

INTRODUCTION TO LABOR AND EMPLOYMENT LAWS



**APMA Human Resources
Certificate Program**

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SECTION I: LABOR LAWS

- **Federal**
 - National Labor Relations Act (NLRA)
 - National Labor Relations Board (NLRB)
 - Agriculture *exempt* from coverage
 - “Affecting Commerce”

- **California**
 - Agricultural Labor Relations Act (ALRA)
 - Agricultural Labor Relations Board (ALRB)
 - California Agriculture only.

“AGRICULTURE” DEFINED

Fair Labor Standards Act, Section 3(f):

“Agriculture” includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

SO WHAT IS “AGRICULTURE?”

- **Primary Agriculture**
 - Planting, growing, pruning, harvesting, field transportation, farm shops, irrigation, tractor driving, cattle, poultry, nurseries, lumber, dairy, etc.
- **Secondary Agriculture**
 - Packing, cooling, processing...preparing the agricultural product for market.

SECONDARY AGRICULTURE

- **“Non-Commercial” Secondary Operations**
 - Secondary operation prepares for market only those agricultural products produced by the owner of the secondary operation.
- **“Commercial” Secondary Operations**
 - Secondary operation prepares for market agricultural products produced by someone other than the owner of the secondary operation.

LABOR BOARD JURISDICTION

- **NLRB only has jurisdiction over Commercial Secondary Operations**
 - **Treated as non-agricultural and therefore, not exempt under the NLRA**

- **ALRB has jurisdiction over Primary and Non-Commercial Secondary Operations**
 - **Exempt as agricultural under the NLRA based on the FLSA's definition of "agriculture"**

NATIONAL LABOR RELATIONS ACT (NLRA)

- **Enacted in 1935.**
- **Protects the rights of Employees and Employers.**
- **Encourages collective bargaining.**
- **Curtails certain private sector labor and management practices which can harm the general welfare of workers, businesses and the U.S. economy.**

NLRA: RIGHTS OF EMPLOYEES

NLRA, Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

NATIONAL LABOR RELATIONS BOARD

- **Administers and Enforces the NLRA.**
- **Board Members appointed by the President/confirmed by the Senate (overlapping five-year terms).**
- **General Counsel represents the Board and enforces the law. Appointed by President/confirmed by the Senate (four-year term).**
- **Regional Offices: Regional Directors and Regional Attorneys.**

NLRB REPRESENTATIONAL ELECTIONS

- **Petition for Certification**
 - Filed by Employees (“RC”)
 - Filed by Employer (“RM”)
 - Showing of Interest (“30%”)
 - At or near peak employment.
 - No Election Bars (no valid election within the previous 12 months; no contract in effect).
- **Petition for Decertification**
 - Filed by Employees (“RD”)
 - Filed by Employer (“RM”)
 - Same Showing of Interest/Peak requirements.

NLRB REPRESENTATIONAL ELECTIONS cont.

- **Compare with:**
 - **Voluntary Recognition**
 - Employer voluntarily recognizes union based on a card check.
 - **Withdrawal of Recognition**
 - Employer refuses to bargain based upon proof that union actually lost support of the majority of Employees.
 - Risky—invites an unfair labor practice charge.
 - **Petition to Deauthorize (“UD”)**
 - Employees covered by a collective bargaining agreement seek an election to revoke the union security clause requiring union membership to work for the Employer.

NLRB REPRESENTATIONAL ELECTIONS cont.

- **Bargaining Units...*factors considered:***
 - **Integration and interchangeability among employees;**
 - **Common working conditions and supervision;**
 - **Bargaining history within the unit and industry; and**
 - **Extent of union organizing and desires of employees themselves.**

NLRB REPRESENTATIONAL ELECTIONS cont.

- **Election Procedures:**
 - **Petitions filed with Regional Office.**
 - **Employer response must include list of Employees working in payroll period immediately preceding the filing of the petition.**
 - **Regional Director makes all determinations.**
 - **Parties may file Requests for Review with Board.**
 - ***Excelsior* List (names, addresses, jobs).**
 - **Pre-Election Hearing (time/place/observers).**
 - **Consent Election Agreements.**
 - **Elections generally conducted within 45-60 days.**

NLRB REPRESENTATIONAL ELECTIONS cont.

- **Post-Election Procedures:**
 - **Challenged Ballots**
 - **Objections to Election**
 - **Laboratory Conditions**
 - **Board Agent Misconduct**
 - **Party Misconduct**
 - **Post-Election Hearings**
 - **May involve Challenges, Objections and any related unfair labor practice charges.**
 - **Request for Review to Board**
 - **No appeal to courts**

NLRB UNFAIR LABOR PRACTICES

- **By an Employer:**
 - **To interfere with, restrain or coerce Employees in the exercise of their rights.**
 - **To dominate or interfere with the formation of any union or contribute financial or other support to it.**
 - **To discriminate in hiring or employment to encourage or discourage union membership.**
 - **To discriminate because an Employee has filed charges or given testimony.**
 - **To refuse to bargain with a certified union.**

NLRB UNFAIR LABOR PRACTICES cont.

- **By a Union:**
 - To restrain or coerce Employees in the exercise of their rights, however, unions may prescribe membership rules.
 - To restrain or coerce Employers in their choice of their bargaining representatives.
 - To cause or attempt to cause an Employer to discriminate against an Employee because of membership (or non-membership) in a union, except when based on non-payment of union dues/fees.
 - To refuse to bargain with the Employer.

NLRB UNFAIR LABOR PRACTICES cont.

- **By a Union (cont.):**
 - **To engage in, or to induce or encourage (or threaten, coerce or restrain) any person employed by another employer to strike or refuse to work where the object is:**
 - **Forcing an employer to reach an agreement refuse to handle the products of another employer (“Hot Cargo Agreement”).**
 - **Forcing another person to refuse using, selling, handling, transporting an Employer’s products (“Secondary Boycott”)**
 - **To force an Employer to bargain with it despite another union being the certified representative.**
 - **To force an Employer to assign work to Employees in one union instead of Employees in another union.**

NLRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Procedures:**
 - **Employees, Unions and Employers may file unfair labor practice charges.**
 - **Regional Office investigates allegations.**
 - **Charging Party must provide sufficient evidence to make a *prima facie* case.**
 - **Respondent will then be asked to respond to the allegations.**
 - **Board Agents prefer to interview witnesses and take affidavits.**

NLRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Procedures (cont.):**
 - **Once an investigation is complete, it is submitted to a Regional “Agenda” meeting involving the investigating Board Agent, the Regional Director, the Regional Attorney, other staff attorneys and agents.**
 - **A determination is made whether to seek additional information, dismiss the charge or issue a Complaint.**

NLRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Procedures (cont.):**
 - **If a decision to issue a Complaint is made, the Respondent will be afforded an opportunity to resolve the case by reaching a settlement.**
 - **If settlement is reached *before* a Complaint is issued, it is an “Informal Settlement” and need not be approved by the Board.**
 - **If reached *after* a Complaint is issued, it is a “Formal Settlement” and must be approved by the Board.**

NLRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Procedures (cont.):**
 - **Hearings conducted before Administrative Law Judges.**
 - **Rules of Evidence.**
 - **General Counsel prosecutes through Regional Attorney.**
 - **Other parties may intervene.**
 - **Briefing and Decision.**
 - **Appeal to Board.**
 - **Request for Review to federal appellate courts.**

NLRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Remedies:**
 - **Backpay (includes all wages and benefits).**
 - **Reinstatement.**
 - **Notice.**
 - **Posting.**
 - **Recognition of the Union.**
 - **Bargaining Orders.**

NLRB: OBLIGATION TO BARGAIN COLLECTIVELY

NLRA, Section 8(d):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession...

AGRICULTURAL LABOR RELATIONS ACT (ALRA)

- **Enacted in 1975.**
- **Protects the rights of Agricultural Employees.**
- **Encourages collective bargaining rights of Agricultural Employees.**
- **Follows the precedents of the NLRA when found applicable to California agriculture.**

ALRA: RIGHTS OF EMPLOYEES

ALRA, Section 1152 provides as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in subdivision (c) of Section 1153.

AGRICULTURAL LABOR RELATIONS BOARD

- **Administers and Enforces the ALRA.**
- **Board Members appointed by the Governor/confirmed by the State Senate (overlapping five-year terms).**
- **General Counsel represents the Board and enforces the law. Appointed by Governor/confirmed by the State Senate (four-year term).**
- **Regional Offices: Regional Directors and Regional Attorneys**

ALRB REPRESENTATIONAL ELECTIONS

- **Access:**
 - **Not provided for under the NLRA.**
 - **Union must file/serve a Notice of Intent to Take Access (“NA”).**
 - **The filing of an NA allows Access to be taken for a 30-day period.**
 - **Four NAs may be filed within a 12-month period.**

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Access (cont.):**
 - **Union's access-takers must wear badges with their name and union affiliation.**
 - **Two access-takers for crews up to 30; with one additional access-taker for every additional increment of 15 employees.**
 - **Up to one hour of access before work, up to one hour during lunch and up to one hour after work.**
 - **Employers illegally disrupting or interfering with lawful access may be charged with unfair labor practices.**
 - **A Motion to Deny Access may be filed to address violations by unions or their representatives.**
 - **Special access rules apply to citrus, dairy, poultry and nursery/floral operations.**

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Notice of Intent to Organize (“NO”):**
 - Distinguish from *Excelsior* lists under NLRA (no election petition need be filed).
 - 10% Showing of Interest.
 - Employer must respond within 5 days regarding the bargaining unit description.
 - Employee job classifications, names and addresses (no P.O. boxes).
 - Also acts as an NA in allowing access.

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Bargaining Unit:**
 - **All Agricultural Employees.**
 - **All job functions combined...no analysis of commonality of interest (NLRB).**
 - **Non-contiguous geographical areas.**

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Petition for Certification:**
 - **May be filed at any time Employer is at half-peak.**
 - **Must be accompanied by a 50% Showing of Interest.**
 - **Employer must respond within 48 hours with list of Employees who worked during the payroll period immediately preceding the filing of the petition.**
 - **Elections conducted within 7 days.**
 - **If Employees are on strike, election conducted within 48 hours.**

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Petition for Decertification:**
 - May be filed at any time Employer is at half-peak.
 - Must be accompanied by a 30% Showing of Interest.
 - Same Employer response time and Electing scheduling as Petition for Certification.
- **Intervention by Rival Unions:**
 - 20% Showing of Interest.

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Farm Labor Contractors:**
 - **Excluded as Employers under the ALRA.**
 - **All FLC Employees are Employees of the Employer.**
 - **All FLC Employee information must be provided within same time limits as direct hire Employees.**
 - **Eligible to vote.**

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Pre-Election Procedure:**
 - **Regional Director determines whether Employer is at half-peak, whether Showing of Interest is met and what the appropriate Bargaining Unit is.**
 - **Election Bars (valid election within last 12 months, valid contract in effect, unfair labor practice charges)**
 - **Pre-Election Hearing: Time and Place of Election.**
 - **Each party selects Election Observers.**

ALRB REPRESENTATIONAL ELECTIONS cont.

- **Post-Election Procedures:**
 - **Challenged Ballots (if outcome determinative).**
 - **Objections to Election.**
 - **Must be filed within 5 days of the Election.**
 - **Must be accompanied by proof and/or affidavits.**
 - **Post-Election Hearing.**
 - **May be combined for Challenges, Objections and any related unfair labor practice charges.**
 - **A Request for Review to the Board may be taken, but no appeal to courts.**
 - **ALRB may dismiss a decertification petition or certify a labor organization based upon employer misconduct that it determines will “render slight” the chances of a new election that is “free and fair.”**

ALRB UNFAIR LABOR PRACTICES

- **By an Employer:**
 - **To interfere with, restrain or coerce Agricultural Employees in the exercise of their rights.**
 - **To dominate or interfere with the formation of any union or contribute financial or other support to it.**
 - **To discriminate in hiring or employment to encourage or discourage union membership.**
 - **To discriminate because an Employee has filed charges or given testimony.**
 - **To refuse to bargain with a certified union.**
 - **To voluntarily recognize any union not certified by the Board.**

ALRB UNFAIR LABOR PRACTICES cont.

- **By a Union:**
 - **To restrain or coerce Employees in the exercise of their rights, however, unions may prescribe membership rules.**
 - **To restrain or coerce Employers in their choice of their bargaining representatives.**
 - **To cause or attempt to cause an Employer to discriminate against an Employee because of membership (or non-membership) in a union, except when based on non-payment of union dues/fees.**
 - **To refuse to bargain with the Employer.**

ALRB UNFAIR LABOR PRACTICES cont.

- **By a Union (cont.):**
 - To engage in, or to induce or encourage (or threaten, coerce or restrain) any person employed by another employer to strike or refuse to work where the object is:
 - Forcing an Employer to reach an agreement refuse to handle the products of another employer (“Hot Cargo Agreement”), *except when the other employer is a supplier of ingredients for the Employer’s products or relating to contracting or subcontracting of work.*
 - Forcing another person to refuse using, selling, handling, transporting an Employer’s products.
 - To force an Employer to bargain with it despite another union being the certified representative.
 - To force an Employer to assign work to Employees in one union instead of Employees in another union.
 - *However, unlike the NLRA, the ALRA allows for secondary activity (picketing, do-not-buy campaigns, boycotts) against an Agricultural Employer’s products.*

ALRB UNFAIR LABOR PRACTICES cont.

- **By a Union (cont.):**
 - **To picket, or threaten to picket, an Employer where the object is to force or require the Employer to recognize or bargain with the Union.**

ALRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Procedures:**
 - **Employees, Unions and Employers may file unfair labor practice charges.**
 - **Regional Office investigates allegations.**
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 - **Respondent will then be asked to respond to the allegations.**
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 - **If settlement is reached *before* a Complaint is issued, it is an “Informal Settlement” and need not be approved by the Board.**
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ALRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Procedures (cont.):**
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ALRB UNFAIR LABOR PRACTICES cont.

- **Unfair Labor Practice Remedies:**
 - **Backpay (includes all wages and benefits).**
 - **Reinstatement.**
 - **Notice.**
 - **Posting.**
 - **Reading.**
 - **Bargaining Orders.**
 - **Make-Whole (failure to bargain).**
 - **Interim court orders to enjoin unfair labor practices.**

ALRB: OBLIGATION TO BARGAIN COLLECTIVELY

ALRA, Section 1155.2(a):

For purposes of this part, to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

ALRB: MANDATORY MEDIATION AND CONCILIATION

- **For unions certified before January 1, 2003 when no collective bargaining agreement has been reached.**
 - **Request for Mediation may be filed 90 days after a renewed demand to bargain.**
 - **No agreement has been reached.**
 - **The Employer has committed an unfair labor practice.**

ALRB: MANDATORY MEDIATION AND CONCILIATION cont.

- **For unions certified after January 1, 2003.**
 - **Request for Mediation may be filed 90 days after initial demand to bargain and no agreement has been reached. The Employer need not have committed an unfair labor practice.**
 - **In the event the ALRB dismisses a decertification petition or a certification order based on a finding the employer engaged in unlawful conduct during the election, the Request may be filed within 60 days after the ALRB acts.**
 - **Employer must have 25 or more Employees.**
 - **Three days to respond.**

ALRB: MANDATORY MEDIATION AND CONCILIATION cont.

- **If Board determines all conditions are met, the parties will be directed to select a Mediator from the State Conciliation and Mediation Service.**
- **If a question is presented as to whether all conditions for mediation are met, the Board will order an expedited hearing.**
- **Mediation costs are borne equally between the parties.**
- **Parties submit their positions and evidentiary support to the Mediator during a formal hearing (not really a “mediation”).**

ALRB: MANDATORY MEDIATION AND CONCILIATION cont.

- **Each party is permitted to subpoena witnesses and documents...including other employers who compete against the Employer.**
- **Mediation is intended to be completed within 30 days, but may be extended for an additional 30 days by the Mediator.**
- **Mediator files report with the Board.**
- **Board can accept the Mediator's determinations or make it's own determination as to what the terms of the collective bargaining agreement shall be.**
- **Writs for Review may be filed with California appellate courts.**

ALRB: MANDATORY MEDIATION AND CONCILIATION cont.

- **Factors considered by Mediator and/or Board:**
 - **The stipulations of the parties.**
 - **The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer makes a plea of inability to meet the union's wage and benefit demands.**
 - **A comparison of corresponding wages, benefits, and terms and conditions of employment in collective bargaining agreements covering similar agricultural operations with similar labor requirements.**

ALRB: MANDATORY MEDIATION AND CONCILIATION cont.

- **Factors considered by Mediator and/or Board (cont.):**
 - **Comparison of corresponding wages, benefits, and terms and conditions of employment in comparable firms or industries in geographical areas with similar economic conditions, considering the size of the employer, the skills, experience, and training required of the employees, as well as the difficulty and nature of the work.**
 - **The average consumer prices for goods and services, commonly known as the Consumer Price Index, and the overall cost of living in the area where the work is performed.**

SECTION II: WAGE AND HOUR LAWS

- **Federal:**
 - **Fair Labor Standards Act (FLSA).**
 - **Enforced by the Department of Labor (DOL).**
- **California:**
 - **California Labor Code.**
 - **Wage Orders of the Industrial Wage Commission (IWC).**
 - **Enforced by the Labor Commissioner and the Department of Labor Standards Enforcement (DLSE).**

FAIR LABOR STANDARDS ACT (FLSA)

- **Uniformly applies to all industries in the United States.**
- **Minimum Wage**
 - **\$6.55 effective July 24, 2008.**
 - **\$7.25 effective July 24, 2009.**
- **Overtime**
 - **Overtime for all work in excess of 40 hours in a week.**
 - **No Daily Overtime.**
 - **Overtime must be compensated at no less than one and one-half times the regular rate of pay**

FLSA: EXEMPTIONS

- **Agriculture**
 - **Exempt from Overtime provisions.**
 - **Primary and Non-Commercial Secondary Agricultural Operations.**
- **Executive**
- **Administrative**
- **Professional**
- **Outside Sales**

FLSA: EXEMPTIONS cont.

- **Salary and Duties Tests:**
 - **Salary Test:**
 - **Salary Level:** For most Employees, the minimum salary level to qualify for the exemption is \$455.00 per week/\$1971.66 per month.
 - **Highly Compensated Test:** At least \$100,000 per year. Not available for non-management employees or employees who perform repetitive physical work.
 - **Total Annual Compensation** includes all non-discretionary bonuses and commissions.
 - **Salary Basis Test:** Regularly receives a predetermined amount of compensation.

FLSA: EXEMPTIONS cont.

- **Salary and Duties Tests (cont.):**
 - **Duties Test:**
 - **Executive:**
 - **Primary duty is management of the enterprise or a customarily recognized department or subdivision.**
 - **Customarily and regularly directs the work of two or more employees.**
 - **Has the authority to hire or fire or whose suggestions or recommendations are given particular weight with regard to hiring, firing, advancement, promotion, demotion or other change of status of other employees.**

FLSA: EXEMPTIONS cont.

- **Salary and Duties Tests (cont.):**
 - **Duties Test (cont.):**
 - **Administrative:**
 - **Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the Employer or the Employer's customers; and**
 - **Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.**
 - **Example: Would include Human Resource Managers.**

FLSA: EXEMPTIONS cont.

- **Salary and Duties Tests (cont.):**
 - **Duties Test (cont.):**
 - **Professionals:**
 - Primary duty must be the performance of work requiring advanced knowledge.
 - In a field of science or learning.
 - Customarily acquired by a prolonged course of specialized intellectual instruction.
 - **Outside Sales:**
 - Primary sales work must be performed away from the office a majority of the time.

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **Wage Orders issued for various occupations and industries.**
- **Minimum Wage: \$8.00 per hour.**
 - July 1, 2014: \$9.00 per hour
 - January 1, 2016: \$10.00 per hour
- **Main Wage Orders affecting Agriculture:**
 - No. 8-2001: Industries Handling Products After Harvest.
 - No. 13-2001: Industries Preparing Agricultural Products for Market, on the Farm.
 - No. 14-2001: Agricultural Operations.

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **IWC No. 8-2001: Industries Handling Products After Harvest:**
 - **Applies to Commercial Secondary Agricultural Operations.**
 - **Overtime after 8 hours in a day and 40 hours in a week. Double-time after 12 hours in a day or after the first 8 hours on the seventh consecutive day.**
 - **Mandatory “day-off” after 72 hours (certain jobs in grape, tree fruit and cotton ginning exempt).**
 - **Allows for “Alternative Work Week” of four ten-hour days without incurring daily overtime. Requires two-thirds approval by Employees.**

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **IWC No. 13-2001: Industries Preparing Agricultural Products for Market, on the Farm.**
 - **Applies to Non-Commercial Secondary Agricultural Operations.**
 - **Overtime after 8 hours in a day and 40 hours in a week. Double-time after 12 hours in a day or after the first 8 hours on the seventh consecutive day.**
 - **All work in excess of 72 hours in a week shall be on a voluntary basis.**
 - **Allows for “Alternative Work Week” of four ten-hour days without incurring daily overtime. Requires two-thirds approval by Employees.**

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **IWC No. 14-2001: Agricultural Operations.**
 - **Applies to all Primary Agricultural Operations.**
 - **Overtime after 10 hours in a day or more than 6 days in a week (*not* after 60 hours in a week).**
 - **Double-time after the first 8 hours on the seventh day.**
 - **Irrigators (more than half their time in any week) are exempt from overtime.**

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **Meal Periods:**
 - Unpaid 30 minutes after 5 hours of work.
 - IWC No 14-2001: “Authorize and Permit”
 - All other Wage Orders: “No employer shall employ...”
 - If work will be completed within 6 hours, meal period may be waived by mutual consent.
 - Several cases before the California Supreme Court.
 - Must be documented on time sheet or cards.

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **Rest Periods:**
 - **10 minutes every 4 hours of work.**
 - **Timed to be taken at or near middle of the 4 hours “insofar as practical.”**
 - **May not be stacked (ie., 20 minutes in the afternoon).**
 - **No requirement to record on time sheet or cards.**
 - **Several cases before the California Supreme court.**

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **Reporting Time Pay:**
 - **If Employee is required to report for work and does report, but is either not put to work or is furnished with less than half the normal day's work, the Employee shall be paid for half the normal day's work, but in no event than for less than 2 hours nor more than 4 hours of pay.**
 - **At least two hours of pay if required to report a second time on the same day.**
 - **Exceptions for civil emergencies, utility failure or Acts of God.**

INDUSTRIAL WELFARE COMMISSION WAGE ORDERS

- **Standby Time:**
 - **Employees must be compensated if they are expected to remain available to work at the worksite.**
 - **Employees must be compensated if they are not fully released even though they are offsite.**
 - **Legal and possibly a legislative issue as to whether base hourly or average hourly pay (if paid by piece-rate) is to be paid.**

CALIFORNIA WAGE AND HOUR

- **Vacation Pay:**
 - Not required by law, but if provided, there are legal requirements.
 - Same as wages once accrued, and must be paid in the same manner.
 - Accrued vacation may not be forfeited (no “use it or lose it”)
 - Caps on accrual of vacation are legal.

CALIFORNIA WAGE AND HOUR

- **Pay Upon Termination of Employment:**
 - **If the Employee is discharged, all wages due (including accrued vacation) must be paid immediately.**
 - **If the Employee quits or is seasonally laid off, all wages must be paid within 72 hours.**
 - **No deductions or offsets without a written agreement, and no acceleration of debt.**
 - **Penalty: Up to 30 days of pay.**

LABOR COMMISSIONER

- **Handles all wage claims under California law.**
- **Conciliation: Attempts to help the parties resolve any wage claims before a hearing is conducted.**
- **Hearing: Conducts the hearing, takes evidence and testimony from the parties and issues a ruling.**
- **Decision can be enforced through courts.**
- **No “appeal” but a trial *de novo* may be sought in Superior Court after posting any judgment amount. If an Employee prevails (even in a lesser amount than granted by the Labor Commissioner), the Employer must pay the Employee’s attorney fees.**
- **Illegal to retaliate against an Employee making a claim or giving testimony as a witness.**

WAGE AND HOUR LAWSUITS

- **Federal Court if violations of FLSA are cited.**
- **State Court under either the Labor Code and/or the Business & Professions Code.**
 - **Private Attorney General Actions (“PAGA”): Extend statute of limitations to four years and incorporate attorneys’ fees as recoverable.**

SECTION III: DISCRIMINATION

- **Federal Law:**
 - Title VII.
 - Americans With Disabilities Act (ADA).
 - Age Discrimination in Employment Act (ADEA).
 - Pregnancy Discrimination Act (PDA).
 - Equal Pay Act (EPA).
 - Enforced by the Equal Employment Opportunity Commission (EEOC)
- **California Law: Fair Employment and Housing Act (FEHA).**
 - Enforced by the Department of Fair Employment & Housing (DFEH)

FEDERAL DISCRIMINATION

- **Title VII of the Civil Rights Act:**
 - Unlawful to discriminate against any individual in regard to recruiting, hiring and promotion, transfer, work assignments, performance measurements, the work environment, job training, discipline and discharge, wages and benefits, or any other term, condition, or privilege of employment.
 - Race
 - Sex
 - National Origin
 - Religion

FEDERAL DISCRIMINATION cont.

- **Title VII of the Civil Rights Act (cont.):**
 - **Sexual Harassment:**
 - **Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.**
 - **Strict Liability of Employer if engaged in by Supervisor upon an Employee.**

FEDERAL DISCRIMINATION cont.

- **Americans With Disabilities Act (ADA):**
 - **An individual with a disability is a person who:**
 - **Has a physical or mental impairment that substantially limits one or more major life activities;**
 - **Has a record of such an impairment; or**
 - **Is regarded as having such an impairment**
 - **Reasonable Accommodation**

FEDERAL DISCRIMINATION

cont.

- **Age Discrimination in Employment Act (ADEA):**
 - **Unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.**
 - **40 years or older.**

FEDERAL DISCRIMINATION cont.

- **Pregnancy Discrimination Act (PDA):**
 - **An employer cannot refuse to hire a pregnant woman because of her pregnancy, because of a pregnancy-related condition or because of the prejudices of co-workers, clients, or customers.**
 - **Treated as a form of Sex Discrimination.**

FEDERAL DISCRIMINATION cont.

- **Equal Pay Act (EPA):**
 - **Employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.**
 - **Job content; not job titles**
 - **Lilly Ledbetter Act (statute of limitations)**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

- **Filing with EEOC also constitutes filing with California DFEH (and *vice versa*)**
- **Oakland and Los Angeles Regional Offices cover most of California's growing regions.**
- **Conciliation**
- **Prosecution/Class Actions**
- **Right to Sue letters.**

CALIFORNIA FAIR EMPLOYMENT & HOUSING ACT

- **Prohibits all forms of discrimination in employment including hiring, termination advancement, promotion, demotion and other terms and conditions of employment.**
- **Based on all protected classes enforced by federal EEOC, plus sexual orientation.**
- **Also prohibits sexual harassment.**
- **No limit on damages for emotional distress.**

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING (DFEH)

- **Filing with DFEH also constitutes filing with EEOC.**
- **Right to Sue letters.**
- **Less likely to prosecute compared with EEOC.**
- **Favored by private plaintiffs' law firms due to no cap on emotional distress damages.**

DIFFERENCES BETWEEN EEOC AND DFEH PROCEDURES

- **EEOC claims must be filed within 300 days. DFEH claims must be filed within one year.**
- **Lawsuit must be filed within 90 days of a “right to sue” letter under the EEOC process, or one year under the DFEH process.**
- **Federal law caps damage awards for compensatory and punitive damages based on number of employees. California law does not.**

SECTION IV: LEAVES OF ABSENCE

- **Family and Medical Leave Act**
- **California Family Rights Act**
- **Americans with Disabilities Act**
- **California's Fair Employment & Housing Act**
- **California's Pregnancy Disability Leave**
- **California's Paid Family Leave**
- **California's Workers' Compensation**

FAMILY AND MEDICAL LEAVE ACT

Basic Purpose

Provide eligible employees with leave to:

Care for a family member with a serious health condition;

Deal with the employee's own serious health condition; or

To bond with a new child, whether a newborn, adopted, or foster child.

FAMILY AND MEDICAL LEAVE ACT cont.

Covered Employer

50 or more employees for at least 20 workweeks in the current year, or in the preceding year

Note: a covered employer remains covered until it has less than 50 employees 20 workweeks in the current or preceding year. Example - an employer has 50 employees from January 1, 2007, through December 31, 2007, but then reduces its work force to 35 employees on January 1, 2008. It is still covered by the FMLA until January 1, 2009.

FAMILY AND MEDICAL LEAVE ACT cont.

Covered Employee

- **Employed for “at least” 12 months**
- **Worked 1,250 hours within the previous twelve 12 months**

Actual hours worked (e.g., overtime, but not vacation)

Exempt employees are presumed to have worked 1,250 hours in 12 months

- **Works as a site where there the employer has 50 or more employees within 75 road miles**

FAMILY AND MEDICAL LEAVE ACT cont.

Reasons for Leave

- The birth of a child;
- The adoption or foster care placement of a child with the employee;
- Care for a spouse, child, or parent with a serious health condition; and/or
- The employee's own serious health condition which makes the employee unable to perform the essential functions of the position
- “Qualifying exigency” or leave to care for an injured service member

FAMILY AND MEDICAL LEAVE ACT cont.

Reasons for Leave cont.

National Defense Authorization Act of Fiscal Year 2008

First expansion of FMLA since originally enacted in 1993. expands the FMLA in two ways, by granting:

- 1. Leave for a “Qualifying Exigency;” and**
- 2. Leave to Care for Injured Service Member.**

FAMILY AND MEDICAL LEAVE ACT cont.

Reasons for Leave cont.

National Defense Authorization Act of Fiscal Year 2008

“Qualifying Exigency” examples:

- **Short notice deployment (employee receives seven (7) or less days of notice to deploy). Such leave is limited to seven (7) calendar days.**
- **Military events and related activities. Official ceremonies or programs related to active duty or to attend family support or assistance programs.**
- **Childcare and School activities.**

FAMILY AND MEDICAL LEAVE ACT cont.

Reasons for Leave cont.

National Defense Authorization Act of Fiscal Year 2008

- **Financial and Legal arrangements.**
- **Counseling.** To attend counseling for oneself, the covered military member or a child, by other than a health-care provider, for purpose of dealing with a mental or physical disability.
- **Rest and Recuperation.** Up to five (5) days leave to spend with a covered military member who is on short-term R&R during a period of deployment.
- **Post-Deployment Activities.**
- **Any other issue agreed to by employee and employer.**

FAMILY AND MEDICAL LEAVE ACT cont.

Reasons for Leave cont.

“Serious Health Condition”

- **A period of incapacity of more than 3 consecutive calendar days, plus a subsequent period of incapacity for the same condition that results in a continuing course of treatment, such as prescription medications, therapy, etc., but not including things like over-the-counter medications, general exercise, etc.;**
- **Pregnancy (note difference between the state law and the federal law),**

FAMILY AND MEDICAL LEAVE ACT cont.

Reasons for Leave cont.

“Serious Health Condition”

- **Incapacity due to a chronic serious health condition (asthma, diabetes, epilepsy, etc.);**
- **Incapacity due to a long-term condition for which treatment may not be effective (Alzheimer’s, terminal cancer, etc.); and/or**
- **Absences to receive continuing treatments by a health care provider, and to recover from such treatment (chemotherapy, kidney dialysis, radiation treatments, etc.).**

FAMILY AND MEDICAL LEAVE ACT cont.

Duration of Leave

12 workweeks within a designated 12 month period:

Calendar year

Anniversary year

Rolling 12-month period: Looking forward or backward.

**National Defense Authorization
Act of Fiscal Year 2008**

12 weeks for “qualifying exigency”

26 weeks to care for injured service member

FAMILY AND MEDICAL LEAVE ACT cont.

Benefit Continuation During Leave

Employer must maintain employee's insurance coverage under any group health plan for the duration of leave as if still working

Employee must continue to make any co-payment while on leave in order to keep benefits in place

FAMILY AND MEDICAL LEAVE ACT cont.

Reinstatement After Leave

Exceptions

- **Job elimination**
- **Fraud in obtaining leave**
- **Violation of company policy**
- **Key Employee**

California Family Rights Act

[Distinctions from FMLA]

“Covered Employee”

Employee must have been employed for "more than" 12 months, as opposed to “at least” 12 months under the FMLA (technically one more day than FMLA).

Pregnancy and Related Conditions

CFRA regulations expressly exclude pregnancy or related medical conditions from the definition of "serious health condition."

Pregnancy Disability Leave (Calif.)

- 5 or more employees
- No length of employment / minimum hours
- Reasonable period of time, not to exceed 4 months
- Disabled due to pregnancy – unable to perform essential functions of job
- Runs concurrently with FMLA, but not CFRA
- Can take CFRA baby-bonding after PDL
- PDL available for each pregnancy
- No benefit continuation, unless otherwise provided by law or policy;
If an employer provides health benefits, maintain and continue to pay for health insurance coverage for up to four months during PDL
- Reinstatement to job prior to leave

Minimum Amount of “Baby-Bonding” Leave

FMLA: All baby-bonding leave at once

CFRA: 2 week minimum duration, but employer must grant shorter leave at least 2 times in 12 weeks

Registered Domestic Partner

CFRA leave is available for purposes of the serious health condition of a “registered domestic partner”

Does not run with FMLA

Can lead to 12 weeks of CFRA leave for the domestic partner, followed by 12 weeks of FMLA leave for the employee

Employer Designation of Leave

FMLA:

Oral or written notice within 5 business days

CFRA:

Written notice within 10 business days

FMLA is more beneficial to employee, so follow that procedure

EEOC regulation saying if employer does not give notice, leave does not count against allotment. No California rule, but best practice is to always give notice.

Military Spouse Leave (Calif.)

California law (Military and Veterans Code § 395.10) requires employers with 25 or more employees to allow spouses of military personnel to take up to 10 days of unpaid leave when their spouse is on leave from deployment to a designated combat zone, or deployment during a period of military conflict.

Must be regularly scheduled to work at least 20 hours per week.

Must provide notice within two business days of receiving official notice that the employee's spouse will be on leave from deployment. The employee also must provide the employer with written documentation certifying the spouse will be on leave from deployment.

Paid Family Leave (Calif.)

All employees who contribute to the State Disability Insurance (“SDI”) fund

No 50 employee requirement

No minimum employment required (either year or hours)

No reinstatement rights or benefit continuation rights, unless by other statute or employer policy

Paid Family Leave (Calif.) cont.

Up to 6 weeks of PFL, within the employer's designated twelve month family leave period

“To bond with a minor child within the first year of the child's birth or placement in connection with foster care or adoption,”

or

“To care for a child, parent, spouse, or domestic partner who has a serious health condition.”

“Serious health condition” is defined using CFRA definition

Paid Family Leave (Calif.) cont.

Waiting period of 7 consecutive days before the employee is entitled to receive paid leave benefits

Employer may require employee to use up to 2 weeks of accrued but unused paid vacation, prior to the employee being able to take PFL

In such a case, the vacation time will include the seven-day initial waiting period

Paid Family Leave (Calif.) cont.

Employee is not eligible to receive PFL benefits if:

He or she is receiving, or is entitled to receive, unemployment insurance benefits or SDI benefits

or

Another family member is ready, willing and able to provide care for the ill family member

“Kin” Care

- Only prerequisites are the employer’s policy with regard to using sick leave – e.g., initial 6 months’ of service, etc.
- Employee can utilize kin care as a way to make a portion of his or her CFRA or FMLA leave paid
- Employee can utilize kin care to cover some, or all, of the waiting period prior to PFL benefits

Americans with Disabilities Act and Fair Employment & Housing Act

Main purpose of the disability statutes (ADA and FEHA) is to:

- Require an employer to engage in an “interactive process”**
- With a “disabled” employee**
- To determine whether there are any “reasonable accommodations”**
- That will enable the employee to perform the “essential functions” of his or her job**

Americans with Disabilities Act and Fair Employment & Housing Act cont.

Covered Employers:

ADA – 15 or more employees

FEHA – 5 or more employees

Americans with Disabilities Act and Fair Employment & Housing Act cont.

“Disability”

ADA – an impairment that “substantially limits” a “major life activity” or “major bodily function”

FEHA – an impairment that “limits” a “major life activity”

A major life activity is "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

A major bodily function is “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

Americans with Disabilities Act and Fair Employment & Housing Act cont.

“Disability” cont.

“Record of Impairment”

The employee has “a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”

“Regarded As”

An impairment that does not substantially limit , but is treated as if it does.

Has an impairment only because of others’ attitudes toward impairments.

Has no impairment but is treated as having one.

Americans with Disabilities Act and Fair Employment & Housing Act cont.

Americans with Disabilities Act Amendments Act of 2008

The ADAAMA went into effect on January 1, 2009 increasing the number of disabled people under the ADA.

The ADAAMA makes several significant changes, including:

The “substantially limits” definition will be construed less strictly;

The “major life activities” definition is expanded to include “major bodily functions;”

“Mitigating measures” are not to be considered; and

The definition of being “regarded as” disabled is expanded.

Americans with Disabilities Act and Fair Employment & Housing Act cont.

"Essential Functions"

- “Essential functions” are those that are the main purpose of the job**
- If the employer does not think the function is essential enough to include in a job description, it is probably not essential**
- Have and update your job descriptions**

Americans with Disabilities Act and Fair Employment & Housing Act cont.

"Reasonable Accommodation"

- **Fact specific inquiry**
- **No stereotypes**
- **Interactive process**
- **Up to date medical information**

Americans with Disabilities Act and Fair Employment & Housing Act cont.

"Undue Hardship"

“Undue hardship” is defined as “an action requiring significant difficulty or expense.”

The statutes delineate factors to consider:

- **Cost;**
- **Financial resources of the employer;**
- **Size of the business; and**
- **Type of business**

WORKERS' COMPENSATION

Basic Purpose

To deliver relatively quick compensation to employees who suffer injury or death arising out of and in the course of their employment.

For its part of this "compensation bargain," the employer is immunized from a civil action in which the employee might obtain a much larger recovery

WORKERS' COMPENSATION cont.

Workers' Compensation Insurance is mandatory.

Generally speaking, all “employees” are entitled to workers' compensation coverage. WCAB resolves doubts in favor of finding covered employment.

“Industrial” injuries are covered by workers' compensation insurance. Industrial injuries are those "arising out of and occurring in the course of employment (AOE/COE)."

WORKERS' COMPENSATION cont.

Benefits

Temporary Disability – wage replacement while recovering

Permanent Disability- compensation for reduction of ability to compete in labor market

Medical Treatment – all treatment reasonably required to treat injury

Vocational Rehabilitation – currently vouchers for job training when employee cannot return to his or her job, but can do other work

WORKERS' COMPENSATION cont.

132a Discrimination

Most frequently arises when an employer must make a decision with regard to an employee who has been on an extended leave of absence due to an industrial injury.

Remedies:

- 50% increase in benefits paid, up to \$10,000;**
- Costs up to \$250;**
- Lost wages and work benefits; and**
- Reinstatement**

QUESTIONS?