



# The Green Law Group, LLP

Construction and Business Attorneys

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## **Defining the Employment Relationship**

California labor and employment laws can be confusing and difficult to navigate for employers and business owners. The bulk of employment regulations are designed to protect employees' rights and will *heavily* favor the employee in disputes arising from their selection, employment, or termination.

There is no way to guarantee that your business will not face lawsuits from applicants, current employees or past employees. However, there are several steps an employer can take to minimize the risk of being sued.

### **Use Accurate Job Descriptions**

A consistent risk reduction tool across business practices is the creation and safekeeping of proper documentation because legal disputes require scrutiny by strangers who were not present at the time of the events. Employment documentation begins with an accurate written job description. A job description should include the essential duties and minimum qualifications of the position. It is important to avoid overly broad or vague descriptions and limit the described duties to the ones the employee will *actually perform*. Accurate job descriptions are useful to determine whether an employee should be paid as exempt or non-exempt, whether a disabled employee can perform the essential functions of the job, as a basis for employee recruitment, as an outline for interviews, to help defend workers compensation audits, and to evaluate challenges to different pay scales for different employees.

### **Use an Employee Handbook or Manual**

Disciplining an employee is rarely an easy decision. However, by having clear policies and procedures in place, an employer can make sure that discipline is administered in a consistent and predictable manner. For this to happen, it is important that each employee receives a copy of the handbook (and signs an acknowledgement of receipt) and that policies in the handbook are actually followed.

For example, a handbook may identify certain behaviors that call for progressive discipline, beginning with a written or verbal warning, and other behaviors that are cause for immediate termination. If an employee violates a policy calling for a warning, it is important that the employee actually receive the warning before more severe disciplinary action is taken.

Another advantage to using a handbook or manual is that it can provide information about employees' rights and benefits. The California Labor Code *requires* employers to provide employees with written information regarding several rights and benefits, such as the right to be free from harassment, discrimination, and retaliation. A properly drafted



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manual can be used to provide many of these notices. Handbooks can also include dispute resolution procedures that allow employees to address grievances quickly, and provide policies that help employers limit liability against claims that could have been solved if the employee had used the available remedy.

Employers must also take measures to prevent discrimination and harassment in the workplace on any illegal basis, including gender, race, sexual orientation, HIV status, disabilities, national origin, language, pregnancy and age.

### **Carefully Analyze Pay Plans**

Wage and hour laws are very complicated, especially if they use incentive structures involving commissions, piece rate, or bonuses. Employees cannot be treated as exempt from overtime and recordkeeping requirements solely based on a salary pay basis. Not only must the salary pay basis be fixed without deductions for most types of partial workweek absences, but the employee's primary (more than 50% of work time) tasks must fall within one of the very specific legal exemption categories. Furthermore, paid vacation and some other entitlements can qualify as "wages" which must be paid on the day an employee is terminated and cannot be forfeited. Wage and hour mistakes are often easy for employees to prove, and are attractive to plaintiffs' attorneys.

### **Employee Leaves Must Be Deliberately Managed**

Depending on the size of your workforce and the jurisdictions in which they work your business may be subject to over twenty employee leave laws. Some required leaves are paid, some are unpaid, and some only apply in specific circumstances. During some leaves an employer is not allowed to require a doctor's note, and during other types of leaves an employer should request the treating doctor's opinion of the employee's ability to perform the essential functions of the job. Some medical leave laws require employers to give time off not only for the employee's own medical leave, but that of family members as well.

### **Terminations Must Be Carefully Managed**

When an employee is terminated all earned but unpaid wages must be paid the same day. Additionally, in most situations it is wise to offer a severance agreement that obtains a release in exchange for a modest payment, even if no wrongdoing occurred. Special language and timing must be followed if the employee is 40 or older.

### **Consider Arbitration Agreements**

Defending employee claims or lawsuits can be very costly and time-consuming. One option available to employers to mitigate these risks is to enter into arbitration agreements with employees. Arbitration is an alternative method of resolving disputes using a private decision maker outside of court.



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Defending a case in arbitration is usually much less expensive than defending in court. Yet another advantage – unlike a trial – arbitration is essentially a private procedure, so that if the parties desire privacy then the dispute and the resolution can be kept confidential unless the award must be enforced in court.

An effective arbitration agreement should be contained in a separate document from other employment paperwork and should be understood and signed by both the employer and employee. It should identify which arbitration service and rules will be used if a dispute arises, and the employee must be allowed time to review it before signing. An employer *can* make a job offer to an applicant contingent on signing an arbitration agreement. An employer should not force existing employees to sign arbitration agreements, but could offer paid days off or other bonus compensation to existing employees in exchange for signing an agreement.

The law surrounding arbitration agreements changes rapidly, and in some situations they should not be implemented, such as with a unionized workforce or during union organizing disputes. Additionally, employment documents must be provided in the language spoken by the employee.

### **Prevention is Far Less Expensive Than Cure**

The Green Law Group offers a complete human resources package as part of our employment law services. Services available include an arbitration agreement, sample hiring forms and required disclosures and an employee handbook tailored to meet your business' specific needs. The Green Law Group can also assist with preparing job descriptions, offer letters, commission agreements, employment contracts, severance agreements, internal investigations into workplace complaints, and negotiation and defense of claims and litigation.

If you have any questions or comments regarding this article, please do not hesitate to contact Daniel Spurgeon at The Green Law Group, LLP.

*Please note that this article is only intended to provide some general educational information. For your particular legal questions, be sure and consult with an attorney.*

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