record or signature was attributable. (Cal. Civil Code section 1633.9.)
 - ▶ For example, a unique login and password known only to the person required to affix the electronic signature, along with evidence detailing procedures the person had to follow to electronically sign the document and the accompanying security precautions.
- ▶ Wet Signature: Employer can show wet signature belongs to the employee by presenting other documents signed by employee with same signature, presenting witness(es) who witnessed employee sign, handwriting analyst.

Onboarding: Documentation

Arbitration Agreements & H-2A Workers

- Among the requirements of the H-2A certification process is one that the employer must submit a “job order” (Form ETA-790/790A) with information including “the material terms and conditions” of the jobs for which it seeks foreign workers.
- In *State ex rel. Cisneros v. Alco Harvest, Inc.* (11/22/23)97 Cal.App.5th 456, the court held that an arbitration agreement signed by an employee in the H-2A program was not enforceable under the Federal Arbitration Act and California law because the employer did not disclose the mandatory arbitration requirement on the job order in the section on “material terms and conditions.”

Onboarding: Documentation

Arbitration Agreements & H-2A Workers

- The court noted that the arbitration agreement required the employee to forfeit his right to a jury trial in “any claim, dispute and/or controversy that [any] Employee may have against the Company . . . arising from, relating to or having any relationship or connection whatsoever with [or to the] Employee’s . . . employment by, or other association with the Company” The arbitration agreement also prohibited the employee from participating in any class action claims against the company.
- The court stated that the relinquishing of these rights was considered to constitute “material terms and conditions” of the individual’s employment that had to be disclosed on the job order. Since this was not disclosed, the court held that the arbitration agreement was not enforceable.

Onboarding: Orientation

- Distribute employee handbook
 - Have employees sign acknowledgment of receipt
- Topics at orientation
 - Meal and rest periods
 - Recording time
 - Approval before working overtime
 - No off-the-clock work
 - Expense reimbursements
 - Cell phone use
- Documentation of topics discussed

Onboarding: Training

- Harassment prevention training
 - 1-hour for non-supervisors within 6 months of hire.
 - 2-hours for supervisors within 6 months of assuming supervisory position.
 - For seasonal, temporary, or other employees that are hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. Cal. Gov't Code § 12950.1.
- Safety
 - Heat Illness Prevention Plan
 - Injury and Illness Prevention Plan
 - Emergency Action Plan
 - Position and Equipment Specific Training
 - Lock out/Tag Out
 - Workplace Violence Prevention Plan (7/1/24)

Onboarding: Orientation and Training Rehires

- Should rehires attend orientation and training each year?

Onboarding: Compensation

- Employers must pay employees for “all hours worked.”
 - California: “Hours worked” is defined as the time when the employee is subject to the employer’s control.
 - Orientation and training are “hours worked.”

Termination

At-Will

Reason for Termination

Discrimination

Retaliation

Seasonal Employees

Lay-Offs

WARN Notice

Documentation

Compensation

Termination: At-Will Employment

- In California, an employment relationship with no specified duration is presumed to be employment at-will. (Labor Code section 2922.)
- If terminating employee, make sure there is no employment contract – written or oral -- that applies providing for certain duration of employment.
- If there is no employment contract, can you just terminate employees with no worries?

Termination: Reason

- Can you articulate a legitimate business reason why you are terminating the employee?
- If you are eliminating the position, are you truly eliminating it?
- If you are eliminating the position, do you have documentation to support that decision?
- If you are releasing the employee for performance reasons, what are those performance reasons?
- Do you have documentation to support that is the reason for the termination?
- Do witnesses to poor conduct/job performance still work for you?
- Have you terminated other employees who have engaged in the same conduct?
- Is your decision consistent with your written policies?

Termination: Discrimination

Is Employee a Member of FEHA Protected Class(es)?

- Race
- Religious Creed
- Color
- National Origin
- Ancestry
- Physical disability
- Mental disability
- Medical condition
- Genetic Information
- Cannabis Use Off the Job
- Marital status
- Sex
- Gender
- Gender identity
- Gender expression
- Age
- Sexual orientation
- Veteran status
- Military status
- Reproductive Health Decision-Making

Termination: Retaliation

- Has employee made internal complaints?
- Does employee have formal claim pending, i.e., lawsuit, Labor Commissioner claim, CRD or EEOC claim?
- Has employee had on-the-job injury, pending workers' compensation claim, talked about filing workers' compensation claim?
- Has employee requested reasonable accommodation?
- If yes to any of these, how long ago?

Termination: Discrimination/Retaliation

- Has employee had health related absences? How long ago?
- Is employee on leave of absence or was employee out on leave of absence previously? How long ago?
- Has employee participated in an investigation? How long ago?
- Is employee party to a collective bargaining agreement?
- Has employee complained about wages owed, failure to provide meal and/or rest periods, working off the clock? How long ago?
- Is person a long-term employee?

Termination: Retaliation

SB 497: Rebuttable Presumption of Retaliation

- As of January 1, 2024, there is a rebuttable presumption in favor of an employee's retaliation claim if an employer takes adverse action within 90 days of an employee
 - Making an oral or written complaint,
 - Instituting a legal action, or
 - Testifying in a proceeding regarding unpaid wages or wage discrimination on the base of sex, race, or ethnicity.
- The employer may defend by establishing legitimate, non-retaliatory reasons for its employment actions.
- \$10,000 civil penalty is now awarded to an employee who proves he/she was subjected to retaliation.
- Applies to applicants as well as employees.

Termination: Seasonal Lay-Offs

Decisions

- **Seniority or “Last Hired/First Fired”**: Rewards employees for tenure and reduces risk of age discrimination claims.
- **Employee Status**: Lay off part-time workers first.
- **Merit Based**: Dismiss poor performers first. But caution – what documentation supports poor performance? Will there be an effect on employees with disabilities, work injuries, older workers?
- **Skills Based**: But caution -- may result in retaining younger workers and laying off older workers.

Termination: WARN Notices

- Are multiple employees being terminated?
- Do Worker Adjustment and Retraining Notification Act (WARN) requirements apply?
- Were seasonal employees informed of seasonal nature of job at outset of employment?
 - Do you have documentation to back that up?

Termination: Documentation

- Notice to Employee as to Change in Relationship
(https://edd.ca.gov/siteassets/files/about_edd/pdf/noticetoeemployeetochangeinrelationship.pdf)
- Pamphlet DE 2330 Summarizing Employee's Right to Unemployment Benefits
(https://edd.ca.gov/siteassets/files/pdf_pub_ctr/de2320.pdf)
- COBRA and Cal-COBRA Notices
- Health Insurance Premium Payment Notice
(<https://www.dhcs.ca.gov/services/Documents/DHCS-9061.pdf>)

Termination: Compensation

- **Terminated Employees:** If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, including vacation/PTO.
 - Note that a layoff without a specific return date within the same pay period constitutes a discharge, and final wages, including unused vacation or PTO, are due immediately. (*Hartstein v. Hyatt Corporation* (9th Cir. 2023) 82 F.4th 825.)
- **Seasonal Employees:** An employer who lays off a group of employees by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish, or vegetables, shall be deemed to have made immediate payment when the wages of said employees are paid within a reasonable time as necessary for computation and payment thereof; provided, however, that the reasonable time shall not exceed 72 hours, and further provided that payment shall be made by mail to any employee who so requests and designates a mailing address therefor.

Termination: Compensation

- **Voluntary Quit**: If an employee not having a written contract for a definite period quits his or her employment, wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his/her intention to quit, in which case the employee is entitled to his/her wages at the time of quitting.
 - Notwithstanding any other law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he/she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of providing payment within 72 hours of the notice of quitting.
 - Keep documentation of the mailing.

Termination: Compensation

- Every employee who is discharged must be paid at the place of discharge.
- Every employee who quits must be paid at the office or agency of the employer in the county where the employee has been performing the work.
 - (Labor Code section 208.)

Termination: Compensation

- No flexibility for agricultural employers on final pay except for lay-offs of seasonal employees in the curing, canning, or drying of any variety of perishable fruit, fish, or vegetables.
- If employer cannot calculate the wages correctly prior to the termination date, i.e., piece rate employees, causing a delay in payment, the employer may have an argument that its failure to pay was not willful, i.e., good faith dispute regarding amount owed, and no waiting time penalties are owed, but this is a very risky approach.

Termination: Compensation

No Offsets

- Employers cannot withhold amounts owed by employee from a final paycheck, including for
 - Damage caused by employee, damaged or unreturned tools, uniforms, equipment, keys, etc.;
 - Amounts owed for overpayment or loans.

Questions?

Thank you!

Disclaimer

- The information in these materials is provided for general informational purposes only and is not intended to constitute legal advice.
- You should seek the advice and opinion of a qualified, licensed attorney on specific facts, circumstances, and legal issues that concern you before acting on any information provided in these materials.