



Summary of Employment Requirements for California Winegrape Growers



VINEYARD TEAM

**Published for: Vineyard Team
Produced by: Farm Employers Labor Service (FELS®)
2014 Edition**

Summary of Employment Requirements for California Agricultural Employers

Introduction

This publication is designed to give agricultural employers in California a handy reference to the major employment laws and regulations reviewed by federal and state enforcement agencies during compliance inspections. Selected other requirements are also covered.

This publication, however, does not provide a comprehensive review of all laws and regulations affecting labor and employment. Issues such as taxation, and agricultural labor relations, for example, are not addressed.

Internet access to employment-related information is available at these Web sites:

California Web Sites

California Code of Regulations	http://ccr.oal.ca.gov/
Department of Industrial Relations	http://www.dir.ca.gov/
Employment Development Department	http://www.edd.ca.gov/
Statutory Codes	http://www.leginfo.ca.gov/calaw.html

Federal Web Sites

Code of Federal Regulations	http://www.gpoaccess.gov/cfr/index.html
U.S. Department of Labor	http://www.dol.gov/
Federal Register	http://www.gpoaccess.gov/fr/
U.S. Citizenship & Immigration Services	http://www.uscis.gov/
United States Code	http://www.law.cornell.edu/uscode/
United States Code	http://uscode.house.gov/

While every effort has been made to ensure the information contained in this guide is accurate, laws and regulations, as well as policies and procedures, are subject to change. Therefore, you need to keep up-to-date on developments. You should consult competent legal counsel when complicated questions arise.

This publication is compiled from various reference sources and is designed to provide current and authoritative information on the subjects covered. It is provided with the understanding that the publisher is not engaged in rendering medical, legal, accounting or any other professional service. Farm Employers Labor Service (FELS®) believes the information is correct but assumes no liability for consequential or other damages attendant to the use of this publication. In no event will the liability of FELS for any claim, however designated, exceed this publication's purchase price. No claim may be maintained against FELS in any tribunal unless written notice of the claim is delivered to FELS within 30 days after its discovery.

Copyright 2014 Farm Employers Labor Service (FELS®)
All Rights Reserved. This publication may not be reproduced in whole or in part
without the express written permission of the copyright owner.

Summary of Employment Requirements for California Agricultural Employers

Table of Contents

	<u>Page</u>
Introduction.....	i
Table of Contents.....	ii
Introduction.....	xi
New and Updated Materials.....	xii
Cal/OSHA.....	1
Cal/OSHA Safety and Health Requirements.....	1
Cal/OSHA Consultation Service.....	1
Injury and Illness Reporting.....	1
Injury and Illness Prevention Program.....	1
Field Sanitation.....	1
Definitions.....	1
Alternative Compliance.....	2
Drinking Water Requirements.....	2
Toilet and Handwashing Facilities.....	2
Location.....	2
Maintenance Standards.....	3
Handwashing facilities.....	3
Notice to Employees.....	3
Required Reports.....	3
Recordkeeping.....	3
Weeding, Thinning and Hot-Capping.....	4
Heat-Illness Prevention.....	5
Personal Protective Equipment (PPE).....	7
Tree Work Maintenance or Removal.....	9
Personal Protective Equipment Checklist.....	10
First Aid and CPR.....	10
Cleaning, Repairing, Servicing, and Adjusting Machinery and Equipment.....	10
Operation of Agricultural Equipment.....	11
Transporting of Employees.....	11
Manual Lifting and Carrying.....	11
Tools.....	11
Working at Heights.....	11
Mounted Air Compressors and Air Tanks.....	11
Emergency Action Plan.....	11
Fire Prevention Plan.....	12
Access to Medical and Exposure Information.....	12
Hazard Communication Program.....	12
Respiratory Protection.....	12
Storage of Hazardous Substances.....	13
Top 10 Cal/OSHA Violations in Agricultural Operations.....	13
Other Safety Issues.....	14
Safety Training.....	14
Specific Training Requirements.....	14
Hearing Conservation.....	14
Ergonomics standard.....	14
Tractor Roll Over Protection.....	14
Injury and Illness Prevention Program.....	16
Formula for Improved Injury Prevention.....	18
Steps to Successful Compliance.....	19
Identify the person or persons.....	19
Responsibilities of the Safety Coordinator.....	19
Include a system for ensuring that employees comply.....	19

**Summary of Employment Requirements
for California Agricultural Employers**

Training.	19
Discipline.	20
Recognition.	20
Safety Compliance Program.	20
Communicating with Employees.	20
Identifying and Evaluating Workplace Hazards.	21
Safety Incident Investigation.	21
Training and Instruction.	21
Safety Program Records.	21
Other Safety Records.	22
Pesticides.	23
Pesticide Safety Regulations	23
Employer/Employee Responsibilities	23
Hazard Communication	23
Training.	23
Labels and Other Warnings.	24
Emergency Medical Care.	24
Restricted Entry Interval.	25
Early Entry Requirements	25
Respiratory Protection.	25
Pesticide Postings.	26
Wage-and-Hour Requirements.	28
Minimum Wage.	28
State Exceptions.	28
Credits Against Minimum Wage for Meals and Lodging.	28
Piece Rates.	29
Travel Time.	29
Waiting Time.	29
Preparation Time.	29
Overtime.	29
Federal.	30
State.	30
IWC Order No. 4.	30
IWC Order No. 8	30
IWC Order No. 13	30
IWC Order No. 14	31
Overtime Rules under Order No. 14.	31
Overtime Rules under Order Nos. 4, 8 and 13.	31
Which IWC Order Applies?	31
Working Under Two IWC Orders.	31
Federal Complication.	32
Winery Employment.	32
Cold-Storage Activities.	32
Figuring Overtime Pay.	32
Workweek Defined.	32
Workday Defined.	33
Overtime Exemptions - State.	34
Executive, Administrative or Professional Employees.	34
Executive Exemption.	34
Administrative Exemption.	34
Professional Exemption.	35
Outside Salespersons.	35
Commissioned Inside Salespersons.	35
Truck drivers.	35
Parents, spouse or children.	35
Irrigators.	35
Part-Time Employees.	35
Make-Up Time.	36

Summary of Employment Requirements for California Agricultural Employers

Truck Drivers.	36
Federal Provisions.	36
California Provisions.	37
Weekend or Holiday Overtime.	38
Other Wage-Hour Issues.	38
Split-Shift Premium Pay.	38
Piece Rates and Commissions.	39
Bonuses' Effect on Overtime Pay.	39
Group Rate for Piecework.	40
Non-Piece-Producing Work Time of Piece-Rate Employees.	40
Exempt Salaried Employees - Salary Deductions.	40
Summary of Allowed Salary Deductions.	41
Summary of Unallowed Salary Deductions.	41
Non-Exempt Salaried Employees.	41
Clerical and Office Staff.	42
Mechanics.	42
Housing Employees.	42
<i>Workers' Compensation Premiums.</i>	43
<i>Taxes.</i>	43
Workday and Workweek.	43
Paid Time Off and Hours Worked.	44
Paydays	44
Workers employed by farm labor contractors.	44
Employees boarded and lodged	44
All other agricultural employees.	44
Executive, administrative and professional employees.	44
Payroll Deductions and Offsets Against Wages	44
Lawful Deductions.	44
Garnishment of Wages.	45
Employer May Not Collect or Receive Wages Paid Employee.	45
Self-Help by Employers to Recover Unliquidated Sums.	45
Losses Resulting from Simple Negligence.	45
Discipline as an Alternative.	45
Loss Suffered from an Employee's Dishonest or Willful Act or Gross Negligence.	45
Deductions for Loans Made to Employees.	46
Any Deduction Must be for Direct Benefit of Employee.	46
Specific Deductions.	46
Deductions Allowed By IWC Orders—Caveat.	46
Deduction For Tardiness.	46
Final Pay	47
Discharged or Laid Off.	47
Quitting Employee.	47
Waiting-Time Penalty.	47
Working Conditions.	49
Rest Periods.	49
Meal Periods.	49
Day's Rest.	52
Lactation Accommodation.	52
Reporting-to-Work Pay.	53
Tools.	53
Uniforms.	54
Personal Protective Equipment - Indemnification.	54
Vacations.	55
Holidays.	55
Sick Pay.	55
Severance Pay.	55
Pension Plans.	56
Health Insurance.	56

Summary of Employment Requirements for California Agricultural Employers

Different Health Insurance for Different Employees.	56
Discontinuance of Health Insurance During Workers' Compensation Disability.	56
Leaves of Absence - Time Off From Work.	57
Pregnancy-Disability Leaves.	57
Family and Medical Leave Act and California Family Rights Act.	58
Court Duty.	59
Time Off for Crime Victims.	59
Emergency Duty as a Volunteer Firefighter.	59
Time Off to Participate in a Child's Daycare-Facility or School Activities.	59
Time Off to Appear at School at School's Request.	59
Time Off to Vote.	59
Drug and/or Alcohol Rehabilitation.	59
Literacy Assistance.	60
Temporary Military and/or Reserve Duty Leave.	60
Military-Spouse Leave.	60
Mass Layoff/Plant Closure (WARN Act).	60
Federal WARN Act.	60
Definitions.	61
California WARN Act.	62
Farm Labor Contractors.	65
Responsibilities of a Grower Using a Farm Labor Contractor (FLC).	65
Independent Contractor Reporting.	65
Land-Management Services.	66
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	66
Coverage Under the MSPA.	66
Employer Coverage.	66
Farm Labor Contractor Coverage.	68
Employee Coverage - Migrant or Seasonal Agricultural Workers.	68
Additional Definition of Terms.	69
"Migrant agricultural worker" exemption.	69
"Seasonal or other temporary basis" defined.	69
"Field Work" defined.	69
"Seasonal or other temporary basis" does not include.	69
"Seasonal agricultural worker" does not include.	70
Overview of MSPA Requirements.	70
Joint Employer Relationship.	70
MSPA Requirements for All Entities.	70
MSPA Requirements for Farm Labor Contractors.	71
Contracts for Labor or Services.	71
Penalties.	72
Private Right of Action.	72
Specific Requirements for Farm Labor Contractors.	72
Checklist of Farm Labor Contractor (FLC) Requirements.	72
Employer Tax Registration Requirements.	73
California Employer Identification Number.	73
California Franchise Tax Board.	73
Internal Revenue Service (IRS).	74
Insurance and Bonding Requirements.	74
Workers' Compensation Insurance Coverage.	74
Vehicle Liability Insurance.	74
Farm Labor Contractor Bonding.	74
Farm Labor Contractor Registration and License Requirements.	74
General.	74
Federal Registration.	74
State Farm Labor Contractor License Requirements.	75
State License.	75
Responsibilities of a Grower or FLC Using an FLC.	75
Application.	76

**Summary of Employment Requirements
for California Agricultural Employers**

Farm Labor Contractor Examination.....	78
Continuing Education.....	79
Laws Relating to Farm Labor Contractor Employment of Employees.....	79
FLC Supervisors.....	79
Worker Recruitment.....	79
Statement of Unpaid Wage Judgments.....	79
Grounds for Losing a Farm Labor Contractor License.....	80
Penalties.....	80
Penalties for Failures to Pay Wages.....	80
County Agricultural Commissioner Registration.....	80
Workers' Compensation.....	82
Premiums.....	82
Coverage.....	82
Employee Exclusions.....	82
Responsibilities of Employers.....	82
Reportable Injury.....	83
Notice of Injury by Employee.....	83
Employee Claim Form.....	84
Physician or Chiropractor Designation.....	84
Disability Benefit Payments.....	84
Medical Treatment.....	84
Premium Calculations.....	84
Traveling To or From Work.....	85
Exclusive Remedy; Exceptions.....	85
Serious and Willful Misconduct.....	85
Illegally Employed Minors.....	85
Discrimination - Labor Code Section 132a.....	85
Penalties.....	86
Postings.....	86
Employment Insurance.....	87
Unemployment Insurance.....	87
Covered Employers.....	87
Experience Rating.....	87
Employer Account Number.....	87
Required Records.....	87
Time Limits of Records.....	88
Posting and Notice Requirements.....	88
Written Notice to Employee.....	88
Penalties.....	88
Disability Insurance and Paid Family Leave.....	88
Benefits of California SDI Coverage.....	89
Paid Family Leave Program.....	89
Child Labor.....	91
Work Permits.....	91
Agricultural Zone of Danger.....	91
Child Labor Summary.....	91
Exemption for One's Own Children.....	91
Minimum Age Standards Generally.....	91
Permits to Work and to Employ.....	91
Recordkeeping.....	92
Hours of Work.....	92
Spread of Hours.....	92
Restricted and Hazardous Occupations.....	92
Posting of Notice.....	93
Wages.....	93
Citations and Penalties.....	93
Posting Requirement.....	93
Transportation.....	95

**Summary of Employment Requirements
for California Agricultural Employers**

Transportation of Employees	95
Interstate Commerce Act (ICA) Regulations.	95
Migrant and Seasonal Agricultural Worker Protection Act (MSPA).	95
FLC Transportation of Workers.	95
Vehicles covered under regulations developed by DOL.	96
Exempt vehicles.	96
Rules Which Apply to All Vehicles.	96
Vehicle Insurance Requirements.	96
Vehicle Safety Regulations Developed by the DOL.	96
State Statutes and Regulations.	97
Farm Labor Vehicles.	97
Vehicle Inspections.	97
Vehicle Drivers.	98
Farm Labor Vehicles.	98
Farm Labor Vehicle Equipment.	98
Pickup, Flatbed and Dump Trucks.	100
Trucks.	100
Carrier or Employer Responsibility.	100
Cal/OSHA.	100
Liabilities Relative to Transportation.	101
Tractor-Driver Licensing Requirements.	101
Transporting Employees.	101
Operation on Public Highways.	102
Transportation Provided by Supervisors.	102
Housing.	104
State Coverage.	104
Cal/OSHA Requirement.	104
Fees for Permits and Inspections.	104
Prohibitions.	104
Federal Coverage.	104
Penalties.	105
Credits Against Minimum Wage for Meals and Lodging.	105
Impact of Housing Employees.	105
Evictions; Housing Agreements.	105
Agricultural Labor Relations Act (ALRA).	106
Agricultural Labor Relations Board (ALRB).	106
Coverage under the ALRA.	106
Definitions.	106
Agricultural Employer.	106
Farm Labor Contractor.	106
Supervisor.	106
Agricultural Employees.	107
Union.	107
Concerted Activities.	107
Unfair Labor Practice.	107
Union Elections and Collective Bargaining.	107
Mandatory Mediation Order.	107
Union Access.	107
Unfair Labor Practices.	108
Strikes, Picketing and Economic Boycotts.	109
Remedies for Unfair Labor Practices.	110
ALRB remedies.	110
Discrimination.	111
Discrimination - General Background.	111
Federal.	111
California.	111
Other Laws.	111
Protected Categories and Definitions.	111

Summary of Employment Requirements for California Agricultural Employers

Ancestry, Race, Color and National Origin.	111
Sex Discrimination.	112
Supervisor Harassment Training.	112
Sexual Orientation.	113
Gender Identity Discrimination and Harassment.	113
Pregnancy, Childbirth, and Related Medical Conditions.	113
Marital Status.	113
Age Discrimination.	114
Disabilities.	114
Reasonable Accommodation.	115
Pre-Job-Offer Inquiries.	115
Post-Job-Offer, Pre-Employment Medical Examinations.	115
Employee Examinations.	115
Alcohol and Other Drugs.	115
Religious Discrimination.	116
Discrimination -- Other Laws.	116
Privacy In Employment.	117
Employee's Off-Work Activities.	117
Garnishments.	118
Return to Work Due to Medical Absence.	118
Employers with one or more employees.	118
Employers regularly employing five or more employees.	118
Pregnancy Disability.	118
Reporting Requirements - EEO-1.	120
Applicant Identification Records.	121
Harassment.	121
Types of Sexual Harassment.	122
<i>Quid Pro Quo</i>	122
Hostile or Offensive Work Environment.	122
Duty to Prevent Sexual Harassment by Non-Employees.	122
Notices, Posters, Disclosures and Records.	125
Notices and Disclosures.	125
U.S Department of Labor.	125
Wages and Hours—Federal.	125
Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA).	125
Patient Protection and Affordable Care Act	125
Wage and Hour Regulation—State IWC Orders.	125
Industrial Welfare Commission (IWC).	125
Payday Notice.	126
Statement of Wages.	126
Compensation Notice.	126
Farm Labor Contractor Rate of Compensation.	126
Commissioned Employee - Written Contract Requirement.	126
Migrant and Seasonal Agricultural Worker Protection Act (MSPA).	127
General MSPA Poster.	127
Worker Information.	127
Housing Terms and Conditions.	127
National Labor Relations Act (NLRA) Employee Rights.	127
Employment of Minors.	127
Employment Development Department (EDD).	128
Equal Employment Opportunity is the Law.	128
Equal Employment Opportunity is the Law.	128
Age Discrimination is Against the Law.	128
Family and Medical Leave Act (FMLA).	128
California Fair Employment and Housing Commission (FEHC).	129
Pregnancy-Disability Leave.	129
California Family Rights Act (CFRA).	129
Discrimination in Employment is Prohibited by Law.	129

Summary of Employment Requirements for California Agricultural Employers

x

Time Off to Vote.....	129
Housing and Meals.....	129
Operators of labor camps.....	129
Amounts charged for meals and lodging.....	129
Fair Housing is the Law.....	129
Cal/OSHA.....	130
Safety and Health Protection on the Job.....	130
Cal/OSHA Form 300A.....	130
Field Sanitation Facilities.....	130
Access to Medical and Exposure Records.....	130
Agricultural - Industrial Tractors.....	130
Operating Rules for Industrial Trucks.....	130
Handwashing Water.....	130
California Safe Drinking Water and Toxic Enforcement Act.....	130
Pesticide Postings.....	130
Posting of Pesticide Storage Areas.....	130
Emergency Medical Care.....	130
Emergency Medical Services.....	130
Field Postings.....	130
Irrigation.....	131
Fumigants.....	131
Application-Specific Information for Field Workers.....	131
Pesticide Safety Information Series A-8.....	131
Pesticide Safety Information Series A-9.....	131
Workers' Compensation.....	131
Notice of Compensation Carrier.....	131
Medical Provider Network Information.....	131
Off-Duty Recreation.....	131
Written Notice to New Employees.....	131
Employee Polygraph Protection Act.....	131
Whistleblower Hotline.....	132
Uniformed Services Employment and Reemployment Rights Act (USERRA).....	132
Mass Layoff/Plant Closure (WARN).....	132
Human Trafficking/Slavery Notice.....	132
Recordkeeping and Reports.....	132
Cal/OSHA.....	132
Field Sanitation Report.....	132
Recordkeeping.....	133
GISO section 3203.....	133
Department of Pesticide Regulation.....	133
Employment Development Department.....	133
Wages and Payroll.....	134
Statement of Wages.....	134
Recording Hours Worked.....	134
Payroll and Related Records.....	134
Workday and Workweek.....	134
Personnel Records.....	135
Job Applications; Personnel Records.....	135
Records That Must be Kept.....	135
Immigration.....	135
CIS Form I-9.....	135
Farm Labor Contractor (FLC).....	136
FLC License.....	136
FLC Payroll Records.....	136
Leave of Absence.....	136
Family and Medical Leave Act.....	136
California Family Rights Act.....	137
Discrimination.....	137

**Summary of Employment Requirements
for California Agricultural Employers**

Applicant Identification Records.	137
EEOC - EEO-1 Report.	137
Recordkeeping and Inspection Requirements.	138
Inspection and Copying of Personnel Files:	138
Inspection and Copying of Payroll Records:	138
Workers' Compensation.	139
Employee Claim Form.	139
Form to Indicate Physician or Chiropractor.	139
Child Labor.	139
Permit to Employ and Work Permit.	139
Date of Birth.	139
Checklist of Forms and Reports	139

Introduction

This publication is designed to give farm labor contractors a handy reference to the major employment laws and regulations they need to know to do business as a farm labor contractor (FLC).

This guide has two parts. The first part is a summary of labor requirements and tells you what you must do to become an employer and a farm labor contractor. The second part is designed to prepare you to take the FLC Examination administered by the state Division of Labor Standards Enforcement (DLSE). Part 2 contains sample exam questions. The questions and answers are based on information in the DLSE Study Materials.

The questions are not from any of the three official state FLC examinations that are randomly administered to test takers. Because you must take and pass the state license examination once every two years, you might take a different examination every other year in a six-year period.

A complete set of the Study Materials is available from the DLSE. You will receive a copy of those materials when you apply for your FLC license and pay the examination fee. Read the Study Materials before taking the examination.

This publication, however, does not provide a comprehensive review of all laws and regulations affecting labor and employment. Issues such as employment discrimination, taxation, and agricultural labor relations, for example, are not addressed.

Internet access to employment-related information is available at these Web sites:

California Web Sites

California Code of Regulations	http://ccr.oal.ca.gov/
Department of Industrial Relations	http://www.dir.ca.gov/
Employment Development Department	http://www.edd.cahwnet.gov/
Statutory Codes	http://www.leginfo.ca.gov/calaw.html

Federal Web Sites

Code of Federal Regulations	http://www.gpoaccess.gov/cfr/index.html
U.S. Department of Labor	http://www.dol.gov/
Federal Register	http://www.gpoaccess.gov/fr/
U.S. Citizenship & Immigration Services	http://uscis.gov/graphics/
United States Code	http://www.law.cornell.edu/uscode/
United States Code	http://uscode.house.gov/

While every effort has been made to ensure the information contained in this guide is accurate, laws and regulations, as well as policies and procedures, are subject to change. Therefore, you need to keep up-to-date on developments. You should consult competent legal counsel when complicated questions arise.

New and Updated Materials

The following items have been added or updated since the last edition of the Summary of Employment Requirements for California Agricultural Employers:

2014 Changes:

Minimum wage increases	28
Overtime Exemptions - State (Executive, Administrative or Professional Employees)	34
Bonuses' Effect on Overtime Pay	39
Non-Piece-Producing Work Time of Piece-Rate Employees.	39
Deduction For Replacement of Lost Paycheck - Bank Charges.	46
Deduction For Overpayment of Wages.	47
Medical Insurance	56
MSPA Agricultural exemption includes grove, fruit and vineyard care operations	66
Reporting Requirements - EEO-1	120
Patient Protection and Affordable Care Act employee notices	125
EDD New Employee Registry & Independent Contractor Reporting	133
Personnel Recordkeeping Requirements	135

Cal/OSHA

Cal/OSHA Safety and Health Requirements

The California Occupational Safety and Health Act protects California employees from workplace hazards. The Act is enforced by the Division of Occupational Safety and Health within the Department of Industrial Relations. (Citations to GISO sections are to General Industry Safety Orders, which are in title 8 of the California Code of Regulations.)

Cal/OSHA Consultation Service: Cal/OSHA offers a consultation service that helps employers voluntarily comply with the extensive employee safety-and-health standards. Offered at no cost to employers, the Consultation Service can be of particular help to small employers without the resources to keep pace with those standards. The Consultation Service is separate from Cal/OSHA's Compliance Unit. At the employer's request a Cal/OSHA consultant will make an onsite visit and help the employer identify any existing violation. Cal/OSHA consultants do not cite employers for safety-and-health violations. Instead, they advise how to correct the condition. The consultant and employer try to agree to a reasonable abatement plan. However, if the employer refuses to abate an imminent hazard or serious violation, the Cal/OSHA Compliance Unit would be notified.

Injury and Illness Reporting: An employer must file with the Division of Labor Statistics and Research or its workers' compensation insurer a report of every occupational injury or illness that results in lost-time beyond the date of injury or illness, or that requires medical treatment beyond first aid. This report must be filed within five days after the employer learns of the injury or illness. A death or serious injury or illness (requiring hospitalization for more than 24 hours other than for purposes of observation) must be reported to the Division of Occupational Safety and Health by telephone or telegraph within 8 hours after the employer knows or should have known of the death or illness.

Employers must also maintain in each establishment a log of all recordable occupational injuries and illnesses for that establishment.

Injury and Illness Prevention Program: Every employer in California must establish, implement and maintain an effective written injury and illness prevention program (IIPP). Because of the importance of this requirement, a whole section is devoted to the subject. See the next section starting on page 16.

Field Sanitation: Agricultural employers must provide toilet and handwashing facilities and drinking water where one or more employees are performing hand-labor operations. "Agricultural employer" includes a person or entity that:

1. Owns or operates an agricultural establishment;
2. Buys a crop before it is produced and exercises substantial control over production (e.g., a packinghouse); or
3. Recruits and supervises employees (e.g., a farm labor contractor) or manages an agricultural establishment (e.g., a grove or vineyard manager).

A farm labor contractor is generally liable for failing to provide field sanitation facilities to the farm labor contractor's employees.

Definitions: A "hand-labor operation" is one performed by hand or with a hand tool in producing an agricultural commodity. Some examples of "hand-labor operations" are: the moving of irrigation pipes and other irrigation equipment by hand; the hand-cultivation, hand-weeding, hand-planting and hand-harvesting of crops; and the hand-packing of produce into containers, whether done on the ground, on a moving machine, or in a temporary packing shed located in the field.

"Hand-labor operations" do not include logging operations, the care or feeding of livestock, or hand-labor operations in permanent structures (e.g., canning facilities or packing houses).

Alternative Compliance: An agricultural employer may meet the field sanitation facility requirements specified below by providing transportation to the facilities only where at least one of these three conditions applies:

1. Employees are performing field work for less than two hours (including transportation time to and from the field);
2. Fewer than five employees are engaged in hand-labor operations on any given day; or
3. Employees are not engaged in hand-labor operations.

Agricultural operations not involving hand-labor must comply with title 8, Calif. Code of Regs., §§3360-3368 (sanitation facilities in permanent places of employment).

Drinking Water Requirements: Potable drinking water must be provided during working hours at locations readily accessible to all employees. Access to the water must always be permitted.

The water must be fresh, pure, cool, and in sufficient amounts to meet the needs of all employees.

Drinking water containers must be constructed of materials that maintain water quality. They must have a faucet, fountain, or other device to draw the water.

The water must be dispensed in single-use drinking cups or by fountains. "Common-use" (*i.e.*, shared) cups or dippers are not permitted unless they are cleaned and sterilized between uses.

Toilet and Handwashing Facilities: A fixed or portable facility designed to collect and contain the products of both defecation and urination must be provided. It must be supplied with toilet paper adequate to employee needs. It may be a biological, chemical, flush or combustion toilet or sanitary privy.

Separate toilet facilities for each sex must be provided for each 20 employees or fraction thereof. One handwashing facility must be provided for each 20 employees or fraction thereof. When fewer than five employees are working, separate toilet rooms for each sex are not required, as long as toilet rooms can be locked from the inside and contain at least one water closet.

Urinals may be installed instead of water closets in toilet rooms to be used only by men, as long as the number of water closets is at least two-thirds the minimum number of toilet facilities.

Toilet and handwashing facilities must meet these standards:

1. Toilet facilities must be screened.
2. Toilet and handwashing facilities must be ventilated and have self-closing doors, lockable from the inside, and otherwise be constructed to ensure privacy.
3. Toilet facilities must have an area of at least 8 square feet, with a minimum width of 2½ feet for each toilet seat. A facility must have a minimum area of 10 square feet, with a minimum width of 2½ feet, when a urinal is included. Sufficient additional space must be included if handwashing facilities are within the facility.
4. The waste water tank on chemical toilets must be constructed of durable, easily-cleanable material and be able to hold at least 40 gallons. It must be constructed to prevent splashing on the occupant, field, or road.
5. The handwashing water tank must be able to hold at least 15 gallons.
6. Units housing toilet and handwashing facilities must be rigidly constructed. Their inside surfaces must be of nonabsorbent material, smooth, readily cleanable, and finished in a light color.
7. Water flush toilets and handwashing facilities must conform to title 24, Calif. Code of Regs., Part 5, Calif. Plumbing Code.

Location: Toilet and handwashing facilities must be accessibly located near each other. They must be within a ¼-mile walk or five minutes of employees, whichever is less. Where due to terrain it is not feasible to locate facilities as required above, they must be located at the point closest to vehicular

access.

Maintenance Standards: The employer must service and maintain potable drinking water, toilet and handwashing facilities in accordance with appropriate public health sanitation practices, including the following:

Drinking water containers must be regularly cleaned, refilled daily or more often as necessary, and covered and protected to prevent persons from dipping the water by hand or otherwise contaminating it.

Toilet facilities must always be operational, clean, sanitary, and in good repair. Written records of service and maintenance must be kept for at least two years.

Toilet paper must be provided in a suitable holder in each toilet unit.

Effective odor control and solid-liquefying chemicals must be used in chemical toilet waste holding tanks.

Contents of chemical tanks must be disposed of by draining or pumping into a sanitary sewer, an approved septic tank of sufficient capacity to handle the wastes, a suitably sized and constructed holding tank approved by the local health department, or by any other method approved by the local health department.

Privies must be moved to a new site or taken out of service when the pit is filled to within 2 feet of the adjacent ground surface. The pit contents must be covered with at least 2 feet of well-compacted dirt when the privy is removed.

Handwashing facilities must meet these standards:

1. Pure, wholesome, and potable water must be available for handwashing.
2. Handwashing facilities must be refilled with potable water as necessary.
3. Soap or other suitable cleansing agent and single-use towels must be provided.
4. Signs stating that the water is only for handwashing must be posted.
5. Handwashing facilities must be provided at or near the toilet unit.
6. Handwashing facilities must be clean and sanitary.

Notice to Employees: The employer must notify each employee of the location of the sanitation facilities and potable water and allow each employee reasonable opportunities during the workday to use them. The employer must ensure that employees use the sanitation facilities and inform each employee of the importance of these good hygiene practices to minimize exposure to the hazards in the field of heat, communicable diseases, retention of urine, and agrichemical residues:

1. Use the water and facilities provided for drinking, handwashing, and elimination;
2. Drink water frequently, especially on hot days;
3. Urinate as frequently as necessary;
4. Wash hands both before and after using the toilet; and
5. Wash hands before eating and smoking.

Required Reports: An employer cited under this section must provide to Cal/OSHA annually for a period of five years after the final order on a citation a declaration giving this information: the estimated peak number of employees; the toilet, handwashing, and drinking water facilities to be provided; and any rental and maintenance agreement related to these requirements.

Recordkeeping: All employers, except those with no more than 10 employees at any time during the prior year, must keep Cal/OSHA records.

These records must be kept on a calendar-year basis and retained for at least five years:

1. A Cal/OSHA Form 301(see appendix, page ?), Injury and Illness Incident Report (replaces Form 101, Supplementary Record of Occupational Injuries and Illnesses) completed on every injury or illness

requiring medical treatment but not mere first aid. Labor Code section 5041 defines “first aid” as any one-time treatment of minor scratches, cuts, burns, splinters, or other minor industrial injury. As such, first aid does not require the employer to record the injury, nor does it trigger the need for an Employee Claim form or Employer’s First Report form.

If a physician or other medical technician renders first aid and later performs a follow-up observation of it, the injury is still considered to be within the first-aid exception.

But if the second visit results in further treatment, then the injury must be recorded.

2. Cal/OSHA Form 300 (see appendix, page ?), Log of Work - Related Injuries and Illnesses, is completed from Form 301. Cal/OSHA Form 300A (see appendix, page ?) Summary of Work - Related Injuries and Illnesses (replaces Form 200, Log and Summary of Occupational Injuries and Illnesses) must be posted in a conspicuous place in the workplace during the months of February through April every year. Employers who employed ten or fewer employees at all times during the last calendar year, do not need to keep or post Cal/OSHA injury and illness records.

In addition to keeping records of occupational injuries and illnesses, an employer must allow employees or their representatives access to the employer’s log of occupational injuries and illnesses and to accurate records of employee exposure to potentially toxic substances or harmful physical agents.

GISO section 3203 requires employers to maintain records that document compliance with that regulation’s requirements to maintain an effective written injury and illness prevention program. Employers with fewer than 10 employees are exempt from certain record requirements. Here is a summary of the recordkeeping requirements in section 3203(b):

Records of the steps taken to implement and maintain the program include:

1. Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records must be maintained for three years.

Exception: Employers with fewer than 10 employees may elect to maintain the inspection records only until the hazard is corrected.

2. Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. These must be maintained for three years.

Exception No. 1: Employers with fewer than 10 employees can substantially comply with the documentation provision by maintaining a log of instructions provided to the employee with respect to the hazards unique to the employee’s job assignment when first hired or assigned new duties.

Exception No. 2: Training records of employees who have worked for less than one year for the employer need not be retained beyond the term of employment if they are provided to the employee upon termination of employment.

Weeding, Thinning and Hot-Capping (GISO section 3456): Employees may not use tools to weed, thin or hot-cap in a stooped, kneeling or squatting position, and they may not engage in unnecessary hand weeding, hand thinning and hand hot-capping in those positions. Specifically:

1. Employees may not weed, thin or hot-cap in a stooped, kneeling or squatting position using either:
 - a. Short-handled tools (i.e., ones with handles less than 48 inches long) or
 - b. Long-handled tools (i.e., ones with handles at least 48 inches long).

2. Employees may not hand weed, hand thin or hand hot-cap in a stooped, kneeling or squatting position unless at least one of the following applies:
 - a. The employer can show that doing the task by hand is necessary because there is no readily available reasonable alternative means (e.g., a long-handled tool) suitable and appropriate to the production of the commodity (i.e., presumably, so the task could be done while standing).
 - b. Hand weeding, hand thinning and hand hot-capping is only occasional or intermittent and incidental to a non-hand weeding operation; this includes both non-weeding operations (e.g., irrigating or harvesting) and weeding operations where employees are generally standing while using long-handled tools. To be "occasional or intermittent," the time devoted to doing the task by hand must be limited to 20% of an employee's weekly work time.
 - c. The commodity plants being weeded, thinned or hot-capped:
 - i. were spaced less than 2 inches apart when planted;
 - ii. are growing in a field or greenhouse registered as organic with the county Agricultural Commissioner;
 - iii. are seedlings; or
 - iv. are horticultural plants growing in tubs or planter containers with openings of 15 inches or less.
3. If a condition stated in item 2.a. or 2.c. above applies, then employees engaged in hand weeding, hand thinning or hand hot-capping get another 5 minutes on top of the 10-minute rest period they are allowed by law for every 4 hours worked or major fraction thereof (i.e., their rest-break time is 15 minutes instead of 10 minutes).
4. Employees engaged in hand weeding, hand thinning or hand hot-capping must be supplied with gloves and kneepads as may be necessary and with training in accordance with existing Injury and Illness Protection Program guidelines.

Heat-Illness Prevention (GISO section 3395): Employers must provide outdoor employees with drinking water, access to shade, and heat-illness training.

Drinking Water: Where the supply of water is not plumbed or otherwise continuously supplied, an employer must either have on hand one quart of drinking water per hour per employee at the start of a shift or show that procedures were in place to replenish the water supply to enable each employee to drink that much water. Additionally:

1. Water must be
 - Fresh, pure and suitably cool
 - As close to employees as practicable
 - Readily accessible by employees
 - Dispensed by fountain or in single-use cups
2. Water container must be
 - Constructed of materials that maintain water quality
 - Provided with a faucet, fountain or other device suitable for drawing the water
 - Regularly cleaned
 - Refilled as necessary
 - Kept covered and protected
3. Employees must be encouraged to drink water frequently

Shade: An employer must provide employees under the following conditions:

1. Except for employers in the agriculture industry, cooling measures other than shade (e.g., use of misting machines) may be provided in lieu of shade if the employer can demonstrate that these

measures are at least as effective as shade in allowing employees to cool

2. **When the temperature is greater than 85 °F:** Shade must be present for at least 25% of crew's employees so they can sit fully in shade in a normal posture without touching each other
3. **When the temperature is no greater than 85 °F:** Timely access to shade must be provided upon employee's request
4. Shaded area must be as close as practicable to work areas
5. Employees feeling they need to cool down to protect themselves from overheating must be allowed and encouraged to rest in shade for no less than 5 minutes
6. By showing it is infeasible or unsafe to have shade continuously present, an employer may use alternative procedures for providing access to shade that provide equivalent protection

High-Heat Procedures (When the temperature equals or is greater than 95 °F):

1. An employer must implement high-heat procedures, including to the extent practicable:
 - Ensuring effective communication so employees can contact their supervisor when necessary
 - Observing employees for alertness and signs or symptoms of heat illness
 - Reminding employees throughout the work shift to drink plenty of water
 - Closely supervising a new employee for the first 14 days of employment

Exception: Not required if the employee when hired indicates he had been doing similar outdoor work for at least 10 of the past 30 days for 4 or more hours per day

Training: Before starting work that should reasonably be anticipated to result in exposure to the risk of heat illness, employees (including supervisors) must be provided with effective training in these required topics on ways to avoid heat illness and steps to take if it occurs:

1. The environmental risk factors for heat illness
2. The personal risk factors for heat illness
3. The importance of:
 - Frequently drinking small amounts of water
 - Acclimatization
 - Immediately reporting to their employer or supervisor symptoms or signs of heat illness in themselves or co-workers
4. The different types of heat illness and its common signs and symptoms
5. The employer's procedures for:
 - Complying with the heat-illness standard's requirements
 - Responding to possible heat illness, including how emergency medical services (EMS) will be provided
 - Contacting an EMS provider and, if necessary, for moving employees to where the EMS provider can reach them
 - Ensuring the EMS provider will receive good directions to the worksite

Before supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness, a supervisor must be provided with effective training in required topics including

1. The procedures the supervisor is to follow to implement the standard's applicable provisions
2. The procedures the supervisor is to follow when an employee exhibits symptoms consistent with possible heat illness, including emergency response procedures
3. How to monitor weather reports and respond to hot-weather advisories

Written Procedures: An employer must have written compliance and emergency procedures for complying with each requirement of this standard and must make it available upon request to employees and Cal/OSHA inspectors. A sample Heat-Illness Program is located in the appendix ?.

Personal Protective Equipment (PPE): Several Cal/OSH standards in California Code of Regulations, title 8, cover PPE. Here are some that apply to agricultural jobs:

Summary of Employment Requirements for California Agricultural Employers

Section 3380 – Personal Protective Devices: While there are few job-specific PPE requirements, the underlying principle is “performance based.” Performance-based standards are standards that require an employer to evaluate the task and the type of exposure expected and, based on the evaluation, determine the injuries likely to befall an employee and take measures to control the hazard by using one or more of three methods, in this order of precedence:

1. Engineering controls (e.g., machine guards)
2. Administrative controls (e.g., training)
3. PPE (e.g., safety glasses)

Take, for example, pruners. While no specific regulation pertains to employees who prune vineyards or orchards, eye protection for them may be required. If, upon considering the potential hazards of branches and flying debris that may contact and injure pruners’ eyes (because fully effective engineering or administrative controls cannot be implemented), an employer might determine that eye protection for them is necessary to control the hazard.

Section 3380 provides: Protection where modified by the words head, eye, body, hand, or foot means the safeguarding obtained by means of safety devices and safeguards of the proper type for the exposure and of such design, strength and quality as to eliminate, preclude or mitigate the hazard.

PPE must be distinctly marked so as to facilitate identification of the manufacturer.

The employer must assure the employee is instructed and uses PPE in accordance with the manufacturer's instructions.

The employer must assure that all PPE, no matter whether provided by the employer or employee, complies with applicable standards.

The employer shall assure PPE is maintained in a safe, sanitary condition.

PPE must be of such design, fit and durability as to provide adequate protection against the hazards for which they are designed.

PPE must be reasonably comfortable and not unduly encumber the employee's movements necessary to perform his work.

Section 3381 – Head Protection: The question of helmets for ATV operators was answered several years ago in a letter from Cal/OSHA. In that letter, then-Chief of Cal/OSHA, Dr. John Howard, noted: “The ATV's are covered in two sets of regulations. The first regulation is Article 13, Agricultural Operations, in §§ 3437, 3440, and 3441 as Ground-Driven Components and/or Self-Propelled Agricultural Equipment. The second regulation set is in Articles 25 and 27 concerning various types of vehicles where §3650(c), Industrial Trucks, General, deals best with the ATV. The referenced ANSI/ASME B56.8-1988 Safety Standard for Personnel and Burden Carriers addresses “any personnel carrier that does not exceed 35 miles per hour” and lays out a required comprehensive safe-driving program. None of these regulations require helmet use. However, §3441(a) requires mandatory comprehensive training in the use and handling of operating agricultural equipment. In addition, Section 3203(a), Injury and Illness Prevention Program (IIPP), requires implementation of an effective IIPP. Implementation of these programs may require the use of a hard hat or helmet to prevent injury depending on the usage of the ATV.”

Cal/OSHA Consultation Manager David Bare conveyed the same observations. However, he pointed out that Cal/OSHA evaluates each situation to determine the potential for injuries and the use of appropriate PPE for that situation – applying, in essence, a “performance based” standard, which Bare believed would generally require that ATV operators wear helmets. Bare gave two reasons for his conclusion:

First, the state requires motorcycle drivers to wear helmets while on public roads and property. Second, ATV manufacturers in their owner's manuals recommend the use of helmets. Because both the state and ATV manufacturers believe that helmets are important safety devices, Cal/OSHA reasons that a strong correlation exists between their use and the prevention of serious head injury if an were to accident occur.

Section 3381 provides: Employees working in locations where they risk receiving head injuries from flying or falling objects and/or electric shock and burns shall wear approved head protection. When head protection is required, the employer shall ensure that approved protective helmets are selected and used in accordance with their demonstrated resistance to impact and electrical hazards.

Each approved protective helmet shall bear the original marking required by the ANSI standard under which it was approved. At a minimum, the marking shall identify the manufacturer, ANSI designated standard number and date, and ANSI designated class of helmet.

Where they risk injury from hair entanglements in moving parts of machinery, combustibles or toxic contaminants, employees shall confine their hair to eliminate the hazard.

Section 3382, Eye and Face Protection, provides: Employees working in locations where they risk receiving eye injuries such as punctures, abrasions, contusions, or burns due to contact with flying particles, hazardous substances, projections, or injurious light rays that are inherent in the work or environment shall be safeguarded by means of face or eye protection. Suitable screens or shields isolating the hazardous exposure may be considered adequate safeguarding for nearby employees.

The employer shall provide and ensure that employees use protection suitable for the exposure.

Where exposed to injurious light rays, the shade of lens to use in any instance shall be selected in accordance with a chart titled "Filter Lens Shade Numbers for Protection Against Radiant Energy."

Required eye protection for employees requiring vision correction shall be provided by safety spectacles with suitable corrected lenses, safety goggles designed to fit over spectacles, or protective goggles with corrective lenses mounted behind the protective lenses.

Employees may not wear contact lenses in working environments having harmful exposure to materials or light flashes, except where special, medically approved precautionary procedures have been established for the protection of the exposed employee.

Section 3383, Body Protection, provides: Body protection may be required for employees whose work exposes parts of their body, not otherwise protected as required by other PPE orders, to hazardous or flying substances or objects.

Clothing appropriate for the work being done shall be worn. Loose sleeves, tails, ties, lapels, cuffs, or other loose clothing that can be entangled in moving machinery shall not be worn.

Clothing saturated or impregnated with flammable liquids, corrosive substances, irritants or oxidizing agents shall be removed and shall not be worn until properly cleaned.

Section 3384, Hand Protection, provides: Hand protection shall be required for employees whose work involves unusual and excessive exposure of hands to cuts, burns, harmful physical or chemical agents or radioactive materials which are encountered and capable of causing injury or impairments. Hand protection, such as gloves, shall not be worn where there is a danger of the hand protection becoming entangled in moving machinery or materials. Wrist watches, rings, or other jewelry should not be worn while working with or around machinery with moving parts in which such objects may be caught, or around electrically energized equipment.

Section 3385 – Foot Protection: Section 3385(a) provides: "Appropriate foot protection shall be required for employees who are exposed to foot injuries ... or who are required to work in abnormally wet locations." Cal/OSHA officials have informally stated that this means that milkers, for example, must wear waterproof footwear when working on milking-barn floors with inadequate drainage.

Accordingly, dairy operators need to provide and maintain rubber "slip-on" shoe covers, rubber boots, or similar waterproof footwear for milkers who work in barns with floors so wet that their feet would become wet if not protected by waterproof footwear.

Summary of Employment Requirements for California Agricultural Employers

Similarly, employers should provide and maintain protective footwear for employees, such as irrigators, who work in other types of abnormally wet locations.

Tree Work Maintenance or Removal (GISO Sections 3420 - 3428): These regulations emphasize specific training, equipment and work-practice requirements. Also of note, High Voltage Electrical Safety Order (section 2950) has increased minimum distances when tree trimming activities are performed. Here is an overview of some of the revised rules:

Section 3420. Scope and Definitions.

"This standard applies to work performed and equipment used in tree and ornamental palm maintenance and removal." It also defines the terms: Apex; Back Cut; Brush Chipper; Bucking; Climbing Hitch; Climbing Lines (Climbing Ropes); Climbing Spurs; Come-along; Crotch; Double-crotching; Drop Zone; Felling; Frond; False Crotch; Hinge; Leader; Lightning Protection System; Limbing; Notch; Palm Frond Skirt; Proximity; Prusik Loop; Qualified Tree Worker; Root Collar; Rope(s); Secured (person); Split Tail; Step Potential; Structural Support System; Tied In; Tree Climbing System; Tree Worker's Saddle; and Work-positioning Lanyard.

Section 3421. General.

This section requires training in topics including: the safe use of equipment, including safety equipment and personal protective equipment; operations that include pesticide and fertilizer applications for employers whose employees are exposed to, or engage in, such operations; the recognition and avoidance of electrical hazards including the instructions and training and instruction outlined in section 3423 for tree work performed near energized power lines and conductors. This also requires job briefings, inspections of work sites by a "qualified tree worker," aerial rescue training, and increased access to first aid and CPR.

The employer must provide training in first aid and CPR. For field work involving two or more persons at a work location, at least two persons trained in first aid and CPR shall be available. New employees must be trained in first aid and CPR within 90 days of their hiring dates. First aid and CPR training must be performed by a certified instructor and be equal to that of the American Red Cross or the Mine Safety and Health Administration.

Section 3422. Ropes and Tree Worker Climbing Equipment.

This section sets standards for tree worker climbing equipment including climbing ropes.

Section 3423. Electrical Hazards, General.

The section provides for the instruction of employees engaged in tree work operations near electrical equipment and conductors.

Section 3424. Mobile Equipment.

The section provides for the transportation of employees and materials to be conducted in accordance with the provisions of GISO Article 27.

Section 3425. Portable Power Hand Tools.

This section provides for requirements of the safe use of power saws and requires safety devices.

Section 3426. Hand Tools.

This section provides general requirements for the safe use of hand tools during tree work operations. The rule requires that when climbing into a tree, tree workers not carry tools and equipment in their hands unless they are tools used to assist them in their climbing.

Section 3427. Safe Work Procedures.

This section covers a broad range of safe tree work procedures including climbing and access into trees, pruning and trimming operations and felling of trees.

For more information on this subject, visit the Cal/OSHA Standards Board website at www.dir.ca.gov/oshsb/Tree_Work_Maint.html.

Personal Protective Equipment Checklist (PPE) (GISO section 3380)—The employer shall ensure that employees are instructed on where and how to use PPE, which includes equipment designed to protect the body, eyes, hands, ears, and feet. Employees must be trained to:

- Wear appropriate gloves and a full body suit when in contact with chemicals.
- Use such eye protection as safety glasses, goggles, or face shields when using grinders, saws, buffers, or hazardous chemicals or when taking part in any other activities that could cause eye injuries.
- Safeguard against falling objects from trees, such as limbs, branches, buckets, and scissors.
- Wear head protection (hard hats, bump caps) with proper eye protection or shields when welding or doing electrical work and when working in areas that are exposed to overhead hazards.
- Remove wristwatches and jewelry and secure long hair.
- Wear proper respirators for protection against atmospheres that may contain toxic gases, vapors, mists or inadequate oxygen. Such atmospheres may exist in grain vaults, manure pits, tanks, pipes, silos, vats, disposal pits, and equipment repair pits.

Caution: Do not enter a confined space (e.g., silo, bin, manure pit)—even to attempt a rescue—without specific equipment, approval, training and backup support. For more information, call your nearest Cal/OSHA Consultation Office and request a free copy of the Confined Space Guide.

First Aid and CPR (GISO section 3439)—At least one person trained in administering emergency first aid must be provided for every 20 workers. However, if the field is within 15 minutes of a medical-care facility, then trained first-aid personnel and a safety communication system are not required.

What is first aid? It is simply those things you can do for the victim before professional medical help arrives. Train workers in the following:

- Providing immediate treatment for injuries
- Maintaining first-aid kits, which need to be provided in each foreman's vehicle and/or at the work site
- Knowing where first aid kits can be found
- Replenishing first-aid materials, keeping them sanitary and in usable condition
- Knowing the basics of first aid
- Taking precautions against bloodborne pathogens
- Reporting all injuries to the immediate supervisor
- Using eye wash and showers, available at the work site, in the event of exposure to chemicals
- Taking first aid provisions to remote work sites
- Knowing the communication system to use in the case of an emergency: radio or cellular phone.
- A CPR qualified person should be available to provide required medical assistance to an injured worker within 4 minutes.

Cleaning, Repairing, Servicing, and Adjusting Machinery and Equipment, Including Unjamming Pneumatic Cutters and Conveyor Belts (Lockout/Tagout) (GISO section 3314)—Each year many employees die or are seriously injured on the job because they did not follow proper lockout/tagout procedures.

- Whenever employees adjust, clean, or repair equipment, the employer must meet all the requirements of section 3314, including employee training. Field equipment includes machines such as mobile harvesting platforms and pneumatic cutters for broccoli, cauliflower, etc.
- When machinery or equipment is stopped, the power source should be de-energized and, when required, the moveable parts should be mechanically blocked or locked out to prevent inadvertent movement.
- To minimize the hazards of movement, the employer should require the use of extension tools

(extended swabs, brushes, scrapers, or other methods).

- To obtain a free copy of the lockout/tagout procedures, contact your nearest Cal/OSHA Consultation Office. This publication is also available in Spanish.

Operation of Agricultural Equipment (GISO section 3441)—Every employee shall be instructed in the safe operation and servicing of all equipment that he or she is assigned to operate.

- All guards must be kept in place when a machine or tractor is in operation.
- Only operators and other persons required for instruction or assistance are permitted to ride on agricultural equipment.
- When servicing, adjusting, cleaning, or unclogging the equipment, stop the engine, disconnect the power source, and wait for all machine movement to stop.
- Before starting the engine, engaging power, or operating the machine, make sure that everyone is clear of the machinery.
- Lock out electrical power before performing maintenance on agricultural equipment.
- All self-propelled equipment, including tractors, must have an operator at the controls when the vehicle is in motion. (See section 3441(b) for exception.)
- The driver is prohibited from climbing onto or down from the tractor while it is operating.

Transporting of Employees (GISO sections 3701 & 3702)—Only licensed drivers of the appropriate class shall operate a farm labor truck or bus. Trucks or buses should have at least a 46-inch-high rail or enclosure on the sides and back of the vehicle to prevent falls. The vehicle should also be equipped with handholds, steps, stirrups, or similar devices arranged for the safe mount and dismount of employees.

Manual Lifting and Carrying: Techniques to Avoid Musculoskeletal Injuries—Agricultural workers have a high risk of back injury. Long hours of heavy lifting, carrying, bending, and stooping can lead to back pain or serious injury. You should train your workers on proper lifting procedures using the fact sheet.

Tools: Instruct employees on the following:

- Tools that are worn, defective, spliced, or broken should always be replaced or repaired.
- Striking tools shall be free of mushroomed or burred heads.
- Metal poles or poles that conduct electricity may not be used for fruit picking or nut knocking.

Working at Heights (GISO section 3210)—Guardrails shall be provided on working surfaces more than 30 inches above the floor, ground, or other working surface. Guardrails, toeboards, and stair rails must comply with GISO sections 3209, 3210 and 3214.

Mounted Air Compressors and Air Tanks (GISO section 4070)—Any exposed v-belts must be guarded. A permit for pressure vessels is required if the tank is larger than 1.5 cubic feet or has more than 150 psi.

Emergency Action Plan (GISO section 3220)—Employers are not required to have a written Emergency Action Plan, but if you have one, it should tell the employees what to do in the event of fire and other emergencies. The plan should be kept at the workplace and made available for employee review. This section applies to maintenance shops and fixed structures. Identify the location of the following items on your escape plan:

- First-aid kits
- Posted emergency numbers
- Pipeline valves
- Main water valve
- Fire extinguishers
- Emergency eye wash
- Backup communication
- Alarm system switches
- Chemical storage areas
- Are there any critical operations or unique hazards?

Fire Prevention Plan (GISO section 3221)—Employers are not required to have a fire plan (except in lieu of Section 6151(a)), but you should tell employees of any potential fire hazards of materials to which

they are exposed. If you have fewer than 10 employees, verbal instruction is sufficient. This section applies to maintenance shops and fixed structures. Employees should be informed of the following:

- Safe use of welding and cutting torches
- Proper storage of flammable or combustible liquids
- Dangers of using damaged electrical cords
- Storage of oily rags in enclosed metal containers
- Dangers created by smoking and other open flames
- Importance of bonding and grounding to eliminate static charge
- Classification of flammable storage and fueling areas
- Posted warning signs prohibiting sources of ignition
- Location of fire extinguishers or other apparatuses (specify)
- Initial training, then follow-up training each year if employees are expected to use a fire extinguisher

Note: If the employer does not expect employees to use fire extinguishers at the work site, then a written Emergency Action and Fire Prevention Plan must be in place. The training requirements for the emergency plan and fire plan must also be implemented.

Access to Medical and Exposure Information (GISO section 3204)—Each employer shall inform current employees of the existence, location, and availability of their medical and workplace exposure records. Tell your employees the name of the person responsible for maintaining and providing access to these records.

Hazard Communication Program (GISO section 5194)—You must maintain and develop a written program that gives employees information about hazardous substances to which they may be exposed at the workplace. Employee training must include:

- Material Safety Data Sheets (MSDS), reports/records, and information on use of hazardous substances, including pesticides, cleaning agents, fuel, oil, etc., in an accessible location for employee review. (Have information available to take to a doctor in the event of a chemical reaction or chemical contact.)
- Location of the employer's list of the hazardous substances that employees use in their work
- List of Material Safety Data Sheets (MSDS)
- Purpose of the MSDS (to describe the substance[s], the hazardous properties of the substance[s], and protective measures for safe use)

Note: The state Department of Pesticide Regulation and the Worker Protection Standard require a completed Pesticide Safety Information Series leaflet A-8 or A-9 to be displayed in an appropriate location.

Respiratory Protection (GISO section 5144)—If the employer provides negative-pressure respirators, then a written respirator program must be developed and implemented. A respirator program is NOT required when disposable paper dust masks are provided for nose and mouth protection from nuisance dust. However, the employer is required to evaluate the levels of airborne contaminants when reasonably expected to go above the permissible exposure limit PEL). The employer is always required to ensure that no employee is exposed over the PEL. The use of respirators is one way to protect employees from these kinds of exposure. When and where should respiratory protection be worn?

- When it is clearly impractical to remove dusts, fumes, mists, vapors, or gases at the source.
- When emergency protection against occasional or brief exposures is needed.

In addition:

- Employees exposed to such hazards shall use respiratory equipment approved by the Mine Safety and Health Administration (MSHA) or by the National Institute for Occupational Safety and Health (NIOSH).
- Employees shall be instructed and trained in the need for and the use, sanitary care, and limitations of such equipment.
- Respirators for emergency use shall be inspected monthly and sanitized after each use.

Note: If employees use negative-pressure air purifying respirators for any reason, the employer must meet all the requirements of Section 5144. Please call the Cal/OSHA Consultation Service for advice when overexposure to contaminants is suspected.

Storage of Hazardous Substances (GISO section 5164)—Substances that react violently, evolve into toxic vapors or gases, have oxidizing components, or have high levels of flammability, explosiveness, or other dangerous properties shall be separated from each other in storage by distance, partition, or other means to prevent accidental contact.

Note: For specific information on pesticide use, contact the office of your county Agricultural Commissioner. Cal/OSHA does not regulate pesticide application.

Top 10 Cal/OSHA Violations in Agricultural Operations

1. **Driverless Self-Propelled Equipment** (GISO section 3441)—This regulation covers all agricultural equipment, including tractors. Employers must have a tractor operator at the controls while the vehicle is in motion. The employer is required to ensure that if driverless tractors are used, they meet the following conditions:
 - The equipment is furrow-guided.
 - The operator has a clear view of other employees and the course of travel.
 - Brake and throttle controls are within easy reach.
 - The operator is within 10 feet of the controls and does not have to climb over or onto equipment to reach the controls.
 - The equipment is not traveling at a speed of over two miles per hour.
2. **Machine Guarding Gears, Sprockets, Chains, and Power Take-Off (PTO) Shafts** (GISO section 3440)—Employers are required to guard the nip points of all power-driven gears, belts, chains, sheaves, pulleys, sprockets, and idlers. Power take-off (PTO) shafts also must be guarded.
3. **Hazard Communication** (GISO section 5194)—Employers must have written guidelines informing employees of how to protect themselves from hazardous chemicals used in the workplace. This includes container labeling, employee training, use of material safety data sheets, and an inventory list of hazardous chemicals present on the site.
4. **Lockout/Tagout** (GISO section 3314)—Employers must have a program that trains employees who repair, service, clean, or adjust machinery (or such equipment as pneumatic cutters) to protect themselves from unexpected energization or start-up of machinery.
5. **Guardrails on Elevated Work Areas** (GISO section 3210)—Employers must provide guard railing on all walkways, platforms, balconies, porches, and working levels more than thirty inches above the floor, ground, or other working levels.
6. **Forklifts, Industrial Tow Tractors, and Agricultural Tractors** (GISO section 3664)—Only drivers who are authorized by the employer and have been trained in the safe operations of industrial trucks shall be permitted to operate these vehicles.
7. **Injury and Illness Prevention Program (IIPP)** (GISO section 3203)—A written IIPP must be implemented and maintained. It must meet the eight requirements for preventing injuries and illnesses in the workplace.
8. **First Aid Training and First Aid Kits** (GISO section 3439)—There shall be at least one employee trained in emergency first aid for every 20 employees at any “remote location” (i.e., more than a 15-minute drive to an emergency care facility). The employer must provide a first-aid kit at every work site and have a means of communication.
9. **Reporting Work Fatalities and Serious Accidents Within 8 Hours** (GISO section 342)—Immediately report by phone or fax to the nearest Cal/OSHA District (Compliance) Office any serious injury, illness, or death of an employee in the workplace.

10. Field Sanitation (GISO section 3457)—Employers must provide potable drinking water and single-use drinking cups. Toilet and hand washing facilities shall be located within 1/4 mile or a five-minute walk from the work site. Facilities must be maintained in a sanitary condition. Soap and single-use towels shall also be provided.

Other Safety Issues

Here is a checklist of other safety issues a farm operator may need to address:

Safety Training:

- New employee orientation, e.g., workers' compensation insurance coverage, work rules, emergency procedures, hazard communication program, good hygiene practices
- Job specific training at time of hire
- When assign a new task where no previous training was provided
- When a new substance, process, procedure or equipment is introduced into the workplace
- When an unrecognized hazard becomes known
- Annual equipment operator training, e.g., GISO section 3664
- Familiarize supervisors of hazards associated with tasks performed by employees under their control

Specific Training Requirements

- New employees, new assignments
- Equipment (e.g., tractor, forklift); retrained annually
- Emergency action plan training
- Fire prevention, fire extinguisher
- Lockout/Tagout
- Medical responders, first aid/CPR
- Respirator users
- Confined space entrants and rescue teams
- Battery charging
- HazMat team (HAZWOPER emergency response activities)
- Bloodborne pathogens, doesn't apply to agriculture
- Hazard Communication, all substances except pesticides

Hearing Conservation: exposure; testing, and analysis

Ergonomics standard (GISO section 5110)

- Two or more Repetitive Motion Injuries, diagnosed by physician, 50% job related, within 12 months
- Evaluation, exposure control, employee training

Tractor Roll Over Protection (ROP):

- All tractors after 10/26/76, except:
Orchards, hops, vineyards, inside barns and greenhouses, when used with mountable equipment incompatible with ROPs , and stationary power units, e.g., pumping units.
- Seat belts

Injury and Illness Prevention Program

In 1990, the California Legislature mandated a revision of California OSHA regulations for workplace health and safety. This revision led to promulgation by Cal OSHA of section 3203 of title 8 of the California Code of Regulations, known as the Injury and Illness Prevention Program (IIPP).

The Cal/OSHA Consultation Service has issued a series of model IIPPs. A model for employers with intermittent employees, such as agricultural employers, is available on the Service's Internet Web site at:

http://www.dir.ca.gov/DOSH/dosh_publications/iipintermitag.html. A copy of the Cal/OSHA agricultural model IIPP, along with useful forms, is available in the appendix starting on page ?.

Effective July 1, 1991, every employer must establish, implement and maintain an effective Injury and Illness Prevention program (IIPP). The Program shall be in writing and, shall at a minimum include the following:

1. Identify the person or persons with authority and responsibility for implementing the Program.
2. Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
3. Include a system for communicating with employees. Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the work-site without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.
EXCEPTION: Employers having fewer than 10 employees shall be permitted to communicate to and instruct employees orally in general safe work practices with specific instructions with respect to hazards unique to the employees' job assignments as compliance with subsection (a)(3).
4. Include procedures for identifying and evaluating work place hazards, including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.
 - (A) When the Program is first established;
EXCEPTION: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
 - (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
 - (C) Whenever the employer is made aware of a new or previously unrecognized hazard.
5. Include a procedure to investigate occupational injury or occupational illness.
6. Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based ON THE severity of the hazard:
 - (A) When observed or discovered; and,
 - (B) When an imminent hazard exists that cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees assigned to correct hazardous conditions shall be provided the necessary safeguards.
7. Provide training and instruction:
 - (A) When the program is first established;
EXCEPTION: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
 - (B) To all new employees;
 - (C) To all employees given new job assignments for which training has not previously been received;
 - (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
 - (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Records of the steps taken to implement and maintain the Program shall include:

(1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year; and
EXCEPTION: Employers with fewer than 10 employees may elect to maintain the inspection records only until the hazard is corrected.

(2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers.

This documentation shall be maintained for at least one (1) year.

EXCEPTION NO. 1: Employers with fewer than 10 employees can substantially comply with the documentation provision by maintaining a log of instructions provided to the employee with respect to the hazards unique to the employees' job assignment when first hired or assigned new duties.

EXCEPTION NO. 2: Training records of employees who have worked for less than one (1) year for the employer need not be retained beyond the term of employment if they are provided to the employee upon termination of employment.

EXCEPTION NO. 3: For Employers with fewer than 20 employees who are in industries that are not on a designated list of high-hazard industries established by the Department of Industrial Relations (Department) and who have a Workers' Compensation Experience Modification Rate of 1.1 or less, and for any employers with fewer than 20 employees who are in industries on a designated list of low-hazard industries established by the Department, written documentation of the Program may be limited to the following requirements:

- Written documentation of the identity of the person or persons with authority and responsibility for implementing the program as required by subsection (a)(1).
- Written documentation of scheduled periodic inspections to identify unsafe conditions and work practices as required by subsection (a)(4).
- Written documentation of training and instruction as required by subsection (a)(7).

EXCEPTION NO 4: Local governmental entities (any county, city, city and county, or district, or any public or quasi-public corporation or public agency therein, including any public entity, other than a state agency, that is a member of, or created by, a joint powers agreement) are not required to keep records concerning the steps taken to implement and maintain the Program.

Note 1: Employers determined by the Division to have historically utilized seasonal or intermittent employees shall be deemed in compliance with respect to the requirements for a written Program if the employer adopts the Model Program prepared by the Division and complies with the requirements set forth therein.

Note 2: Employers in the construction industry who are required to be licensed under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code may use records relating to employee training provided to the employer in connection with an occupational safety and health training program approved by the Division, and shall only be required to keep records of those steps taken to implement and maintain the program with respect to hazards specific to the employee's job duties.

Employers who elect to use a labor/management safety and health committee to comply with the communication requirements of subsection (a)(3) of this section shall be presumed to be in substantial compliance with subsection (a)(3) if the committee:

- (1) Meets regularly, but not less than quarterly;
- (2) Prepares and makes available to the affected employees written records of the safety and health issues discussed at the committee meetings and, maintains records for review by the Division upon request. The committee meeting records shall be maintained for at least one (1) year;
- (3) Reviews results of the periodic, scheduled worksite inspections;
- (4) Reviews investigations of occupational accidents and causes of incidents resulting in occupational injury, occupational illness, or exposure to hazardous substances and, where appropriate, submits suggestions to management for the prevention of future incidents;

- (5) Reviews investigations of alleged hazardous conditions brought to the attention of any committee member. When determined necessary by the committee, the committee may conduct its own inspection and investigation to assist in remedial solutions;
 - (6) Submits recommendations to assist in the evaluation of employee safety suggestions; and
 - (7) Upon request from the Division, verifies abatement action taken by the employer to abate citations issued by the Division.
8. Provide a process for recordkeeping and documentation.

Formula for Improved Injury Prevention

Background: Faculty from the University of California Division of Agriculture and Natural Resources investigated the strategies used by other industries with high injury rates that had made significant recent improvements. These included mining, construction, meat cutting and auto manufacturing. Five factors were found in common among successful high hazard industry safety programs.

1. **Management Commitment:** One of the clearest messages from general industry experiences and from practitioners is that effective injury prevention programs depends on the active involvement of management. Management commitment is usually actualized through such measures as on-site monitoring, incentive and accountability for middle managers, and the provision of an on-site or close-by access to medical treatment.
2. **Problem Identification:** Successful hazard reduction and prevention improvement is dependent on accurate information on the sources and the nature of job-related safety problems. Without identification and prioritization of specific hazards, prevention is necessarily reduced to general cautionary advice. In each of the cases reviewed, either a set of specific hazards (e.g., explosions, falls) or a hazard category (ergonomic factors) was clearly targeted. Furthermore, in each of these hazardous industries, a continuing system for monitoring hazards and injury causes was put in place to ensure that this information remained current and accurate. Effective injury prevention programs are workplace specific.
3. **Engineering Controls:** Engineering controls are the most effective means of reducing and preventing injuries. The work environment is changed in such a way that improved safety relies on the elimination of hazardous tasks, equipment, exposure or the lack of “fit” between the worker and the job. The most successful programs have resulted from hazard-specific controls.
4. **Worker Involvement:** Workers play a critical roles in the success or failure of an injury prevention program for two reasons: first, worker input is necessary for successful job-site hazard analysis and for the design of useful and used interventions; second, it is the effective representation and involvement of workers’ interests that have provided much of the impetus for change. It is the responsibility of management to encourage positive worker participation in safety.
5. **Education and Training:** Employee and management education is an essential part of each of the industrial successes; education, rather than training, to emphasize that education requires active worker/manager involvement in the identification and control of hazards throughout the workplace. None of the most successful programs relies exclusively on teaching workers to minimize their exposure to accepted workplace hazards. Generally, in fact, such training is regarded as the least effective way of reducing injuries. Success in injury prevention suggests that worker education should focus on the development of the broad goal of safety in the workplace and become the focal point for specific hazard identification, preventive improvements, and worker-management interaction about safety issues. Safety training related to specific tasks is most effective when it is an integral part of basic skills training, with occasional “tailgate” reinforcements.

Steps to Successful Compliance

Identify the person or persons with authority and responsibility for implementing the Program.

The job of Safety Coordinator is an important responsibility. The job requires a person with a dedication

to safety, knowledge about safety regulations and requirements, and the skills to successfully implement the prevention program.

The Safety Coordinator must be identified in writing in the written IIPP; must have the authority and backing of top management to carry out the requirements of the IIPP. The Safety Coordinator is responsible for organizing and implementing all aspects of the IIPP. The program must be operational. There must be inspections, communication with employees, training, and other activities that ensure program implementation.

The Safety Coordinator must ensure that all activities of the program are documented, including inspections, investigations, training and other reports.

Here is a sample policy for an IIPP regarding the responsibilities of a safety coordinator.

Responsibilities of the Safety Coordinator:

The responsibilities of the Safety Coordinator include:

1. Advising management on safety and health issues.
2. Maintaining current information on local, state and federal safety and health regulations.
3. Planning, organizing and coordinating safety training, preparing and distributing company policies and procedures on workplace safety and health issues.
4. Developing and effectively communicating safe practices, establishing a system for ensuring employee compliance with safety and health policies and procedures.
5. Developing and implementing inspection guidelines, arranging safety and health inspections and follow up to ensure that corrective action is complete.
6. Making sure that personal protective equipment is serviceable and available as needed.
7. Establishing accident report and investigation procedures, and maintaining and injury and illness records (OSHA Form 300, 300A and 301).
8. Reviewing injury and illness trends, establishing a system for maintaining records of inspection, hazard abatement, and training.

Include a system for ensuring that employees comply with safe and healthy work practices.

GISO section 3203 requires that the IIPP include “a system for ensuring that employees comply with safe and healthy work practices.” Substantial compliance is described as including a program of safe work recognition, discipline, and training. Any evidence of management prioritizing interest in safety will greatly improve employee attitude and compliance. Means of recognition can range from the individual “pat on the back” to formal and material rewards (e.g., safe employee of the month, hats, gift certificates, bonuses, etc.).

Training

All new employees will be oriented, including orientation to safety rules and policies. All employees will be expected to participate in regularly scheduled safety training activities.

Discipline

All observed or reported infractions of the safety policy or safety rules will be appropriately disciplined

according to the operation's employee discipline schedule. Multiple infractions will be treated to systematically increased discipline that can result in employment termination for serious and repeated failure to comply with safety policy and rules. The intent is to make safety part of the job, rather than accepting injury as part of the job.

Recognition

If you already have a recognition program you should add safety performance to it. If you don't have an ongoing employee recognition program, this section suggests you implement one related to safety performance. Ideas include:

- Keeping a posted record of days worked without injury
- Informal recognition of safety practice
- Formal recognition of individuals or groups for safety performance
- Material recognition: gifts, products, services and money, including raises and bonuses
- Privileges: time off, opportunity for promotion, new responsibility.

With any recognition program, it is important to make clear to employees that non-report of injury or illness remains a safety rule infraction, both to ensure that minor injuries are treated and that unsafe practices or conditions are recognized and dealt with before causing a major incident.

Safety Compliance Program

The compliance program should be documented in your overall IIPP records. A summary statement such as the following example will suffice.

Safety Compliance Program

Preventing Injury and Illness on the Job Is the Responsibility of Everyone on this Operation.

- **Recognition**
 - A posted record of **Safe Days Worked** will be kept on the employee bulletin board.
 - Observed safe work practices will be commended by managers and supervisors.
 - All hazards will be reported to management. Hazards and hazard correction reports by employees will be responded to with verbal or written commendation.
 - A program of prize recognition for Safe Employee of the (Month/Quarter/Season) will be implemented.
 - A program of annual recognition for Safe Employee(s) of the Year will be implemented
- **Training**
 - All new employees will be oriented, including orientation to safety rules and policies.
 - All employees will be expected to participate in regularly scheduled safety training activities.
- **Discipline**
 - All observed or reported infractions of the safety policy or safety rules will be appropriately disciplined according to the operation's employee discipline schedule.
 - Multiple infractions will be treated to systematically increased discipline that can result in employment termination for serious and repeated failure to comply with safety policy and rules.

Communicating with Employees

Include a system for communicating with employees in a form readily understandable by all. The objective of the communications requirement is to ensure that employees receive information about hazards and safe work practices in language they understand. On many farms, this means providing information in Spanish.

GISO section 3203 requires employers to include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health.

The requirement also seeks to ensure that communication is two way between employer and employees, that employees can and will report hazards without fear of reprisal.

An effective communication system must:

- Be seen and heard,
- Be understood,
- Be respected and credible,
- Show results in attitudes and actions.

A communication system should include:

- Orientation of new employees, including safety issues,
- Efforts to establish a positive safety attitude and environment,
- Provision for ongoing interaction between management and employees
- Use of written and posted information, and
- Individual communication

Identifying and Evaluating Workplace Hazards

Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.

Employee Participation In Hazard Identification

Employers in other high-risk industries have discovered that effective employee involvement in hazard identification and control results in much more effective prevention. Successful employee involvement requires clear evidence of management commitment and assurance that identifications of hazards and concerns will not meet with repudiation or retaliation.

Safety Incident Investigation

All incidents that cause serious injuries and those that potentially could have caused serious injury (i.e., “close calls”) must be investigated as soon as possible after reported incidents by the immediate supervisor in consultation with the Safety Coordinator. Written records must be maintained by the Safety Coordinator, along with a record of corrective actions taken.

Correcting Unsafe or Unhealthy Conditions

Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard.

Training and Instruction

The safety order requires that training and instruction be provided to employees:

- When the IIPP is implemented
- To all new employees
- To all employees given a new job assignment for which training was not previously given
- Whenever new substances, processes, or procedures are introduced and represent a hazard
- Whenever the employer is made aware of a new or previously unrecognized hazard
- For supervisors to familiarize them with safety and health hazards

Safety Program Records

The safety order requires that records be kept on all aspects of the IIPP. A Cal/OSHA inspector visiting your operation will want to review not only your written plan but your records, too.

Cal OSHA has a five-point recordkeeping requirement:

1. A report of every injury or illness requiring medical attention;
2. A record of each injury or illness reported on the Cal OSHA Forms 300 and 301, according to instructions;

3. A supplementary record of occupational injuries and illnesses on (Form 5020), with the same information.
4. An annual summary Cal OSHA Form 300A, Posted no later than February 1, kept posted until May 1.
5. Maintenance of these records for five (5) years.

The objective of this recordkeeping is to enable you to see where your injuries and illnesses are occurring and to inform and improve your hazard-control efforts.

IIPP records include:

1. Records of all hazard identification inspections (scheduled and non-scheduled). Maintain for at least three (3) years.
2. Documentation of safety and health training required by the order for each employee. These records must include the employee name, training dates, subjects, and name of the trainer. These records must be kept for three (3) years.

Other Safety Records

If you use hazardous materials, including pesticides, you are required by other rules to have the material safety data sheets (MSDS) on all materials used, along with any required physical examination reports, and training records. You should also keep records and training information under the hazard communication program with your IIPP to simplify recordkeeping. The Department of Pesticide Regulation, Cal EPA, has separate recordkeeping requirements for registered pesticide use. See section titled "Required Posters, Notices and Disclosures." starting on page [125](#).

Pesticides

Pesticide Safety Regulations

The pesticide worker safety regulations specify safe work practices for employees who handle pesticides or work in treated areas. The term "handle" refers to any activity related to the application of pesticides. Handle includes mixing, loading, applying, repairing or cleaning contaminated equipment, and handling unrinsed containers. The Department of Pesticide Regulation and the local agricultural commissioner enforce the worker safety regulations. Here are important requirements of the regulations, which are in title 3 of the California Code of Regulations (cited section numbers are to that source):

Employer/Employee Responsibilities (§ 6702): Agricultural employers must:

1. Know the regulations and requirements on pesticide label
2. Tell employees, in a language they understand, about the pesticides used, pesticide safety hazards, personal protective equipment required, other equipment used, work procedures, and pesticide safety regulations
3. Ensure that employees work safely and follow all safety rules.

Employees must:

1. Use the personal protective equipment (PPE)
2. Follow safety rules in regulations and on pesticide labeling.

Hazard Communication (§§ 6723, 6723.1, 6761, 6761.1): Hazard communication ensures that employees know the hazards they may face and what to do to protect themselves from those hazards. Through proper hazard communication, employees will know about the hazards, safe work practices and where records are kept. Pesticide Safety Information Series (PSIS) leaflets A-8 and A-9 are the written hazard communication programs for handlers and field workers, respectively.

Agricultural employers must display PSIS A-8 and A-9 for employees to read. Agricultural employers must also display the following for pesticide handlers and field workers to read:

1. Identification of the treated area
2. Time and date of applications
3. Restricted entry interval (REI)
4. Pesticide product name, active ingredient and EPA registration number.

Agricultural employers must make available:

1. Material Safety Data Sheets (MSDS), if available, for the pesticides used
2. PSIS leaflets applicable to the use situation.

Training (§§ 6724, 6764, 6770): Employees who handle pesticides must receive adequate training in the use of pesticides. Training must occur before the employee begins to handle pesticides. Handlers must receive refresher training each year. Training of handlers must include the following for each pesticide or group of chemically similar pesticides (such as organophosphates):

1. The meaning of information on the pesticide label concerning human health effects
2. Hazards of the pesticide, including acute and long term effects
3. Pesticide poisoning symptoms
4. Routes through which pesticides can enter the body
5. Emergency first aid
6. How to get emergency medical care
7. Routine and emergency decontamination procedures
8. Need, limitations, use and cleaning of PPE

9. Prevention, recognition and first aid for heat-related illnesses
10. Safety requirements for handling pesticides
11. Environmental concerns
12. Warnings about taking pesticides home
13. Regulatory requirements, MSDS, and PSIS
14. Purpose and requirements of medical supervision, when applicable
15. Location of the written hazard communication program, PSIS leaflets and MSDSs
16. Rights as an employee.

Once training is received, then employees must sign the training record. Handler training records must be kept at the work headquarters.

Field workers must receive training every 5 years; and must receive training before working in treated fields.

The training must include:

1. Importance of routine washing after exposure
2. The meaning of posting and REIs
3. Where exposure to pesticides might occur
4. Routes of exposure
5. Acute and long term effects of pesticides
6. Symptoms of overexposure
7. First aid and where to get emergency medical care
8. Warnings about taking pesticides home
9. The hazard communication program
10. Rights as an employee.

Employees have the right to receive information about pesticides to which employees may be exposed (or it can be given to the employee's physician). Employees cannot be fired for exercising their rights.

Labels and Other Warnings (§§ 6602, 6618, 6674, 6678, 6776): Pesticide labels must be available at the work site. If pesticides are transferred from their original container, the new container must be labeled with the identity of the pesticide, the signal word from the product label and the name of the person or firm responsible.

Before applying pesticides, the applicator must notify the farmer of the application before it takes place. The notice must include:

1. Date and time of the application
2. Name, EPA registration number and active ingredient of the pesticide used
3. Safety precautions required by label or regulations
4. Location of the area to be treated
5. The REI.

The farmer is responsible for warning employees and contractors who may enter or walk within ¼ mile of a treated area. The warning must include:

1. Location of the treated area
2. Any REI
3. Instructions not to enter the field until the REI expires.

The farmer may substitute posting of the treated field for the oral warning, if the label does not require both oral warnings and field posting.

Emergency Medical Care (§§ 6726, 6766): Agricultural employers must make prior arrangements for emergency medical care, and tell employees the location of the medical facility in case someone is sick or injured on the job. If employees handle pesticides, agricultural employers must post at the work site

(or on the work vehicle if there is no fixed work site) the name, address and telephone number of the physician, clinic or emergency room able to provide care. Agricultural employers must make sure that employees are taken to a medical care facility if employees become injured or ill while handling pesticides or exposed to pesticide residues on the job.

Restricted Entry Interval (§§ 6770, 6772, 6774): A restricted entry interval (REI) is the period of time, following a pesticide application, when people are not allowed to go into the treated field for picking (handharvesting), thinning, weeding, tying, pruning, limb propping or similar work. REIs for many pesticides are stated on pesticide labels; others are established by regulation. Both must be observed.

Reentry for activities with no contact, such as operating tractors, is allowed if special protection is used to prevent exposure to residues. People incorporating pesticides into the soil during an REI must wear the same PPE required for the applicator.

People may enter the field during the REI for limited contact activities, such as irrigation, provided certain conditions are met. Those conditions include:

1. Both oral warning and field posting are not required by the label
2. It has been at least 4 hours since the application
3. Inhalation exposure is below acceptable levels
4. Exposure is minimal and limited to the feet, lower legs, hands and forearms
5. The person is wearing PPE required for early entry workers
6. They do not work in treated fields for more than 8 hours
7. The need for the activity is unforeseen.

Early Entry Requirements (§ 6771): If employees enter a field prior to the expiration of the REI, employees must be informed of the requirements on the label relating to:

1. Health hazards
2. First aid
3. Symptoms of poisoning
4. Use of PPE required
5. Symptoms and first aid for heat-related illness
6. The need for washing when out of the treated area.

Agricultural employers must provide PPE required for early entry. Employees must not take PPE home to clean it; cleaning is the responsibility of agricultural employers. One pint of water for eye flushing must be immediately accessible for each employee, if the pesticide label requires eye protection. Employers must provide early entry workers with soap, water and towels to wash when they remove their PPE.

Respiratory Protection (§§ 6738, 6739): Where a pesticide handler is required to use a respirator, an agricultural employer must first:

1. Identify a physician or other professional licensed health care provider (PLHCP) to perform a medical evaluation and get a written recommendation from the PLHCP on the employee's ability to use a respirator.
2. Establish a written respiratory protection program that describes worksite-specific procedures for selecting, fit-testing, using, cleaning, inspecting, storing and repairing respirators and the procedures for employee medical evaluation, training, handling emergencies, and regularly evaluating the respiratory protection program.
3. Designate a respirator "program administrator" to administer the respiratory protection program and conduct the required evaluations of program effectiveness.
4. Provide training on various kinds of personal protective equipment to ensure each employee can demonstrate knowledge and skills specific to the use of respiratory protection in the workplace.

An employer must retain written information on medical recommendations, fit testing and the respirator program. See Recordkeeping section for additional information, starting on page [132](#).

Voluntary Respirator Use: An employer may provide respirators to employees or allow employees voluntarily to use their own respirators. The employer must provide to employees information outlined in Title 3, California Code of Regulations section 6739(r) about the proper use of respirators and their limitations. Under an employer-supplied voluntary respirator provision, the employer must implement a “minimum” written respiratory protection program. A written program is not required for a voluntary respirator program involving the use of only filtering facepieces. For more information see DPR’s Question and Answer sheet at cdpr.ca.gov/docs/whs/pdf/voluntary_resp_prov.pdf.

Pesticide Postings: The California Department of Pesticide Regulation requires various postings; they are listed in the section “Pesticide Postings” on page 130.

Employers violating these provisions may be subject to both criminal and civil violations.

Notes

Wage-and-Hour Requirements

Minimum Wage

The California minimum wage is \$8 per hour. **On July 1, 2014, California's minimum wage will rise to \$9 per hour. On January 1, 2016, it will rise to \$10 per hour.**

The federal minimum wage is \$7.25 an hour.

The federal and state minimum wages apply to all nonexempt employees working for covered employers, subject to limited exemptions and subminimum wage provisions. Employers must comply with the higher requirement (*i.e.*, the state minimum wage).

State Exceptions: Exceptions that apply to certain agricultural employees include:

1. **Learners** (employees in occupations in which they have had no previous similar or related experience) may be paid a subminimum wage during their first 160 hours of employment. Learners may be paid not less than 85 percent of the minimum wage rounded to the nearest nickel.
2. A person whose earning capacity is impaired by **physical disability or mental deficiency** may be paid less than the minimum wage, if the employer first obtains a special license from the DLSE.
3. A **parent, spouse, child or legally adopted child** of the employer is not subject to the minimum-wage laws.

Credits Against Minimum Wage for Meals and Lodging: Both state and federal laws allow an employer to credit against its minimum wage obligation the value of meals and lodging. Two requirements must be met. First, the employee must voluntarily agree to the credit in writing. Second, the amounts credited may not exceed specified amounts.

The maximum amounts that may be credited are specified in the Industrial Welfare Commission (IWC) industry and occupation orders as amended and republished by the California Department of Industrial Relations, effective January 1, 2007. The maximum credit amounts are:

Lodging:

Room occupied alone	\$37.63 per week
Room shared	\$31.06 per week
Apartment - two-thirds of the ordinary rental value, and in no event more than . . .	\$451.89 per month
Where a couple are both employed by the employer, two-thirds of the ordinary rental value, and in no event more than	\$668.46 per month

Meals:

Breakfast	\$2.90
Lunch	\$3.97
Dinner	\$5.34

The IWC orders provide that:

1. Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift.
2. Deductions shall not be made for meals not received or lodging not used.
3. If an employee must live at the place of employment or occupy quarters owned by or under the control of the employer, then the employer may not charge rent in excess of the values listed above.

Piece Rates: Workers may be paid on a piece-rate basis for tasks that can be measured on a unit basis.

During any given pay period, the piece rate may not amount to less than the minimum wage and must include compensation for any overtime worked.

Travel Time: Federal and state laws have similar requirements for the payment of wages for time spent by an employee while traveling. Generally, an employer must pay for travel time related to the job. Here is a summary of the rules for travel-time pay:

1. Travel to work and return home: Time spent traveling to and from work is generally not considered hours worked, no matter whether the employee works at one or several workplaces. Wages are therefore ordinarily not due for such commuting time. Typically, farm labor contractors direct employees to report to different work sites with a wide range of travel times. To avoid any misunderstanding, each employee should, when hired, acknowledge that travel distances will vary and that travel between the employee's home and job assignments is not compensable. A written statement should be given to each employee that describes the farthest destination in various directions to which the employee will have to report.
2. Travel before or after work hours: Time spent by an employee while traveling to execute an assignment as directed by the employer on the way to or from work must be compensated. An example of this is where the employer or its representative (*e.g.*, foreman) tells the employee to check an irrigated field or retrieve spare parts in town while commuting to or from work. Normal commuting time need not be compensated.
3. Travel between job sites: Time spent by an employee while traveling between places of work (*e.g.*, from field to field or from a field to some location to receive instructions or tools) must be compensated.
4. Transportation provided by employer: When the employer provides transportation to employees and requires them to ride in company-provided transportation, the time spent traveling must be compensated. In contrast, travel time need not be compensated where an employee may choose whether to ride in company transportation.
5. Travel to other work places or meetings: Time spent during an employee's normal working hours traveling out of town for an overnight business trip must be compensated, no matter whether the employee is traveling on a normal workday or on a normal day off. Likewise, all travel time of an employee who travels on a one-day assignment upon the employer's direction must be compensated.
6. Pay rate: Travel time may be compensated at any rate, as long as it is at least the minimum wage, the travel time is separately recorded, and the employer and employee agreed to the travel-time pay rate before the employee incurred the travel time.

Waiting Time: When an employee is "on duty," time spent waiting is considered time worked. For example, harvest employees who cannot work until a trailer arrives from the winery must still be paid while waiting. However, an employee completely relieved of duties need not be compensated, as long as the employee may leave the job, the period of time is long enough for the employee to use it effectively, and the employee is told when to return to work.

Preparation Time: Generally, both federal and state agencies view voluntary activities of employees performed before or after work, such as changing clothes or washing up, as not compensable. However, time spent performing preparatory or concluding activities that are an integral part of the job or required by law or company rules is compensable. Examples of compensable activities performed before or after work include changing clothes and washing up after applying chemicals as required by Cal/OSHA, and sharpening pruning shears.

Overtime

Non-exempt employees are entitled to premium pay for work performed during specified overtime periods. Most non-exempt non-agricultural employees may work up to 40 regular hours per workweek. Non-exempt agricultural employees in California may work up to six 10-hour days per workweek at their regular pay rate.

Federal: The federal Fair Labor Standards Act (FLSA) requires covered employers to pay an employee at the overtime premium rate of 1½ times the employee's regular rate of pay after 40 hours of work in a workweek. Certain types of work are exempt from this requirement, however.

One such exemption applies to persons employed in agriculture. Section 3(f) of the FLSA defines *agriculture* to mean both:

(1) 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 . . . , and the raising of livestock, bees, fur-bearing animals, or poultry, and

(2) 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.

Thus, the term "agriculture" has two distinct subsets:

1. The primary meaning of "farming in all its branches" and
2. A secondary and broader meaning that includes "practices incidental to or connected with farming performed by a farmer or on a farm."

Under the FLSA's secondary meaning of "agriculture," a farmer's employee who is engaged in packing or shipping commodities produced by only his employer is considered to be an agricultural employee. In contrast, a farmer's employee who, during a workweek, packs, ships or otherwise handles any commodity produced by another farmer is not considered to be an agricultural employee for that workweek.

State: Agriculturally related employees typically fall under one of these four orders of the Industrial Welfare Commission (IWC):

IWC Order No. 4 applies only to particular occupations rather than to an entire industry. Thus, it covers only persons engaged in professional, clerical, technical, mechanical and similar occupations employed by a business that is not covered by an industry order. Take, for example, an agricultural employer who employs only field workers and a secretary. An industry order does not apply to this employer. Order No. 4 therefore covers the secretary. (IWC Order No. 14 covers the field workers.) Other occupations often associated with agricultural employment that are covered by Order No. 4 are office clerks and bookkeepers.

IWC Order No. 8 covers employees of an employer engaged in an industry handling products after harvest, at least some of which were not grown or otherwise produced by the employer. It typically covers commercial establishments that clean, dry, sort, pack, dehydrate, slaughter, ferment or pasteurize a commodity. While Order No. 8 covers the office and transportation employees of such an employer, Order No. 14 covers the employer's field workers.

IWC Order No. 13 covers employees of an employer engaged in an industry preparing on a farm agricultural products for market. It typically covers an employer's employees who prepare for market, in either a fixed structure or on a moving packing plant on a farm, commodities grown or otherwise produced by that employer only, plus the employer's clerical employees and those who transport the commodities to market. Order No. 14 covers the employer's field workers.

IWC Order No. 14 is an occupational order, not an industry order. It thus covers only persons *employed*

in an agricultural occupation on a farm or ranch. As noted in the above discussions of IWC Order Nos. 4, 8 and 13, other employees are covered by another IWC order. *Employed in an agricultural occupation* includes activities such as preparing the land for planting, caring for and harvesting of the crop and transporting it directly from the field to market or to the place of first processing. The term also includes the conservation, maintenance and improvement of the farm and its tools and equipment. While performing any of these tasks, an employee is covered by IWC Order No. 14.

Overtime Rules under Order No. 14: While working in an agricultural occupation, an employee must be paid at least 1½ times the employee's regular rate of pay for work performed after 10 hours in a workday or during the first 8 hours on the seventh day of work in a workweek. Such an employee must be paid double the employee's regular rate of pay for hours worked after 8 on the seventh day of work in a workweek.

Overtime Rules under Order Nos. 4, 8 and 13: An employee covered by one of these orders must be paid an overtime premium for work performed after 8 hours in a workday, after 40 hours in a workweek, or on the seventh day of work in a workweek. A covered employee must be paid at least 1½ times the employee's regular rate of pay for work performed after 8 and through 12 hours in a workday, after 40 hours worked in a workweek, or during the first 8 hours on the seventh day of work in a workweek. Such an employee must be paid double the employee's regular rate of pay for hours worked after 12 in a workday or after 8 on the seventh day of work in a workweek.

Which IWC Order Applies? Certain job activities employees now do did not exist when the classification definitions in the IWC orders were written more than 30 years ago. There is often no case law to guide employers on how to classify these new activities. Therefore, the next best thing is to see how the state Division of Labor Standards Enforcement (DLSE), which enforces the IWC orders, views these new activities. The DLSE booklet ***Which IWC Order? Classifications*** includes a table that lists for various agricultural commodities those operations the DLSE regards as Order No. 14 operations and those that are Order 13. For example, under "Grapes, Table," the Order No. 14 activities are "growing, thinning, girdling, pruning, typing, picking, pick-packing (field)." The Order No. 13 activities are "sorting, trimming, packing, fumigating, labeling, shipping."

See the appendix for the chart *Classifications of Crops and Activities under IWC Orders*, starting on page ?.

Working Under Two IWC Orders: Sometimes an employee who usually works in an agricultural occupation performs non-agricultural work. For example, employees in asparagus operations may move between harvest activities and packing-shed work.

The rules for employees working under two IWC Orders in the same workday or workweek were set by a 1977 Superior Court decision in *California Asparagus Growers Association v. IWC*. Generally, a trial court's decision applies only to the parties in the case. However, the state Labor Commissioner has applied this decision throughout agriculture.

This decision allows an employer to have an employee work under both IWC Order No. 14 (Agricultural Occupations) and IWC Order No. 13 (Industries Handling Products on the Farm) in the same workday or workweek and still pay overtime after working 10 hours per workday or 6 days per workweek if the employee's work is properly scheduled and proper records of that work are kept.

The procedure to accomplish this feat is explained in a letter from the state Labor Commissioner. Here are excerpts of that letter:

In the decision the court ruled that,

- 1) Daily overtime is controlled by the "Order under which the employee is working when the daily overtime period is reached. . . ."
- 2) The provision of Order 13-76 for overtime for all hours worked over forty hours in the

workweek shall be determined by counting only the hours worked under Order 13-76. Hours worked under Order 14-76 shall not be counted in such determination.

Federal Complication: Under the FLSA an employee who spends any amount of time during a workweek doing non-agricultural work must be paid overtime for all work—including agricultural work—done after working 40 hours in that workweek. For example, suppose in a workweek an employee spent 30 minutes in a packing shed where some of the product was grown by another grower and 59½ hours picking the product grown by his own employer. While the employee spent less than one percent of his time handling another grower's product, it causes him to be treated under the FLSA as a non-agricultural employee for the whole workweek; thus, he must be paid time-and-a-half for 20 hours of work!

In summary, the two key points are:

1. Make sure time records clearly reflect what work was performed at what time of the workday, and
2. Clearly distinguish between work performed as agricultural from non-agricultural during the workday.

Winery Employment: Employment in a winery—even one where grapes grown in only the winery's own vineyards are crushed—is not considered agriculture under the federal Fair Labor Standards Act (FLSA). Thus, an employee who during a workweek either works only in a winery or switches between vineyard work and winery work may work only 40 hours in that workweek at his regular pay rate. For work beyond that limit, the employee must be paid under the FLSA an overtime premium at a rate of 1½ times his regular pay rate. In contrast, an employee is exempt from FLSA overtime in any workweek in which he works only in agriculture.

Cold-Storage Activities: Employees working in a cold-storage facility may be covered by one of three Industrial Welfare Commission (IWC) Orders: No. 14 (Agricultural Occupations); No. 13 (Industries Preparing Agricultural Products for the Market, on the Farm) or No. 8 (Industries Handling Products after Harvest).

Generally, as long as only farmer's own commodities are merely being placed and stored in a cold-storage facility, Order No. 14 covers the employees handling them. Under Order No. 14, "[e]mployed in an agricultural occupation means...[t]he assembly and storage of any agricultural or horticultural commodity...."

In contrast, Order No. 13 covers employees handling commodities produced by their employer that are undergoing other processes or treatment.

Figuring Overtime Pay: Sometimes employees work eight or more consecutive days over two or more workweeks. The most common question about this situation is: "How do I calculate overtime pay for the 8th, 9th, etc., days of work?"

The first thing to consider is the employer's workweek. "Workweek" is defined in California's Industrial Welfare Commission (IWC) orders. The Division of Labor Standards Enforcement (DLSE), which enforces the provisions of the IWC orders, explains:

Workweek Defined: A workweek is any seven consecutive 24-hour period, starting with the same calendar day each week, beginning at any hour on any day, so long as it is fixed and regularly recurring. An employer may establish different workweeks for different employees, but once an employee's workweek is established, it remains fixed regardless of his working schedule. An employee's workweek may be changed only if the change is intended to be permanent and the change is not designed to evade overtime obligations.

While an employer may establish a workweek as noted above, an employer may not artificially design the workweek so as to avoid payment of overtime due for the seventh consecutive day of work in a workweek. In *Seymore v. Metson Marine, Inc.*, the employer scheduled employees to work 14 consecutive workdays that spanned over three workweeks. The employer scheduled the employees so they would not work on either the first three days of the first workweek or the last four days of the third

#1	0 hours	10 hours	10 hours	10 hours	10 hours	10 hours	10 hours
#2	10 hours	10 hours	10 hours	10 hours	10 hours	10 hours	0 hours

During Workweek #1, the employee worked six 10-hour days. Because he neither worked more than 10 hours on any workday nor on more than six workdays of the workweek, the employee didn't work any overtime hours. The same applies to Workweek #2. So, even though he worked 12 consecutive days, the employee didn't earn any overtime during the two-week period, because each workweek is independent of the other.

In conclusion, when calculating overtime, each workweek stands alone.

Overtime Exemptions - State

The state wage-and-hour laws contain complete and partial overtime pay exemptions for certain employees. Employees falling within any of these classifications are completely exempt from the overtime pay requirements established by the IWC orders:

1. **Executive, Administrative or Professional Employees:** State and federal laws exempt specified executive, administrative and professional from their wage-and-hour requirements. Whether an exemption applies depends on the employee's duties and salary. Because the federal and state exemptions for these so-called "white-collar" employees differ, each must be examined separately when considering whether an exemption applies.

IWC Order No. 14 exempts an employee engaged in work that is primarily intellectual, managerial, or creative and requires exercise of discretion and independent judgment, for which the remuneration is at least twice the monthly state minimum wage for full-time employment (based on 40 hours per workweek).

The other IWC orders exempt persons employed in administrative, executive, or professional capacities. In addition to meeting the "duties test" noted below, an exempt employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (40 hours per week). The minimum monthly salary requirement is \$2,773.34 (the equivalent of \$33,280 per year). **Starting on July 1, 2014, when California's minimum wage rises to \$9 an hour, the minimum monthly salary requirement will be \$3,120 (the equivalent of \$37,440 per year).**

The following requirements apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

- (A) **Executive Exemption.** A person employed in an executive capacity means any employee: (a) whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision; and (b) who customarily and regularly directs the work of two or more other employees; and (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and (d) who customarily and regularly exercises discretion and independent judgment; and (e) who is primarily engaged in duties that meet the test of the exemption. The employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (40 hours per workweek.)
- (B) **Administrative Exemption.** A person employed in an administrative capacity means any employee: (a) whose duties and responsibilities involve the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and (b) who customarily and regularly exercises discretion and independent judgment; and (c)(1) who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity, or

(2) who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or (3) who executes under only general supervision special assignments and tasks, and (d) who is primarily engaged in duties that meet the test of the exemption. The employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (40 hours per week.)

(C) **Professional Exemption.** A person employed in a professional capacity means an employee who (a) is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or (b) is primarily engaged in an occupation commonly recognized as a learned or artistic profession.

2. **Outside Salespersons:** Both federal and state laws exempt outside salespersons from their requirements for overtime premium pay. Under the FLSA, an outside salesperson is an employee who (1) sells or takes orders for products or services while customarily and regularly away from the employer's place of business and (2) does not perform non-sales type work for more than 20% of the hours worked in the workweek by nonexempt employees. Under the IWC orders, an outside salesperson is an employee who (1) is 18 years of age or over, (2) customarily and regularly spends more than 50% of the working time away from the employee's place of business and (3) sells tangible or intangible items or obtains orders or contracts for products, services or use of facilities.
3. **Commissioned Inside Salespersons:** Federal and state laws provide narrow overtime exemptions for inside commissioned salespersons. The FLSA's exemption applies only to retail establishments. To qualify, the retail employee must earn more than 1½ times the minimum wage and receive more than half of his or her total compensation in the form of a commission from the sale of goods or services. IWC Order Nos. 4 (Professional, Technical, Clerical, Mechanical, and Similar Occupations) and 7 (Mercantile Industries) provide a similar exemption from overtime. Overtime premium pay does not apply to any employee whose earnings exceed 1½ times the minimum wage if more than half of that employee's compensation is from commissions. Employers must record the hours of work of commissioned inside salespersons to prove they qualify for the exemption.
4. **Truck drivers:** Both the FLSA and IWC orders exempt from their overtime premium pay requirements employees covered by federal or state laws regulating motor carriers. See "Truck Drivers" on page 36.
5. **Parents, spouse or children:** Employees who are the parents, spouse or children of the employer are exempt from overtime-premium-pay requirements.
6. **Irrigators:** Since they are *employed in agriculture*, irrigators are exempt from the FLSA's overtime-premium-pay requirements. Further, they are exempt from the overtime-premium-pay requirements of IWC Order No. 14 during any workweek in which they perform an irrigator's duties for more than half of their hours in that workweek. Those duties include the job functions defined in the U.S. Department of Labor's **Dictionary of Occupational Titles (DOT)** (*i.e.*, Head Irrigator, Valve-Pipe Irrigator, Sprinkling-System Irrigator and Gravity Flow Irrigator). But as the **DOT** listing of irrigator types is not exhaustive, the state Labor Commissioner has acknowledged that other types of irrigators, such as drip-system irrigators, may fall within the exemption.
7. **Part-Time Employees:** IWC Order No. 14 exempts certain part-time employees from the requirement that they receive overtime premium pay on the seventh day of work in a workweek. To qualify, the employee must not have worked more than 30 hours in the workweek or more than six hours in any workday. (The FLSA regulates only the number of hours that may be worked in a workweek and not daily hours or number of days worked. Thus, covered employees are entitled to overtime pay under the FLSA only if they work more than 40 hours in a workweek.)
8. **Make-Up Time:** Section 513 the California Labor Code provides a way for non-agricultural employees (*i.e.*, those not covered by IWC Order No. 14) to take time off to attend to their personal

needs and work other hours within the same workweek to make up that time, without the payment of overtime compensation except for hours worked in excess of 11 in one workday or 40 in one workweek. The employee benefits by neither losing pay nor having to use paid-time-off benefits such as sick or vacation time for the time off. The employer benefits by not having to pay daily overtime to an employee who works more than eight hours (but not more than 11 hours) in a day to make up the missed time.

Section 513 allows an employer to approve an employee's signed request to make up work time that has been or that will be lost due to the employee's personal needs. The employer may choose to grant or deny a request for time off or to work make-up time.

An employee must submit a separate written request each time the employee wants make-up time. The request need not be made before the employee takes work time off, but it must be made before the make-up work is performed so as to ensure the employer is not liable for daily overtime for the make-up hours worked. Daily overtime hours worked before a request to perform make-up work cannot be credited as make-up time; rather, it constitutes time worked for which overtime compensation must be paid.

Most importantly, time taken off in one workweek may be made up only during that same workweek. If the employee performs the make-up work in a different workweek than when he took work time off, the daily overtime hours worked must be paid at the applicable premium rate.

The statute prohibits an employer from "encouraging or otherwise soliciting an employee to request [the] employer's approval to take personal time off and make up the work hours. . . ." This does not prohibit employers from merely informing workers of the statute's provisions; however, it clearly does prohibit them from suggesting, recommending (or, of course, ordering) employees to "request" make-up time.

Nothing in the statute prohibits an employee from making up time worked before the time being made up is lost, as long as the make-up work is performed during the same workweek in which the time is lost. Thus, an employee who knows he will need to take time off late in the workweek may, earlier in that workweek, make up that time off in advance.

In this situation, however, if the employee were to fail to take the time off after working the make-up time, the employer would have to pay the employee overtime for hours worked over 40 hours in that workweek. In contrast, the employer would not be liable for daily overtime because the employer had agreed to allow the employee to work the extra daily hours without payment of daily overtime so as to make up for the time the employee asserted would be lost later in the workweek due to the employee's personal obligations, and the employer relied on the employee's assertion in granting that request.

Truck Drivers

Federal Provisions: Specified employees covered by the federal Motor Carrier Act of 1935 are exempt from FLSA overtime pay. Exempted are drivers, drivers' helpers, loaders, and mechanics whose work affects the safe operation of certain vehicles in interstate commerce. Qualifying vehicles are those: (a) weighing more than five tons; (b) designed to transport more than eight passengers, including the driver, for compensation; (c) designed to transport more than 15 passengers, including the driver, not for compensation; or (d) used to transport certain hazardous materials.

However, the exemption does not apply—and therefore FLSA overtime must be paid—to an employee in any workweek in which the employee's work, in whole or in part, is that of a driver, driver's helper, loader, or mechanic affecting the operational safety of motor vehicles weighing five tons or less, other than a vehicle described in (b), (c) or (d) above.

The federal Motor Carrier Act applies whenever the load or delivery is on its way out of the driver's state of domicile, while the driver is out-of-state, and during the return trip within the domicile state.

Further, where a driver or driver's helper has not made an actual interstate trip, or a loader or mechanic has not been working on an interstate shipment or vehicle that has been used in such a shipment, they may still be subject to the jurisdiction of the U.S. Department of Transportation (DOT) and thus exempt from FLSA overtime if:

1. The carrier is shown to have an involvement in interstate commerce; and
2. It is established that the driver or driver's helper could have, in the regular course of his employment, been reasonably expected to make one of the carrier's interstate runs or, in the case of a loader or mechanic, could have been reasonably expected to perform as such in the carrier's interstate activity.

Satisfactory evidence of this can take the form of statements from the carrier's employees, or documentation such as employment agreements. Where such evidence is developed with regard to an employee, the DOT asserts jurisdiction over that employee for a four-month period starting with the date he could have been called upon to, or actually did, engage in the carrier's interstate activity. Thus, such employee would be exempt from the FLSA's overtime provisions for the same four-month period.

A truck driver covered under the federal Motor Carrier Act may drive for up to 11 hours after having been off duty for at least 10 hours. Before driving again, the truck driver must remain off duty for at least another 10 hours. After having been on-duty for 14 hours—no matter the activity—the driver must have 10 hours off-duty. The 14-hour duty period may not be extended with off-duty time for meal, fuel or other types of stops. Only the use of a sleeper berth can extend the 14-hour on-duty period. Further, during any seven consecutive days, a driver may not drive after having been on-duty for more than 60 hours; during any eight consecutive days, a driver may not drive after having been on-duty for 70 hours, but the driver may perform non-driving activities. Drivers can "restart" the seven- and eight-day periods by taking at least 34 consecutive hours off-duty.

Agricultural operations are exempted from driving-time requirements for transportation occurring within a 100 air-mile radius of a farm or distribution point during planting or harvesting season within or as determined by each state.

California Provisions: Drivers covered by the California Motor Carrier Safety Act are exempt from the overtime premium pay provisions of the Industrial Welfare Commission (IWC) orders. However, they are limited to a maximum number of hours on duty. The state allows the exemption for only the truck driver and not for any non-driver who rides along for any other purpose such as to assist in loading or unloading.

Covered by the state Motor Carrier Safety Act are drivers * of:

- (a) Motortrucks of three or more axles that are more than 10,000 pounds gross vehicle weight rating.
- (b) Truck tractors.
- (c) Buses and farm labor vehicles.
- (d) Trailers and semitrailers designed or used for the transportation of more than 10 persons, and the towing motor vehicle.
- (e) A commercial motor vehicle with a gross vehicle weight rating of 26,001 or more pounds or a commercial motor vehicle of any gross vehicle weight rating towing a vehicle with a gross vehicle weight rating of more than 10,000 pounds, except combinations including camp trailers, trailer coaches, or utility trailers.
- (f) Two-axle trucks:
 - (1) Connected to a regulated trailer or semitrailer so that the combination exceeds 40 feet in length;
 - (2) Transporting any hazardous material or towing a trailer transporting hazardous material;
 - (3) With a gross vehicle weight of 26,001 or more pounds, and any two-axle truck towing any regulated trailer/semitrailer with a gross vehicle weight rating of more than 10,000 pounds.

(*Note: the above list covers vehicles commonly used in agriculture, other vehicles are covered by this exemption. Refer to California Vehicle Code sections 35000 and 35001.)

The IWC exemption applies only to employees whose regular duty is that of a driver, not any other category of worker. The policy would cover employees regularly employed as relief drivers or as assistant drivers. However, any driver who does not drive or operate a truck for any period of time during an entire workday is entitled to overtime premium compensation for all overtime hours worked performing duties other than driving during that day.

Truck drivers covered by the state Motor Carrier Safety Act may not drive more than 12 hours within a work period or drive after having been on duty for 16 hours. A truck driver may accumulate off duty time in two periods totaling eight hours when resting in a sleeper berth, provided neither period is less than two hours. However, title 13, California Code of Regulations, section 1212(k) relaxes the driving and on-duty time restrictions for drivers employed by agricultural carriers when transporting farm products from the field to the first point of processing or packing. An agricultural carrier is one who transports for compensation fresh fruits, nuts, vegetables, logs and unprocessed agricultural commodities. These drivers may not drive for any period after having been on duty 16 hours or more after 8 hours off duty nor may they drive after having been on duty for 112 hours in 8 consecutive days.

Fruit and Vegetable Harvest Transportation: Exempted from FLSA overtime is an employee engaged in either:

1. The transportation and preparation for transportation of fruits and vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or
2. In transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables.

The exempt operations of preparing for transportation and transporting must be performed with respect to "fruits or vegetables." The intent of exemption is to exempt such operations on fruits or vegetables which are "just-harvested" and still in their raw and natural state. Also, the exemption was intended to eliminate the difference in treatment of farmers and non-farmers with respect to exemption of such "handling or hauling of fruit or vegetables in their raw or natural state." Transporting and preparing for transportation other farm products that are not fruits or vegetables are not exempt. For example, operations on livestock, eggs or poultry are nonexempt.

Weekend or Holiday Overtime: Unless required by a contractual obligation or policy adopted by the employer to do so, an employer is not legally required to pay overtime or a premium merely because employees work on holidays, Saturdays or Sundays. Those days are treated like any other day: An overtime premium is due only if the hours worked exceed the limits specified by the applicable IWC order. An employer choosing to give employees time off with pay for certain holidays need not count the unworked holiday time as "hours worked" for overtime purposes. Overtime is based on "hours worked," not "hours paid."

Other Wage-Hour Issues

Split-Shift Premium Pay: Section 4(C) of the IWC orders requires an employer to pay an employee who works a split shift one hour of pay at the minimum wage in addition to the minimum wage due for a workday. A split shift is an interruption of working time on a workday by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

For example: Suppose an employee whose pay rate is \$8.50 per hour works on a workday two split shifts of five hours each, for a total of 10 hours. The employee earned \$85 of pay (i.e., 10 hours times \$8.50 per hour). The minimum wage due for 10 hours is \$80 (i.e., 10 hours times \$8 per hour). The difference between those two daily amounts is \$5. So, the employee's regular pay already covered \$5 of the employer's split-shift premium pay obligation of \$8. Thus, the employer must pay the employee a net premium of only the difference between those two amounts: \$3.

In the same situation, but with a pay rate of \$9 per hour, no additional split shift premium pay would be due the employee. That is because the \$90 due the employee as pay for the 10 hours worked exceeds

by more than \$8 the minimum wage due for those hours.

The only exemption to the split-shift premium pay provision is where an employee resides at the place of employment. Unlike the reporting time pay provision, there is no exemption when the split shift is caused by a condition beyond the employer's control.

Piece Rates and Commissions: To calculate the regular rate where compensation is by the piece or by a commission, either of these two methods may be used:

1. Divide the total earnings for the week, including those during overtime hours, by the total hours worked during the week, including the overtime hours. Then, for each overtime hour worked, the employee is entitled to receive an additional ½ of the regular rate for those hours requiring time-and-a-half, and the full regular rate for those overtime hours requiring the payment of double time.
2. Use the piece or commission rate as the regular rate and pay for pieces produced or commissions earned during overtime hours at the applicable premium rate. For example, if the piece rate is 10 cents per unit produced during regular hours, then it would be 15 cents per unit produced during time-and-a-half work hours. **This method may not be used where an employee has more than one pay rate.**

Bonuses' Effect on Overtime Pay: Bonuses (and commissions) earned by a non-exempt employee must be included into the employee's regular rate of pay and used in computing overtime compensation. The amount of a bonus earned during a single pay period is added to the employee's regular earnings for that pay period and is thus factored into the calculation of the employee's regular rate of pay used in computing any overtime-premium pay owed to the employee.

Under many bonus plans, however, a bonus is not earned in a single pay period but is earned over several pay periods. In that instance, a not-yet-earned bonus is disregarded in computing the regular rate of pay for any pay period during which the bonus is being (partially) earned. In other words, until a bonus being earned over multiple pay periods has finally been earned, an employer computes overtime pay for each pay period based on that pay period's earnings, excluding any amount of the yet-to-be earned bonus.

When a bonus has been earned and its amount can be ascertained, that amount must be apportioned back over the workweeks of the multiple pay periods during which it was earned. The employee must then be paid an additional amount of compensation for each overtime hour worked during the bonus-earning period equal to the applicable overtime hourly rate of pay allocable to the bonus multiplied by the number of overtime hours worked during that period.

Example: Below is the computation for an end-of-season bonus. In this example, a \$1,000 bonus is paid to an employee who earned \$10 per hour and worked 500 hours through the end of harvest season. Of those 500 hours, the employee worked 50 hours of overtime at time-and-a-half and 25 hours of overtime at double-time.

Bonus	\$1,000
Bonus allocated to employee's regular rate of pay (RRP) (\$1,000 divided by 500 hours).....	\$2/hr

Overtime pay excluding bonus from RRP:

Overtime at 1½ times RRP of \$10/hr	\$15 per hour x 50 = \$750
Overtime at 2 times RRP of \$10/hr	\$20 per hour x 25 hours = \$500
Total overtime earned excluding bonus from RRP.	\$1,250

Overtime rates including bonus (once earned) in RRP:

Overtime at 1½ times RRP of \$12 (\$10/hr plus \$2/ hr bonus)	\$18 per hour x 50 = \$900
Overtime at 2 times RRP of \$12 (\$10/hr plus \$2/ hr bonus)	\$24 per hour x 25 hours = \$600
Total overtime earned including bonus in RRP.	\$1,500

Additional overtime pay due with bonus included in RRP (\$1,500 minus \$1,250):	\$250
---	-------

Group Rate for Piecework is an acceptable method of computing pay. In this method the total number of pieces produced by the group is divided by the number of persons in the group and each is paid accordingly. The regular rate for each worker is determined by dividing the pay received by the number of hours worked. However, each employee must receive a separate payroll check and an itemized statement of earnings. Employers may not pay the total earnings to one employee, such as the father of a family unit, and expect that person to pay the other members of the group. Each person must be treated as an individual employee in every way.

Non-Piece-Producing Work Time of Piece-Rate Employees: In California, separate compensation for a piece-rate employee's non-piece-producing work time must be paid to the employee regardless of the amount of the employee's piece-rate earnings. Specifically, an employer must pay an employee for non-piece-producing work time at the minimum wage (or a higher contract wage, if one exists) *in addition* to the employee's piece-rate earnings. Examples of non-piece-producing work time are safety-training sessions, post-work cleanup time, waiting time for equipment repairs or delivery, time spent traveling between fields or in a vehicle as required by the employer, rest periods taken under an order of the Industrial Welfare Commission, and cool-down breaks taken under Cal/OSHA's Heat Illness Prevention standard.

In contrast, under federal law an employer may average an employee's piece-rate earnings across all of the employee's hours worked—both piece-producing and non-piece-producing work time—in a workweek to determine whether those earnings suffice to meet the employer's minimum-wage obligation to the employee.

Exempt Salaried Employees - Salary Deductions: Under federal and California wage-and-hour rules, an employer may classify certain professional employees, executive employees, and administrative employees as "exempt" from minimum-wage, overtime-pay and recordkeeping requirements.

To be exempt from these requirements in a workweek, an employee during that workweek must meet both a "duties test" and a "salary test." In other words, an employee who does not meet one test or the other (or both) in a workweek is a non-exempt employee and loses exempt status for at least that workweek.

Only a few types of deductions may be made from an exempt employee's salary. For example, hours worked during the first and last week of employment may be paid on a prorated basis. Employers may deduct time off on a prorated basis when the employee takes a full day or more off for personal business. The employer may also make a prorated salary deduction for a full day or more off for sickness or disability as long as the employer has a bona fide sick-leave policy that provides compensated sick leave and the employee has exhausted his accrued sick leave and thus has none left. Employers may deduct time off for a disciplinary suspension, but only if the suspension lasts for a week or more.

Impermissible deductions include those based on the quantity or quality of work performed, lack of work, safety penalties, jury duty, witness appearance, and temporary military leave lasting less than a week. Employers may not deduct for time when work is not available to an employee if they are ready and willing to work, and the employee has performed any work in that workweek. The employer may not deduct from salary due to a safety infraction.

The California Division of Labor Standards Enforcement (DLSE) opined that an employer may deduct from an employee's vacation- and/or sick-leave "banks" in one-hour increments for personal leaves taken by an exempt employee without jeopardizing the employee's exempt status.

The DLSE further stated that an employer may combine accruals from vacation- and sick-leave banks to make deductions from them when the employee has no sick leave as long as the employer's policy expressly provides for that as well.

For example, if an exempt employee is out sick for three hours, and the employee has only two hours of accrued sick leave and eight hours of accrued vacation remaining, the employer may deduct the two hours from the employee's sick bank and one hour from the employee's vacation bank.

If, however, under the same scenario, the employee's sick and vacation banks are both exhausted, the employer may not deduct any of the employee's salary and must pay the employee full salary for that day.

Following the U.S. Department of Labor's lead, the DLSE opined that an employer may reduce an exempt employee's salary with a corresponding reduction in the employee's work schedule to avoid or limit the need for layoffs in a difficult economic environment without jeopardizing the employee's exempt status.

Summary of Allowed Salary Deductions:

- When an employee is absent from work for one or more full days for personal reasons other than sickness or disability
- For absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness
- To offset amounts employees receive as jury or witness fees, or for temporary military duty pay
- For penalties imposed in good faith for infractions of safety rules of major significance
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct-rule infractions
- In the employee's initial or final week of employment if the employee does not work the full week
- For unpaid leave taken by the employee under the federal Family and Medical Leave Act.

Summary of Unallowed Salary Deductions:

- Deductions for partial-day absences generally violate the salary-basis rule, except those occurring in the first or final week of an exempt employee's employment or for unpaid leave under the Family and Medical Leave Act
- A deduction because the employer's business was closed for less than a workweek due to inclement weather
- A deduction because the exempt employee was absent for jury duty for less than a workweek
- A deduction because the exempt employee was absent for less than a workweek due to an illness where the employer does not have a bona fide sick-leave plan, policy or practice of providing wage-replacement benefits
- A deduction for a partial-day absence to attend a parent-teacher conference

Non-Exempt Salaried Employees: Overtime pay is computed using an employee's regular rate of pay, which is usually an hourly rate. The regular rate of a non-exempt employee paid a salary is usually computed by dividing the employee's weekly compensation by the maximum number of hours (i.e., regular hours) the employee may work in a workweek at that regular rate. Where, however, the employer and employee have agreed the salary compensates the employee for fewer hours than that maximum, the weekly compensation is divided by the agreed-upon number of hours.

Here's how to determine the regular rate of a non-exempt employee paid a monthly salary that compensates the employee for the maximum number of regular hours the employee may work:

First, multiply the salary by 12 months per year; this gives the annual rate. Divide the annual rate by 52 weeks per year; this gives the weekly rate. Divide the weekly rate by the maximum number of regular hours the employee may work each workweek; this gives the regular hourly rate.

Take, for example, a non-exempt agricultural employee paid a monthly salary of \$2,600. The employer and the employee agreed that the salary is intended to compensate the employee for a regular workweek of six 10-hour days (i.e., 60 hours). Then:

\$ 2,600/month	x	12 months/year	=	\$31,200/year
\$ 31,200/year	÷	52 weeks/year	=	\$600/week
\$ 600/week	÷	60 hours/week	=	\$10/hour

The employee's regular rate is thus \$10 per hour. So, on top of his salary, the employee must be paid \$15 for each non-regular hour worked for which overtime pay is due at the rate of 1½ times the regular rate (i.e., time-and-a-half). And, \$20 is due for each non-regular hour worked for which overtime pay is due at the rate of two times the regular rate (i.e., double time).

The fixed salary of a non-agricultural non-exempt employee may include compensation only for the employee's regular, non-overtime hours, even if there is a private agreement to the contrary. In other words, an employer and such an employee may not have an explicit wage agreement that includes regular compensation and overtime compensation into a single fixed salary.

Clerical and Office Staff: IWC Order 4 applies to office staff who support agricultural operations where their employer conducts no operations under IWC Order 8 or 13. Clerical staff supporting an operation covered by IWC Order 8 or 13, such as a packinghouse, are covered by that order.

Under federal law, clerical employees who exclusively support their employer's farming operations are exempt from FLSA overtime as agricultural employees because their work falls within the secondary meaning of agriculture. However, clerical employees supporting non-agricultural activities, such as in a winery operation, at any time during a workweek are entitled to FLSA overtime after 40 hours worked.

Mechanics – Federal Law: Mechanics who are employed by a farmer and who during a workweek exclusively maintain the farmer's tools and equipment are employed in agriculture and are exempt from overtime pay. If they spend any time during the workweek maintaining equipment or machinery in wineries or doing other non-agricultural activities, they are entitled to overtime after 40 hours worked in that workweek.

California Law: The maintenance of farm tools and equipment is considered agricultural work under IWC Order 14. Thus, mechanics servicing farm tools, equipment, and vehicles for a vineyard operated or managed by their employer are covered by Order 14 and are entitled to overtime pay after working 10 hours in a workday and for all work on the seventh day of work in a workweek.

However, if the employer allows other growers to pay to use his mechanics' services, the mechanics are covered by IWC Order 4, which requires daily and weekly overtime pay in the same manner as IWC Order 8, except that a day off after 72 hours worked in a week is not required.

Housing Employees: Some employers provide their farm employees with housing for free or at less than its fair market value. However, doing so can have economic impacts under laws and rules regarding overtime pay, workers' compensation premiums, and taxes, as follows.

Overtime Premium Pay: Under both federal and California law, the premium pay owed an employee for working overtime is computed based on the employee's regular rate of pay. The regular rate of pay includes remuneration beyond wages and other cash compensation.

Thus, non-monetary remuneration, such as board, housing and utility services, an employer furnishes to an employee must be accounted for in calculating the employee's regular rate of pay. Excepted are facilities whose cost is to be excluded from wages under a collective bargaining agreement covering the employee.

In valuing such housing, the California Division of Labor Standards Enforcement (DLSE) uses the same standards as the U.S. Department of Labor. Under those standards, the value of housing is generally its "reasonable cost" to the employer, meaning the lesser of either (1) the cost of its operation and maintenance including adequate depreciation plus a reasonable allowance (up to 5½%) for interest on the depreciated amount of capital invested by the employer or (2) its fair rental value.

For example, if housing valued at \$200 a month is provided at no cost to an employee who worked 200 hours in a month, \$1 an hour for the housing would have to be added to the employee's regular rate of pay in calculating overtime pay due the employee.

(Authority: DLSE's *Enforcement Policies and Interpretations Manual*, §§ 49.1.1 to 49.1.2.2, available

online at www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf ; Title 29, Code of Federal Regulations, §§ 531.3, 531.29 to 531.33, and 778.116, available online at www.dol.gov/dol/allcfr/ESA/Title_29/Chapter_V.htm.)

Workers' Compensation Premiums: An employer's payroll (i.e., remuneration earned by employees) is used in calculating the premium for the employer's workers' compensation insurance policy. In addition to money, remuneration includes "all substitutes for money."

While lodging provided to an employee is generally not remuneration in this context, one notable exception from that exclusion is for lodging an employer provides for farm employees. The market value of such lodging is included as payroll.

(Authority: *California Workers' Compensation Uniform Statistical Reporting Plan—1995*, effective 1/1/10, Part 3, § IV, Rule 3.c.(2) and § V, Rule 1.b., available online at https://wcirbonline.org/WCIRB/root/pdf/usrp_ic_regs_only.pdf)

Taxes: Any fringe benefit an employer provides to an employee is taxable and must be included in the employee's pay unless the law specifically excludes it.

The amount to be included in an employee's pay is the amount by which a fringe benefit's value exceeds the sum of (1) any amount the law excludes from pay and (2) any amount the employee paid for the benefit. The amount is subject to income and employment taxes and must be reported on the employee's Internal Revenue Service Form W-2, Wage and Tax Statement.

Housing provided to an employee is such a taxable fringe benefit, and its value must be included in the employee's wages, unless it meets all three of these tests:

1. It is furnished on the employer's premises (generally the employee's place of work);
2. It is furnished for the employer's convenience (that is, for a substantial business reason other than to provide the employee with more pay); and
3. The employee must accept it as a condition of employment (this applies where an employee must live on the business premises to perform his duties—for example, the employee must be available at all times, or the employee could not perform his duties without being housed there).

(Authority: Internal Revenue Service Publication 15-B, *Employer's Tax Guide to Fringe Benefits for use in 2010*, pages 2 and 14, available online at www.irs.gov/pub/irs-pdf/p15b.pdf.)

Workday and Workweek: A workday is any consecutive 24-hour period starting at the same time each calendar day. The 24-hour period may start at any hour of any day. Daily overtime pay is based on hours worked in a workday. See also "Workday and Workweek Defined" on page 32.

An employer may change the workday or the workweek as long as the change is intended to be permanent. It is not necessary for all employees to have the same workday or workweek.

Paid Time Off and Hours Worked: Time taken off for paid vacation, holidays or sick leave need not be counted as hours worked in determining any overtime-pay obligation.

Paydays

Wages must be paid according to a regularly set schedule. When employees work overtime during a pay period, the payment of only the overtime wages may be delayed to the next payday. Straight-time wages generally must be paid within seven days of the end of the pay period in which they were earned.

Workers employed by farm labor contractors must be paid at least once a week on a business day

designated in advance of payment. Payment must include all wages earned through the fourth day before the payday. In addition, a farm labor contractor on each payday must include on itemized wage statements the name and address of the legal entity that secured the services of the farm labor contractor. See also "Wages and Payday" on page 134.

Employees boarded and lodged by an employer (except for those employed by a farm labor contractor, who must always pay at least weekly) must be paid at least once per month. Payment must include all wages up to the regular payday designated in advance.

All other agricultural employees must be paid twice each month on days designated in advance. Payment must include all wages earned through the seventh day before payday.

Executive, administrative and professional employees, as defined by law, may be paid monthly, as long as all of these conditions are met: (1) They are not covered by a collective-bargaining agreement containing language on paydays to be applied; (2) They are not covered by the FLSA; (3) Their monthly remuneration does not include overtime pay; and (4) They must be paid within seven days after the close of the monthly payroll period.

Payroll Deductions and Offsets Against Wages

An employer may lawfully withhold amounts from an employee's wages only when: (1) required or empowered to do so by law; (2) when the employee expressly authorizes in writing a deduction to cover insurance premiums, benefit-plan contributions or other deductions not amounting to a rebate of the employee's wage; or (3) when a deduction to cover health, welfare or pension contributions is expressly authorized by a wage or collective-bargaining agreement.

The ability of employers to deduct amounts from a non-exempt employee's wages due to cash shortage, breakage, or loss of equipment is specifically regulated by the IWC orders. Further, several court decisions significantly limit the employer's ability to offset various employee debts, such as overpayment of wages, against the employee's wages. Having written authorization to accelerate repayment of an employee debt does not necessarily make such a deduction legal. Balloon payments on separation from employment are not valid even if the employee agrees to such a repayment schedule in advance. It would be prudent to review with legal counsel any contemplated unauthorized or accelerated payroll deduction.

Here is a discussion of proper and improper deductions.

Lawful Deductions: California Labor Code section 224 allows an employer to deduct any portion of an employee's wages where the employer is required or empowered to do so by federal or state law. Further, deductions for insurance premiums, hospital or medical dues or other deductions not amounting to a rebate or deduction from the standard wage under a collective bargaining agreement (CBA) or required by a statute may also be deducted upon the written authorization of the employee. Deductions for health and welfare or pension payments provided by a CBA are also allowed even without the written authorization of the employee.

Garnishment of Wages: California law provides that wages of an employee may be garnished by a creditor of the employee. The legal procedure to obtain a judicial order relating to the garnishment is set forth in numerous sections of the Code of Civil Procedure. An employer may be required to withhold a portion of the wages of an employee and to pay the amount withheld to the creditor. Such withholding shall be in the amounts and at such times as may be authorized by the court order.

Under California law, the amount of wages protected from garnishment is greater than under federal law. Under federal law, garnishments are tied, in part, to the federal minimum wage, which is less than the California minimum wage. Under California law, an employee's wages are protected from garnishment based on the state minimum wage of eight dollars per hour multiplied by 40 hours per week. This amounts to \$320 per week. Wages at or below \$320 per week are exempt from garnishment. Wages exceeding \$320 per week may be garnished up to a limit of 25% of the debtor's disposable income.

Section 2929 of the California Labor Code provides that an employer may not discharge an employee because garnishment of the employee's wages has been threatened or due to a single garnishment of the employee's wages. A civil action may be brought by an employee against an employer for a violation of either provision. An employer may discharge an employee against whom multiple garnishment actions have been judicially approved except where the multiple garnishments were for child support.

The federal Consumer Credit Protection Act prohibits discharging an employee because one garnishment of the employee's wages has been approved. A violation is a criminal act subject to criminal prosecution and remedies.

Employer May Not Collect or Receive Wages Paid Employee: Labor Code section 221 prohibits an employer from recovering wages paid. This provision prohibits an employer from receiving from an employee any wage paid by the employer to the employee either by deduction or recovery after payment of the wage.

The California courts have held that section 221 is "declarative of a strong public policy against fraud and deceit in the employment relationship. Even where fraud is not involved, however, the Legislature has recognized the employee's dependence on wages for the necessities of life and has, consequently, disapproved of unanticipated or unpredictable deductions because they impose a special hardship on employees."

Self-Help by Employers to Recover Unliquidated Sums: Courts have held that deductions from wages in effect allow an employer a self-help remedy that is illegal. The 1962 opinion in *Kerr's Catering v. DIR* made it clear that courts in California will scrutinize attempts by employers to recoup losses or damages by deducting from wages earned by arguably blameworthy employees. An employer who resorts to self-help by taking such deductions does so at its own risk.

Losses Resulting from Simple Negligence: *Kerr* held that shortages and other losses occurring without any fault on the part of an employee or merely due to simple negligence are inevitable in almost any business operation. Accordingly, an employer must bear those losses as an expense of doing business.

Discipline as an Alternative: In addition, of course, an employer may discipline an employee whose carelessness caused a loss. But the threat of discharge if the employee refuses to allow a deduction is not allowed. In addition, the courts have held that a discharge due to an employee's complaint about an illegal deduction constitutes a violation of public policy and gives rise to a cause of action for wrongful discharge.

Loss Suffered from an Employee's Dishonest or Willful Act or Gross Negligence: The IWC orders purport to give an employer the right to deduct for losses suffered due to an employee's dishonest or willful act or gross negligence. However, Labor Code section 224 proscribes any deduction that is neither authorized by the employee in writing nor permitted by law. Again, an employer who resorts to self-help does so at its own risk, as even under the proviso contained in the IWC orders, an objective test is applied to determine whether the loss was due to a dishonest or willful act or gross negligence. If it is determined that the employee was not guilty of a dishonest or willful act or gross negligence, the employee could recover not only the wages withheld but any waiting-time penalties due.

Deductions for Loans Made to Employees: In *Barnhill v. Saunders*, the court concluded that an employer may, with an employee's written consent, deduct from the employee's wages payments on loans made by the employer to the employee. However, the employer may not deduct a "balloon payment" to repay the loan when employment ends even if the employee had consented to such a deduction.

The conclusion reached in *Barnhill* allowing deductions from the wages of employees to repay loans made by the employer to the employee is questionable in view of the provisions of Labor Code section 300. That statute provides that no assignment of future wages may be made unless wages have already been earned except that future wages may be assigned for necessities of life (e.g., necessary food,

necessary clothing, housing), and such assignment for necessities must be made directly to the person or persons supplying the necessities. Further, an assignment requires spousal consent unless at least an interlocutory judgment of dissolution has been entered.

Any Deduction Must be for Direct Benefit of Employee: Deductions from an employee's wages are permitted only for items that are for the employee's direct benefit. They may not be made for the benefit of the employer, either directly or indirectly.

Specific Deductions: The Division of Labor Standard Enforcement (DLSE) has addressed the question of deductions made by or suggested by an employer for a number of different reasons, such as dealing with the cost of replacing a lost or stolen payroll check or deductions for unreturned safety equipment. The position taken by the DLSE in denying such recovery relies heavily on the court opinions in *Barnhill*, the 1988 case of *CSEA v. State of California*, and the 1969 case *Sniadach v. Family Finance Corp.*

Deductions Allowed By IWC Orders—Caveat: Section 9 of each IWC order in effect before 2000 provided that an employer may "deduct from the employee's last check the cost of an item furnished...in the event said item is not returned." As the courts have repeatedly stated, the Legislature enacted Labor Code sections 400-410 to provide a method whereby the parties to an employment contract may create a bond to ensure against loss by an employee of items such as uniforms, tools and equipment. Accordingly, the IWC's rationale in adopting the provisions of section 9 might not pass judicial scrutiny. The DLSE has continued to explain that the agency will enforce the IWC orders as written. However, employers are nonetheless cautioned about their right to deduct for unreturned uniforms or tools from an employee's final wages. The courts will have the final say on this issue, and they haven't yet spoken.

Deduction For Tardiness: California Labor Code section 2928 provides: "No deduction from the wages of an employee on account of his coming late to work shall be made in excess of the proportionate wage which would have been earned during the time actually lost, but for a loss of time less than 30 minutes, a half hour's wage may be deducted."

Under this statute, an employer may, for instance, deduct from the wages of an employee who was 35 minutes late wages for only 35 minutes. However, it may deduct from the wages of an employee who was only five minutes late wages for 30 minutes.

Deduction For Replacement of Lost Paycheck - Bank Charges: Any deduction by an employer for costs associated with the reissuance of a paycheck is a violation of Labor Code section 224. But an employer may have a cause of action against the employee for recovery of costs associated with the reissuance of a payroll check. In such a lawsuit, of course, an employer bears the burden of showing that the actions of the employee resulted in the loss suffered by the employer. However, even if the employer were successful in the action to recover these costs, the employer could deduct from the employee's wages the amount awarded only under a court-ordered garnishment. Such a garnishment action would be subject, of course, to all defenses available under the wage earner's exceptions.

Deduction For Overpayment of Wages: A unilateral deduction by an employer for the reimbursement of an overpayment of wages is a violation of Labor Code section 224. However, an employer may deduct from an employee's wages amounts voluntarily authorized in writing by the employee to repay the overpayment. The amount deducted from any one paycheck may not result in the employee receiving less than the minimum wage for all hours worked in that pay period.

Final Pay

Discharged or Laid Off: A discharged or laid off employee must be paid immediately upon the discharge all wages then due, including any earned but unused vacation pay. Commission payments that cannot be calculated on the date of termination must be paid by the next regular commission payment due date. An employer must pay a discharged employee at the place and time of discharge.

An employer that 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 is deemed to have

made immediate payment when the wages are paid within a reasonable time, not to exceed 72 hours. Payment must be made by mail to any employee who so requests and designates a mailing address.

Quitting Employee: An employee without a written agreement for a definite period of employment who quits without giving prior notice must be paid final wages due within 72 hours after the quit. The final wages of an employee who gives at least 72 hours' advance notice of his or her intention to quit must be paid upon the quit. An employee who quits must be paid at the employer's office or agency in the county where the employee worked. An employee who quits without 72 hours' notice may request that his or her final wage payment be mailed to a designated address. The date of mailing is considered the date of payment.

Waiting-Time Penalty: An employer who willfully fails to pay any wage due a discharged or quitting employee by the applicable deadline may be assessed a waiting-time penalty. The penalty is an amount equal to the employee's daily pay for each day the wages remain unpaid, up to a maximum of 30 days. By avoiding or refusing to receive payment of final wages due, an employee becomes ineligible for any waiting-time penalty for the period of that avoidance or refusal. Where a good-faith dispute exists about the amount of the wages due, no waiting-time penalty is imposed. Such a good-faith dispute occurs when an employer presents a defense based in law or fact, which, if successful, would preclude any recovery by the former employee. The fact that a defense is ultimately unsuccessful does not preclude a finding that a good-faith dispute existed. In contrast, one that is unsupported by any evidence, is unreasonable, or is presented in bad faith precludes a finding of a good-faith dispute, and the waiting-time penalty may be awarded to the employee.

Even where a dispute exists, the employer must pay, without requiring a release, whatever wages are due and not in dispute (*i.e.*, conceded wages). By failing to pay conceded wages, an employer's good-faith-dispute defense against the imposition of the waiting-time penalty is defeated, no matter the outcome of the disputed wages.

Notes

Working Conditions

Rest Periods

Federal law does not require rest periods for employees. The IWC orders, however, require employers to authorize and permit all employees to take rest periods, which must be counted as hours worked. To the extent it is practical to do so, rest periods must be in the middle of each work period. The amount of rest-period time is based on total hours worked daily, with a break of at least 10 minutes for each four hours worked (or major fraction of four hours). Exception: A rest period need not be authorized for an employee whose total daily work time is less than 3½ hours.

An employer must pay an employee an extra hour of wages, at the employee's regular rate of pay, for each workday that one or more rest periods are not provided to the employee. This payment is not due an employee who chooses on his own not to take an authorized rest period.

See **Meal Period and Rest Period Requirements in Detail** below for more information.

Meal Periods

Federal law does not require meal periods for employees. The IWC orders, however, do require them.

Under IWC orders other than Order No. 14 (Agricultural Occupations), as well as under California Labor Code section 512, which does not apply to employees covered by IWC Order No. 14, an employer may not employ a person for a work period of more than five hours without providing a meal period of at least 30 minutes. However, where a work period of not more than six hours will complete the day's work, the employer and employee may agree to waive the meal period.

Those orders further provide that an employee who works more than 10 hours in a day must be provided a second meal period of at least 30 minutes. Exception: If no more than 12 hours in a day are worked, the employer and employee may agree to waive the second meal period, but only if the first meal period was not waived.

In contrast, IWC Order No. 14 requires an employer to authorize and permit persons employed in an agricultural occupation, after a work period of not more than five hours, to take a meal period of not less than 30 minutes, except that when a work period of not more than six hours will complete the day's work, the meal period may be waived by mutual consent of employer and employee. In contrast to Labor Code section 512 and to the other IWC orders that require a second meal period as discussed above, IWC Order No. 14 apparently requires that agricultural employers be authorized and permitted to take a meal period after *each* work period of not more than five hours.

An employer must keep accurate time records showing when each employee begins and ends each work period. Meal periods, split-shift intervals and total daily hours worked must also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

A meal period is not counted as time worked as long as employees are relieved of all duty and may leave the employer's premises during it. Otherwise, it is an on-duty meal period and counted as time worked. Further, an on-duty meal period is permitted only where both (1) the nature of the work prevents an employee from being relieved of all duty and (2) the employer and employee have agreed in writing to an on-the-job paid meal period.

An employer must pay an employee an extra hour of wages, at the employee's regular rate of pay, for each workday that one or more meal period are not provided to the employee. This payment is not due an employee who chooses on his own not to take a provided meal period.

See **Meal Period and Rest Period Requirements in Detail** below for more information.

Meal Period and Rest Period Requirements in Detail

In its landmark 2012 opinion in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, the California Supreme Court answered these practical and vexing questions about requirements for meal periods and rest periods under pertinent California laws and regulations:

- What is meant by an employer's duty to *provide* meal periods? That is, must an employer allow employees a genuine opportunity to take them without requiring that they take them? Or must an employer ensure that employees not work during meal periods?
- How many meal periods must be provided, and when during the workday must they be provided?
- How much rest-period time must be authorized, and when during the workday must rest periods be authorized?

Duty to Provide Meal Periods: The Court concluded that under applicable California laws and regulations, "an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." Summarizing an employer's duty in this regard, the Court said:

The employer satisfies its obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry.... [T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay....

Number and Timing of Meal Periods: The Court held "an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work."

In so holding, the Court rejected the plaintiff employee's claim that an employer must additionally provide a meal period no later than five hours after the end of each meal period.

Under the rejected theory—nicknamed the "rolling five-hour requirement"—for example, an employee who took his first meal period after having worked only two hours of a nine-hour shift would be entitled to a second meal period after working no more than five hours after the first meal period. In other words, under the rejected rolling five-hour requirement, the employer would have to provide a second meal period even though the employee had worked only seven of a total nine hours on that workday. However, as is discussed under **Comment** below, the rolling five-hour requirement might apply to meal periods required under Industrial Welfare Commission (IWC) Order No. 14.

Rest Periods: The Court held that under the pertinent IWC order, "[e]mployees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on."

The Court further held that employers must "make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible." In the context of an eight-hour shift, as a general matter, "one rest break should fall on either side of the meal break.... Shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule."

Comment: The Court's holdings on these issues provide employers with much needed and welcome clarity of their obligations under California laws and regulations to provide employees with meal periods and rest periods. This is especially important to employers because they face substantial monetary liability for failing to provide employees with those meal periods and rest periods. Specifically, an employer must pay an employee one hour of premium pay at the employee's regular rate for each workday on which one or more meal periods were not provided, plus one hour of pay for each workday

on which one or more rest periods were not provided.

But despite the Court's holding in *Brinker* that an employer needn't insist that employees take their meal periods (just as an employer needn't force employees to take their authorized rest periods), an employer may decide for good reason to require employees not to work during their meal periods and rest periods.

Doing so removes any doubt that employees were in fact provided with those breaks and were not discouraged or impeded from taking them. Doing so thus undermines any claim by employees—or, more likely, ex-employees—that they are entitled to premium pay for having been denied those breaks.

In one especially interesting passage, the Court said: "[A]ctually relieving an employee of all duty... transforms what follows into an off duty meal period, *whether or not work continues*." (Italics added.) In a related footnote, the Court stated: "If work does continue, the employer will not be liable for premium pay. At most, it will be liable for straight pay, and then only when it 'knew or reasonably should have known that the worker was working through the authorized meal period.'" The footnote concludes by noting that "hours worked" includes "all the time the employee is suffered or permitted to work, whether or not required to do so."

Accordingly, by relieving an employee of all duty for a meal period but then allowing the employee to work during it, an employer "suffers or permits" the employee to work and thus that time is compensable as hours work. Nonetheless, the meal period is an "off duty" meal period because the employer relieved the employee of all duty and is merely allowing—as opposed to requiring—the employee to work during it.

Consistent with that passage and footnote, where an employer, despite having relieved an employee of all duty for a meal period, lets the employee work during it, the employer should record that time as an off-duty meal period while also counting the time as hours worked. A notation on the employee's time card that the employee chose to work during the employee's meal period should suffice.

Odd as doing so may seem, this approach is also consistent with the requirement in the Records section of the IWC orders that meal periods (other than those during which operations cease) be recorded. (An on-duty meal period meeting the requirements specified in the IWC orders should similarly be recorded, again while of course counting the time as hours worked.)

Further buttressing this recommendation is this passage in the concurring opinion in *Brinker* by two justices:

If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. This is consistent with the policy underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement.

Time records showing meal periods—whether worked through or not—will help an employer establish an affirmative defense to an employee's claim that the employer did not provide the employee with those meal periods.

Employers of agricultural employees covered by IWC Order No. 14 are cautioned that *Brinker's* holding rejecting the "rolling five-hour requirement" might not apply to that order's unique meal-period provisions. The change in the law on which the Court based that rejection did not apply to IWC Order No. 14, and the conforming amendments made by the IWC to its other orders were not made to IWC Order No. 14. Accordingly, a court may at some point reasonably conclude that IWC Order No. 14's meal-period provision does require an employer to authorize a meal period after each work interval of no more than five hours.

One way to comply with a rolling five-hour requirement under IWC Order No. 14 is to authorize and permit the first meal period of a workday to occur immediately after employees have worked five hours. That way, even if employees eat a snack or meal earlier than that, the five-hour work period before a second meal period must be authorized and permitted will start to run at the end of the first authorized

meal period—whether taken or worked through—rather than from the end of earlier snack or meal break.

Assume, for example, that Order 14 employees start a 10-hour workday at 7 am. At 9:30 am, they take a 20-minute break to rest and eat. This break would not be their meal period but would be their rest period, even though it is double the length of a rest period that must be authorized and permitted. They resume work until 12 noon—five hours into their workday. A meal period is then authorized and permitted, with employees being relieved of all duty. But as is common in agriculture, the employees choose not to take the meal period but instead work through it, with some resting for a few minutes. As discussed above, this is still their meal period and should be recorded as such in the employer's time records, with the time being treated as compensable hours worked. At the end of the meal period—12:30 pm—the employees have worked five and one-half hours so far in the workday. They then work for another two and one-half hours—until 3 pm—when they are authorized and permitted to take a second rest period. They then return to work for another two hours—to 5 pm—when work ends for the day.

This type of schedule complies with the requirements of IWC Order No. 14 as long as employees, individually and collectively, are truly relieved of all duty for their rest periods and meal periods, with any work they do during them being of their own free will. As the Court in *Brinker* cautioned: "[A]n employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks.... The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks."

Day's Rest

California Labor Code section 551 provides: "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Further, section 552 provides: "No employer of labor shall cause his employees to work more than six days in seven."

Section 554, however, limits the applicability of sections 551 and 552. First, it states that those sections do not apply "to any cases of emergency nor to work performed in the protection of life or property from loss or destruction. . . ." Second, and very importantly for agricultural employers, it states that those sections do not apply to any person employed in an agricultural occupation as defined in IWC Order No. 14. Third, it allows for an accumulation of days of rest when the nature of the employment reasonably requires that an employee work seven or more consecutive days, if in each calendar month the employee receives days of rest equivalent to one day's rest in seven. Fourth, it authorizes the Labor Commissioner, "when in his or her judgment hardship will result, [to] exempt any employer or employees from the provisions of Sections 551 and 552."

Moreover, section 556 provides: "Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof."

Lactation Accommodation

Both federal and California laws require employers to provide lactation accommodation.

The federal Fair Labor Standards Act requires an employer with 50 or more employees to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time the employee needs to do so. In addition, it requires such an employer to provide a private place, other than a bathroom, for this purpose. (29 U.S.C. § 207(r)(1).)

Every California employer must provide a reasonable amount of break time to accommodate an employee wishing to express breast milk for her infant child. Further, every employer must make reasonable efforts to provide such an employee with the use of a room or other location, other than a toilet stall, near the employee's work area where she can express milk in private.

The statute does not define what constitutes "reasonable efforts." The room or other location may include the place where the employee normally works if it is a private area. Neither does the statute define what

constitutes a "reasonable amount" of break time. California's Industrial Welfare Commission (IWC) orders require employers to provide employees with a 10-minute rest period for every four hours worked, or major fraction thereof, based on the total numbers of hours worked in a workday. The lactation break is, if possible, to run concurrently with that rest period, which must be counted as paid time worked.

Lactation time that does not run concurrently with a rest period mandated by the applicable IWC order may be unpaid. (Of course, employers should not deduct lactation time from exempt employees' salaries because doing so would likely defeat the salary requirement of the overtime exemption.)

Lactation break time need not be provided if to do so would seriously disrupt the employer's operations. "Seriously disrupt" is not defined.

Whether an agricultural employer with a field employee who wishes to express milk would be required to provide her with a private place (that is not a toilet stall) in the field is an open question. Even if not, however, such an employer should consider offering such an employee with transport to suitable private place. Until the issue is considered in a reported judicial opinion or at least until the Labor Commissioner has issued an advice letter on it, it may be wise to accommodate such an employee in this way. Doing so may help reduce one's exposure to liability (and the legal expense associated with it) for violating the law, which imposes a civil penalty of \$100 per violation.

Reporting-to-Work Pay

Sometimes when an employee reports to work at the employee's regularly scheduled time, the employer finds it necessary to send the employee home because there is no work. In this case, the employee generally must be paid for at least half of the scheduled or usual work hours, but in no case for less than two or for more than four hours. If the employee reports a second time during the same day, he or she must receive at least two hours' additional work or pay for the second appearance.

These provisions do not apply when: (1) the work is interrupted by an act of God or other cause not within the employer's control; (2) operations cannot begin due to threats to the employee or property or when recommended by civil authority; (3) public utilities fail to supply water, gas, electricity or sewer; or (4) the employee is on paid standby status and is called to work at times other than his or her usual shift.

Section 45.1.5 of the **Enforcement Policies and Interpretations Manual** of the Division of Labor Standards Enforcement (DLSE) interprets the term "Interruption Of Work." Section 45.1.5 states:

[R]eporting time pay is not required when "the interruption of work [requiring the second reporting time] is caused by an Act of God or other cause not within the employer's control." [In 2002] DLSE ... concluded that rain or other inclement weather that makes it impossible or unsafe to work falls into the category of "an Act of God or other cause not within the employer's control." This means that if workers are sent home (either immediately upon reporting to work or during the workday) because of rain or other inclement weather, there is no obligation to pay reporting time pay.

Tools

If an employer requires an employee to have certain tools or equipment, or if such tools are required to perform the job, the employer must provide and maintain them for an employee who is paid less than twice the minimum wage. An employee who is paid at least twice the minimum wage may be required to provide and maintain hand tools and equipment customarily required by his or her trade.

Employers who lend tools or equipment often worry about not recovering them. Another problem arises when employees report to work without items lent to them. In light of the requirement to provide necessary tools and equipment and the restriction against taking unauthorized deductions from employee wages, employers must be careful how they handle the situation of non-returned tools or equipment. See page 44 for a review of proper and improper deductions. Below are other approaches to dealing with non-returned tools and equipment.

Discipline As An Alternative. An employer may discipline an employee whose carelessness caused a loss. But the threat of discharge where an employee refuses to allow a deduction is not allowed. (See Labor Code section 98.6, which protects an employee who exercises "any right afforded him.") In addition, the courts have determined that a discharge for a complaint made by an employee about an illegal deduction constitutes a violation of public policy, giving rise to a cause of action for wrongful discharge in violation of public policy.

Tool Bin: One way to approach the problem of lent equipment is to issue the items daily and collect them at the end of each workday. In other words, maintain a "tool bin." This concept does require effort and time, but it does substantially reduce if not eliminate the problem of non-returned tools and equipment.

Employees who prefer to use the same tool that they maintain in a certain manner might not like being re-issued a tool each day. This being the case, some employees will purchase their own tools rather than borrow a different tool daily. Over time, the additional time and effort of a tool bin will be reduced, making a tool bin worth the effort.

An employee using the employee's own tool may nonetheless decide he wants to use an employer-provided tool. Where an employee requests that, an employer must provide the employee with a tool necessary to perform the job. For that reason, an employer must keep on hand at least some tools for that purpose, as well as to show evidence that tools were available to employees.

Reporting to Work without Tools: Sometimes employees fail to bring to work lent tools. In this situation the employer has three choices: 1) issue the employee another tool on the condition the employee will return the original tool; 2) suspend and not allow the employee to work until he or she returns with the lent equipment; or 3) discharge the employee.

Uniforms

Some employers require employees to wear a uniform as a condition of employment. In this case, the employer generally must provide and maintain the uniforms at its expense. *Uniform* includes wearing apparel and accessories of distinctive design or color. Ordinary work clothes are not considered uniforms as long as the employees have free choice of what to wear. Apparel for which the employer specifies the design or color or to which the employer requires an insignia be affixed is considered a uniform.

The employer need not supply to employees uniforms that are standard in their industries, such as white nurses' uniforms or black-and-white uniforms for wait persons, as these can be used from one job to the next.

Employees may be asked to maintain employer-furnished uniforms that require minimal time for care, e.g., uniforms made of a material requiring only washing and tumble or drip drying. Employers must maintain or provide a maintenance allowance for uniforms requiring ironing, dry cleaning, special laundering for heavy soil, or patching and repairs due to the nature of the work. The maintenance allowance for washable items must be based on a realistic time estimate and paid at the minimum wage. The allowance for uniform items requiring dry cleaning must be based on the actual cost of that service. Also, an employer must pay for any personal protective clothing or equipment that the employer is required by law to furnish to employees.

Personal Protective Equipment - Indemnification

Several Cal/OSHA standards, notably at sections 3380 to 3387 in title 8 of the California Code of Regulations, require the use of personal protective equipment (PPE). An employer must provide required PPE to employees.

One remedy available to an employee where an employer did not provide a required item of PPE, such as goggles or rubber boots, lies under Labor Code section 2802, subdivision (a). It provides: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the

directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”

Vacations

Paid vacations are not required by law. However, paid vacation benefits offered by an employer are considered the same as wages. Therefore, once they have been earned, they may not be forfeited. An employee offered vacation benefits earns and vests in them daily.

The employer's policy, however, may set the amount of vacation earned and when the vacation time may be taken. For example, an employer's policy may provide that employees earn one week of vacation the first year of employment, but that vacation time cannot be taken until after the employee has completed one year of service.

Nevertheless, an employee covered by such a policy who ends employment before completing one year of service must be paid the accrued *pro rata* vacation earned up to the termination date. The employer may not require that earned vacation pay be forfeited upon termination of employment.

Further, an employer may cap vacation accruals by setting a limit on the amount of earned but unused vacation an employee may have at any one time. Such a provision states that employees earn no more vacation whenever their accrued vacation time hits a stated limit and will resume earning vacation benefits only after they have used some of their accrued time and are thus once again below the limit. In contrast, a so-called “use-it-or-lose-it” provision in a vacation policy is not legal, as it results in a forfeiture of earned vacation time.

Holidays

Employers in California are not legally required to provide employees with paid holidays or to pay overtime or premium pay for hours worked on a holiday. However, paid “personal” or “floating” holidays offered by an employer are treated like vacation benefits. Other paid holiday requirements are dependent on the employer's own policy.

Sick Pay

Most California employees participate in the State Disability Insurance(SDI) program, for which they pay through payroll deduction. Employers must give newly hired employees a copy of the SDI brochure, as well as provide claim forms when an employee is eligible to apply for benefits. Brochures and claim forms can be obtained from the Employment Development Department (EDD). Employers in California are not legally required to provide sick-pay benefits in addition to mandated SDI benefits.

Sick-pay benefits offered an employee in addition to mandated SDI benefits are generally governed by the employer's own policy or the terms of a health and welfare plan that provides them. An exception to this is when sick pay is added to vacation benefits to provide a combined benefit, such as a “time off” plan. In that situation, the combined benefit is treated like vacation pay. Also, employers who provide paid sick leave must allow an employee to use up to half of his or her annual accrued leave to care for a sick parent, child, domestic partner or spouse.

Severance Pay

Neither California nor federal law requires employers to provide severance pay for terminating employees. Employers who provide severance pay as part of an employee benefit plan, however, must comply with the reporting, disclosure, claims procedure, and fiduciary provisions of the federal Employee Retirement Income Security Act (ERISA).

For more information, contact the nearest office of the Employee Benefits Security Administration of the U.S. Department of Labor.

Pension Plans

Neither California nor federal law requires employers to provide pension benefits. Employers who do provide pension benefits, however, must comply with the provisions of the federal Employee Retirement Income Security Act (ERISA).

Health Insurance

Under the federal Patient Protection and Affordable Care Act, certain employers that employ an average of 50 or more full-time and "full-time equivalent" (includes some part-time) employees per month in the prior year will have to provide health care insurance coverage for their full-time employees, or pay a penalty, starting in 2015. The requirement will not apply to an employer:

- That does not employ any full-time (30 hours per week) year-round workers.
- That does not have 50 or more employees in any month during the year.
- With more than 50 employees a month for no more than 4 months (120 days) during a calendar year, as long as the employees in excess of 50 employees are seasonal employees.

Because of the complexity of the new law, employers should consult a knowledgeable health insurance broker to determine coverage and compliance strategies.

Different Health Insurance for Different Employees: Employers sometimes wonder about providing health-insurance benefits to employees. They want to know if they can provide one type of coverage to one group of employees, and either different or no coverage to another group.

Generally, an employer may lawfully designate that only certain classifications of employees are to receive health-insurance benefits, as long as employees are not excluded from benefits because they belong to a protected classification.

For example, an employer may lawfully provide health-insurance benefits to salaried employees but not to hourly employees. This is permissible because non-salaried employees do not constitute a protected class of employees.

In contrast, suppose an employer wants to provide its female employees with a better health insurance policy than its male employees. This would clearly be prohibited, since both federal and state laws prohibit discrimination in employment based on sex.

The same principle applies to many other types of fringe benefits such as holiday pay and sick pay.

Special and complex nondiscrimination rules under the federal Employee Retirement Income Security Act (ERISA) apply to pension benefits, however.

Discontinuance of Health Insurance During Workers' Compensation Disability: Many health insurance plans are trusts covered by the Employee Retirement Income Security Act (ERISA), a federal law that protects employee pension and welfare benefits. These ERISA trusts typically prohibit contributions for employees who, for six or more months, have not worked enough hours per month to qualify for coverage.

Under a California Workers' Compensation Appeals Board (WCAB) ruling, an employer does not have to continue paying health insurance premiums for an employee temporarily disabled due to a work-related injury who no longer qualifies for health insurance coverage under the terms of his employer's federally regulated insurance plan.

Before that decision, the WCAB had required an employer to continue making health insurance contributions for an employee unable to work due to a work-related injury until it became clear the employee could never return to his previous job with the employer. The WCAB had held it was a violation of Labor Code section 132a for an employer to stop health insurance contributions during that time even if the employee had been off work for two years.

Now employers with health plans governed by federal law may lawfully discontinue benefits without fear of losing a section 132a discrimination claim.

In addition, under a 2003 California Supreme Court decision, an employee with a work-related injury must show the employer treated him detrimentally *and* differently (i.e., that he was singled out for detrimental treatment) due to his injury, as opposed to showing merely that he incurred some detriment as a result of his injury. Thus, an employer may apply the same policy or practice regarding continuation of workers' compensation coverage to employees with work-related injuries as it does to other employees.

Leaves of Absence - Time Off From Work

An employer is required by law to grant an employee a leave of absence or time off from work in these situations:

Disability Leaves: An employer covered by the federal Americans with Disabilities Act (ADA) or California Fair Employment and Housing Act (FEHA) must provide as a reasonable accommodation to an employee with a physical disability or mental disability leave beyond that which the employer provides to other employees. (Upon a request for reasonable accommodation by an employee or applicant with a known disability, an employer must engage in a timely, good-faith, interactive process to determine effective reasonable accommodations.) The leave may be unpaid. The leave need not be provided where either (1) the employer can provide an effective accommodation that would enable the employee to keep working or (2) it would result in undue hardship to the employer.

Pregnancy-Disability Leaves: An employer regularly employing five or more employees must grant a leave of absence of up to four months to an employee who cannot work due to a pregnancy-related disability. If more than four months of leave is provided for other medical disabilities, the length of the pregnancy-disability leave must be at least as long as that allowed for them.

A pregnancy-disability leave of absence is required only when an employee is disabled due to a pregnancy-related condition. Leaves of absence for the birth or adoption of a child are available to eligible employees of employers covered by the California Family Rights Act. A pregnancy-disability leave does not have to be compensated unless other non-work-incurred medical-disability leaves of absence are compensated. An employer may require an employee to use any of her accrued sick leave during the otherwise unpaid portion of her pregnancy leave. Also, an employee may request and is entitled to the use of her sick leave, vacation leave, or any other leave credits she has to receive compensation during the otherwise unpaid portion of her pregnancy-disability leave.

An employee returning from a pregnancy-disability leave of absence within the allowed time generally must be returned to the same position she had before her leave began. Otherwise, she must be offered a comparable position. An employer may reinstate a woman who takes a leave to a comparable position only if her same position is no longer available, such as in a layoff due to plant closure. If that is the case, the employer should offer a position that is comparable in terms of pay, location, job content, and promotional opportunities unless the employer can prove that no comparable position exists. An employer may not refuse to return a woman who has taken a pregnancy-disability leave to her original position if they like her temporary replacement better or if while she was out on leave her employer identified performance deficiencies that existed before her leave.

An employer covered by the California Pregnancy Disability Leave (PDL) law (i.e., one regularly employing five or more employees) must maintain and pay for coverage under a group health plan for a female employee on PDL on the same basis as if she were actively employed, for up to four months in a 12-month period. This requirement is in addition to an employer's obligation to similarly maintain and pay for that coverage for up to 12 weeks of leave taken by an eligible employee under the federal Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA), both of which cover employers regularly employing at least 50 employees. Accordingly, for example, a covered employer must maintain group health plan coverage for up to four months while a female employee is on PDL, plus up to 12 weeks while the eligible employee then takes CFRA "baby-bonding" leave.

Family and Medical Leave Act and California Family Rights Act: Both the federal and California governments have enacted family-leave laws. They differ in scope and application. Employers must comply with the law that requires the more-generous benefit. Here is a summary of the two laws:

Federal: Under the Family and Medical Leave Act (FMLA), employers regularly employing 50 or more employees must provide up to 12 weeks of unpaid leave per year to eligible employees to use for: (1) care of a newborn or newly adopted child, (2) care of a family member with a serious medical condition, or (3) their own serious medical condition.

To be eligible for this leave, an employee must have been employed for at least 12 months and have worked at least 1,250 hours in the 12-month period before taking the leave. An employee taking this leave generally must meet certain notice and certification requirements.

The FMLA also permits a spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

Covered employers are required, with some exceptions, to restore eligible employees using family leave to the same or equivalent job upon their return and to continue to provide health-insurance coverage under the same conditions it would have been provided had the employee worked instead of taking the leave.

California: Under the California Family Rights Act, employers regularly employing 50 or more employees in the State of California must provide unpaid time off to employees for: (1) the birth of a child for purposes of bonding, (2) the placement of a child in the employee's family for adoption or foster care, (3) the serious health condition of the employee's child, parent or spouse or (4) the employee's own serious health condition. Eligible employees may take up to 12 weeks of family leave every 12 months. To be eligible for this leave, an employee must have been employed for at least 12 months and have worked at least 1,250 hours in the 12-month period before taking the leave. An employee taking this leave generally must meet certain notice and certification requirements.

This leave does not have to be taken in consecutive days or weeks. An employer need not grant family leave to a parent to care for a child being cared for by the child's other parent.

Family-care leave for the birth of a child may be taken in addition to pregnancy-disability leave. In other words, pregnancy-disability leave taken by an employee does not count against her entitlement to state family-care leave. This means that after taking up to four months of pregnancy-disability leave, an employee may take up to 12 weeks of family-care leave.

Religious Leave: Title VII and the FEHA mandate that covered employers make a reasonable accommodation for known religious observances or practices of employees or applicants. For example, an employer would have to make reasonable accommodation for an employee's sincerely held religious belief that he should not work on his Sabbath. In this situation, one such reasonable accommodation might be for the employer to excuse the employee from reporting to work on his Sabbath. Such time off from work would not have to be allowed, however, where to do so would impose an undue hardship on the employer.

Upon learning of a conflict between an employee's religious observances or practices and the employer's work requirements, an employer should obtain promptly from the employee whatever additional information the employer needs to determine whether an accommodation is available that would eliminate the conflict without posing an undue hardship on the operation of the employer's business. If no reasonable accommodation (i.e., one that would not cause the employer undue hardship) is ascertained, then the employer is relieved of the duty to make an accommodation.

Court Duty: Every employer must provide a leave of absence to an employee required by law to serve on inquest or trial juries or to appear in court as a witness. The employee must give to the employer reasonable notice of the need for this leave. An employee taking court-duty leave need not be

compensated for it.

Time Off for Crime Victims: Employers must let certain employees attend criminal court proceedings and let an employee who is a victim of a crime, and certain employees who are related to a crime victim (including domestic partners) or who sustained a pecuniary loss due to an injury or death to a crime victim, to be absent from work to attend judicial proceedings related to the crime. Employers with 25 or more employees must let employees who are victims of sexual assault or domestic violence take time off for specified reasons.

An eligible employee may use vacation, personal, sick, or unpaid leave time for the absence. The employee must, where feasible, provide the employer written notification of each scheduled proceeding, unless advance notice is . If advance notice is not feasible, the employer may not take an adverse employment action against the employee, as long as the employee provides the employer with the required documentation.

Emergency Duty as a Volunteer Firefighter: All employers must provide leaves of absence for employees who must perform emergency duty as a volunteer firefighter. It is not a requirement that the employee be compensated during time off to perform emergency volunteer fire-fighting duties.

Time Off to Participate in a Child's Daycare-Facility or School Activities: Employers with 25 or more employees working at the same location must allow a parent, guardian or grandparent with custody of a child in a licensed daycare facility, kindergarten, or grade 1 to 12, to take up to 40 hours off per year (capped at eight hours per month) to participate in the child's daycare-facility or school activities. The employee must give to the employer reasonable notice of the planned absence. Employees must first use existing vacation, personal leave or compensatory time off for this purpose. The time off need not be compensated.

Time Off to Appear at School at School's Request: All employers must allow a pupil's parent or guardian to appear at the pupil's school when the school has given advance notice of a need for the parent or guardian's presence. The employee need not be compensated for the time off. The employee must give reasonable notice to the employer of need to take time off to appear at the school.

Time Off to Vote: If a voter does not have enough time to vote outside of working hours, he or she may take off time to vote at the start or end of a shift, whichever provides the most free time to vote. The employee may take off no more than two hours without loss of pay, as long as he or she has given at least two working days' notice that time off is desired.

Drug and/or Alcohol Rehabilitation: Employers with 25 or more employees must reasonably accommodate an employee's voluntary participation in an alcohol- and/or drug-rehabilitation program, as long as this reasonable accommodation does not impose an undue hardship on the employer. *Reasonable accommodation* means time off work, but such time does not require compensation. An employer must also make reasonable efforts to safeguard an employee's privacy as to his or her enrollment in a rehabilitation program. An employer may refuse to hire or may discharge an employee due to the employee's current use of alcohol and/or drugs, or because the employee cannot perform his or her duties, or cannot perform the duties in a manner that would not endanger his or her health and safety, or the health and safety of others.

Literacy Assistance: Employers with 25 or more employees must reasonably accommodate and help any employee who reveals a literacy problem and asks for employer help either in enrolling in a literacy assistance program or in arranging visits of an instructor to the job site, as long as such accommodation does not pose an undue hardship on the employer. *Reasonable accommodation* means time off work, but such time does not require compensation. Further, the employer must make reasonable efforts to safeguard the employee's privacy as to a literacy problem. An employee who satisfactorily performs his or her duties may not be discharged for disclosing a literacy problem.

Temporary Military and/or Reserve Duty Leave: An employee who is a member of the Reserve Corps of the Armed Forces of the United States, the National Guard or the National Militia is entitled to a

temporary leave while engaged in military duty ordered for purposes of military training, drills, encampment, naval cruises, special duty or like activity. Such temporary leave need not exceed 17 calendar days, including travel time, and need not be compensated.

Military-Spouse Leave: Employers with 25 or more employees must let a spouse of a military serviceperson take up to 10 days of unpaid leave when the serviceperson is on leave from deployment to a designated combat zone or deployment during a period of military conflict. To be eligible, the employee must be regularly scheduled to work at least 20 hours per week.

The employee must notify the employer that the employee wishes to take leave within two business days of receiving official notice that the employee's spouse will be on leave from deployment. The employee also must give the employer written documentation certifying the spouse will be on leave from deployment.

Organ & Bone-Marrow Donation Leave: California employers with 15 or more employees must allow an employee up to 30 business days' paid leave in any one-year period for donating an organ and up to five days' paid leave for donating bone marrow. The one-year period is a rolling 12-month period measured forward from the date an employee uses the leave.

An employee must provide the employer with written verification of the employee's status as an organ or bone-marrow donor and the medical necessity for the donation. Leave may be taken in one or more periods. During a leave, an employer must maintain and pay for coverage under a group health plan.

Leave taken may not be considered a break in an employee's continuous service for the purpose of salary adjustments, sick- or vacation-pay accrual, annual leave or seniority. However, an employer may require an employee to use up to five days of accrued sick or vacation time for bone-marrow donation leave and up to two weeks of such time for organ-donation leave, as long as requiring such use does not conflict with a collective bargaining agreement. Upon returning from leave, an employee must be restored to the same position or to a position with equivalent status, pay and benefits.

This leave does not run concurrently with any leave taken pursuant to the federal Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA). This means an employee is entitled to this leave in addition to any FMLA or CFRA leave to which the employee is entitled. The law also protects employees from retaliation for exercising their leave rights and prohibits employers from interfering with their efforts to take such leave.

Mass Layoff/Plant Closure (WARN Act)

Federal WARN Act:

The federal Worker Readjustment and Retraining Notification (WARN) Act requires covered employers to give written notice of a plant closure or mass layoff (see defined below) at least 60 days before it occurs to:

1. Representatives of affected employees, or to each employee;
2. The State dislocated worker unit created under Title III of the Job Training Partnership Act (in California, notify the Job Training Partnership Division, Employment Development Department, P. O. Box 942880, Sacramento, CA 94280-0001; telephone (916) 322-8460.; and
3. The chief elected official of the local-government unit within which the plant closure or mass layoff will occur.

An employer who effects a plant closure or mass layoff without giving these notifications may be liable for back pay and benefits to affected employees and for civil penalties of up to \$500 for each day of violation.

The WARN Act does not apply to a layoff that is due to the completion of a particular project or

undertaking where the affected employees were hired with the understanding that their employment was limited to the duration of the project or undertaking.

An employer meets its WARN Act notification duty by notifying its employees, such as harvest employees, upon an end-of-season layoff that, unlike in prior years, they will not be recalled for work several months later due to a shutdown of the employer's harvesting operations. Affected employees need not be notified about the shutdown at least 60 days before the end of their last season of work. This is because they incur an employment loss at the earliest time they reasonably could have expected to be recalled to work—not at the end of their last season. (*Marques v. Telles Ranch* (9th Cir. 1997) 131 F.3d 1331.)

Definitions:

Employer means any business enterprise that employs at least (1) 100 employees (excluding part-time employees); or (2) 100 employees who in total work at least 4,000 hours per week (excluding overtime hours). In counting the number of employees, an employer may be required to include employees provided through an independent contractor. The pertinent WARN Act regulation at 20 CFR § 639.3 (a)(2) states:

Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

Employment Loss means (1) an employment termination other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months; or (3) a reduction in hours of work of more than 50% during each month of any six-month period.

Plant Closure means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period* for 50 or more employees excluding part-time employees.

Mass Layoff means a reduction in force that is not the result of a plant closing and which results in an employment loss at the single site of employment during any 30-day* period for either: But employment losses occurring within a 90-day period in two or more groups of employees at a single site of employment which, by themselves, do not meet the minimum numbers specified, must be aggregated in determining whether a plant closure or mass layoff has occurred. The only exception to this rule is where the employer shows that the employment losses are due to separate and distinct actions and causes and are not done in an attempt to evade the WARN Act's requirements.

1. At least 33 percent of the employees (excluding part-time employees) and at least 50 employees (excluding part-time employees); or
2. At least 500 employees (excluding part-time employees).

Part-time employee means one who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months before the date on which notice is required.

California WARN Act:

The California WARN Act is patterned after the federal WARN Act except in these areas:

1. The California law applies to employers that own and operate industrial or commercial facilities employing 75 or more employees at any time during the preceding 12 months. In contrast, the WARN Act covers employers with at least 100 current employees.
2. Rather than use the federal term *plant closure*, which means that 50 or more people will lose their jobs within a 30-day period, the California law uses the term *termination*, which is vaguely defined as *the cessation or substantial cessation of industrial or commercial operations in a covered establishment*.
3. While using the same term—*mass layoff*—as the federal law, the California law defines that term much more broadly. Under the California law, a *mass layoff* is any layoff of 50 or more employees in any 30-day period.
4. *Relocation* is defined differently under the state law than it is under the applicable WARN Act regulation. Under the California law, *relocation* means moving *all or substantially all of the industrial or commercial operations in a covered establishment* to a site at least 100 or miles away. Under the federal regulation, a "*relocation or consolidation* " *of part or all of an employer's business means that some definable business . . . is transferred to a different site of employment and that transfer results in a plant closing or mass layoff*.
5. The notice requirement under the state law is triggered by a *relocation*. The California law does not require advance notice be given either to seasonal employees or to employees who were employed for fewer than six of the 12 months before the notice deadline. There are also exceptions for the construction, logging and mining industries.
6. An employer required to give a 60-day written notice under the state law must give it directly to each affected employee, as well as to the Employment Development Department.
7. An employer that fails to provide the required notice is liable for up to 60 days' back pay for each affected employee, as well as the value of the cost of benefits the employee lost and any out-of-pocket expenses the employee incurred due to the loss of benefits. Further, a fine of \$500 per day can be imposed, and any person suing to enforce the obligations under the California law can recover reasonable attorneys' fees. The amount of the employer's liability can be reduced if it is found the employer, in good faith, believed it was in compliance with the law and had reasonable grounds for believing itself to be in compliance.
8. The written-notice requirements under the California law incorporate the federal WARN Act's requirements.

NOTES

Farm Labor Contractors

Responsibilities of a Grower Using a Farm Labor Contractor (FLC)

Under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA) no one may use the services of an FLC to be supplied with migrant or seasonal agricultural workers unless he first takes reasonable steps to determine that the FLC has a valid certificate of registration that authorizes the activity for which the FLC is to be used. In making that determination, the person may rely upon either the possession by the FLC of a certificate of registration or confirmation of registration by the U.S. Department of Labor. While not required to do so, the person (e.g., grower) engaging the FLC should get and retain a copy of the federal certificate of registration.

Under the California Labor Code, before engaging an FLC, a grower must inspect the FLC's California state FLC license to see if it reasonably appears on its face to be genuine. Second, the grower must get from the FLC a copy of the license and then keep it for three years after the contract's termination. Third, the grower must verify the FLC's license by contacting an FLC verification unit established by the state Labor Commissioner.

The grower must perform the verification by the close of the third business day after the day on which the grower engaged the FLC. The verification unit must respond to the verification request within 24 hours of receiving it. Meanwhile, the grower may receive services from the FLC and is not liable for violations of the FLC if it turns out the FLC's license is not valid, in which case the grower must cease using the FLC's services upon receiving notice of its invalidity.

The same duties apply to an FLC who engages the services of another FLC. A grower or FLC who fails to take these steps faces both criminal penalties and civil liability. A grower or FLC who violates any of these requirements is guilty of a misdemeanor punishable by a fine of up to \$1,000 and/or imprisonment in the county jail for up to six months. Further, a grower or FLC using the services of an unlicensed FLC without taking the required steps faces liability for worker claims directly resulting from a violation of any state law regulating wages, housing, pesticides or transportation committed by the unlicensed FLC.

Independent Contractor Reporting

Any business (service-recipient) that prepares an IRS form 1099-MISC relating to payments made to an independent contractor (service-provider) as compensation for services must file with the Employment Development Department (EDD) using form DE 542, *Report of Independent Contractors*, information for the contractor and the contractor's services. *Service-provider* means a natural person (that is, not a corporation, partnership or other entity) who is not an employee of the service-recipient and who received compensation or executes a contract for services performed for that business.

The report must be submitted to the EDD within 20 days of the first payment that is \$600 or more in any year to the service-provider and include this information: (1) the service-provider's full name, address, and social security number; (2) the service-recipient's name, business name, address, and telephone number; (3) the service-recipient's federal employer identification number, California state employer account number, social security number, or other identifying number as required in consultation with the Franchise Tax Board; (4) the date the contract is executed, or if no contract, the date payments in the aggregate first equal or exceed \$600; and (5) the total dollar amount of the contract, if any, and the contract expiration date.

For each failure to comply with this reporting requirement (unless the failure is due to good cause), the EDD may assess a penalty of \$24, or \$490 if the failure is due to conspiracy between the service-recipient and service-provider not to supply the required report or to

supply a false or incomplete report.

A fact sheet and forms are available from the EDD at <http://www.edd.ca.gov/taxrep/txicr.htm>

Land-Management Services

In California, agricultural land is often managed by a firm that does not own or lease it. These firms include companies typically referred to as vineyard management or orchard management operators. Because California law defines the term *farm labor contractor* more broadly and contains narrower exceptions from it than does federal law, the state Division of Labor Standards Enforcement (DLSE) often deems such land-management companies (LMCs) as FLCs under California law, even though they are not so deemed under federal law.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

Coverage Under the MSPA

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) is a far-reaching law, containing severe penalties for non-compliance. Knowing whether you are covered by the MSPA and which of your employees are protected by the law can be difficult to determine. Here is a logic tree to help you analyze your exposure:

Employer Coverage:

- A. Is your business an agricultural association? "Agricultural association" means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law.

If yes, go to step L (page 68) under "Employee Coverage - Migrant or Seasonal Agricultural Workers."

If no, go to item B.

- B. Are you an agricultural employer? "Agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed. **"Agricultural employer" includes a person who performs year-round all the farming operations required before harvest in the production of a crop of fruit from groves and vineyards owned or leased by another person. However, by also engaging in harvesting operations in any grove or vineyard where the grove- or vineyard-care contractor did not perform all required pre-harvest farming operations, the contractor is considered a farm labor contractor under the MSPA. (U.S. Department of Labor, Wage and Hour Division, *Field Operations Handbook*, section 57g.)**

If yes, go to item E.

If no, go to item C.

- C. Do you provide custom combine, hay harvesting, sheep shearing or custom poultry operations? "Custom combine, hay harvesting, or sheep shearing operation" means the agricultural services and activities involved in combining grain, harvesting hay and shearing sheep, respectively, that are provided to a farmer on a contract basis by a person who provides the necessary equipment and labor and who specializes in providing those services and activities. A custom poultry operation provides custom poultry harvesting, breeding, debeaking, desexing, or health services, and its are not regularly required to be away from their permanent place of residence other than during their normal working hours.

If yes, stop, you are exempt from the MSPA.

If no, go to item D.

- D. Are you a farm labor contractor? "Farm labor contractor" means any person--other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association--who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity. Farm labor contracting activities include recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker.

If yes, go to item K (page 68) under "Farm Labor Contractor Coverage."

If no, go to item E.

- E. Are you a family business? A family business is any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, that is owned or operated exclusively by such individual or an immediate family member of such individual, if such activities are performed only for such operation and exclusively by such individual or an immediate family member, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

If yes, stop, you are exempt from the MSPA.

If no, go to item F.

- F. Are you a small business? A small business is any person, other than a farm labor contractor, for whom the man-days exemption for agricultural labor is applicable. That exemption applies to an agricultural employer who did not, during any calendar quarter of the preceding calendar year, use more 500 man-days of agricultural labor. "Man-day" means any day during which an employee performs agricultural labor for not less than one hour. Agricultural labor performed by an employer's parent, spouse, child, or other member of his immediate family--i.e., step-children, foster children, step-parents, foster parents, brothers, and sisters--is not counted as man-days. The man-days of agricultural labor rendered in a joint employment relationship are counted toward the man-days of such labor of each employer for purposes of the man-day test.

If yes, stop, you are exempt from the MSPA.

If no, go to item G.

- G. Are you a common carrier? A "common carrier" by motor vehicle is one that holds itself out to the general public to engage in transportation of passengers for hire, whether over regular or irregular routes, and that holds a valid certificate of authorization for such purposes from an appropriate local, State or Federal agency.

If yes, stop, you are exempt from the MSPA.

If no, go to item H.

- H. Are you a labor organization? A labor organization is an organization as defined in section 2(5) of the Labor Management Relations Act (29 U.S.C. 152(5)) or as defined under applicable State labor relations law.

If yes, stop, you are exempt from the MSPA.

If no, go to item L (page 68).

- I. Are you a nonprofit charitable organization, or a public or private nonprofit educational institution?

If yes, stop, you are exempt from the MSPA.

If no, go to item J.

- J. Are you involved in seed production? Seed production exemption: (1) Any person whose principal occupation or business is not agricultural employment, when supplying full-time students or other individuals whose principal occupation is not agricultural employment to detassel, rogue, or otherwise engage in the production of seed and to engage in related and incidental agricultural employment, unless such full-time students or other individuals are required to be away from their permanent place of residence overnight or there are individuals under eighteen years of age who are providing transportation on behalf of such person.

If yes, stop, you are exempt from the MSPA.

Farm Labor Contractor Coverage:

- K. Do you engage in farm labor contractor activities within a 25-mile intrastate radius of your permanent place of residence and for not more than 13 weeks per year? "Twenty-five mile intrastate radius" means that engagement in a farm labor contracting activity may not go beyond a 25-mile intrastate geographical radius. Once this limit is exceeded, the exemption no longer applies, and the person becomes subject to the requirements of the MSPA. A person who uses lines of communication (such as U.S. Postal Service, telephone, or advertising) to recruit, solicit, hire, or furnish workers over a distance greater than 25 miles from his permanent residence or from across a State line for agricultural employment is also engaged in a named activity beyond the specified limit of the exemption and is subject to the MSPA. In the case of a corporation its permanent place of residence for these purposes shall be a single designated location.

"For not more than 13 weeks per year" means that farm labor contracting activities may not be engaged in for more than 13 weeks in a year. The number of weeks of contracting activity during the prior year is also a factor. When the limit of weeks for the exemption is exceeded in a calendar year, the person is subject immediately to the MSPA and is also presumed subject to the MSPA in the next calendar year, unless it can be shown that the tests are met.

If yes, stop, you are exempt from the MSPA.

If no, go to item L below under "Employee Coverage - Migrant or Seasonal Agricultural Workers."

Employee Coverage - Migrant or Seasonal Agricultural Workers:

- L. Do you employ any Migrant Agricultural Workers? "Migrant agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence. Permanent place of residence, with respect to an individual, means a domicile or permanent home. Permanent place of residence does not include seasonal or temporary housing such as a labor camp. The term permanent place of residence for any nonimmigrant alien is that individual's country of origin. (See "Migrant agricultural worker" exemption below).

If yes, the MSPA covers your migrant agricultural workers. See "Overview of MSPA Requirements" below. Go to item M below.

If no, go to item M below under "Employee Coverage - Migrant or Seasonal Agricultural Workers."

- M. Did you employ any Seasonal Agricultural Workers? "Seasonal agricultural worker" means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence (see "seasonal or other temporary basis" below):

- (1) When employed on a farm or ranch performing field work (see "Field Work" below) related to planting, cultivating, or harvesting operations; or
- (2) When employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day- haul operation.

If yes, the MSPA covers your migrant agricultural workers. See "Overview of MSPA Requirements" below.

If no, your employees are not covered by the MSPA.

Additional Definition of Terms:

"Migrant agricultural worker" exemption:

Migrant agricultural worker does not include:

- (1) Any immediate family member of an agricultural employer or a farm labor contractor; or
- (2) Any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States (known as H-2A workers) of the Immigration and Nationality Act.

"Seasonal or other temporary basis" defined:

"On a seasonal or other temporary basis" means:

- (1) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.
- (2) A worker is employed on other temporary basis where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration.

"Field Work" defined:

- (1) Field work related to planting, cultivating or harvesting operations includes all farming operations on a farm or ranch that are normally required to plant, harvest or produce agricultural or horticultural commodities, including the production of a commodity that normally occurs in the fields of a farm or ranch as opposed to those activities that generally occur in a processing plant or packing shed. A worker engaged in the placing of commodities in a container in the field and on-field loading of trucks and similar transports is included.
- (2) Nursery, mushroom and similar workers engaged in activities in connection with planting, cultivating or harvesting operations are intended to be covered. (However, see "Seasonal or other temporary basis does not include" below.)
- (3) An individual operating a machine, such as a picker, or tractor is not included when performing such activity.

"Seasonal or other temporary basis" does not include:

- (1) Generally, employment that is contemplated to continue indefinitely is not temporary.
- (2) On a seasonal or other temporary basis does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.
- (3) On a seasonal or other temporary basis does not include the employment of any worker who is living at his permanent place of residence, when that worker is

employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work (see "Field Work" above).

"Seasonal agricultural worker" does not include:

- (1) Any migrant agricultural worker;
- (2) Any immediate family member of an agricultural employer or a farm labor contractor; (Immediate family includes only: (1) A spouse; (2) Children, stepchildren, and foster children; (3) Parents, stepparents, and foster parents; and (4) Brothers and sisters.) or,
- (3) Any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under the Immigration and Nationality Act.

Overview of MSPA Requirements:

The MSPA provides employment-related protections to migrant and seasonal agricultural workers. Every non-exempt farm labor contractor, agricultural employer, and agricultural association that "employs" workers must:

1. Provide to migrant workers written disclosure of the terms and conditions of employment at the time of recruitment (must provide disclosure to seasonal workers upon request);
2. Post information about worker protections at the worksite;
3. Pay workers the wages owed when due and provide an itemized statement of earnings and deductions;
4. Comply with the terms of any working arrangement made with the workers and,
5. Make and keep for three years payroll records for each employee.

The protections do not apply to individuals who are independent contractors rather than employees.

Joint Employer Relationship: Agricultural workers can have more than one employer at the same time. Each "joint employer" is responsible for all employer obligations under the MSPA, but the MSPA does not require the unnecessary duplication of effort. Thus, employer responsibilities may be carried out by only one of the joint employers. However, the failure to provide the required protections will result in joint liability for all joint employers.

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) covers the activities of farm labor contractors and agricultural employers who employ migrant or seasonal agricultural workers. The law is enforced by the Wage and Hour Division of the U.S. Department of Labor.

MSPA Requirements for All Entities: Any person or entity covered by the MSPA, including growers who recruit or employ migrant agricultural workers or seasonal agricultural workers, must adhere to these rules:

1. Specified information must be disclosed in writing to recruited migrant agricultural workers and day-haul seasonal agricultural workers when they are recruited. (For seasonal agricultural workers other than day-haul workers, the information must be disclosed in writing only upon the worker's request when an offer of employment is made to the worker.)

Also to be disclosed are the name of the workers' compensation insurance carrier, the name(s) of the policy holder(s), the name and telephone number of each person who must be notified of an injury or death, and the time period within which the notice must be given. This disclosure requirement may be met by giving the worker a photocopy of any workers' compensation insurance notice required by State law. California Labor Code sections 3550 and 3551 require employers to post and to give to each new employee by the end of the first pay period specified workers' compensation information.

2. In a conspicuous place at the place of employment, a poster specifying the rights and protections afforded to workers under the MSPA must be posted.
3. Anyone who provides housing for a migrant agricultural worker must post in a conspicuous place at the site of the housing or present to workers a statement of the terms and conditions, if any, of occupancy of such housing.
4. Specified payroll records must be made and kept for three years and an itemized written statement must be provided to each worker each pay period. A grower who receives from an FLC a copy such payroll records must keep them for three years (see item 5 under "Requirements for Farm Labor Contractors," above).
5. No FLC or grower may knowingly provide false or misleading information to any migrant agricultural worker or seasonal agricultural worker about the terms, conditions or existence of agricultural employment and housing required to be disclosed by the MSPA.
6. All information required to be disclosed in writing must be in English or, as necessary and reasonable, in Spanish, or another language common to migrant agricultural workers or seasonal agricultural workers who are not fluent or literate in English.
7. No person employing migrant agricultural workers or seasonal agricultural workers may:
 - a. Fail to pay wages when due;
 - b. Require workers to purchase goods or services solely from the FLC or grower; or
 - c. Violate the terms of any working agreement made with any migrant agricultural worker or seasonal agricultural worker.

MSPA Requirements for Farm Labor Contractors: The MSPA requires every person doing business as an FLC to:

1. Possess a certificate of registration specifying which farm labor contracting activities the FLC is authorized to perform (*e.g.*, recruiting, transporting, or housing of agricultural workers).
2. Use only persons who possess a valid certificate of registration when hiring employees (*i.e.*, crew bosses) to perform farm labor contracting activities. An FLC is liable for the acts of his employees, no matter whether the employee is registered.
3. Carry the certificate of registration at all times while performing farm labor contracting activities.
4. Notify the DOL within 30 days of each change of permanent place of residence, information on new vehicles used to transport workers, or information on the use of another housing facility for workers.
5. Give to each grower to whom the FLC furnishes workers copies of all payroll records made by the FLC regarding those workers with respect to the work they performed for the grower.
6. Obtain at each place of employment and make available for inspection to every worker the FLC furnishes for employment a written statement of conditions of such employment.

Contracts for Labor or Services

The California Labor Code allows employees to recover actual damages through a civil action and imposes civil penalties against a person or entity that enters into a contract for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knows or should know that the contract does not provide funds sufficient to allow the contractor to comply with all applicable laws and regulations governing the labor or services to be provided.

There is a rebuttable presumption affecting the burden of proof that there has been no such violation where the labor contract or material change to the labor contract is in a single

document meeting 10 specified requirements. The person or entity hiring the contractor must keep a copy of the written contract for at least four years after its termination.

Penalties: Anyone who violates the MSPA may be fined up to \$1,000 or sentenced to prison for a term up to one year, or both. Upon a subsequent conviction the person may be fined up to \$10,000 or sentenced to prison for a term up to three years, or both.

Private Right of Action: Any worker aggrieved by a violation of the MSPA or any regulation under it by a farm labor contractor, agricultural employer or any other person may file suit in U.S. District Court. If the court finds that the respondent intentionally violated any provision of the MSPA, the court may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to \$500 per plaintiff per violation. However, multiple infractions of a single provision of the MSPA constitute only one violation for the purpose of determining the amount of statutory damages due a plaintiff.

If the complaint is certified as a class action, the court may award up to \$500 per plaintiff per violation, up to a maximum of \$500,000.

Specific Requirements for Farm Labor Contractors

Checklist of Farm Labor Contractor (FLC) Requirements

Here is a quick overview of the requirements for an FLC. A thorough explanation of each of these requirements follows this checklist.

- * Register with state Employment Development Department and obtain an Employer Number
- * Register with state Franchise Tax Board and obtain a Taxpayer Identification Number
- * Register with federal Internal Revenue Service and obtain a Taxpayer Identification Number
- * Obtain workers' compensation insurance
- * Obtain Farm Labor Vehicle Certificate for vehicles used to transport nine or more employees
- * Have each vehicle transporting employees inspected and a U.S. Department of Labor (DOL) Form WH-514 or Form WH-514a completed for each vehicle.
- * Each driver of a Farm Labor Vehicle must have a Class B license and a Farm Labor Vehicle endorsement
- * Each driver of any vehicle must have a medical certification
- * Obtain necessary bonding
- * Obtain necessary bodily injury and property damage insurance if transporting agricultural workers
- * Obtain three sets of fingerprints for each person applying for a federal registration (one set required) and state license (two sets required)
- * Register as an FLC with the U.S. Department of Labor

- * Apply for a state FLC license
- * Register with the county Agricultural Commissioner in each county in which you will be doing business as an FLC
- * Provide to each crew leader, foreman, and supervisor information and training on applicable laws and regulations governing worker safety, pesticide safety, and terms and conditions of agricultural employment

Employer Tax Registration Requirements

California Employer Identification Number: An employer who becomes subject to California's employment-tax laws must register with the Employment Development Department (EDD) (within 15 days after paying wages) to obtain an identification number, the state equivalent of a federal identification number. This number can be obtained by filing with EDD a DE-1 AG, Registration Form for Agricultural Employers. Along with the identification number, the employer also receives information about all state-required employment taxes and reporting requirements.

Request form DE 1 AG from your local EDD office,

or write: EDD

805 R Street

Sacramento, CA 95814-6497

or call: (888) 745-3886 or (916) 322-2835

or fax: (916) 928-5910

or visit on the Internet: http://www.edd.ca.gov/Payroll_Taxes/Forms_and_Publications.htm

Submit to EDD your employment taxes (*i.e.*, Unemployment Tax and State Disability Tax) using the number assigned to you by EDD.

More information can be obtained by writing to Employment Development Department, Box 826880, Sacramento, CA 94280-0001, or by contacting the local Employment Tax District Office listed in the State Government section of the white pages of the telephone directory under "Employment Development Department." For federal identification number information, contact the Internal Revenue Service.

California Franchise Tax Board: Register with California Franchise Tax Board for the withholding of personal income taxes. Write or call for information and registration forms to:

Franchise Tax Board

1912 I Street

Sacramento, CA 95814

1-(800) 338-0505 (forms)

1-(800) 852-5711 (information)

Obtain forms on the Internet at:

<http://www.ftb.ca.gov/forms/index.shtml>

Internal Revenue Service (IRS): Register with Internal Revenue Service (IRS) and get a federal Employer Identification Number. Use Form SS-4 for this purpose. Obtain this form from any IRS walk-in office, call 1-(800) 829-3676, or download the form from the Internet at: <http://www.irs.gov/pub/irs-pdf/fss4.pdf>. Submit to IRS federal employment taxes (*i.e.*, Social Security Taxes and Personal Income Taxes) using the Taxpayer Identification Number assigned to you by IRS.

Insurance and Bonding Requirements

Workers' Compensation Insurance Coverage: All employers must have workers' compensation insurance or receive state approval to self-insure for the required benefits. Employers without workers' compensation insurance or authorization to be self-insured face significant criminal and civil penalties. Many insurance companies offer policies providing workers' compensation benefits.

For information on self-insured plans, write: Manager, Self-Insurance Plans, 2848 Arden Way, Suite 105, Sacramento, CA 95825.

Vehicle Liability Insurance: Vehicle liability insurance is required for each vehicle used to transport agricultural employees. This includes even those vehicles not owned by you but that are nonetheless used to transport your employees.

If employees are transported in a vehicle only in the course of employment, then both state and federal employment laws consider workers' compensation insurance as adequate coverage for bodily injury.

California Vehicle Code section 16451, however, requires all vehicles to carry basic bodily injury and property damage insurance. The minimum coverage requirement for vehicles carrying 15 or fewer passengers is \$15,000/\$30,000 for bodily injury. For more than 15 passengers, Vehicle Code section 16500 requires a minimum coverage of \$30,000/\$60,000 for bodily injury.

If employees are ever transported in a situation where they would *not* be covered by workers' compensation insurance, then bodily injury coverage of at least \$100,000 per seat, up to a maximum of \$5 million per vehicle, must be maintained under the federal Migrant and Seasonal Agricultural Worker Protection Act. Further, that law requires *all* vehicles used in covered transportation to carry at least \$50,000 in property damage coverage.

Farm Labor Contractor Bonding: Bond amounts required to obtain an FLC license are:

- \$25,000 for annual payrolls of up to \$500,000
- \$50,000 for annual payrolls between \$500,000 and \$2 million
- \$75,000 for annual payrolls of more than \$2 million

Farm Labor Contractor Registration and License Requirements

General: Federal registration and a state license are required before one may operate as a farm labor contractor (FLC). The United States Department of Labor, Wage and Hour Division (WHD), registers FLCs. The California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE), licenses FLCs, including day haulers (*i.e.*, persons transporting farm workers for a fee).

Federal Registration: Every FLC doing business in California, and every person performing contracting duties for an FLC, must be registered with the WHD. Registration applications are available at the local office of the U.S. Department of Labor and are usually available at local offices of the California Employment Development Department.

There is no charge for registration, nor is there an exam to take. Because proof of federal registration must be shown when you apply for your state FLC license, register with the U.S. Department of Labor *before* applying for your state FLC license. To register, complete FLC Application (DOL Form WH 510).

Here are some tips on registering with the DOL as an FLC:

1. In block 1, do not check "Consolidated Federal-State" boxes, because you must complete the state application as a separate process.

2. Use the same business and personal names in the registration form as you will use in your state license application. The state will verify your federal registration and will reject your state application if the names do not match. In block 3, enter your business name. In block 4, enter the name of the owner or a corporate officer or, in the case of a partnership, one of the partners. Do not enter a P.O. Box number; use only a street address.
3. If you answer "Yes" to question 9 (transportation), 10 (driving) or 11 (housing), you must submit the appropriate attachments such as Farm Labor Vehicle Certificate, Doctor's Certificate, or housing permits.
Each person, including a leased or bus-company driver, who transports employees for you must complete a separate registration Form WH-512 and submit it to the Department of Labor. Each driver must show his or her state driver's license number and send a medical certificate with the registration form.

If you will be transporting employees, and the transportation is *not* covered by your workers' compensation insurance, you must secure either a surety bond or bodily injury insurance in an amount of at least \$100,000 per seat in the vehicle, up to \$5 million per vehicle. Further, in all cases each vehicle must be covered by at least \$50,000 of property damage insurance or its equivalent.

4. If you answered "Yes" to question 11, you must also complete the form "Statement of Intent to Comply With Housing Requirements of the Migrant and Seasonal Agricultural Worker Protection Act" on page 3.
5. Submit with your FLC Application one set of fingerprints (DOL Form FD-258.)
6. Send all of the above to:
U.S. Department of Labor
Wage and Hour Division
National Certificate Team
90 7th Street, Suite 13-100
San Francisco, CA 94103-6714

State Farm Labor Contractor License Requirements:

State License: Every FLC doing business in California must be licensed by the DLSE. Information on California's FLC licensing requirements can be obtained by writing to: DLSE, Licensing Section, P.O. Box 420603, San Francisco, CA 94142.

Responsibilities of a Grower or FLC Using an FLC: Before engaging an FLC, a grower must inspect the FLC's license to see if it reasonably appears on its face to be genuine. Second, the grower must get from the FLC a copy of the license and then keep it for three years after the contract's termination. Third, the grower must verify the FLC's license by contacting an FLC verification unit established by the state Labor Commissioner.

The grower must perform the verification by the close of the third business day after the day on which the grower engaged the FLC. The verification unit must respond to the verification request within 24 hours of receiving it. Meanwhile, the grower may receive services from the FLC and is not liable for violations of the FLC if it turns out the FLC's license is not valid, in which case the grower must cease using the FLC's services upon receiving notice of its invalidity.

The same duties apply to an FLC who engages the services of another FLC. A grower or FLC who fails to take these steps faces both criminal penalties and civil liability. A grower or FLC who violates any of these requirements is guilty of a misdemeanor punishable by a fine of up to \$1,000 and/or imprisonment in the county jail for up to six months. Further, a grower or FLC using the services of an unlicensed FLC without taking the required steps faces liability for worker claims directly resulting from a violation of any state law regulating wages, housing,

pesticides or transportation committed by the unlicensed FLC.

Application: To become licensed by the state as an FLC, you must complete license application Form DLSE 401. The form is available at:

Department of Industrial Relations
Division of Labor Standards Enforcement - Licensing
455 Golden Gate Avenue, 8th Floor East
San Francisco, CA 94102
Phone: (415) 703-4854

or

770 East Shaw Avenue, Suite 312
Fresno, CA 93710
Phone: (559) 248-1893

The cost of the application process is:

New application filing fee	\$ 10
(Filing fee is not required when an application is timely filed)	
Examination fee	\$100
Annual license fee (expires on the day before the birth date of owner or the day before the annual anniversary of the corporation).	\$500
(\$50 of the annual fee is deposited into Farmworker Remedial Account.) (Fees are not prorated; full amount must be paid at the time of application.)	

Answer all questions, and date and sign the application. An incomplete application will be returned to you, delaying its processing.

Here are tips on completing the application:

1. Mail your renewal application to DLSE at least **90 days before** your license's expiration date. The FLC Licensing Unit processes new and renewal applications on a first-come, first-served basis.
2. Use the same name (both business and personal) that you used to register with the U.S. Department of Labor. The state receives from DOL a list of federally registered FLCs. If your business and personal names on that list do not match those as indicated on your state application, the state will reject it. The first name of all persons listed should be given in full. Do not use initials.
3. Use only a street address as your business address, not a P.O. Box number or your accountant's address on the application.
4. If you are renewing your license, use your state license "FL" number on the application.
5. In question 9, in the box "Birth date:" enter the birth date of the individual owner, the birth date of the oldest general partner or, if a corporation, the date of incorporation.
6. In question 21, list only those persons who are or have been licensed by the state as FLCs and who will be performing farm labor contracting activities (*i.e.*, supervising, recruiting, solicitation, hiring, transporting). Also provide the federal registration number for each of these individuals.
7. In question 24, if you will be doing only "day hauling" activities, check the "No" box; otherwise check the "Yes" box.
8. In box 25 ("If yes, how will employees be paid?"), do not check "Other." FLCs must pay workers at least weekly.

Summary of Employment Requirements for California Agricultural Employers

9. Answer question 37 frankly. The DLSE will eventually discover any record of a conviction. Even if you have a conviction, you may still be approved for a license.

Enclose these items with your application:

1. The corporate seal, if any, must be affixed to the application. If the corporation is incorporated in another state, enclose a "Statement of Domestic Stock Corporation" with the application.
2. A Personal Record [Form DLSE 301-B (Rev. 1/87)] must be completed by the individual owner, by all general partners if a partnership, or by all corporate officers if a corporation, and by each person with managing responsibility in the business.
3. Two Affidavits of Character (Form DLSE 301-A) must be completed for each individual for whom a Personal Record is required. The persons executing the affidavits should be over 18 years of age and not related to the applicant.
4. A Farm Labor Contractor Bond (Form DLSE 402) must be executed by a bonding company. The original must be submitted with the FLC License Application. All signatures (both that of the bonding company representative and that of the principal [license applicant]) must be notarized. The name of the legal entity shown on the bond must be the same as that of the entity applying for the license.
5. Two Fingerprint Cards (Form BID-7) each must be completed for an individual applicant, for each general partner of a partnership, or for each corporate officer of a corporation, *and* for each person acting in a managerial capacity in the business.

The personal information requested on the fingerprint cards should be completed by the applicant. The fingerprints should be taken by an official fingerprint technician employed by the local police department or sheriff's office.

After the fingerprint cards are completed and signed by both the applicant and the fingerprint technician, they must be submitted to the Labor Commissioner's office.

6. A Workers' Compensation Certificate of Insurance must be included. Every employer in California with one or more employees—full-time or part-time—must have workers' compensation insurance coverage. Have your insurance carrier prepare a Workers' Compensation Certificate of Insurance that names the State Labor Commissioner, Division of Labor Standards Enforcement, Licensing and Registration, as a policy certificate holder. Do not have the carrier mail the certificate directly to DLSE because it may arrive before your application and get misplaced. Have the carrier mail the certificate to you, and then you mail it with your application.

The certificate of insurance must show, as applicable, an individual owner's full name, all partners' full names, or the name of the corporation, whichever is applicable, along with any business (dba) name(s), full current business address (**physical** address must be shown; you may also include a P.O. Box number), policy number, and the effective and expiration dates of the policy. Do not give another person's address, such as a bookkeeper's. You must give your own address.

If you live in another state and plan to work in California, your workers' compensation insurance certificate must show "California operations."

7. A Declaration (Form DLSE 405) must be completed and included. Or, write a letter stating you will inform the Labor Commissioner of any change of address and are designating the Labor Commissioner to accept service of summons in any action against you as it relates to your activities as an FLC.

8. California Labor Code Sections 1695(a)(6) and 1696.4 require an FLC who, in connection with his or her operations as an FLC, transports persons in any vehicle owned or operated by the FLC, to carry vehicle liability insurance on each vehicle owned or operated by the FLC. The insurance on each vehicle must be in the amounts of at least \$15,000/\$30,000 for bodily injury and \$5,000 for property damage, as required by Vehicle Code Sections 16054.2 and 16056.

(As noted above, however, higher amounts are required by other laws or in other situations; *i.e.*, at least \$100,000 per seat up to \$5 million per vehicle bodily injury coverage if transporting farm workers in a situation where workers' compensation insurance does not apply, and \$50,000 property damage coverage for all transportation covered by the federal farm worker protection law.)

9. Ask your insurance carrier to send to you a Certificate of Insurance showing coverage for your motor vehicles. Send the certificate with your application. Do not have the carrier send it to DLSE, as it may arrive before your application and be misplaced by DLSE.

If you transport persons as described above, an FLC License cannot be issued until this certificate is received.

10. An IRS Form 8821 (Tax Information Authorization) must be completed. Follow the instructions carefully. Send the original form to the IRS with a copy of your state license application to:

IRS Service Center
Attn: DLSE Licensing
PO Box 24015, Stop #8434
Fresno, CA 93779

Enclose a *copy* of the completed IRS Form 8821 with your application.
Before you will be issued a license, you must file and pay all taxes due.

When you mail your application and attachments to DLSE, send the original form and attachments, not copies (except for IRS Form 8821).

Farm Labor Contractor Examination: The farm labor contractor license examination is administered in English and Spanish in writing, not orally. The applicant must correctly answer at least 85 percent of the questions on the examination within four hours. The examination may be taken a maximum of three times in a calendar year.

The examination requires a demonstration of knowledge of the laws and regulations regarding wages, hours and working conditions, penalties, employee housing and transportation, collective bargaining, field sanitation, and safe work practices related to pesticide use, including all of the following subjects:

1. Field reentry regulations.
2. Worker pesticide safety training.
3. Employer responsibility for safe working conditions.
4. Symptoms and appropriate treatment of pesticide poisoning.

The Labor Commissioner may renew a license without requiring the applicant for renewal to take the examination if the Labor Commissioner finds the applicant has:

1. Passed the examination during the immediately preceding two years;
2. Not been found during the prior year to be in violation of any applicable law or regulation; and
3. For each year since the license was obtained, enrolled and participated in at least eight hours of relevant educational classes, chosen from a list of approved classes prepared by

the Labor Commissioner.

Continuing Education: Each farm labor contractor must enroll and participate in at least eight hours of relevant educational classes each year. The classes must be chosen from a list of approved classes prepared by the Labor Commissioner.

Laws Relating to Farm Labor Contractor Employment of Employees

FLC Supervisors: The actions of a farm labor contractor's supervisor are controlled by law. While the FLC supervisor is not the employer, the law attributes the actions of the supervisor to the FLC and will hold the FLC responsible for the supervisor's activities. FLCs need to train their supervisors and monitor their actions so they will represent the FLC business in a manner that won't jeopardize the business. Here are the laws your supervisors must know and obey:

Worker Recruitment: You, or any person acting for you, may not make any false or misleading statement—oral or written— about the terms, conditions or existence of employment. You may not accept a fee from any applicant for employment or any kind of registration fee or make any false statement to workers that they have to pay a transportation fee to get or keep a job. You may not send workers to a job site unless you already have an order to supply labor there. If you drive workers to a job site and there is no work available as promised, you must pay them the agreed-upon rate of pay for all the time spent traveling to the job site and all the time traveling back. If there is a strike or a lockout at a place of employment, you must tell your workers about it before you take them there.

Before you hire workers, you must tell them where they will be employed, the wage rates, the kinds of crops they will work on, their work duties, and the expected length of employment. You must also tell them about any charges for transportation or housing or other benefits and whether you will receive a commission from sales of a store owned by the grower. Workers may not be required to buy goods or services solely from a contractor or a grower or any person acting for them.

You must post a notice that states the rights of workers under the federal Migrant and Seasonal Agricultural Worker Protection Act. Form WH-516 - Worker Information is used by employers to disclose employment information at time of recruitment.

Statement of Unpaid Wage Judgments: California Labor Code section 274 requires an FLC to submit a statement under penalty of perjury as to whether the FLC has satisfied all requirements involving unpaid wages imposed by a final court judgment or by a final order issued by the Labor Commissioner. The Labor Commissioner will deny the applicant's renewal if the statement shows unpaid wages, unless the applicant submits a bond or cash deposit to guarantee payment of the wages, or a notarized agreement between the applicant and the other parties to the judgment demonstrating that the FLC has satisfied all requirements involving unpaid wages imposed by the judgment. The Labor Commissioner will suspend the license of an FLC who made a false representation in the statement. A licensed FLC must also notify the Labor Commissioner within 90 days of a final court judgment.

Grounds for Losing a Farm Labor Contractor License: Your state license may be denied or revoked if you:

1. Violate any law governing farm labor contractors, such as those pertaining to safety and health or payment of wages.
2. Make a false statement in your application or if you are not the real party in interest on the application.
3. Let an employee, without the proper license and certification, drive a farm labor vehicle.
4. Knowingly employ a person who is not eligible to be employed in the United States.
5. Knowingly let persons of bad character, prostitutes, gamblers, inebriates or procurers visit your premises.
6. Send or cause to be sent any woman or minor to any house of prostitution.

7. Sell or plan to sell liquor on your business premises.

Penalties: Except where otherwise provided, a violation by any person of these state laws is punishable as a misdemeanor by a fine of up to \$1,000 and/or six months imprisonment in a county jail. (Labor Code §1697(a).)

Penalties for Failures to Pay Wages: An FLC or grower using an FLC, or other person acting either individually or as an officer, agent, or employee of such a grower or FLC, who knowingly and willfully fails, or causes a failure, to pay wages is guilty of enhanced misdemeanor penalties that include:

1. Imprisonment in a county jail for up to 30 days and/or a fine of from \$1,000 to \$5,000.
2. Upon a conviction for a violation committed within three years after a conviction for a prior violation, imprisonment in a county jail for not more than six months and/or a fine of at least \$10,000.
3. Upon a conviction for a violation committed within five years of a second conviction pursuant to item 2 above, imprisonment in a county jail for up to six months and/or a fine of at least \$25,000.

A person prosecuted under these penalties may not be prosecuted under any other law if the prosecution would be based upon the same set of facts.

Further, the Labor Commissioner must, upon a first conviction, revoke the license of the convicted FLC, who then is ineligible for a license for one year from the date of revocation. Upon a second conviction as discussed in item 2 above, the Labor Commissioner must revoke the license of the convicted FLC, who then is ineligible for a license for two years from the date of revocation. Upon a third conviction as discussed in item 3 above, the Labor Commissioner must revoke the license of the convicted FLC, who then is forever ineligible for a license. (Labor Code §1695.7(c)(3) and (f).)

County Agricultural Commissioner Registration

An FLC must register at the start of each year with the County Agricultural Commissioner in each county where the FLC will perform farm labor contracting services. To register, an FLC must:

1. Show FLC's federal Farm Labor Contractor Certificate of Registration and California Farm Labor Contractor License.
2. Complete and file County Farm Labor Contractor Registration Form AWM 000 (2/99).
3. Pay the annual registration fee of \$75 year.

Workers' Compensation

California employers must provide workers' compensation benefits to an employee who is injured or becomes ill due to the employee's job.

The cost of workers' compensation insurance is the employer's responsibility. An employer may not require an employee to pay any of the cost of its workers' compensation coverage, including any out-of-pocket medical expenses.

The workers' compensation program in California is administered by the Division of Workers' Compensation (DWC) in the Department of Industrial Relations. The Workers' Compensation Appeals Board adjudicates disputes between injured employees, insurance carriers and employers as to the merits of employee claims.

Premiums: Workers' compensation insurance premiums charged to an employer are generally based on its business type (classification), claim history (loss experience) and the total wages it pays (payroll). An employer in California is placed in one of more than 400 different classifications.

Employers in the same classification may have very different loss experience, which causes their insurance premiums to be different. Employers are subject to an experience modification rating, which is applied to their premium, when their premiums meet an amount set by law over a three-year period. This so-called "ex-mod" is used to determine the premium the employer will be charged relative to other employers in its classification. An ex-mod of 100 percent means an employer's loss experience is average. One with a higher loss experience than such an employer would pay a higher premium.

Coverage: California's workers' compensation system covers nearly all employers and employees. To be entitled to workers' compensation benefits, a person must be an *employee* of a covered *employer* as those terms are defined in the Labor Code.

Employer Defined: Labor Code section 3300 defines an *employer* as:

1. The state and every state agency.
2. Each county, city, district, and all public and quasi-public corporations and public agencies therein.
3. Every person including any public service corporation, which has any natural person in service.
4. The legal representative of any deceased employer.

Employee Defined: Labor Code section 3351 defines *employee* as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." The term includes aliens, minors, corporate officers and directors while rendering actual service for the corporation for pay (except that where they are the sole shareholders thereof, they and the corporation become covered only if they elect to do so), domestic employees (other than one who is employed by his or her parent, spouse or child), and all working members of a partnership who receive wages irrespective of profits from the partnership (except that where the working members of the partnership are general partners, the partnership and the partners become covered only if they elect to do so. If a private corporation is a general partner, "working members of a partnership" includes the corporation and its officers and directors who are its sole shareholders).

Employee Exclusions: Labor Code section 3352 excludes from the definition of employee various categories of other persons. The exclusions do not pertain to agricultural employment.

Responsibilities of Employers: California's workers' compensation laws require employers to:

1. Secure workers' compensation insurance for employees, either under a policy from an insurer or by obtaining a certificate of consent to self-insure. (Failure to do so is a misdemeanor for which criminal penalties and injunctive action may result.)

2. Provide compensation benefits within a reasonable period to an injured employee. (Failure to comply may result in the employee's total benefits being increased 10% as a penalty against the insurer and employer.)
3. Provide within one working day after learning of an injury a claim form and a notice of potential eligibility for benefits to the injured employee or, in the case of death, to his or her dependents. The notice must include a description of the procedures and help available to the employee. (For more information about the claim form and notice, see "Workers' Compensation" in the section "Posters, Notices and Disclosures" on page 131 and "Notice of Injury by Employee" and "Employee Claim Form" in this section.)
4. File with the insurance carrier an "Employer's First Report of Injury" within five days after learning of a reportable injury. See explanation of "Reportable Injury" in this section.
5. Post and keep posted in a conspicuous place frequented by employees during the workday a notice stating either the name of the current compensation insurance carrier or the fact that the employer is self-insured, who is responsible for adjusting claims and the employee's rights.
6. Give every new employee, either when the employee is hired or by the end of the first pay period, written notice of the employee's right to receive workers' compensation benefits should the employee be injured on the job. This is in addition to the posting requirement mentioned above.
7. Notify an injured employee of the availability of rehabilitation services when the disability exceeds 27 days. A copy of the notification must be forwarded to the State Department of Rehabilitation. Either the employer or its insurer must comply with this requirement.
8. Give an employee, together with the last payment of temporary disability indemnity, a notice stating the employer's position on the payment of permanent disability indemnity to the employee. For more details, see "Permanent Disability Indemnity" in this section.
9. Give an employee, upon request, a form to indicate the employee's personal physician.

Other employer obligations as to occupational illnesses and injuries are covered in the section "Cal/OSHA Safety and Health Requirements" starting on page 1.

Reportable Injury: An employer must file a complete report of every occupational injury (including an illness) incurred by an employee that results in lost time beyond the date of the injury or requires medical treatment beyond first aid. The report must be filed with the insurer within five days after the injury has been reported to the employer. "Lost time" means an absence from work for a full day or shift beyond the date of the injury, and "first aid" means any one-time treatment of minor scratches, cuts, burns, splinters, and so forth, that does not require a physician's services.

Specifically, an injury requiring only first aid need not be reported. Such first aid may be provided by the employer or a physician or other health-care provider. To avoid opening a workers' compensation claim, an employer may choose to pay for the medical treatment of these minor industrial injuries. The employer should ask the medical provider to bill it directly. However, the employer should be aware that a second treatment, other than mere observation, of an injury will bring it within the definition of a reportable injury. In this case, the employer must provide the injured employee with an Employee Claim form and submit an Employer's Report of Occupational Injury or Illness to its workers' compensation insurer.

Only an injury that arises out of employment triggers the employer's duties under the workers' compensation laws. Thus, an employer who is positive an alleged on-the-job injury is fraudulent (*i.e.*, no injury exists or it did not arise out of employment) may choose to refuse to provide a claim form and medical treatment to the individual and to report it to the insurer. An employer taking this route must be sure it can prove its position, as the individual alleging the injury may seek to adjudicate the issue before the Workers' Compensation Appeals Board. The outcome hinges on the weight of the evidence and the credibility of testimony, and the employer faces penalties should it be held the employee did indeed incur a covered injury.

Notice of Injury by Employee: An employee must notify his employer about a work-related injury within 30 days after incurring it. The notice of injury must be in writing and signed by the injured person or someone on his behalf. However, knowledge of an injury obtained by the employer, or

by the employer's manager, supervisor, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to enable the employer to investigate the facts, is considered sufficient notice.

Employee Claim Form: Within one day after learning of an injury, an employer must give the injured employee a claim form and a notice of potential benefit eligibility. The form must state the injured employee's name and address and the time, place and nature of the injury. The notice must include: a description of the procedures and help available to the employee; the procedure used to start proceedings to collect benefits; the telephone number of the Office of Benefit Assistance and Enforcement; and a statement that the employee has the right to consult with the Office of Benefit Assistance or an attorney.

The completed claim form must be filed with the employer by the injured worker or, in the case of death, by a dependant of the decedent employee, or by an agent of the employee or dependant.

Physician or Chiropractor Designation: The workers' compensation medical needs of an employee covered by a Medical Provider Network (MPN) are attended to by one or more doctors in the MPN unless the employee was eligible to pre-designate his personal doctor and did so before the injury occurred. An employee may pre-designate his personal doctor of medicine (M.D.) or doctor of osteopathy (D.O.) only if:

1. The employer offers group health coverage;
2. The doctor treated the employee in the past and has the employee's medical records;
3. Before the injury, the doctor agreed to treat the employee for work injuries or illnesses; and
4. Before the injury, the employee provided the employer the following in writing:
 - a. Notice that the employee wants his personal doctor to treat him for a work-related injury or illness; and
 - b. The employee's personal doctor's name and business address.

At the time of hire, each new employee must be given a pamphlet describing workers' compensation coverage and a form for the employee to designate her personal physician or personal chiropractor. The employer may require an employee who selects his or her own personal physician or personal chiropractor to be examined by a medical consultant of the employer's choice, at the employer's expense, at reasonable intervals. The Division of Workers' Compensation provides forms for designation of physicians. See DWC form 9783 at www.dir.ca.gov/dwc/forms.html.

Disability Benefit Payments: Disability benefit payments include the services of a physician, hospital care, physical restoration, dental care, prescriptions, medical and surgical supplies, crutches, X-rays, laboratory tests and studies and all other necessary and reasonable apparatus and care ordered by the treating physician. There are no deductibles. The employer or its workers' compensation insurance carrier pays for all medical and hospital care.

In addition to all necessary medical treatment, an employee is entitled to mileage fees from home to the place of treatment and/or examination and back.

Medical Treatment: An employer may require an employee injured on the job to be treated by a physician designated by the employer within the first 30 days of the injury, unless the employee could not report the injury before receiving emergency services or the employee previously indicated, in writing, that he or she wanted to be treated by another physician. Despite the 30-day provision, however, after an injury has been incurred where the employee has not previously indicated another physician, the employee may orally or in writing request another physician.

Premium Calculations: The premium an employer pays for workers' compensation insurance is based on earnings of employees. The earnings of each employee are multiplied by an occupational classification rate for the class of employee.

Traveling To or From Work: Generally, workers' compensation does not cover an employee

while going to or returning home from work. However, this rule has many exceptions. If the employee's travel to or from work benefits the employer, then the trip is considered as having been made within the scope of employment. For example, the trip of an employee told to pick up supplies on the way to work is covered. Also, if an employee is expected to perform a service for the employer, such as bringing other employees to work, then the time traveling is covered. Another exception to the "going and coming" rule is where an employer expressly or impliedly requires employees to provide their own transportation to move between ranches during the workday.

Injuries sustained during the course of "special missions" are compensable, even though part of the trip could be considered going to or returning from work. For example, an employee who is not required to report to work at any particular place but travels in the course of his duties is considered to be on a special mission.

Where an employer provides transportation to or from work, the employee is inferred to be within the scope of employment. This also applies to employees driven to work by an employee paid by the employer to provide carpooling services, even though the employee uses his own vehicle. Traveling time is also covered under workers' compensation where the employer pays or reimburses employees for the time spent or expenses incurred in traveling to or from work.

Exclusive Remedy; Exceptions: With some exceptions, workers' compensation is the exclusive remedy available to an employee for a job-related injury. Thus, an employee injured on the job generally may not sue or get tort damages from his employer. However, an injured employee may sue his employer if it failed to cover him with workers' compensation insurance, or the employee may apply for workers' compensation benefits as though he were covered, or both.

Serious and Willful Misconduct: Where an employee is injured due to his employer's serious and willful misconduct, the amount of compensation otherwise recoverable is increased by one-half. There is no limit on the recoverable compensation, and the liability is not insurable. Serious and willful misconduct involves: (1) a deliberate act done to injure another, (2) an intentional act with the knowledge that serious injury is a probable result, or (3) an intentional act with a reckless disregard of its possible consequences. An employer must have known of the dangerous condition or safety order violation and failed to take corrective action either deliberately or with a reckless disregard for the consequences.

Illegally Employed Minors: A minor under 16 years of age who is injured while employed illegally (e.g., working during school hours or after 10 p.m.) is awarded an additional amount equal to 50 percent of his workers' compensation benefits. There is no cap on the award, and the liability is not insurable, so the employer must pay it.

Discrimination - Labor Code Section 132a: Labor Code section 132a prohibits an employer from discharging an employee for filing a claim for the payment of workers' compensation benefits or a complaint with the Workers' Compensation Appeals Board, or for testifying or making known his intention to testify in a case under consideration by the Board.

For many years, California appellate courts held that the incurrence of any detriment by an employee due to a work-related injury violated section 132a's ban against workers' compensation discrimination—even where other employees not incurring a work-related injury faced the same detriment under the employer's neutrally applied policy or practice. But under a 2003 California Supreme Court decision, an employee with a work-related injury now must show the employer treated him detrimentally *and* differently (i.e., that he was singled out for detrimental treatment) due to his injury, as opposed to showing merely that he incurred some detriment because of his injury. Thus, an employer may apply the same policy or practice to employees with work-related injuries as it does to other employees.

One problem associated with Labor Code section 132a is where an injured employee has returned to work but is chronically absent or does not perform up to company standards, especially where

the employer tolerated such performance or attendance before the injury. Extreme caution should be used in this situation.

An employer should consult legal counsel before discharging any employee who has incurred an on-the-job injury. Discriminating against an employee because of an occupational illness or injury is a misdemeanor, and the employee's compensation may be increased by one-half up to \$10,000. Also, the employee may be entitled to reinstatement and reimbursement for lost wages.

Penalties: Employers face significant criminal and civil penalties for failing to procure either workers' compensation insurance or authorization by the State of California to be self-insured. An employer lacking this insurance is fined \$1,500 for each employee on its payroll. For example, an employer with 10 employees would be fined \$15,000. In addition, investigators will close the employer's business until the insurance is procured. While it is closed, the employer must still pay its employees their regular pay for up to 10 days.

Postings: Required postings are discussed in the section "Workers' Compensation" on page [131](#).

Employment Insurance

Unemployment Insurance

California participates in a joint federal/state unemployment insurance program designed to reduce the effect of economic fluctuations and to help those who become unemployed through no fault of their own.

With few exceptions, all California employers are covered by the unemployment insurance law and must pay the applicable unemployment insurance tax. A former employee is ineligible for benefits if he or she is out of work for any of these reasons:

1. Voluntary quit without good cause;
2. Discharge for willful misconduct; or
3. Refusal of suitable work.

Employers may respond to a claim for unemployment insurance by a former employee. An employer may appeal a final benefit-payment determination with which it disagrees.

Covered Employers: Under the California Unemployment Insurance Code, the term *employer* includes any individual, joint venture, partnership, association, trust, estate, joint stock company, insurance company, corporation (whether domestic or foreign), community chest fund, foundation, receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person.

An employer becomes subject to UI as an employing unit, if the employer employed within the current calendar year or had within the preceding calendar year one or more employees and paid wages in excess of \$100 during any calendar quarter.

Employers with less than \$100 of quarterly payroll are exempt from state unemployment insurance (UI) law. New employers register by filing Form DE-1 and pay a 3.4 percent UI tax on wages up to \$7,000 per worker per calendar year. When an employer receives an identification number, it also will receive information concerning all state-required employment taxes and reporting requirements.

Experience Rating: Employers are usually in business 2-3 years before they are experience rated, with individual state UI tax rates ranging from 0.7 to 5.4 percent, depending on the employer's unemployment experience. The experience ratings for employers hiring seasonal agricultural labor frequently rise to the 5.4 percent ceiling.

Employer Account Number: Employers are required to register within 15 days after becoming subject to the Code. Registration forms are available at the nearest Employment Tax District Office or at headquarters in Sacramento. All registered employers must report any change in business name, form or entity.

Each liable employer is assigned an eight-digit employer account number. This number appears on the Quarterly Contribution Return (DE 3) and other documents sent to the employer that are related to the collection of unemployment and disability insurance contributions and used in the determination of benefits. Employers should use this number on all correspondence, forms, and remittances submitted to the Department.

Required Records: Every registered employer is required to keep a true and accurate record of:

1. All workers and their status, (*i.e.*, employed, on layoff or leave of absence.)
2. The wages paid by the employer to each worker.
3. The period covered by all payrolls.

4. For each employee:
 - A. Name.
 - B. Social Security Account Number.
 - C. The date on which the individual was hired, rehired, or returned to work after temporary layoff, and the date when the individual's name was removed from the payroll.
5. The wages paid to each employee for each payroll period, showing separately:
 - A. Money wages;
 - B. Cash value of all other remuneration received from the employer;
 - C. Special payments in cash or kind for services rendered exclusively in a given pay period such as annual bonuses, gifts, prizes, *etc.*, showing the nature of such payments and the period during which the services were performed for which such special payments were made.

Time Limits of Records: Employers subject to the Code must keep required records for at least four years after the date the contributions to which they relate become due, or the date they are paid, whichever is later.

Posting and Notice Requirements: Employers must post on the premises in places accessible to employees printed statements about benefit rights and other matters as may be prescribed by regulations. These printed statements are furnished by the Department and include posters such as "Notice to Employees" about rights and responsibilities under the Code.

Employers must also make available to each employee when they become unemployed printed statements or pamphlets about benefit rights. These pamphlets are supplied by the Department and include forms DE 2320 and DE 2515 on unemployment insurance and disability insurance benefit claims information.

The poster *Notice to Employees of Unemployment Insurance and Disability Insurance* (DE-1857A) may be obtained from the local Employment Tax Office of the EDD. See page 128 for more information.

Written Notice to Employee: An employer must give an employee who is laid off or discharged or who takes a leave of absence written notice of the change in status. The notice must include: (1) the employer's name; (2) the employee's name; (3) the employee's social security number; (4) the date of the action; and (5) whether the action was a discharge, layoff, leave of absence, or change in status from employee to independent contractor.

No written notice is required in any of these situations:

1. Voluntary quit
2. Promotion or demotion
3. Change in work assignment or work location
4. Cessation of work due to a trade dispute

Penalties: Employers are subject to a penalty of \$100 per employee for the failure to register with EDD as an employer when the failure is due to "intentional disregard or an intent to evade employment taxes." This penalty applies only to the calendar quarter in which the employer had the highest number of employees.

Disability Insurance and Paid Family Leave

California State Disability Insurance (SDI) is a partial wage-replacement insurance plan for California workers. The SDI program is state-mandated and funded by employee payroll deductions. SDI provides affordable, short-term benefits to eligible workers who suffer a loss of wages because they cannot work due to an illness or injury that is not work-related, or a medically-disabling condition resulting from pregnancy or childbirth.

Payroll deductions for all covered workers are based on the same contribution rate.

Benefits of California SDI Coverage:

1. SDI coverage "travels" with the worker. Coverage is not dependent on staying with a specific employer.
2. SDI coverage is mandatory for most California workers.
3. SDI is non-exclusionary. An eligible worker's coverage cannot be canceled or denied because of health risk factors, pre-existing medical conditions, or hazardous employment.
4. SDI may pay up to 52 weeks of benefits with a waiting period of only seven days.

Employers must provide a new employee with an SDI pamphlet. See page 128 for more information.

Paid Family Leave Program: California is the first state to provide employees with paid family-care leave. The paid family leave (PFL) program is incorporated into the state disability insurance (SDI) program. The program is financed entirely by an increase in employee payroll contributions to the SDI fund and is administered by the Employment Development Department (EDD).

Under the PFL program, an employee is eligible for up to six weeks of PFL benefits during a 12-month period, at rates up to 55 percent of the employee's wages, while taking time off work for a purpose specified under the federal Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA). Those purposes are caring for a child, spouse, parent, or domestic partner with a serious health condition and bonding with a new child.

PFL does not create any new leave entitlement. Rather, it merely provides that an employee who takes a leave for a purpose specified under the FMLA and CFRA can receive PFL benefits. Accordingly, an employer not covered by the FMLA or CFRA—simply stated, one with fewer than 50 employees—need not hold the employee's job open, although the employee would still be entitled to PFL benefits.

Employers must give a PFL notice (DE 2511) to all new employees and to each employee leaving work due to pregnancy or non-occupational injury or illness, or to care for a family member.

EDD has updated its UI/SDI poster (DE 1857A) by incorporating PFL information into the poster. EDD requires the notice to be posted at the workplace and a flyer (DE 2511) to be given to each employee. The poster and flyer, in English and Spanish, may be downloaded for printing by visiting www.edd.ca.gov/direp/dipub.htm#pfil

Notes

Child Labor

California and federal laws regulate the conditions under which minors may be employed and the hours they may work. The employment of minors in some situations is completely banned.

Work Permits

An employer that directly or indirectly employs a minor under 18 years of age (other than a high-school graduate or equivalent) must keep a "Permit to Employ" and a "Work Permit" on file throughout the minor's employment. The Permit to Employ must be obtained before the minor starts work. Minors apply for Work Permits from the minor's school. Minors visiting from another state (or country, if eligible to work in the United States) who wish to work in California must obtain the standard Permit to Employ and Work, and their employers must possess such permit. These permits may be issued by the local school district in which the minor will reside while visiting.

Agricultural Zone of Danger

Minors under 12 may not work or accompany an employed parent into an "agricultural zone of danger," which includes being near moving equipment, unprotected chemicals or water hazards. Minors under 16 may not perform hazardous duties.

Minors employed on a farm owned or operated by their parents or guardians are not subject to minimum wage, overtime, or working-condition requirements. While not needing work permits, they may not work during hours that school is in session.

Child Labor Summary

Here is a summary of child-labor requirements on California farms and in agriculturally related workplaces:

Exemption for One's Own Children: A minor of any age (even under age 12) may be employed without either a permit or any limitation in agricultural, horticultural (including fruit curing and drying but not canning), viticultural and domestic labor for or under the control of his or her parent or guardian upon or in connection with premises owned or operated by the parent or guardian. This exemption applies only during nonschool hours and even if the minor is under school age.

In a nonagricultural workplace operated by a grower (e.g., a packinghouse where the commodities being handled were produced by that grower and other growers) a minor is exempt from federal Fair Labor Standards Act (FLSA) coverage only if the minor's parent or guardian is the exclusive employer; where such an operation is a partnership or corporation, a minor is exempt from FLSA coverage only if the minor's parents or guardians are the sole partners or shareholders. (A minor employed in such a workplace is exempt under California law as long as the conditions stated in the above paragraph exist.)

Minimum Age Standards Generally:

Minors aged 14 through 17: May work in any job except those listed for their respective age bracket under **Restricted and Hazardous Occupations**, below.

Minors aged 12 and 13: May not work in FLSA-covered nonagricultural jobs (e.g., commercial processing operations). May work, with either written parental consent or on a farm where the minor's parent or person standing in the parent's place is also employed, in any agricultural job except those listed for their age bracket under **Restricted and Hazardous Occupations**, below.

Permits to Work and to Employ: Required unless minor is a high-school graduate or has a certificate of proficiency. Minor obtains permits from school district where minor resides or attends school. Permits must be available for inspection by state labor-law and local and state school authorities.

Recordkeeping: In addition to regular requirements for maintaining employment records, an employer must keep for 3 years a record of the birthdate of one who was a minor when hired; copy of work permit is acceptable.

Hours of Work:

Exception: High-school graduates and those with a certificate of proficiency may work same hours as adults.

Minors aged 16 and 17: When school is in session, may work 4 hours on school days and 8 hours on nonschool days; with special permission may work 8 hours on school days before nonschool days.

When school is not in session, may work 8 hours per day and 48 hours per week.

Exception: May work 10 hours per day on nonschool days during peak harvest season in an agricultural packing plant to which the Labor Commissioner has issued an exemption.

Minors aged 14 and 15: When school is in session, may work 3 hours per day and 18 hours per week.

When school is not in session, may work 8 hours per day and 40 hours per week.

Minors aged 12 and 13: May work only in agriculture for 8 hours per day and 40 hours per week on nonschool days only.

Spread of Hours:

Minors aged 16 and 17: May work between 5 a.m. and either 10 p.m. on school days or 12:30 a.m. on nonschool days.

Minors aged 14 and 15: May work between 7 a.m. and 7 p.m., but from June 1 to Labor Day may work until 9 p.m.

Minors aged 12 and 13: May work only in agriculture between 7 a.m. and 7 p.m., but from June 1 to Labor Day may work until 9 p.m.

Restricted and Hazardous Occupations:

All minors: No minor may be employed in: explosives manufacturing and storing; motor-vehicle driving and outside helping on public roads; mining; logging and sawmilling; power-driven woodworking, metal forming, punching, shearing, hoisting-apparatus, bakery, paper-products, and sawing machine operations; jobs involving exposure to radioactive substances; slaughtering; meat packing, processing and rendering; brick and tile (etc.) manufacturing; wrecking, demolition and ship-breaking; roofing; excavating; certain jobs in gasoline service stations selling or serving alcoholic beverages; or handling pesticides.

Minors aged 12 through 15: No minor under age 16 may be employed in: manufacturing or processing (e.g., cracking nuts, dressing poultry) **occupations or workplaces**¹; public messenger services; transporting persons; warehousing; communications; construction; certain work in retail or food-service businesses; automobile or truck driving; operating a tractor of over 20 PTO, or connecting or disconnecting implements to or from such a tractor; operating or otherwise physically contacting these machines--corn or cotton picker, grain or potato combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, power post-hole digger, power post driver, nonwalking-type rotary tiller, trencher, earthmoving

equipment, forklift, or power-driven saw; near a bull, boar or stud horse, or a sow with suckling pigs or cow with newborn calf (with umbilical cord); working on a ladder at a height of over 20 feet, or on any scaffolding; felling, bucking, skidding, loading or unloading timber over 6 inches thick; riding on a tractor; oxygen-deficient or toxic-atmosphere fruit, forage or grain storage facility; certain silos; manure pits; handling explosives or anhydrous ammonia; adjusting, sewing or lacing machinery belts; oiling, wiping or cleaning machinery; **near moving machinery**²; and certain other hazardous jobs.

¹ Exception: May work subject to the restrictions listed above (i.e., performing only non-hazardous tasks) in noncommercial agricultural processing/ packing of only the grower's own commodities (i.e., where the commodities being handled were produced by only the grower/processor/packer employing the minor).

² The restriction on working near moving machinery means that minors may not work "in harm's way" of *any* moving machinery; the restricted activities involving moving machinery listed in this section (which are specified in various laws and regulations) should thus be regarded as examples and not as an exhaustive listing of such activities or machinery that minors under age 16 must avoid.

Posting of Notice: Farms employing any parent or guardian with minor children in immediate custody must post a notice, in English and Spanish, stating that minors are not allowed to work on the premises unless legally permitted to do so by duly constituted authorities.

Wages: Generally, minors must be paid wages on same basis as adults. Employers may pay a sub-minimum wage to adult and minor employees who qualify as "learners" as specified under IWC Orders. See "Learners" under "Minimum Wages" on page 28.

Citations and Penalties: Citations may be issued for violations.

A "Class A" citation is issued for violations of Labor Code sections 1292, 1293, 1293.1, 1294, 1294.1, 1308, and 1392, and for others that present an imminent danger to minor employees, or a substantial probability that death or serious physical harm would result therefrom. A civil penalty of at least \$5,000 and up to \$10,000 is imposed for each Class A violation.

A "Class B" citation is issued for violations of Labor Code sections 1290, 1299, 1308.5 and for others that have a direct or immediate relationship to the health, safety, or security of minor employees. A civil penalty of at least \$500 and up to \$1,000 is imposed for each Class B violation.

These penalties may be imposed on a landowner who knowingly benefits from child-labor violations, regardless of whether the landowner is the minor's employer.

Posting Requirement: The posting requirement is reviewed in the section "Employment of Minors" on page 127.

NOTES

Transportation

Transportation of Employees

Two federal laws set safety standards for the transportation of agricultural employees: the Interstate Commerce Act (ICA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The transporting of non-agricultural employees is not covered by either act. However, several regulations of the federal Occupational Safety and Health Administration cover the transportation of employees. As California has an agreement to administer OSHA standards, those provisions are reviewed in this section under the Cal/OSHA standards. The California Vehicle Code also regulates vehicles that transport employees.

Wage-and-hour issues arising from the transportation of employees are reviewed in the Wage and Hour section of this Guide starting on page [28](#).

Below are the provisions regulating the transportation of employees from a safety standpoint:

Interstate Commerce Act (ICA) Regulations: Section 204(3a) of the ICA regulates the transportation of farm workers by motor vehicle. The ICA is administered by the Federal Motor Carrier Safety Administration, a unit of the U.S. Department of Transportation (DOT).

The ICA exempts from regulation the transportation of farm workers where such transportation is:

- By a common carrier
- Within the boundary of one state
- For any distance of less than 75 miles
- By automobile or station wagon
- By a person transporting members of his or her own family

Regulations on the transportation of farm workers are designated as Part 398 of title 49 of the Code of Federal Regulations. A copy may be obtained from the Federal Motor Carrier Safety Administration, 201 Mission Street, Suite 2100, San Francisco CA 94105 (telephone: 415-744-3088).

Migrant and Seasonal Agricultural Worker Protection Act (MSPA): By regulation, the U.S. Department of Labor (DOL) has adopted the DOT's rules, as noted above, plus additional provisions for other transportation covered by the MSPA.

Where the agricultural employer or FLC "uses or causes to be used" a vehicle for the transportation of a migrant or seasonal agricultural worker (no matter who is operating it), then the MSPA's transportation provisions apply. This can occur where the agricultural employer or FLC (or a supervisor) tells only workers with vehicles who give other workers rides—rather than telling every worker—where to report for work the next day (or later in the same day where workers move from field to field). In that type of situation, the agricultural employer or FLC becomes responsible for ensuring compliance with the MSPA's transportation provisions.

In contrast, agricultural employers and FLCs may, without subjecting themselves to the MSPA's transportation provisions, encourage workers to make carpooling arrangements among themselves. Also, workers may ride with crew leaders as long as the agricultural employer or FLC has no part in the arrangement and the crew leader is simply another employee and not an agent of the employer (as are supervisors and foremen). A carpooling arrangement does not exist, however, where a foreman or supervisor is involved in the transportation arrangement.

FLC Transportation of Workers: The DOL identifies on an FLC's certificate of registration the maximum number of workers the FLC may transport and requires proof of adequate insurance and compliance with vehicle safety standards.

An FLC must identify each vehicle to be used, or caused to be used, for the transportation of any migrant or seasonal agricultural worker during the period for which registration is sought. The FLC must provide written proof that every such vehicle under the FLC's ownership or control complies with MSPA's vehicle safety and insurance requirements.

Here is a summary of the MSPA regulations on the transportation of covered agricultural workers by the type of vehicle used:

Vehicles covered under regulations developed by DOL: These vehicles must comply with the regulations developed by the DOL (see "Vehicle Safety Regulations Developed by DOL" below):

1. Passenger automobiles and station wagons used to transport covered workers.
2. Vehicles other than passenger automobiles or station wagons (*e.g.*, vans or buses) used to transport covered workers less than 75 miles round trip.
3. Pickup trucks used only for transportation when transporting passengers only within the cab.

Exempt vehicles: These vehicles are not subject to the vehicle safety standards under the MSPA:

1. Agricultural machinery and equipment while performing planting, cultivating, or harvesting activities, while being used in the care of livestock, and transportation incidental to these activities.
2. The vehicle of an individual worker when the only other passengers are members of the worker's immediate family.
3. Carpooling arrangements. The DOL says a bona fide carpooling arrangement is one that:
 - a. is voluntary among the workers and uses one or more of their vehicles;
 - b. yields for the worker providing the vehicle no more than the cost of its operation;
 - c. is not specifically directed or requested by an agricultural employer, farm labor contractor (FLC) or agricultural association; and
 - d. does not include an FLC as a participant.

Rules Which Apply to All Vehicles: These regulations apply to any vehicle when transporting workers.

1. Any vehicle used to transport workers must meet applicable vehicle safety standards prescribed by the Secretary of Labor and by other federal and state agencies.
2. A driver of any vehicle transporting workers must have a valid motor vehicle operator's license.
3. Where an agricultural employer or association specifically directs or requests an FLC to use the FLC's vehicle to do a task, such direction constitutes a joint responsibility with the FLC for assuring that the vehicle meets the MSPA's insurance and safety provisions.

Vehicle Insurance Requirements: Except where an approved liability bond is established or the transportation of workers is fully covered by workers' compensation insurance, an FLC, agricultural employer or agricultural association must purchase and maintain liability insurance coverage for any vehicle used to transport migrant or seasonal agricultural workers. The policy liability limits must be in an amount of at least \$100,000 for each available seat, subject to a limit of \$5 million.

Insurance against damage to or loss of property of others must also be maintained. The policy must provide at least \$50,000 coverage for loss or damage in an accident. An employer of migrant or seasonal agricultural workers that does not obtain liability insurance, but instead relies on its workers' compensation insurance to cover them for bodily injury or death, still must obtain this insurance.

Vehicle Safety Regulations Developed by the DOL: Vehicles covered by regulations developed by the DOL must meet specific safety standards. Generally these standards are similar to the regulations governing the equipment for passenger vehicles under the California Vehicle Code. Here is a summary of the equipment covered by DOL regulations:

1. External lights, brakes, tires, steering, horn, mirrors, windshield/windshield wipers, fuel system, exhaust system, and handles/latches.
2. Ventilation: windows must be operational.
3. Loading of vehicles not to exceed manufacturer's gross weight rating.
4. A seat fastened to the vehicle must be provided for each rider, except where transportation is primarily on private farm roads and the trip is less than 10 miles. One trip may have numerous stops.
5. Passenger compartments must be free of openings, rusted areas or other defects that are likely to result in injury to riders.

A copy of the DOT standards adopted by the DOL may be obtained from district offices of the DOL's Wage and Hour Division (WHD). When requesting them, specify 29 CFR Part 500.105. They are also available online at http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_500/29CFR500.105.htm.

State Statutes and Regulations: California laws regulating the transportation of employees are found mainly in the Vehicle Code (VC) and Cal/OSHA General Industry Safety Orders.

Farm Labor Vehicles: A vehicle designed, used or maintained for the transportation of nine or more farm workers in addition to the driver is a farm labor vehicle. A farm labor vehicle must be inspected annually by the California Highway Patrol (CHP).

A Vehicle Inspection Certificate must be displayed in the farm labor vehicle. Contact the CHP for an inspection.

As required by law, the California Department of Motor Vehicles developed specifications for a display sticker that must be clearly displayed on every farm labor vehicle. The display sticker lists the inspection certification date and the "800" telephone reporting system required by California Vehicle Code section 2429.

Every farm labor vehicle must be identified as follows:

(1) Markings.

(A) The words "FARM LABOR VEHICLE" shall be displayed on each side of each farm labor vehicle in uppercase lettering on a sharply contrasting background. Letters shall be a minimum of 1.5 inches in height and clearly legible from a distance of 50 feet during daylight hours.

(B) The words "TO REPORT VIOLATIONS" in uppercase characters and the toll-free telephone number "1-800-TELL CHP" must be displayed on the exterior on each side of each farm labor vehicle on a sharply contrasting background. Characters must be a minimum of 1 inch in height and may be displayed on one or two lines.

(2) Interior Notice. A farm labor vehicle notice in English and Spanish, furnished by the CHP, must be displayed in the interior of each farm labor vehicle in a location visible to the passengers. The required notice, Farm Labor Vehicle Notice, CHP 408C (New 12-99), must be completed by an authorized CHP employee to indicate the maximum number of passengers the vehicle may transport and the vehicle license number. The notice must also advise the reader of the toll-free CHP telephone number where violations relating to the operation of farm labor vehicles may be reported.

For other requirements, see page [98](#).

Vehicle Inspections: Vehicles, even vehicles other than Farm Labor Vehicles, used by an FLC to transport employees must be inspected. Either DOL Form 514a (for passenger cars or station wagons) or Form WH-514 (for all other vehicles) must be completed for each vehicle.

Vehicle Drivers: Drivers of any vehicle must possess the appropriate licence for the vehicle driven. The driver of a farm labor vehicle must hold a Class B license with a farm labor vehicle driver endorsement. The driver must take and pass a farm labor vehicle course approved by the Department of Education and obtain a medical certification before being licensed as a farm labor vehicle driver. Further, Class B drivers are subject to the Department of Motor Vehicles (DMV) Employer Pull Notice Program. Obtain registration information and forms at any DMV office. Or, write or call:

Department of Motor Vehicles
DL Information Service Unit
PO Box 944231
Sacramento, CA 94244
(916) 657-6346

or obtain information and forms on the Internet by visiting:
<http://www.dmv.ca.gov/vehindustry/epe/epeformlist.htm>

See also California Driver License chart on page ?.

Farm Labor Vehicles: A farm labor vehicle (FLV) is any motor vehicle (including a bus) designed, used, or maintained for the transportation of nine or more farm workers, in addition to the driver, to or from a place of employment or employment-related activities. A vehicle carrying only members of the immediate family of the owner or driver, or a vehicle regulated by the state Public Utilities Commission, is not an FLV. (VC § 322.)

An FLV driver must possess a class B driver license and a certificate issued by the Department of Motor Vehicles and a medical certificate issued within the past two years. (VC §§ 12519 & 12804.9, subd. (b)(2)(D).) For other requirements, see page 98.

Farm Labor Vehicle Equipment: Here is a brief summary of the equipment that an FLV must have. For more detailed information, see title 13, California Code of Regulations (CCR), section 1242 *et seq.* These regulations may be viewed by accessing the regulation search page on the Web site of the California Office of Administrative Law at <http://ccr.oal.ca.gov/Templates/CCR/Sectem.htm>.

1. **Seats:** The driver's seat must be positioned so he sits in a natural position, has a clear view ahead, a clear view of mirrors, and adequate leg room for operation of foot controls. The seat must be adjustable, and the adjustable parts must be secured with a locking device. (13 CCR § 1270(a).)

Seating accommodations for each passenger must provide a space with a depth of at least 10 inches, a width of 16 inches, and a height (measured from the floor) of 15-19 inches for the seat and 32 inches for the top of the seatback. Aisles between facing seats must be at least 24 inches wide. Headroom, measured from the ceiling to the top of the cushion at least 7 inches from the interior side wall, must be at least 39 inches (except for seats installed by the original chassis manufacturer). Each seat cushion must be fastened to the seat frame by at least two positive locking devices at the front or rear of the cushion.

The passenger compartment must be enclosed to a height of at least 46 inches or equipped with other equally effective means to prevent passengers from falling off the vehicle. Seat frames and backs must be rigidly constructed and maintained to ensure structural safety and resistance to displacement of any component in the event of an accident. For the purpose of establishing passenger capacity, weight per person is calculated at 150 pounds. (13 CCR § 1270.3(a).)

All passenger seating positions in an FLV must meet federal motor vehicle safety standards—that is, they must have properly-installed forward-facing seating that meets or exceeds the vehicle manufacturer's specifications. (VC § 31406.)

2. **Seatbelts:** An FLV must be equipped with a seatbelt assembly complying with federal motor vehicle safety standards at each passenger position. (VC §§ 27315 & 31405, subd. (e)(2).)
3. **Fire Extinguisher:** An FLV must carry a fully charged fire extinguisher, with UL label and at least a 4B:C rating. (13 CCR § 1242.)
4. **First-Aid Kit:** An FLV must carry a 10-unit first-aid kit that is readily visible, accessible and plainly marked. Its contents must be protected from dirt and moisture. (13 CCR § 1243.)
5. **Spare tires** must be securely mounted on an FLV by tire carriers or other means. (13 CCR § 1244(b).)
6. **Brakes** must comply with the provisions of title 13, California Code of Regulations, section 1245. A bus may have a manual or automatic device for reducing braking effort on the front wheels. The manual means may be used only when operating on roads with adverse conditions, such as wet, snowy, or icy roads. (VC § 26311, subd. (b).)
7. **Towing equipment** must be maintained in good condition. The lower half of a fifth wheel must be securely fastened to the frame with U-bolts to prevent it from shifting on the frame. (13 CCR § 1247.)
8. **Fuel systems** must be free of leaks, securely mounted, and properly supported to minimize vibration, and have other than gravity feed. Containers must be securely sealed by a cap or plug. (13 CCR § 1253(a).)
9. **Ventilation** must be adequate for passengers in any weather. Ventilator openings must be screened. (13 CCR § 1260.)
10. **Exhaust systems** must minimize entry of gases into passenger compartment. Discharge must be below passenger compartment and beyond the rear or side of the body, but not near any exit, entrance, or window. (13 CCR § 1261.)
11. **Speedometer and odometer** must maintained in good working condition, visible to driver, and illuminated at night. (13 CCR § 1262.)
12. **Operator identification** must be displayed on both sides of the FLV and legible from a distance of 50 feet. (13 CCR § 1256(c).)
13. **Interior lights** must be on buses operated at night. (13 CCR § 1263.)
14. **Passenger compartment**, if separated from driver, must have a means to get driver's attention, such as a buzzer or other signaling device. (13 CCR § 1264.)
15. **Entrances and exits:** Buses manufactured after September 1, 1973, must meet federal manufacturing standards in effect at the time. Buses manufactured before that date must be equipped with at least one emergency door on the left side of vehicle and behind the driver, or an emergency door on the rear center of the bus, or escape windows of the push-out type. See regulation for other requirements, including signage. (13 CCR § 1268.)
16. **Tool and Equipment Storage:** Cutting tools or tools with sharp edges carried in the passenger compartment of a farm labor vehicle must be placed in securely-latched containers that are firmly attached to the vehicle. All other tools, equipment and materials carried in the passenger compartment must be secured to the vehicle and may not obstruct an aisle or emergency exit. (VC § 31407.)

Pickup, Flatbed and Dump Trucks Except for the situations noted below, no person may ride in or on the back of a pickup truck or flatbed motortruck on a highway. Similarly and subject to the

same exceptions, no person driving a pickup or flatbed truck on a highway may transport anyone in or on the back of the truck. (VC section 23116.)

Exceptions: A person may ride in or on the back of a pickup or flatbed truck if the person is:

1. Secured by a restraint system that conforms to federal motor vehicle safety standards.
2. Being transported in the back of a truck or flatbed motortruck owned by a farmer or rancher, if that vehicle is used exclusively within the boundaries of lands owned or managed by that farmer or rancher, including the incidental use of that vehicle on not more than one mile of highway between one part of the farm or ranch to another part of that farm or ranch;
3. Being transported in an emergency response situation (*i.e.*, where measures must be taken to prevent injury or death to persons or to prevent, confine or mitigate damage or destruction to property) by or pursuant to the direction or authority of a public agency; or
4. Being transported in a parade that is supervised by a law-enforcement agency, and the speed of the truck while in the parade does not exceed eight miles per hour.

Trucks: Trucks used primarily or regularly for the transportation of workers must have:

1. Seats securely fastened to the vehicle;
2. If a motortruck, a railing or other suitable enclosure on the sides and end of the vehicle extending at least 46 inches above the floor of the vehicle; and
3. Steps, stirrups, or other equivalent devices so placed and arranged that the vehicle may be safely mounted and dismounted. (VC § 34100.)

Carrier or Employer Responsibility: These duties are specified in sections 1229 to 1232 of title 13 of the California Code of Regulations:

1. The responsible employer or operator must ensure that the driver is properly certificated and capable of safe operation of the vehicle and may not knowingly permit driving in violation of statutes or regulations.
2. The responsible employer or operator must also ensure that the vehicle is properly equipped and is in safe operating condition.
3. A vehicle damaged in an accident shall not be moved until inspected by a qualified person.
4. A vehicle designated as "out-of-service" by a law enforcement official shall not be operated until repaired.
5. Vehicles must be annually inspected by the California Highway Patrol (CHP). A "Vehicle Inspection Approval Certificate" issued by the CHP must be displayed in a visible certificate holder in each vehicle.
6. The employer must arrange for periodic safety checks, adequate preventative maintenance procedures, receipt of driver reports, action to correct deficiencies reported, and records of service provided.

The owner or any other person employing or otherwise directing the driver of any vehicle may not cause the vehicle to be operated upon a highway in any manner contrary to law. (VC § 40001(a).)

Cal/OSHA: Cal/OSHA regulates the transportation of employees when transported exclusively on private property. Under Cal/OSHA General Industry Safety Order sections 3700-3703 (found in title 8, California Code of Regulations), one may drive a vehicle while transporting workers only if he holds a valid operator's license for the appropriate class of vehicle being driven.

The General Industry Safety Orders issued by Cal/OSHA specify the equipment for vehicles used to transport employees. GISO section 3702(q) allows employees to be transported in the back of a flatbed, pickup, or dump truck as long as:

1. The employees sit on the truck bed;
2. Barriers or guardrails around the perimeter of the truck bed prevent employees from falling;
3. Pickup tailgates are closed or an equivalent closure is provided;
4. If a dump truck, the body is secured or the hoist lever is locked, and tailgate is closed; and

5. Employees do not ride on the top of side rails, the top of the cab, running boards, fenders, the hood, or with their legs hanging over the end or sides.

EXCEPTION: One or two employees may be permitted to ride on the bed of a truck that does not comply with 2, 3, and 4 above as long as they stand or sit immediately behind the cab, holding on to suitable grabirons that are rigidly fastened to the truck.

Liabilities Relative to Transportation: Accidents involving employees while commuting between home and the workplace in their own vehicles can sometimes create certain liabilities.

Generally, under California law, employees are entitled to workers' compensation benefits as the exclusive remedy for injuries and illnesses that arise from their employment and are sustained in the course of that employment.

As a general rule, an injury incurred by an employee while going to work from home or while coming home from work is not covered by workers' compensation law. However, exceptions exist to this so-called going-and-coming rule.

One such exception of special note to agricultural employers is where, to get the job done, employees must bring their own vehicles to work or ride in co-workers' vehicles during the workday. This exception applies whether the requirement is directly imposed by the employer or is merely implied due to workplace circumstances.

Another exception to the going-and-coming rule is where an employee is performing a "special mission" directed by the employer on the way to work or while returning home from work. To fall within the exception, the mission or errand must be "substantial," meaning one requiring the employee to commute at a time different from the normal commute time.

An agricultural employer that uses, or causes to be used, a vehicle to transport a migrant or seasonal agricultural worker must ensure that the vehicle conforms to vehicle safety and insurance standards issued under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and to other applicable laws. An agricultural employer must also ensure that the driver of any such vehicle has a valid license to operate the vehicle.

Tractor-Driver Licensing Requirements: Here is a summary of tractor-driver license requirements:

Transporting Employees: While tractors are not generally used to transport passengers, they may be used to transport employees (passengers) if they have suitable seats. Tractors may be used to transport passengers by pulling a suitable trailer for passengers.

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the California Division of Occupational Safety and Health (Cal/OSHA) regulate employee transportation.

Under the MSPA, a driver of any vehicle transporting workers must have a valid motor vehicle operator's license. This applies to both on- and off-the-road transportation.

Cal/OSHA regulates the transportation of employees when hauled exclusively on private property. Under Cal/OSHA General Industry Safety Order sections 3700-3703, one may drive a vehicle while transporting employees only if the driver holds a valid operator's license for the appropriate class of vehicle being driven.

Operation on Public Highways: The California Vehicle Code regulates vehicle equipment and licensing while used on public roads. Vehicle Code section 36300 provides that any person, while driving or operating an implement of husbandry incidentally operated or moved over a highway, is not required to obtain a driver's license. However, a driver's license is required:

1. While the tractor is being used to draw a farm trailer carrying farm produce between farms or from a farm to a processing or handling point and return.
2. While operating an automatic bale wagon along a highway for a total distance greater than one mile from the point of origin of the trip.
3. While operating a combination of vehicles that includes an implement of husbandry at a speed in excess of 25 miles per hour or towing any implement of husbandry as follows:
 - A. A spray or fertilizer applicator rig used exclusively for spraying or fertilizing in the conduct of agricultural operations.
 - B. A trailer or semitrailer which has a maximum transportation capacity in excess of 500 gallons of anhydrous ammonia,
 - C. A trap wagon.

The California Highway Patrol offers a booklet with more information. Titled **Registration Enforcement Manual** (publication number HPM 82.5), the publication costs \$5.40 plus California sales tax. Call (916) 375-2101, or mail order with check to: CHP Fiscal Management Section, PO Box 942901, Sacramento, CA 94298-2901.

Transportation Provided by Supervisors: Supervisors who give employees rides to and from work in their own vehicles create several potential problems.

The first problem arises where the supervisor requires employees to ride with him and to pay for the rides. This is a kickback; in Spanish, it is called *mordida* (the bite). It is a violation of state law to require an employee to pay anything of value to be hired or remain employed. Since the supervisor is the employer's agent, the employer would be liable for the violation.

A second concern would be injuries to third parties while transporting employees. The employer would be liable for an accident caused by the supervisor's negligence.

A third concern is meeting the vehicle safety, insurance requirements and driver qualification requirements the MSPA imposes for employee transportation. Especially where an employer is unaware that a supervisor is transporting employees, the employer can't monitor the supervisor's activities.

Finally, if employees must ride with their supervisor, then the time spent traveling to and from work must be compensated.

NOTES

Housing

State Coverage: The summary of California requirements is based on the state Health and Safety (H & S) Code, sections 17000 through 17062 (the Employee Housing Act), the California Code of Regulations (CCR), title 25, sections 600 through 940, and the CCR, title 24. Other California statutes and regulations not referenced may also apply to employee housing.

With some exceptions, the Employee Housing Act applies to two types of employee housing: (1) living quarters provided for five or more employees by the employer; and (2) housing accommodations or structures in specified rural areas provided for five or more agricultural workers employed on a temporary, seasonal, or permanent basis, not maintained in connection with any workplace.

Cal/OSHA Requirement: Section 3350 of title 8 of the CCR requires every employer operating employee housing under the provisions of the Employee Housing Act to obtain a permit issued by the Department of Housing and Community Development or by any authorized local governmental agency. The employer must post or have available a valid and current permit.

Fees for Permits and Inspections: Permit Fees (t25 CCR § 637) - Every person applying for a permit exemption for employee housing on a dairy farm, or for a permit to operate employee housing, must pay fees to the enforcement agency for an exemption or a permit to operate in accordance with the following:

1. Fees for a permit to operate employee housing are:
 - a. Issuance fee of \$35.
 - b. Permit to operate fee of \$12 for each employee whom the operator intends to house, and \$12 for each lot or site provided for parking of mobile homes or recreational vehicles by employees.
 - c. Amended permit fee of \$20 for any transfer of ownership or possession.
 - d. Amended permit fee of \$20 and fees as specified above for any increase in the number of employees to be housed and additional lots or sites provided for parking of mobile homes or recreational vehicles by employees.
2. Fees for an exemption are:
 - a. Issuance fee of \$35.
 - b. An exemption fee of \$12 for each permanent housing unit.
 - c. Amended exemption fee of \$20 for any transfer of ownership or possession.
 - d. Amended permit fee of \$20 and fees as specified above for any increase in the number of permanent housing units.

Prohibitions: No person operating employee housing may terminate or modify a tenancy by increasing rent, decreasing services, threatening to bring or bringing an action to evict, refusing to renew a tenancy, or in any other way intimidating, threatening, restraining, coercing, blacklisting, or discharging an employee or tenant because of the tenant's exercise of any legal right under the Employee Housing Act. H & S Code §§ 17031.5 and 17031.7.

Federal Coverage: The summary of federal requirements is derived from regulations under the Occupational Safety and Health Act (OSHA) at title 29, Code of Federal Regulations (CFR) Part 1910.142, and under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) at title 29, CFR Part 500. Housing constructed after March 1980 is subject to those OSHA regulations. One who owns or controls housing constructed before April 1980 may elect to comply with either those OSHA regulations or with the standards issued by the Employment Training Administration at title 29, CFR 654.404 et seq.; those standards are not summarized here.

The MSPA and regulations under it protect migrant and seasonal agricultural workers in their dealings with farm labor contractors (FLCs), agricultural employers and agricultural associations.

However, it regulates only migrant (not seasonal) agricultural worker housing. The MSPA applies to housing even if only one migrant agricultural worker lives there.

Penalties: Penalties for violating the state Employee Housing Act are extremely harsh. Violators are subject to civil and criminal penalties, including fines and imprisonment. Depending on the circumstances, they range from a minimum civil penalty of \$300 and, for a continuous repeat violation, go up to \$6,000 per day. Criminal penalties range from \$2,000 to \$6,000 and imprisonment of up to 180 days, or both. Violators also must pay the other party's reasonable costs and attorney's fees. A repeat violator may even be ordered to be confined for up to one year in the employee housing at issue and to pay up to \$2,000 for a guard to enforce and monitor the confinement! H & S Code §§17061-17061.9.

A civil fine of up to \$1,000 may be imposed for each violation of the federal Migrant and Seasonal Agricultural Worker Protection Act's housing provisions. 29 USC §1853(a).

Credits Against Minimum Wage for Meals and Lodging: Both state and federal laws allow employers to credit against their minimum wage obligation the value of meals and lodging. For more information, see Wage-Hour section starting on page 38.

Impact of Housing Employees:

Some employers provide their farm employees with housing for free or at less than its fair market value. However, doing so can have monetary impacts under laws and rules regarding overtime pay, workers' compensation premiums, and taxes. For more information on the impact of providing housing, see the Wage-Hour section starting on page 48.

Evictions; Housing Agreements:

Employers providing housing to employees usually want them to vacate it promptly when employment ends. A written agreement can establish this requirement. In fact, all terms for the occupancy of employee housing should be in writing. If it is feasible to do so, the employee/occupant should be required to be solely responsible for paying utility bills, with the utility service accounts established in the employee/occupant's name.

California case law holds that merely allowing an employee to occupy housing during the existence of and as an incident to an employment relationship does not create a tenancy. Rather, it creates a mere license allowing the employee to occupy the housing, which the employer may revoke at any time in the absence of an unlawfully discriminatory motive. Thus, in the absence of such a motive and of any contrary agreement between them, an employer may require an employee/occupant to vacate the housing immediately when the employment lawfully ends or whenever the employer chooses to revoke the privilege. The employee is entitled to no notice or "grace period" to quit the housing before the employer may bring an unlawful detainer action to evict the employee. An exception to the employer's right to revoke an employee's occupancy privilege may exist under the federal Family Medical and Leave Act (FMLA) and, by logical extension, the California Family Rights Act (CFRA). In its FMLA Advisory Opinion No. 6 (Nov. 5, 1993), the U.S. Department of Labor (DOL) stated it would construe as unlawful an employer requirement that employees vacate employee-provided housing while they are on FMLA leaves.

Agricultural Labor Relations Act (ALRA)

In 1975, the California State Legislature passed the Agricultural Labor Relations Act. The purpose of the Act is to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.” The Act states that it is the policy of the State of California to encourage and protect the right of farm workers to act together to help themselves, to engage in union organizational activity and to select their own representatives for the purpose of bargaining with their employer for a contract covering their wages, hours, and working conditions.

The law prohibits the employers from interfering with these rights, protects the rights of workers to be free from restraint or coercion by unions or employers, and it prohibits unions from engaging in certain types of strikes and picketing.

Agricultural Labor Relations Board (ALRB)

The Agricultural Labor Relations Board is the agency that administers the ALRA and protects the rights of agricultural employees in various ways. For example, the ALRA creates a method by which workers may select a union or other representative to bargain with their employer if they wish. Agents of the Board conduct secret-ballot elections to determine whether workers wish to be represented and if so, by whom. Also, the ALRA gives authority to the ALRB to investigate, process and take to trial employers or unions who engage in actions that the Act describes as “unfair labor practices” (ULPs). When Board employees conduct an investigation and obtain enough evidence to show that an unfair labor practice has been committed, a “complaint” is issued and a hearing is held at which each party has a right to present its side of the case.

The ALRA guarantees the rights of employees to engage in, or to refrain from, union activities or “concerted activities,” such as acting together to help or protect each other in matters related to their employment, including their wages, hours or working conditions. Actions by an employer or a labor organization that prevent employees from exercising their free choice in a Board election may result in setting aside the election and conducting a new election. Such actions may also be unfair labor practices.

Coverage under the ALRA

The Agricultural Labor Relations Act applies only to agricultural employers, agricultural employees and labor organizations that represent agricultural employees. Those who are not engaged in agriculture and are not agricultural employers are not touched by the ALRA.

Definitions

Agricultural Employer: The term “agricultural employer” includes any person, association or group engaged in agriculture, and any person acting directly or indirectly in the interests of such an employer, or of any grower, cooperative grower, harvesting association, hiring association or land management group.

Farm Labor Contractor: An agricultural employer is responsible for the acts of its supervisors or other persons with supervisory authority over employees. When a farm labor contractor is engaged by an agricultural employer, the employer is responsible for the acts of the labor contractor, its foreman, other supervisors and any other agents acting on his/her behalf.

Supervisor: A supervisor is defined in the ALRA as . . . “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them or to adjust their grievances or effectively to recommend such actions.” In most circumstances, supervisors are not entitled to the rights and protections set forth in the ALRA.

Agricultural Employees: Agricultural employees, as defined in the ALRA, are those engaged in

agriculture or in functions that a farmer performs as an incident to or in connection with farming operations. For example, an office clerical employee or a bookkeeper is an agricultural employee if he or she keeps records or books that are incidental to a farming operation.

Union: The ALRA defines a union or labor organization as any organization or group in which employees participate and having a purpose of dealing with employers about grievances, labor disputes, wages, hours, and working conditions of agricultural employees. Although labor organizations are responsible for the acts of their agents and employees, an agricultural employee does not become an agent of a labor organization merely by joining or supporting the union.

Here are some terms used in the ALRA and in this Guide, along with definitions and some explanatory comments.

Concerted Activities: Conduct by two or more employees, acting together, for mutual aid and protection. The ALRA protects such activities even if they do not involve union membership or activity.

Unfair Labor Practice: Any action by an employer or a labor organization that has the effect of restraining or coercing employees in the exercise of their rights guaranteed by the ALRA. An unfair labor practice can be committed by anyone who the law considers an agent of a union or employer.

Union Elections and Collective Bargaining

Labor Code section 1152 gives farm workers these rights: to unite and campaign for a union; to elect a representative by secret ballot to speak for all employees with management about wages, hours and working conditions; to have their representative recognized by management as the bargaining agent and be dealt with in good faith; to act together without interference or discrimination to solve the problems faced by farm workers; and to refrain from any or all of these activities. The secret-ballot election is the first step in this guarantee and protection for the exercise of workers' rights. By casting individual votes in a secret-ballot election, farm workers choose whether they wish to be represented by a labor organization in bargaining with their employer.

Certification Remedy: If the ALRB refuses to certify a unionization election due to employer misconduct that affected the election's outcome, the ALRB must nonetheless certify the union as the employees' bargaining representative if the ALRB also finds that the employer's misconduct renders slight the chances of a new election reflecting the free and fair choice of employees.

Mandatory Mediation Order: Where a certified union and employer fail to reach a collective bargaining agreement after bargaining for a specified time depending on specified circumstances, either the union or employer may request from the ALRB "mandatory mediation" (really, according to one appellate court decision, compulsory interest arbitration). Under a mandatory mediation order, if the parties cannot reach a complete agreement, the mediator will notify the ALRB that the mediation process is exhausted and will file with the ALRB a report stating the terms that are to bind the parties, including terms resolving issues over which the parties could not agree. The report generally becomes the final order of the ALRB and binds the parties, but review by the ALRB and revision of the terms is possible.

Union Access

To make an intelligent choice, employees must have access to information and the opportunity to hear both sides in an election campaign. The ALRB's access regulation is meant to ensure that farm workers, who often may be contacted only at their work place, have an opportunity to be

informed with minimal interruption of working activities. The ALRB regulates and enforces these rights by setting certain hours and times when representatives of labor organizations may be present on the employer's property: one hour before and after work, and one hour during the lunch break. The ALRB has limited the number of organizers to two for each crew of 30 or fewer, three for each crew of 31 to 45, four for each crew of 46 to 60, and so on. A labor organization may take access for only four 30-day periods in a single year.

A labor organization wanting to take access must complete a form, called a Notice of Intent to Take Access, and delivers a copy of it to the employer's office or to its manager or one of the supervisors. The union then files the notice at the nearest ALRB office. Once the notice is filed, the employees have a right to meet with, talk to, and receive literature from union organizers at their work site during the hours already mentioned.

Unfair Labor Practices

The purpose of establishing an Unfair Labor Practice (ULP) procedure is to prevent employers and unions from interfering with, restraining or coercing farm workers in the exercise of their rights as granted by the ALRA.

Under the ALRA, it is the exclusive right of employees to decide whether they wish to be represented by a union. In an effort to ensure an atmosphere free from threats, coercion and intimidation, the law specifically declares certain acts by an employer to be unfair labor practices. An employer is responsible for the unfair labor practices committed by any person acting directly or indirectly in the interests of the employer, including supervisors, agents, and farm labor contractors engaged by the employer.

Labor Code section 1153, subdivision (a), provides that it is an unfair labor practice for an employer to interfere with, restrain or coerce agricultural employees in the exercise of their protected rights. Any attempt by the employer to tamper with, control or dominate the free choice of employees as to whether or not of they wish to organize or be represented by a labor organization is a violation of the ALRA and therefore an unfair labor practice. Speeches, leaflets, booklets, or other communications that threaten employees with physical abuse, lay-offs, reduced wages, loss of wages, loss of work, job transfers and the like violate the ALRA because they are threats of force or reprisal.

During an election campaign, granting benefits or promising to raise wages, improve working conditions, make promotions or provide health insurance or other benefits violate the ALRA because they may imply a threat that such benefits would be taken away if a representative is elected, or because they make voting for a representative seem irrelevant or unnecessary.

Here are some examples of employer interference, restraint and coercion. The employer, his or her agents, foremen, supervisors and farm labor contractors may not:

- threaten to fire employees if they organize, vote for, or join a union, or if they engage in activities on behalf the union;
- threaten to harm workers or their property if they join or vote for a union;
- question employees about their union, activities or their support of a union;
- spy on or engage in surveillance of employees, or threaten or appear to do so, while they are engaging in union activities, such as talking to organizers or other workers about a union;
- offer or give employees higher wages, better working conditions, or increased benefits in order to influence workers' votes or support for a union;
- prohibit employees from engaging in union activities during breaks, lunch period, or before or

after work, while on the employer's property;

- deny access to union organizers during the time periods established by the Board, or refuse to turn over current lists of employees' names and current residence addresses when requested by the Board;
- intimidate or prohibit employees from wearing union buttons, insignia or other symbols at work;
- in any other way interfere with, coerce or restrain employees in the exercise of their rights under the ALRA.

An employer commits an unfair labor practice by refusing to grant access to union organizers during the time periods established by the ALRB, if such a refusal interferes with employee rights. The employer may not create or control a "company union" or help one labor organization over another by giving money or any other kind of special privilege or support to the preferred organization. An employer or its agents, including supervisors, violates this prohibition by:

- pressuring employees to join a preferred labor organization, except under a lawful union security clause;
- organizing, aiding or supporting a union or committee of employees to represent workers concerning wages, hours and working conditions;
- asking employees or applicants for employment to sign authorization cards;
- giving a preferred labor organization extra time on company property in which to organize employees before an election while denying another organization a similar opportunity; and
- giving special privileges or information to one labor organization that are denied another, except under a lawful collective bargaining agreement.

It is an unfair labor practice under Labor Code section 1153, subdivision (c), for an employer to discriminate in regard to hiring, or firing, or any term or condition of employment, so as to encourage or discourage membership in any labor organization. Under this section an employer may not treat any employee or potential employee differently because of union affiliation, involvement in union activities or support of any labor organization.

Thus, when an employer conditions hiring or continued employment on the employee's attitude towards unionization or support or activity on behalf of a particular union, the employer has engaged in an unfair labor practice.

An employer who discharges or punishes employees for filing grievances or because of union activity, or otherwise discriminates against employees by requiring them to work apart from other employees, transferring them to lower-paying or less-desirable jobs, or requiring them to use tools or instruments that make their labor more difficult because of their union affiliation or union activity, violates the ALRA because such actions tend to discourage union membership.

It is an unfair labor practice under Labor Code section 1153, subdivision (d), for an employer to discharge or discriminate against an employee because the employee has filed charges or given testimony under the ALRA. Thus, an employer may not layoff, suspend, take action against, or in any other way discriminate against an employee because he or she has filed a charge, or a petition, attended or testified in a proceeding involving the ALRB, or given evidence or information in an ALRB investigation.

Strikes, Picketing and Economic Boycotts

Strikes, picketing, and economic boycotts are permitted under the ALRA, except that under certain circumstances, such activity may constitute unfair labor practices. Labor Code section 1154, subdivision (d), prohibits strikes, picketing and economic boycotts where an object is to force an employer or self-employed person to join any labor organization or employer organization.

Under section 1154, subdivision (d), a “secondary boycott” exists when a union engages in, or induces or encourages individuals to engage in, a strike and picketing against a neutral or secondary employer (one with which that union does not have a labor dispute). While a union may picket or strike the primary employer (one with which it has a legitimate labor dispute), a union may not try to force any other employer, person, or manufacturer with whom it does not have a dispute to cease dealing with the primary employer.

The ALRA permits publicity, including picketing, for the purpose of truthfully advising the public and consumers that a product or ingredient of a product is produced by an agricultural employer (the primary employer) with whom the union has a primary dispute and is distributed by another employer (the secondary employer). A union’s picketing of the secondary employer is lawful as long as it does not have an effect of inducing any individual employed by that employer to cease delivering or performing services for the secondary employer and as long as such publicity does not have the effect of asking the public to stop patronizing the secondary employer. However, publicity that includes picketing and has the effect of requesting the public to cease patronizing such other employer shall be permitted only if the labor organization is currently certified as the representative of the primary employer’s employees.

Remedies for Unfair Labor Practices

The ALRB can correct violations that may hinder employee rights to organize, engage in collective bargaining and concerted activities, and vote free from threats, coercion, restraint or interference. A party found to be in violation of the ALRA may be subject to a remedial order issued by the ALRB.

Here are examples of ALRB remedies:

- restoration of employees to the position they would have been in but for the unfair labor practice; for example, making them whole for any pay or other money losses;
- reinstatement and backpay for wrongfully discharged workers;
- posting and reading a notice to workers that explains the party has engaged in an unfair labor practice and listing the specific unlawful activities it engaged in;
- allowing organizers to speak to employees on the employer’s property beyond the usual time restrictions;
- providing bulletin boards of the employer’s property for union communications;
- in cases where but for the bad faith of one party or another a contract would have been reached, the ALRB can make employees whole for the losses they suffered in not having a contract covering them;
- barring a union agent from engaging in organizing activities for one year in a certain region;
- the payment of costs to the charging party for a course of conduct amounting to frivolous litigation.

Discrimination

Discrimination - General Background

Both the federal and the state governments have enacted laws to prohibit discrimination based on various criteria. The principal laws prohibiting discrimination in employment are:

Federal:

- Title VII of the Civil Rights Act of 1964
- Equal Pay Act of 1963
- Age Discrimination in Employment Act of 1967
- Americans With Disabilities Act of 1990
- Family and Medical Leave Act of 1993

California:

- Family Rights Act of 1991 (See page [58](#))
- Fair Employment and Housing Act
- Constitution, Article I, Section 8

Other Laws:

Besides the laws mentioned above, other laws prohibit discrimination when an employee exercises his or her rights. For example, California Labor Code section 132a prohibits an employer from discriminating against an employee for filing a workers' compensation claim.

Protected Categories and Definitions

This summarizes the primary categories of personal traits protected from discrimination in employment. Decisions on hiring, firing, compensation, and other terms, conditions and privileges of employment may not be based on a person's inclusion in a protected category.

Ancestry, Race, Color and National Origin

Both the federal and state laws—that is, Title VII and the FEHA—protect persons from employment discrimination due to their race, color or national origin. The FEHA also prohibits discrimination on the basis of ancestry.

When hiring, an employer may not express a preference for or against an individual based on these characteristics. Job applications should not ask applicants to state such things as their "mother tongue," eye or hair color, height, or any trait that identifies a person by these characteristics.

Employers must provide a work environment free of harassment. For example, supervisors should be warned not to make derogatory comments about a person's race or racial characteristics. As agents of the employer, supervisors can expose the company to liability for their improper conduct in this area. For more on harassment see .

Wages, work assignments and schedules may not be based on unlawful considerations. Any employment procedure not justified by business necessity that disproportionately hurts the employment opportunities of a protected class of persons is prohibited. An adverse disparate impact exists where the procedure hurts members of a protected class more than persons outside that class. Thus, a height requirement not required by business necessity may be unlawful where it tends to screen out persons of a protected category disproportionately to persons not in that category.

Sex Discrimination

Under both federal and state laws, covered employers may not discriminate against an employee or job applicant on the basis of the person's sex.

Some of the practices that an employer should avoid are:

1. Classifying jobs as "men's" or "women's" work.
2. Maintaining seniority lists based on sex.
3. Prohibiting someone from applying for a job due to the prospective applicant's sex.
4. Laying off employees on the basis of gender.
5. Restricting employment or benefits of married females but not of married males.
6. Indicating a preference for persons of either gender in job selection or promotion.
7. Asking a question on an employment application that could provoke a response indicating the applicant's sex.
8. Establishing wage scales based on employee's sex for equal or similar work.
9. Basing eligibility for fringe benefits such as health insurance on a "head-of-household" criterion.
10. Denying fringe benefits to a family member of a female employee while granting them to a family member of a male employee.
11. Basing eligibility for a job on a strength or agility test unless pursuant to a permissible defense. If the test is defensible, an employer cannot deny a person an opportunity to demonstrate his or her agility because of his or her sex.
12. Assigning work or hiring on the basis of a gender-stereotyped categorization of the job; for example, hiring only men to be equipment operators.
13. Refusing to hire members of one gender because it would require separate facilities.

Equal pay laws prohibit employers from using the sex of a person to determine the rate of compensation. Both federal and state laws have specific provisions to protect employees from this type of discrimination.

The equal pay laws generally require employers to provide equal pay without regard to sex for equal work performed under similar working conditions requiring equal skill, effort and/or responsibilities. However, employers may use a number of factors to justify pay differentials unless the factors differentiate between the sexes. These factors are seniority systems, merit systems, pay based on quality or quantity of production, or other paying methods based on bona fide factors not related to sex.

Equal pay applies not only to wages but also to fringe benefits. Therefore, eligibility for benefits such as medical insurance or pension plans must not be based on sex.

Supervisor Harassment Training: The FEHA requires all California employers with at least 50 employees to provide supervisors with at least two hours of sexual harassment training every two years. In calculating whether a particular employer meets the 50-employee threshold, the law includes employees from a temp agency, and even independent contractors, in addition to direct employees. Further, the law does not specify that the 50 employees must be within California; it therefore at least arguably applies to California employers with 50 total employees, including those outside the state.

The term "supervisor," is a fairly expansive term under California law. In general, it includes any employee having the authority to exercise independent judgment to:

- Hire, fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees;
- Direct the work of other employees or adjust their grievances; or
- Effectively recommend any of these actions.

The law requires two hours of training for all supervisors within six months of becoming supervisors and at least two hours of harassment training every two years thereafter.

The training must include "information and practical guidance regarding the federal and state

statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment." Further, "the training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation." While it is not clear, the wording of the new statute indicates that simple taped programs will not be sufficient, but rather, the employer must provide the training through qualified trainers.

Meeting these requirements does not provide a defense to a sexual harassment claim, nor does failure to do so establish liability, in and of itself. However, failure to do the training will almost assuredly be urged as grounds for punitive damages in a sexual-harassment lawsuit.

Sexual Orientation

California Labor Code bans discrimination in employment or opportunity for employment based on actual or perceived sexual orientation.

Covered are employers who employ at least five employees on each working day in 20 or more consecutive weeks in the current or prior calendar year.

This employment protection does not require or permit the use of quotas or other affirmative action, nor does it infringe on an employer's right to base employment actions on the commission of conduct illegal in California.

Aggrieved employees may seek administrative remedies, including back pay with interest, reinstatement, cease-and-desist orders, and the posting of notices to employees. The Labor Commissioner may award reasonable attorney fees in those cases in which an administrative hearing is held.

Gender Identity Discrimination and Harassment: The prohibition against sex discrimination under the FEHA includes "gender." Section 422.76 of the Penal Code, which defines "gender" as "the victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of the victim's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim's sex at birth."

Employers may require employees to comply with reasonable workplace appearance, grooming, and dress standards consistent with state and federal law. However, employees must be allowed to appear or dress consistently with their "gender identity," which appears to include cross-dressing.

Pregnancy, Childbirth, and Related Medical Conditions

Federal and state laws protect employees and applicants from discrimination because of pregnancy, childbirth and related medical conditions. Some of these provisions are identical, while others differ.

The size of an employer's workforce determines the set of provisions that covers the employer. The FEHA covers California employers regularly employing five or more employees, whereas the federal law (Title VII) covers employers with at least 15 employees on each working day in each of 20 or more weeks in the current or previous calendar year. See page [57](#) for a review the pregnancy-disability leave requirements.

Marital Status

The FEHA protects individuals from discrimination in employment based on the person's marital status, whereas Title VII does not. Discrimination in this category may take the form of denying

Summary of Employment Requirements for California Agricultural Employers

employment or employment opportunities based on whether or not a person is married, divorced, separated or widowed, or is the spouse of a current employee.

Application forms should not ask questions, either directly or indirectly, about the marital status of an applicant. In only a few instances may an employer restrict job assignments based on the person's being married to a current employee. An employer may refuse to assign an employee to work under the direct supervision of his or her spouse based on business reasons of safety, security or employee morale. Also, an employer may refuse to assign a married couple to the same department, division or facility, if to do so would create potential conflicts of interest or other hazards that are greater for married couples than for other persons.

Employment decisions such as job assignments, travel or promotions may not be based on the child-rearing responsibilities of a married employee. Therefore, questions on application forms should not ask for number of children or the like.

Fringe benefits may not be available to employees based on their marital status. For example, an employer may not limit coverage under a health insurance plan to married employees on the ground that both spouses work for the same company. Nor may an employer designate that only married persons are eligible for health insurance.

Age Discrimination

Both federal and state laws prohibit discrimination in employment against any person on the basis of age. The federal Age Discrimination in Employment Act of 1967 (ADEA) and the state FEHA protect persons 40 or more years of age.

Employers must not establish a compulsory retirement age or use any generalizations about age as factors supporting their hiring, promoting, work assigning, or other employment decisions.

Employers may reject applicants or discharge employees who do not meet job requirements. An employer may require applicants or employees to submit to nondiscriminatory physical or medical examinations to determine their fitness for the job. Promotion within existing staff or hiring on the basis of prior experience, training, service or under an established recruitment program with high schools or colleges do not in and of themselves constitute a violation.

An employer may select the better-qualified person among applicants. One claiming a violation of age discrimination has the burden of proving it. (Govt. Code §12941, subd. (b).)

Disabilities

The federal Americans with Disabilities Act (ADA) and state FEHA prohibit discrimination in employment against individuals with disabilities.

An individual with a disability is one who has a physical or mental impairment that substantially limits one or more major life activities or a record of such an impairment, or who is regarded as having such an impairment. Thus, a cured cancer victim or an individual with a disfiguring scar may be disabled if that individual is regarded by others as being impaired.

"Major life activities" includes functions such as caring for oneself, walking, seeing, hearing, speaking, and working.

Impairment includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the major body systems, or any mental or psychological disorder, such as mental illness, retardation, or specific learning disabilities. The ADA specifies that homosexuality and bisexuality are not impairments and thus are not disabilities.

A qualified individual with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the job. The employer determines what those essential functions are, with job descriptions considered primary evidence of the employer's intent. An individual who

poses a direct threat—that is, a significant present risk of substantial harm to the health or safety of the individual or of others—is not qualified for the job.

Reasonable Accommodation:

Upon a request for reasonable accommodation by an employee or applicant with a known disability, an employer must engage in a timely, good-faith, interactive process to determine effective reasonable accommodations. A reasonable accommodation for an individual with a disability may include making existing facilities readily accessible; job restructuring; modifying work schedules; reassigning to vacant positions; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials or policies; providing readers or interpreters; or other similar accommodations.

The ADA does not require any accommodation that would impose an undue hardship on the employer's business. This means a significant difficulty or expense. To determine whether an accommodation would impose an undue hardship, these factors are considered:

1. The nature and cost of the accommodation;
2. The size, type, and financial resources of the specific facility where the accommodation would have to be made;
3. The size, type, and financial resources of the covered employer; and
4. The covered employer's type of operation, including the composition, structure, and functions of its workforce, and the geographic separateness and administrative or fiscal relationship between the specific facility and the covered employee.

Pre-Job-Offer Inquiries:

Before offering an applicant a job, an employer's ability to ask for disability-related information is very limited. Generally, employers may ask about the applicant's ability to perform job functions, but not in terms of disability. The employer may ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant would perform job-related functions. The request may be made of either all applicants in the same job category regardless of disability, or only applicants whose known disabilities may interfere with or prevent the performance of job-related functions.

Post-Job-Offer, Pre-Employment Medical Examinations:

An employer may require an applicant to take a medical examination after an offer of employment has been made to the applicant, as long as all new employees entering the same job category must take one and information obtained is kept confidential and in separate medical files. The exam may be given before employment duties begin, and an offer of employment may be conditioned on the exam's results. However, although the exam itself need not be job-related and consistent with business necessity, any factor on which the employer bases an offer's withdrawal must either be job-related and consistent with business necessity, or not screen out individuals with disabilities.

Employee Examinations:

Employers may require employees to take job-related medical examinations (fitness-for-duty-exams) consistent with business necessity to determine whether an employee remains able to perform the essential job functions. The exam's results must be kept confidential and in separate medical files.

Alcohol and Other Drugs:

The ADA does not prohibit employers from testing for the illegal use of drugs. These tests are not medical examinations under the ADA. Employers may prohibit the illegal use of drugs and alcohol at the workplace and may require that employees not be under the influence of alcohol or illegal

Summary of Employment Requirements for California Agricultural Employers

drugs at the workplace. (Caution: California employers should proceed very carefully in implementing any mandatory drug-testing policy for employees, as state court cases have held that discharging an employee for refusing to be tested, especially on a random basis and where the employee's job is not safety- or security-sensitive, may violate the state Constitution's privacy protections and thus public policy.)

The ADA does not protect the current illegal use of drugs, and an employer may hold those who use drugs illegally and alcoholics to its work standards. However, it does cover those who have been rehabilitated, who are participating in a supervised rehabilitation program and are not currently using drugs, or who are erroneously regarded as engaging in the illegal use of drugs.

Religious Discrimination

Both federal and state laws protect individuals because of their religious beliefs and background. Also, both Title VII and the FEHA mandate that employers make a reasonable accommodation for known religious observances or practices of employees or applicants. The most common methods of providing reasonable accommodation are: (1) flexible scheduling; (2) voluntary substitutes or swaps of shifts and assignments; (3) lateral transfer or change of job assignment; and (4) modifying workplace practices, policies or procedures.

Protected religious observances and practices are broad in scope. In fact, guidelines of the U.S. Equal Employment Opportunity Commission state that the "fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."

Under the California Fair Employment and Housing Act, a religious dress practice or religious grooming practice is a "belief" or "observance" protected from religious discrimination. "Religious dress practice" includes the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts and any other item that is part of the observance by an individual of his or her religious creed. "Religious grooming practice" includes all forms of head, facial and body hair that are part of the observance by an individual of his or her religious creed. Segregating an employee from the public or other employees is not a reasonable accommodation of the employee's religious dress practice or religious grooming practice. No accommodation is required if it would result in the violation of certain laws protecting civil rights.

No accommodation is required if it would result in the violation of certain laws protecting civil rights, or if the employee cannot perform the duties of the job with endangering his or her own safety or health or that of fellow employees.

Upon learning of a conflict between an employee's religious observances or practices and the employer's work requirements, the employer should obtain promptly from the employee whatever additional information the employer needs to determine whether an accommodation is available that would eliminate the conflict without posing an undue hardship on the operation of the employer's business. If no reasonable accommodation (i.e., one that would not cause the employer undue hardship) is ascertained, then the employer is relieved of the duty to make an accommodation.

Discrimination -- Other Laws

These laws specify actions that also constitute unlawful discrimination in employment.

Federal Fair Labor Standards Act (FLSA)

The FLSA provides it is unlawful to discharge an employee, or otherwise discriminate against an employee, because the employee filed a complaint or testified in a case relating to the FLSA.

Employee Polygraph Protection Act

The Employee Polygraph Protection Act of 1988 (EPPA) bans polygraph exams by most private employers. The EPPA prohibits most private employers—including any person acting directly or indirectly in the interest of an employer—from using any lie-detector test either for pre-employment screening or as a basis for discharging, disciplining, or failing to promote an employee. Employees who exercise their rights under the EPPA are protected against retaliation by their employers.

The EPPA requires employers to post a notice informing employees about the EPPA.

Agricultural Labor Relations Act

The Agricultural Labor Relations Act (ALRA) protects employees when exercising their rights of self-organization, to form, join, or assist a union, to bargain collectively, or to engage in other concerted activities. See section titled “Agricultural Labor Relations Act” starting on page [106](#).

Privacy In Employment

A developing area of law is the right of employees to privacy and not suffer discrimination because of activities not related to the job. This theory is rooted in Article I, Section 1, of the California Constitution, which cites privacy as an inalienable right.

Because privacy in employment is such a danger zone for employers, they should use caution in dealing with these subjects:

1. Surveillance and Intelligence Gathering
2. Disclosure of Personnel Information
3. False Imprisonment and Assault and Battery
4. Searches
5. Alcohol and Drug Testing
6. Background Checks
7. Records and Disclosure.

Employee's Off-Work Activities

The Labor Commissioner has the authority to pursue on behalf of employees claims for loss of wages due to their demotion, suspension, or discharge from employment for lawful conduct occurring during non-working hours away from the employer's premises. (Labor Code section 96, subdivision (k).)

Labor Code section 98.6 provides that an employee who is discharged or otherwise discriminated against for such conduct is entitled to reinstatement, as well as lost wages and benefits. Those protections extend beyond just current employees: Applicants refused employment due to lawful off-duty conduct are entitled to employment and reimbursement for lost wages and work benefits.

Section 98.6 does allow certain employment contracts or collective bargaining agreements that protect an employer from conduct that is in “direct conflict” with its “essential enterprise-related interests” and that would actually create a “material and substantial disruption” of its operations. The law protects only employers that incorporate conflict-of-interest policies in employment agreements. Further, the exception encompasses only conflict-of-interest agreements executed by applicants and not those executed by existing employees.

One Court of Appeal decision severely limited the statute's scope by concluding that the conduct in question must be otherwise protected by a provision of the California Labor Code. (*Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72, 88.)

Garnishments

See "Garnishment of Wages" under "Payroll Deductions and Offsets Against Wages " beginning on page [45](#).

Summary of Employment Requirements for California Agricultural Employers

Return to Work Due to Medical Absence

Whether from an on- or off-the-job medical absence, the process of returning an employee to work is often not simple.

Here are basic guidelines for dealing with such a returning employee.

Employers with one or more employees are covered by California Labor Code section 132a. That law prohibits an employer from discriminating against an employee injured on-the-job because the employee has either filed a workers' compensation claim or revealed an intent to file a claim. The law also protects an employee who has testified in a Workers' Compensation Appeals Board hearing.

An employer need not return an employee to his or her job before the employee's medical condition has been determined to be "permanent and stationary" and while the employee cannot perform the job's essential functions. In many cases, however, it is in the employer's interest to return the employee to light-duty work to minimize disability expenses.

Once the employee's condition has been classified as permanent and stationary, the employer has these options:

1. The employer may return the employee to a job based on the employee's restrictions at the new job's current rate of pay. Once the employee's condition has been classified as permanent and stationary and during a year in which the employee can invoke vocational rehabilitation services, the employee may not be paid less than 85% of the employee's prior compensation.
2. An employee with a work restriction that makes him unfit for available work need not be reinstated. Other reasons for not allowing an employee to return to work include job elimination and business necessity. See **Job Elimination** and **Business Necessity** under **Exceptions** below.

If the employee was on a disability leave due to an off-the-job medical reason and the employer has fewer than five regularly employed employees, then there are no restrictions. The employer, however, must treat the employee in the same manner as other employees had been treated under similar conditions. Otherwise, the employer may discharge the employee or place the employee in another position upon return to work.

Employers regularly employing five or more employees (regularly means for each working day in 20 or more consecutive calendar weeks of the current or prior calendar year) are covered by the pregnancy- and physical-disability and medical-condition provisions of the California Fair Employment and Housing Act (FEHA), as amended.

Pregnancy Disability: An employee disabled due to pregnancy (including childbirth or related medical conditions) may, on a physician's recommendation, take up to four months of unpaid leave. Such an employee who cannot return within the four-month period may be discharged (unless more leave is offered to other disabled employees). Otherwise, the employee must be allowed to return to the same job or, in exceptional situations, to a comparable job equal job at the same rate of pay.

Physical Disability, Mental Disability or Medical Condition: It is unlawful to discriminate against an employee due to the employee's medical condition, physical disability or mental disability where, either with or without a reasonable accommodation, the employee can perform the essential functions of his or her job. While medical condition relates only to recovery from cancer, physical disability includes many medical conditions anyway, such as high blood pressure.

An employer should have a policy on leaves of absence and apply the policy equally. Such policies typically allow a one-month leave of absence for an off-the-job injury.

However, an employee injured off-the-job might become a qualified person with a disability. A person with a physical disability is one who has an actual or perceived condition that affects one or more of the body's systems or limits the person's ability to participate in a major life activity. An employer would be expected to explore reasonable accommodations for an employee with a disability. See **Reasonable Accommodations** below.

Even if a reasonable accommodation would allow an employee with a disability to do the job, an employer may refuse to reinstate the employee due to the job's elimination or where doing so would jeopardize the safety or health of other employees. See **Job Elimination and Health or Safety** under **Exceptions** below.

Employers regularly employing 15 or more employees are covered by the federal Americans with Disabilities Act.

Under the ADA, employers may not discriminate against qualified persons with disabilities. Under the ADA, a qualified individual with a disability means one with a physical or mental impairment who, with or without reasonable accommodation, can perform the position's essential functions.

A person without a permanent disability is not protected by the ADA. For example, a person with a broken arm is not a disabled person, assuming he or she will regain full use of the arm.

Where an employee who is a qualified individual with a disability asks to return to work, the employer must take one of two options:

1. Return the employee to a job consistent with the employee's restrictions, at the new job's current rate of pay.
2. If the employee's ability to return to work is in doubt, the employer may require the employee to submit to a medical examination. See **Medical Examinations** below.

Next, the employer, based on a medical evaluation, must try to make a reasonable accommodation for the employee's current disability or prove the employee would endanger the employee or other employees. See **Reasonable Accommodation** and **Health or Safety** under **Exceptions** below.

Another reason for not allowing an employee to return to work is job elimination. See **Job Elimination** under **Exceptions** below.

Employers regularly employing 50 or more employees are covered by the California Family Rights Act (CFRA) and the federal Family and Medical Leave Act (FMLA). To be covered, an employee must have worked at least 1,250 hours during the 12 months before leave is requested.

A covered employer may not discriminate against a covered employee for taking an unpaid leave of absence for any of several reasons, including due to the employee's serious health condition or to care for a spouse, parent or child with a serious health condition. The leave of absence may be for up to 12 weeks.

The employer of an employee seeking a leave of absence must inform the employee that the time on leave will count against the employee's FMLA or CFRA leave allowance. Employers should use U.S. Department of Labor Form WH-381, "Employer Response to Employee Request for Family or Medical Leave." Employers should do this even if the injury appears to be a minor injury. Short absences sometimes turn into lengthy leaves.

If the leave is to care for a sick child, spouse or parent, the employer may require the employee to verify the serious medical condition with Fair Employment and Housing Commission form "Certification of Health Care Provider."

While on leave, an employee covered under a group employee health plan is entitled to coverage

Summary of Employment Requirements for California Agricultural Employers

under the plan in the same manner as if the employee were actively working.

Generally, an employer must reinstate an employee who returns from an FMLA or CFRA leave within the 12-week leave period to the same or equivalent position with equivalent pay, benefits and other terms of employment. However, the employer may refuse to reinstate the employee due to the job's elimination. See Job Elimination under Exceptions, below.

Exceptions:

Reasonable Accommodation: Before an employee with a disability may be denied reinstatement to a job, the employer must determine if the employee can perform the job's essential functions job, taking into account any reasonable accommodation that can be made for the employee's disability. To do a proper analysis, it is important to have a written description of the employee's job or potential jobs he or she may be qualified to fill.

Next, the employer and employee should discuss the requirements of the job(s) and determine whether some device or change in the job would allow the employee to do the job. The employer need not accept unreasonable suggestions made by the employee.

Health or Safety: If the condition of an employee seeking reinstatement is such that he or she would pose a direct threat to the health or safety of other employees, then the employer may be justified in not reinstating the employee. The employer must be able to show that, after reasonable accommodation, the employee cannot perform the job's essential functions in a way that would not endanger other individuals. Also, the employer must be prepared to prove that the danger created for others is greater than that which would exist if an individual without a disability did the job.

Job Elimination: If an employee's job was eliminated during a disability leave, such as due to a layoff or reduction in force that would have affected the employee had the employee been working, then the employer would not have to return the employee to another job.

Business Necessity: An employer that can prove an employee's absence forced the employer to hire a replacement employee on a non-temporary basis may consider not returning the employee to the same or another job. However, as it is often very difficult to prove the business necessity, this option should be used only sparingly and after careful consideration. If it can be shown that an alternative practice existed that would accomplish the business purpose just as well with less of a discriminatory impact, then not reinstating the employee would be unlawful.

Reporting Requirements - EEO-1

Both state and federal anti-discrimination laws require employers with 100 or more employees to prepare annually a report. The reports assemble data on the sex, race, and ethnic composition of the employer's work force.

A copy of the federal Employer Information Report EEO-1 report (standard Form 100) must be filed with the Joint Reporting Committee no later than September 1, and the employer must retain a copy of the most recent report and make it available upon request from the Commission. Copies of the Standard Form 100 can be obtained from the Joint Reporting Committee at eeoc.gov/employers/eeo1survey/index.cfm.

The state report, California Employer Information Report (CEIR), merely needs to be completed and made available to the FEHC and DFEH upon request. FEHC Regulations allow employers to use the EEO-1 Report Form instead of the CEIR form.

Determine whether you must file this report by this two-step process:

1. First, you must be covered by Title VII of the Civil Rights Act; to be subject to Title VII, you must employ 15 or more persons on each working day in each of 20 or more calendar weeks in the current or prior year.

2. Second, if you meet the first test, you must file an EEO-1 if you either:
 - A. Have 100 or more employees* or
 - B. Are a federal contractor with 50 or more employees and have a contract worth \$50,000 or more.

* *Employee* does not include a person hired on a casual basis for a specified time, or for the duration of a specified job (for example, a person at an agricultural operation or a construction site whose employment relationship is expected to end when his work at the site ends). See eeoc.gov/employers/eeo1survey/2007instructions.cfm.

Applicant Identification Records

California Fair Employment and Housing Commission regulation section 7287.0(b), "Applicant Identification Records/Applicant Flow Data" requirement.

The regulation requires every covered employer (those regularly employing 5 or more employees) to maintain data on the race, sex and national origin of each applicant by the position sought. An identification form used to gather this data must be separate or detachable from an employment application form.

Employment decisions may not be based on whether an applicant provided this voluntary information, nor may the applicant identification record be used for discriminatory purposes. "Applicant" means any individual who either files a formal application or, where an employer does not provide application forms, otherwise indicates to the employer a specific desire to be considered for employment. One who asks informally about work or who files an unsolicited resume upon which no employment action is taken is not an applicant.

An employer must either retain the original documents—that is, applicant flow data—used to identify applicants, or keep statistical summaries of the collected data. The information must be preserved for at least two years from the date of making the record or the date of the personnel action, whichever occurs later.

Harassment

Employers must take responsibility for and understand their liability for workplace harassment. While the law forbids harassment in the workplace based upon any of several types of protected classifications—such as race, religion, and age-over-40—sexual harassment has certainly received the most media attention and is perhaps the most common form of it.

The Fair Employment and Housing Act requires employers to take "all reasonable steps" to prevent sexual harassment against their employees. This includes the duty to address alleged harassment committed by a non-employee, on the ground that the employer had no power of control over a non-employee.

Preventing sexual harassment at the workplace is much easier to do when you have a good understanding of what sexual harassment is. All supervisors and managers have a duty to report possible sexual harassment situations to the company.

All employers with at least one employee is responsible for complying with sexual harassment laws.

Types of Sexual Harassment

There are two definitions of sexual harassment that are important to understand.

Quid Pro Quo: The first type of sexual harassment is called *quid pro quo*, which is Latin for *this for that*. An employee who expects a sexual favor from another employee and who threatens the

Summary of Employment Requirements for California Agricultural Employers

employee with termination or loss of benefits if the employee were to reject the request (in other words, "Give me a sexual favor or lose your job") has committed *quid pro quo* sexual harassment.

Hostile or Offensive Work Environment: The second type of sexual harassment is called "conduct based on gender" or "because of gender." The harasser's conduct toward another co-worker creates a hostile or offensive work environment that interferes with the co-worker's job performance. This type of harassment does not threaten the co-worker's job as much as it threatens the co-worker's sense of safety or security.

By law, a company is responsible for investigating all claims of sexual harassment and for investigating the claim quickly.

If the company fails to investigate the claim and correct the situation (if the company determines harassment has occurred), the company may be held responsible for the harasser's conduct.

What is sexual harassment? Here are some examples of various forms:

1. Any unwanted sexual advances.
2. Offering employment benefits in exchange for sexual favors.
3. Making or threatening retaliation after being turned down for sexual favor.
4. Making sexual gestures, leering, displaying sexually suggestive objects, pictures, cartoons or posters.
5. Speaking offensive language, telling offensive jokes, slurs or derogatory comments, or sexual propositions.
6. Verbal abuse of a sexual nature, graphic verbal descriptions about a person's body, sexually degrading words used to describe an individual, or sexually suggestive words, letters, notes or invitations.
7. Physical contact, such as unwanted touching, assault, or blocking movements.

The U.S. Supreme Court has stated that a plaintiff in a hostile-environment sexual harassment suit doesn't have to prove psychological injury to win. The Court determined that the victim must show only that he or she subjectively believed the work environment was hostile or abusive and that a reasonable person would find it similarly hostile or abusive.

An employer may avoid legal liability for sexual harassment by implementing and enforcing a sexual-harassment prevention program. Providing information to employees and training supervisors are important steps in preventing sexual harassment.

In California, employers must give their employees sexual harassment information. Contact the state Fair Employment and Housing Commission or your state or local Chamber of Commerce or agricultural association for pamphlets that meet the disclosure requirements of California law.

At a minimum, new employees should receive the information sheet, and new supervisors and managers should be trained in this area. To avoid liability, employers must make sure that supervisors do not create or allow hostile-environment sexual harassment. Employers who do not already have a training program that educates supervisors about the consequences of sexual harassment to the employer and employees should begin one.

Duty to Prevent Sexual Harassment by Non-Employees

The Fair Employment and Housing Act requires employers to take "all reasonable steps" to prevent sexual harassment against their employees. An appellate court case found that an employer had no duty to address alleged harassment committed by a non-employee, on the ground that the employer had no power of control over a non-employee. The state Legislature amended the FEHA to overrule the case, reaffirming prior interpretations that the employer should do what it can to address harassment by third parties. An employer's ability to deal with the situation is somewhat less than its ability to deal with a situation in which its own employee is the accused harasser, but the employer should still do what it can, such as contacting the harasser's employer and asking it to address the situation.

Federal Requirements

On the federal level, the U.S. Equal Employment Opportunity Commission (EEOC) also enforces prohibitions against sexual and other protected-class-based harassment in employment as well as Title VII of the Civil Rights Act of 1964. An EEOC publication states: “[E]mployers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.”

Instruct employees and management personnel about the company’s sexual harassment policy: Employers can be held liable for harassment of other employees by a co-employee, a supervisor and even a non-employee.

Suggested Steps to Take

To help protect themselves, growers should take three actions. These are:

1. Develop and disseminate a company sexual harassment policy.
2. Instruct employees and management personnel (including forepersons and supervisors) about the company’s sexual harassment policy.
3. Assign a high-level employee to oversee the sexual harassment policy.

Notes

Notices, Posters, Disclosures and Records

Many state and federal laws reviewed in this Guide provide that specified information shall be posted or disclosed to employees. Posters and notices must be conspicuously posted where it will be seen and can be read by employees. In some cases additional posting requirements are provided.

Employers also must create and maintain specific records and file specific reports. These required records must be kept for specified periods and in some cases must be filed in a separate area from other records. The recordkeeping requirements and required reports are reviewed at the end of this section starting on page ?.

Notices and Disclosures

Listed below are the notice, posting and disclosure requirements applicable to agricultural employers.

U.S Department of Labor

Wages and Hours—Federal: With certain exceptions, employers in interstate commerce must post the poster *Your Rights under the Fair Labor Standards Act* (Publication WH 1088). Agricultural employers should add this text to the “overtime pay” section: *Overtime provisions do not apply to individuals employed in agriculture. FLSA Section 13(b)(12)*. The poster, in English and Spanish, can be obtained from the Wage and Hour Division, U.S. Department of Labor.

Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA): CHIPRA requires employers with group health plans to notify their employees of potential opportunities for group health plan premium assistance through Medicaid and the Children's Health Insurance Program (CHIP) in the states where the employees reside. As required by CHIPRA, the U.S. Department of Labor (DOL) issued a model Employer CHIP Notice that may be used for this purpose. Employers must provide the initial annual notice to its employees by the date that is the later of (1) the first day of the first plan year, or (2) May 1, 2010. For employers whose next plan year begins on or after May 1, 2010, the notice must be provided by the first day of that next plan year. The Employer CHIP Notice must be sent annually thereafter. The Employer CHIP Notice may be sent by first-class mail. Alternatively, the notice may be furnished electronically, provided that the requirements of the DOL regulation at title 29, Code of Federal Regulations section 2520.104b-1(c), are satisfied.

Patient Protection and Affordable Care Act: An employer must furnish all current employees and newly hired employees within two weeks of starting employment a notice to satisfy Health Benefits Exchange notice requirements under the Affordable Care Act. The U.S. Department of Labor has provided model notices for employers' use. One is for employers without a health plan; the other is for employers who will offer a health plan to some or all of their employees.

Wage and Hour Regulation—State IWC Orders

The **Industrial Welfare Commission (IWC)** requires employers to post in an area frequented by employees where it may be easily read during the workday the appropriate IWC order(s) for their industry or employees' occupations. Most agricultural employers must post Order 14 (Agricultural Occupations) plus one of these orders: Order 4 (Professional, Technical, Clerical, Mechanical and Similar Occupations); Order 8 (Handling Products after Harvest); or Order 13 (Preparing Agricultural Products for Market, on the Farm).

Also, IWC Order MW-2007 (Minimum Wage) must also be posted next to each IWC industry or occupational order.

Summary of Employment Requirements for California Agricultural Employers

IWC orders may be obtained from the California Department of Industrial Relations and are posted on the IWC's Web site at <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>. For more information on IWC orders, see the heading Overtime, page 29, this publication.

Payday Notice: Every employer must post a notice stating the regular paydays and time and place of payment set by the employer. Either DLSE 8, available from the Department of Industrial Relations, or a notice stating that information must posted.

Statement of Wages: When employees are paid, the employer must provide each employee with a written itemized statement. See "Statement of Wages" in the Recordkeeping and Reports section on page 134.

Compensation Notice: Under Labor Code section 2810.5, an employer must at the time of hiring provide most employees (see exceptions below) with a written notice, in the language the employer normally uses to communicate employment-related information to the employee, containing this information:

1. The rate or rates of pay and basis of the pay (e.g., hour, shift, day, week, piece, commission), including any rates for overtime, as applicable.
2. Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.
3. The regular payday designated by the employer.
4. The name of the employer, including any "doing business as" names used by the employer.
5. The physical address of the employer's main office or principal place of business, and a mailing address, if different.
6. The telephone number of the employer.
7. The name, address, and telephone number of the employer's workers' compensation insurance carrier.

Further, an employer must notify each employee in writing of any change in this information within seven calendar days of the change unless the change is reflected on a timely wage statement.

The Division of Labor Standards Enforcement (DLSE) has posted online a form that employers may use to comply with this requirement. The form is available in several languages. The English-language version is posted at www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf. The Spanish-language version is posted at www.dir.ca.gov/dlse/LC_2810.5_NoticeSpanish.pdf. The DLSE has also posted online Frequently Asked Questions to provide guidance to employers to comply with this requirement; it is posted at www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.

Exceptions: The notice is not required for an employee who is: employed by the government; exempt from the payment of overtime wages by statute or an Industrial Welfare Commission order; or covered by a valid collective bargaining agreement that meets specified conditions.

Farm Labor Contractor Rate of Compensation: State-licensed farm labor contractors must prominently display at the worksite and on all vehicles used to transport employees, the rate of compensation printed in English and Spanish. (Labor Code § 1695, subd. (a)(7).) A poster, DLSE 445, is available from the Department of Industrial Relations, Division of Labor Standards Enforcement.

Commissioned Employee - Written Contract Requirement: A contract between an employer and employee whose compensation includes commissions for services to be performed in California must be in writing and set forth the method by which the commissions will be computed and paid. The employer must give a signed copy of the contract to the employee and must get and retain the employee's signed receipt of the contract.

In the event the contract by its terms expires but the parties nevertheless continue to work under it, its terms are presumed to remain in full force and effect until it is expressly superseded by a new contract or the employment relationship ends.

For purposes of this law, “commissions” are defined in accordance with Labor Code section 201.4 as compensation paid to any person in connection with the sale of the employer’s property or services and based proportionately upon the amount or value thereof. However, the term does not include short-term productivity bonuses or bonus and profit-sharing plans, unless they are based on the employer’s promise to pay a fixed percentage of sales or profits as compensation for work.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

Employers employing migrant or seasonal agricultural workers must post or give the following notices:

1. **General MSPA Poster** - explains rights of protected employees. Form WH-1376.
2. **Worker Information** - used by employer to disclose employment information at time of recruitment. Form WH-516.
3. **Housing Terms and Conditions** - employers providing housing to migrant employees must post information regarding housing Form WH-521.

National Labor Relations Act (NLRA) Employee Rights: If a rule issued by the National Labor Relations Board (NLRB) takes effect,* an employer with employees subject to the NLRA would have to conspicuously post a notice to employees informing them of their rights under the NLRA. Certain small employers would be exempted from the requirement because the NLRB has declined to assert jurisdiction over them, and employers of only agricultural employees would be exempted because the NLRA does not cover them. In contrast, an agricultural employer with a commercial packinghouse, for example, would have to post the notice.

Copies of the notice are available from the NLRB by calling 202-273-0064 or via download from the NLRB’s website at <https://www.nlr.gov/poster>. The poster would have to be 11 by 17 inches. Where at least 20 percent of employees are not proficient in English, the employer would also have to post the notice in the most commonly used foreign language.

Failing to post the poster could be considered an unfair labor practice. The NLRB’s traditional cease-and-desist remedies would apply to any violation of the posting requirement; there would be no monetary penalty for a failure to comply.

*A court has temporarily enjoined the NLRB’s rule, and it will not take effect unless the court determines it is valid. Accordingly, at this writing the notice is not required to be posted, and it is possible that it will never be required to be posted. However, as the court’s injunction might be lifted and the rule might thus take effect in 2013, this coverage of this potential requirement is being included in the 2013 edition of the Guide to assist the reader in complying with the rule in that event.

Employment of Minors

An agricultural employer who employs a parent or guardian of minor children must post the following notice (Education Code § 49140):

Minor children are not allowed to work on these premises unless legally permitted to do so by law and unless permits to work have been secured by the minor children from duly constituted authorities.

No se permite que menores de edad trabajen en estos terrenos, a menos que tengan permiso de hacerlo legalmente y a menos que se hayan asegurado permisos oficiales para trabajar de las autoridades constituidas.

Employment Development Department (EDD)

1. A poster entitled "Notice to Employees" (Poster No. DE-1857A) may be obtained from the

Summary of Employment Requirements for California Agricultural Employers

125

local Employment Tax Office of the Employment Development Department.

2. A written statement relating to filing of claims for benefits under UI and SDI is required when employees are terminated, laid off or become disabled. The Department has produced two pamphlets to aid in compliance. These pamphlets are: "For Your Benefit, California's Programs for the Unemployed" (DE 2320) and "Disability Insurance" (DE 2515 and DE 2515S - Spanish).
3. Terminated or laid-off employees must be given a reason in writing for their separation. (Unemployment Insurance Code §§ 1085 & 1089.)
4. Upon the hiring of an employee, each employer must provide employees information regarding State Disability Insurance and Paid Family Leave. DE 2515 and DE 2511 can be used for this purpose.
5. Employers must notify all employees that they may be eligible for the federal Earned Income Tax Credit. Employers must notify them within one week before or after, or at the same time, they provide them with an annual wage summary (IRS Form W-2). Employers must provide notification to employees by either handing it directly to them or mailing it to their last known address. Posting of this information on an employee bulletin board does not satisfy the notification requirement. The text of the notice is posted online at www.edd.ca.gov/Payroll_taxes/FAQ_-_Earned_Income_Tax_Credit_Notification.htm.

Equal Employment Opportunity is the Law

Federal: The poster ***Equal Employment Opportunity is the Law*** must be posted by employers with 15 or more employees in 20 or more weeks of the current or prior year. This poster includes the poster ***Age Discrimination is Against the Law***, which must be posted by employers with 20 or more employees in 20 or more weeks of the current or prior year. It may be obtained from the U.S. Equal Employment Opportunity Commission.

Family and Medical Leave Act (FMLA): Employers with 50 or more employees in 20 or more weeks in the current or prior year must post a notice describing the federal FMLA, under which qualified employees may take up to 12 weeks of unpaid leave each year for the birth or adoption of a child or for the serious health condition of the employee or of the employee's spouse, parent or child. This notice must be easily readable by applicants and employees and be posted in alternate languages if an employer has a significant portion of its workforce that is not literate in English. In 2009 the regulation was amended to permit the notice to be posted electronically, as long as employees have access to information in electronic form. Furthermore, if an employer has even one eligible employee at its worksite, this notice must be published in an employee handbook or other written benefits communication, or, if such material does not exist, given to each new employee upon hire.

Employers have five business days (instead of two days under the previous regulation) from the date the employer learns of the need for leave to communicate eligibility information to the employee. The Eligibility Notice must state whether the employee meets the eligibility requirements (minimum months and hours) and if not, at least one reason why not.

Employers must provide employees going on an FMLA leave with a "Notice of Rights and Responsibilities" together with the Eligibility Notice discussed above. DOL has developed a prototype notice (Form WH-381, available at www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf) that contains both notices in the same document. The purpose of the Notice of Rights and Responsibilities is to inform employees of their obligations and expectations while on FMLA leave.

Employers must notify employees that their leave is being designated as FMLA leave. This designation notice must now be in writing, and, absent extenuating circumstances, the time period for such designation has been extended to within five business days of the employer's knowledge that such leave is FMLA-qualifying. DOL Form WH-382 "Designation Notice" is used for this purpose. It is available at www.dol.gov/esa/whd/forms/WH-382.pdf.

An employer, when restoring an employee whose leave was triggered by his or her own serious health condition, may apply to the employee a uniformly applied requirement that all similarly

situated employees submit a healthcare provider's certification that the employee can resume work. However, the employer must notify the employee of that requirement when it provides the Designation Notice.

California Fair Employment and Housing Commission (FEHC)

Regulations of the Fair Employment and Housing Commission (FEHC) require these notices:

1. **Pregnancy-Disability Leave:** Employers with five to 49 employees in 20 or more weeks of the current or prior year must post a notice describing the FEHC's requirements for pregnancy-disability leave.
2. **California Family Rights Act (CFRA):** Employers with 50 or more employees in 20 or more weeks of the current or prior year must post in a conspicuous place a notice describing the provisions for CFRA leave and for pregnancy-disability leave under the Fair Employment and Housing Act.
3. The poster ***Discrimination in Employment is Prohibited by Law*** must be posted by employers with 5 or more employees in 20 or more consecutive calendar weeks in the current or prior year. The poster, in English and Spanish, can be obtained from the California Department of Fair Employment and Housing.

Time Off to Vote

The California Elections Code requires employers to post at least 10 days before each statewide election this notice:

If a voter does not have sufficient time outside of working hours to vote at a statewide election, the voter may, without loss of pay, take off enough working time that, when added to the voting time available outside of working hours, will enable the voter to vote.

Not more than two hours of the time taken off for voting shall be without loss of pay. The time off for voting shall be only at the beginning or end of the regular working shift, whichever allows the most free time for voting and the least time off from the regular working shift, unless otherwise mutually agreed.

If the employee on the third working day prior to the day of election, knows, or has reason to believe that time off will be necessary to be able to vote on election day, the employee shall give the employer at least two working days notice that time off for voting is desired, in accordance with the provisions of this section.

Housing and Meals

The California Department of Housing and Community Development (DHCD) requires these notices:

1. **Operators of labor camps** must post a notice summarizing the legal requirements for labor camps. Poster HCD 206 can be obtained from the DHCD.
2. **Amounts charged for meals and lodging** must be posted at labor camps.
3. The poster ***Fair Housing is the Law*** (DFEH164) must be posted at labor camps.

Cal/OSHA

1. A poster in English and Spanish entitled "**Safety and Health Protection on the Job**" describing the Cal/OSHA program may be obtained from the Department of Industrial Relations.

Summary of Employment Requirements for California Agricultural Employers

2. Employers subject to Cal/OSHA's recordkeeping requirements (*i.e.*, employers with 10 or more employees) must record injuries and illnesses on Cal/OSHA Form 301, or an equivalent form and transfer the information onto Cal/OSHA Form 300 "Log of Work-Related Injuries and Illnesses." Each year **Cal/OSHA Form 300A**, "Annual Summary of Work-related Injuries and Illnesses," which consists of a compilation of Cal/OSHA Form 300, must be posted during the months of February, March and April.
3. Field laborers must be informed of the location of **Field Sanitation Facilities** and of good hygiene practices . (8 CCR § 3457(c)(4).)
4. A poster entitled "**Access to Medical and Exposure Records**" must be posted if the employer maintains medical records for employees. (8 CCR § 3204.) Form S-11 may be used for this requirement.
5. A poster entitled "**Agricultural - Industrial Tractors**" (Form S-504) must be posted at a place frequented by tractor drivers. (8 CCR § 3664(b).)
6. A poster entitled "**Operating Rules for Industrial Trucks**" (Form S-503) must be posted at a place frequented by truck or industrial tow tractor drivers. (8 CCR § 3664(a).)
7. Containers of **Handwashing Water** for agricultural hand laborers must be posted with a sign stating the water is only for handwashing purposes. (8 CCR § 3457(c)(3)(G)4.)

California Safe Drinking Water and Toxic Enforcement Act

California Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): An employer must provide Occupational Exposure warnings to employees if substances identified by the state as causing cancer or birth-related defects are present in the workplace.

Pesticide Postings

Pesticide Postings: The California Department of Pesticide Regulation requires the following postings:

1. **Posting of Pesticide Storage Areas:** Signs visible from every direction of probable approach must be posted around all areas where containers that hold, or have held, pesticides required to be labeled with the signal words "warning" or "danger" are stored. Each sign must be big enough to be readable from at least 25 feet away. The notice must be repeated in another appropriate language where it may reasonably be foreseen that persons who do not understand English will come to the enclosure.
2. **Emergency Medical Care:** Where employees apply or handle pesticides, prior arrangements must be made for emergency medical care. A notice must be posted at the work site, or on the application vehicle, of the name, address and telephone number of the physician, clinic, or hospital providing emergency care.
3. **Emergency Medical Services:** Emergency Medical Services: An employer with an employee who regularly handles pesticides containing organophosphates or carbamates must retain a physician to provide emergency medical services and post the notice described above. "Regularly handles pesticides" means handling them during any part of the day on more than six days in a 30-day qualifying period starting on the first day of handling.
4. **Field Postings:** A property operator must assure that signs are posted around a field to be treated with a pesticide where either (1) the product label requires posting, unless access to the field is controlled so that no employee (other than handlers applying the pesticide) will enter, work in, remain in, or walk within one-quarter mile of the field during the application and the restricted entry interval (REI) or (2) the application results in an REI of greater than seven days. Further, signs must be posted around a greenhouse in which a pesticide application will be made, unless access is controlled so no employee will enter, work in, or pass through the greenhouse during the application and the REI. Required signs must be posted before the pesticide is applied but no more than 24 hours before its application. The signs must remain posted and clearly legible throughout the application and the REI. They must be removed within three days after the REI ends and before any entry prohibited during the REI is made.
5. **Irrigation:** Signs must be posted when a pesticide product with the signal word "DANGER" on the label, or a minimal exposure pesticide is being applied to a field through an irrigation

system, signs shall be posted.

6. **Fumigants:** Signs must be posted when a fumigant is applied to a field.
7. **Application-Specific Information for Field Workers:** The operator of property used for commercial or research production of an agricultural plant commodity must display at a central location application-specific information. The information must be displayed within 24 hours of the completion of an application and include all applications that have been made to any treated field on the agricultural establishment within one-quarter mile of where employees will be working.
8. **Pesticide Safety Information Series A-8:** Before employees may handle pesticides, the employer must display a copy of a completed written Hazard Communication Information for Employees Handling Pesticides (Pesticide Safety Information Series leaflet A-8) at a central location at the workplace. Upon request, the employer must read it to the requesting employee in a language the employee understands.
9. **Pesticide Safety Information Series A-9:** Whenever employees are working as field workers in a treated field, the employer must display at the worksite a copy of a completed written Hazard Communication Information for Employees Working in Fields (Pesticide Safety Information Series leaflet A-9). In the event that field workers gather at a central location before being transported to the worksite, Pesticide Safety Information Series leaflet A-9 may instead be displayed at that central location. Upon request, the employer must read it to the requesting employee in a language the employee understands.

Workers' Compensation

These notices must be posted:

1. **Notice of Compensation Carrier** can be obtained from the employer's workers' compensation carrier. In addition, employers must post a notice that names the employer's workers' compensation carrier, reviews workers' compensation benefits and other basis information regarding filling a claim. The poster is provided by the employer's workers' compensation carrier. (Labor Code § 3550.)
2. **Medical Provider Network Information:** As of October 8, 2010, California employers must distribute an updated version of the workers' compensation new-hire pamphlet to all employees hired on or after that date (see item 4 below); post revised Division of Workers' Compensation notice *Notice to Employees—Injuries Caused By Work* (Form DWC 7); provide an updated version of *Workers' Compensation Claim Form Notice of Potential Eligibility to injured workers* (Form DWC 1); and post new medical provider network (MPN) notices if they use an MPN.
3. **Off-Duty Recreation:** To limit the employer's liability, a notice should be posted reading substantially as follows: "Your employer or its insurance carrier may not be liable for the payment of workers' compensation benefits for any injury that arises out of an employee's voluntary participation in any off-duty recreational, social, or athletic activity that is not a part of the employee's work-related duties." (Labor Code § 3600(a)(9).)
4. **Written Notice to New Employees:** At the time of hire, each new employee must be provided a pamphlet describing Workers' Compensation coverage and a form for the employee to designate her personal physician or personal chiropractor. This notice and pre-designation form must be given either at the time of hire or by the end of the first payroll period. (Labor Code §3551.)

Employee Polygraph Protection Act

Employers must post a notice informing employees about the Act.

Whistleblower Hotline

Employers must post a notice a list of employees' rights under the whistleblower laws, including the telephone number of the hotline. (Labor Code § 1102.8.) The Division of Labor Standards Enforcement believes that the sample posting at <http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf> meets the requirements of Labor Code section 1102.8(a).”

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Employers must inform employees of their rights under the USERRA. The poster *Your Rights under USERRA* contains the required information employers must provide to covered employees.

Mass Layoff/Plant Closure (WARN)

The Worker Readjustment and Retraining Notification (WARN) Act requires covered employers to give written notice of a plant closure or mass layoff (see page 60 for definitions and more details) at least 60 days before it occurs to:

1. Representatives of affected employees, or to each employee;
2. The State dislocated worker unit created under Title III of the Job Training Partnership Act (in California, notify the Job Training Partnership Division, Employment Development Department, P. O. Box 942880, Sacramento, CA 94280-0001; telephone (916) 322-8460.; and
3. The chief elected official of the local-government unit within which the plant closure or mass layoff will occur.

The WARN Act does not apply to a layoff that is due to the completion of a particular project or undertaking where the affected employees were hired with the understanding that their employment was limited to the duration of the project or undertaking.

Human Trafficking/Slavery Notice: Specified types of businesses must post a notice urging the reader to report instances of slavery and human trafficking. Among those types of businesses are farm labor contractors. The California Department of Justice is expected to make this notice available early in 2013. The notice must be posted conspicuously near the establishment’s public entrance or elsewhere conspicuously where similar notices are customarily posted. The notice must be printed in English, Spanish and one other language that is the most widely spoken language in the county where the establishment is located and for which translation is mandated by the federal Voting Rights Act. The statute specifies the notice's content, font and size and requires the DOJ to develop a model notice and make it available for download on its website by April 1, 2013. The notice does not have to be posted before the DOJ has issued its model notice. A covered business that fails to comply with this requirement is liable for a civil penalty of \$500 for a first offense and \$1,000 for each subsequent offense, enforceable by the Attorney General or a local prosecutorial agency, if the business fails to correct the violation within 30 days after being notified of the offense by an agency that regulates the business.

Recordkeeping and Reports

Cal/OSHA

Field Sanitation Report: An employer cited for violations of the field sanitation rules (Title 8,CCR, §3457) must provide to Cal/OSHA annually for a period of five years after the final order on a citation a declaration. See page 3 for more information.

Recordkeeping: All employers, except those with no more than 10 employees at any time during the prior year, must keep for at least five years Cal/OSHA records. These records are:

1. Cal/OSHA Form 301, Injury and Illness Incident Report
2. Cal/OSHA Form 300, Log of Work - Related Injuries and Illnesses.
3. Cal/OSHA Form 300A, Summary of Work - Related Injuries and Illnesses.

See page 3 for more information.

GISO section 3203 requires employers to maintain records that document compliance with that regulation's requirements to maintain an effective written injury and illness prevention program. Records of the steps taken to implement and maintain the program include:

1. Records of scheduled and periodic inspections.
2. Documentation of safety and health training

See page 4 for more information.

Department of Pesticide Regulation

1. Respiratory Recordkeeping. An employer must retain written information regarding medical recommendations, fit testing, and the employer's respirator program. An employer must retain records while an employee is required to use a respirator and for three years after the end of employment conditions requiring respirator use. An employer must retain a copy of the current respirator program, and previous versions must be retained for three years.
2. Other records that must be retained by an employer using pesticides include:
 - A. Training papers
 - B. Written training program
 - C. Respirator program procedures
 - D. Medical evaluation (respirator use)
 - E. Accident response plan
 - F. Pesticide label
 - G. Pesticide Safety Information Series
 - H. Material Safety Data Sheet
 - I. Treatment notification method
 - J. Field posting
 - K. Storage area posting ¹
 - L. Employee exposure records ²
 - M. Identity of medical supervisor notice ²
 - N. Employer/medical supervisor agreement ²
 - O. Medical supervisor recommendations ²
 - P. Cholinesterase blood test results ²
 - Q. Employee work practice review ²
 - R. Emergency medical care notice
 - S. Pesticide use records

Footnotes:

¹ Required only for pesticides with the signal word DANGER or WARNING.

² Required only for organophosphate and carbamate pesticides with the signal word DANGER or WARNING.

Employment Development Department

New Employee Registry: Every California employer must report information about (1) new employees and (2) employees rehired after a separation of at least 60 days to the California New Employee Registry within 20 days of the first day of work. This includes all businesses, nonprofit organizations, and household employers, regardless of the number of employees they employ. An employer may submit the report on EDD Form DE 34, on an electronic form, or on a form the employer created that includes all required information.

For more information, call EDD at 1-888-745-3886, visit a local EDD Office, or search for "New Employee Registry" at edd.ca.gov.

Independent Contractor Reporting: A business required to file Internal Revenue Service Form

Summary of Employment Requirements for California Agricultural Employers

1099-MISC for services received from an independent contractor must report specific independent contractor information to the EDD within 20 days of paying or contracting for \$600 or more in services. A business is not required to report an independent contractor that is a corporation, general partnership, limited liability partnership, or limited liability company. For more information, see page 65.

Wages and Payroll

Statement of Wages: When paying employees, an employer must provide each employee with a written itemized statement that contains this information:

1. Gross wages earned;
2. Total hours worked (if the employee's compensation is based on an hourly wage);
3. Piece-rate units produced and the rate per unit produced;
4. All deductions (deductions authorized by the employee may be aggregated and shown as one item);
5. Net wages earned;
6. The inclusive dates of the pay period;
7. Name of the employee and either the last four digits of his or her Social Security number or an employee identification number other than a Social Security number; and
8. Name and address of the employer (legal entity).
9. Farm labor contractors only: The name and address of the legal entity that secured the services of the farm labor contractor.

Federal law also requires that the written statement include (1) the basis on which wages are paid and (2) the employer's federal taxpayer identification number assigned by the Internal Revenue Service.

Like other employers, those paying wages in cash must give each employee this itemized statement of wages. These statements must be recorded in ink or other indelible form and maintained in English. The employer must keep a copy of them.

Recording Hours Worked: Employers must keep in indelible ink records of the time worked by their non-exempt employees. This can be done by writing the time worked on a card or sheet or by having employees punch a time clock. Time records must show when an employee starts and ends each work period, as well as meal periods, split shift intervals and the total daily hours worked.

Payroll and Related Records: The employer must maintain employee records in English in indelible ink or equivalent form. All documents must be properly dated. The employer must maintain comprehensive records showing employees' names, addresses, occupations, social security numbers and ages of all minors. At a central location in the state or at the establishment at which the employees work, the employer must keep payroll records showing the hours worked each day and the wages paid to each employee.

Workday and Workweek: A workday is any consecutive 24-hour period starting at the same time each calendar day. The 24-hour period may start at any hour of any day. Daily overtime pay is based on hours worked in a workday.

An employer may change the workday or the workweek as long as the change is intended to be permanent. It is not necessary for all employees to have the same workday or workweek.

Hours taken off for vacation, holidays or sick time need not be counted as "hours worked" in determining any overtime obligation.

Personnel Records

Job Applications; Personnel Records: Employers must keep files of all job applications and personnel and employment-referral records for at least two years after the files are created or

received.

Records That Must be Kept: Employers must keep these types of personnel records:

- Documents with employee's signature
- Records relating to performance or grievances
- Records relating to promotion, compensation, or disciplinary action, including employment termination
- Applications for employment (2 – 4 years recommended)

Employers must keep the personnel files of former employees for two years after employment ends (but it is better to keep them for at least four years) and the files of rejected applicants for two years after the rejection.

Immigration

CIS Form I-9: Every employer must verify the eligibility of every new employee to work in the United States. This is done by using Citizenship and Immigration Service Form I-9. See appendix, page ?. The completed form must be kept for three years after employment begins or one year after employment is terminated, whichever is later. Employers must present Forms I-9 for inspection upon request by an Immigration and Customs Enforcement or U.S. Department of Labor official. At least three days advance notice of such an inspection must be given.

Compliance Tips for Employers:

1. Have a Form I-9 for each employee hired after November 6, 1986.
2. Conduct a self-audit of your Forms I-9 annually, preferably by outside immigration counsel. Self-audits are helpful on many levels, including showing good faith and understanding what the field is doing and how they are completing the forms. It is also considered a "best practice" by ICE pursuant to its IMAGE program. One caveat: In the process of performing a self-audit, you can worsen your situation if for instance (even if well-intentioned) you backdate information on the forms, make corrections without proper annotations, or destroy prior Forms I-9 after completing a new form.
3. Maintain a "tickler system" to notify you of expiring work authorization documents. Having in your employ someone whose work authorization has expired is "low-hanging fruit" for ICE agents in an audit. Once you are aware that an employee's work authorization has expired, you have knowledge that you are employing someone who may not be authorized to work in the United States. You need to take immediate action to address this issue. Given the complexities of such a situation, you should consult with immigration counsel before acting.

Top Mistakes Employers Make:

1. Not having a corporate immigration compliance strategy or plan in place. If ICE agents were to appear at one of your sites, do you have a plan in place to make sure either the receptionist or front line supervisor/manager contacts the appropriate person internally (i.e., legal counsel, head of Human Resources and/or owner) and that the Notice of Inspection (NOI) is properly routed? An NOI requires you to provide ICE with your Forms I-9 and supporting documents within three business days of receipt.
2. Not completing a Form I-9 for new hires. Completion of Form I-9 is mandatory, and all employers must have a Form I-9 for every employee hired after November 6, 1986. One of the first things that ICE will do when auditing a company is cross-check a list of current employees to confirm there is a corresponding Form I-9 for each employee.
3. Destroying current employees' Forms I-9. An employer may lawfully destroy Forms I-9 within a specified time frame as spelled out by the U.S. Department of Homeland Security (DHS). However, you must have a Form I-9 for each current employee hired after November 6, 1986. Misapplying DHS' time frames, some employers have purged Forms I-9 for current employees, which is not acceptable.
4. Failing to complete Form I-9. While the need to fill out Form I-9 in its entirety should be obvious, some employers simply do not do so. One way this occurs is by having the employee

Summary of Employment Requirements for California Agricultural Employers

complete Section 1 and then stapling photocopies of the employee's documents as a proxy for completion of Section 2 by the employer. That is not acceptable.

5. Using an outdated version of Form I-9. The most recent version of Form I-9 is found on the U.S. Citizenship and Immigration Services (USCIS) website. At this writing, the current version has the date 08/07/09 in its bottom right corner; until a new version is issued, use it. While it may seem efficient to print and store blank Forms I-9 to use when hiring new employees, stockpiling copies can lead to using an obsolete—and thus improper—Form I-9, which can lead to complications if ICE were to audit you. Further, at this writing the release of a new two-page Form I-9 is on the horizon.
6. Over-documentation in Section 2. Form I-9 requires an employer to verify the identity and work authorization of each new employee by allowing the employee to present either a List A document or a List B and a List C document. You do not need to record on Form I-9 a document from each of List A, List B and List C, nor should you do so. You do not get more stars if you complete every space in Section 2 of Form I-9. It is not unusual to see employers require employees—particularly non-U.S. citizens—to provide a permanent resident card (a List A document) and also a Social Security card (a List C document) for instance. This is not acceptable. Doing so can lead to claims of discrimination on the basis of national origin and/or citizenship because you are treating these new hires differently than U.S.-born employees. Another way this can occur is if a new employee declares in Section 1 that she is a lawful permanent resident but then presents a driver's license and Social Security card instead of a permanent resident card. This is acceptable, and an employer may not request different documents in this situation, such as requiring the employee to show you her permanent resident card.

(Source: Arnall Golden Gregory, LLP - Permission to reprint given by Author Montserrat C. Miller. The *Immigration Compliance Newsletter* provides a general summary of recent legal and legislative developments and is for informational purposes only. It is not intended to be, and should not be relied upon as, legal advice. ©2012 All Rights Reserved.)

Farm Labor Contractor (FLC)

FLC License: A grower engaging the services of a FLC must get from the FLC a copy of the license and then keep it for three years after the contract's termination. The grower must also verify the FLC's license by contacting an FLC verification unit established by the state Labor Commissioner and keep the Labor Commissioner's verification during the FLC's services. See page 65 for more information.

FLC Payroll Records: Specified payroll records must be made and kept for three years and an itemized written statement must be provided to each worker each pay period. A grower who receives from an FLC a copy such payroll records must keep them for three years. See the **Farm Labor Contractor** section starting on page 65 for more information.

Leave of Absence

Family and Medical Leave Act: Covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period. See page 58 for a review of FMLA requirements. Here is a summary of the forms associated with FMLA compliance.

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition: This is an optional form. The FMLA provides that an employer may require an employee seeking FMLA leave due to a serious health condition to submit a medical certification issued by the employee's healthcare provider. This form contains the permissible medical inquiries allowed under FMLA regulations. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files.
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition: This is an optional form. The FMLA provides that an employer may require an

employee seeking FMLA leave due to a serious health condition of a covered family member to submit a medical certification issued by the health care provider of the covered family member. This form contains the permissible medical inquiries allowed under FMLA regulations. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members.

- **WH-381 Notice of Eligibility and Rights & Responsibilities:** This is an optional form. The FMLA requires employers to give specific information to an employee seeking FMLA leave. This form, when fully completed, provides employees with the required information. It must be provided within five business days after the employee notified the employer of the need for FMLA leave. Part B of the form provides employees with information about their rights and responsibilities as to taking FMLA leave.
- **WH-382 Designation Notice:** This is an optional form. The employer of an employee seeking a FMLA leave must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. The employer can use this form to notify the employee with the required written information. This form's employee notification is also included in WH-381.
- **WH-384 Certification of Qualifying Exigency For Military Family Leave:** This is an optional form. The FMLA provides that an employer may require an employee seeking a FMLA leave due to a qualifying exigency to submit a certification. This form contains the permissible inquiries allowed under FMLA regulations.
- **WH-385 Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave:** This is an optional form. The FMLA provides that an employer may require an employee seeking a FMLA leave due to a serious injury or illness of a covered servicemember to submit a certification providing sufficient facts to support the request for leave. This form contains the permissible medical inquiries allowed under FMLA regulations. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members.

Each of the above forms can be obtained online at www.dol.gov/esa/whd/fmla/.

California Family Rights Act: Covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period. See page 58 for a summary of CFRA requirements.

Discrimination

Applicant Identification Records: California Fair Employment and Housing Commission regulation section 7287.0(b), "Applicant Identification Records/Applicant Flow Data" requirement. The regulation requires every covered employer (those regularly employing five or more employees) to maintain data regarding the race, sex and national origin of each applicant by the position sought. An identification form used to gather this data must be separate or detachable from an employment application form. See page 121 for more information.

EEOC - EEO-1 Report: Both state and federal anti-discrimination laws require employers with 100 or more employees to prepare annually a report. The reports assemble data on the sex, race, and ethnic composition of the employer's workforce. See page 120 for more information.

Recordkeeping and Inspection Requirements

Inspection and Copying of Personnel Files: California Labor Code section 1198.5 entitles every current and former employee, or his or her representative, to inspect and receive a copy of the personnel records that the employer maintains relating to the employee's performance or to

Summary of Employment Requirements for California Agricultural Employers

any grievance concerning the employee. Exempt are records relating to the investigation of a possible criminal offense, letters of reference, and ratings, reports or records that were obtained before the employee's employment, prepared by identifiable examination committee members, or obtained in connection with a promotional examination.

An employer must make the records available for inspection, or provide a copy if the employee so requests, to the current or former employee or employee's representative within 30 calendar days of the employer's receipt of the employee's written request. The employee and employer may agree in writing to a date beyond 30 days, but not to exceed 35 days, from the employer's receipt of the employee's request. The employer may require the employee to make the request to inspect or copy in writing on an employer-provided form and to a designated person. The employer may remove the name of any nonsupervisory employee contained in the personnel records before inspection or copying.

For current employees, the employer must make the records available for inspection or provide a copy at the place where the employee reports to work or another agreed-upon location. For former employees, the employer must make the records available for inspection or provide a copy at the place where the employer stores the records, unless a different location is agreed upon in writing. The employee may receive a copy by mail if he or she reimburses the employer for postal expenses. For an employee who was discharged for a violation of law, or an employment-related policy, involving harassment or workplace violence, the employer may make the records available at a location a reasonable driving distance from the former employee's residence or mail a copy of the records to the employee.

An employer must comply with only one request for inspection or copying per year by a former employee and only 50 requests per month by representative(s) of employees. These provisions do not apply during the pendency of an employee's lawsuit relating to a personnel matter against his or her employer, or to an employee covered by a valid collective bargaining agreement that provides for hours, wages, and working conditions, a procedure for copying and inspection of personnel records, and a regular rate of pay not less than 30 percent more than the California minimum wage.

An employer must maintain a copy of a former employee's personnel records for at least three years after the former employee's employment ended.

An employer who does not timely comply with the above inspection and copying requirements is liable to the employee or the Labor Commissioner for penalty of \$750, plus injunctive relief and attorneys' fees. However, impossibility of performance is an affirmative defense to an alleged violation of this provision. These penalty provisions mirror those of Labor Code section 226, which covers payroll records.

Inspection and Copying of Payroll Records: Labor Code section 226, subdivision (a), requires an employer to afford current and former employees the right to inspect or copy payroll records pertaining to that current or former employee, upon reasonable request to the employer. The employer may take reasonable steps to assure the identity of the current or former employee. If the employer provides copies of the records, the actual cost of reproduction may be charged to the current or former employee.

An employer who receives a written or oral request to inspect or copy payroll records must comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request.

Workers' Compensation

Employee Claim Form: Within one day after learning of an injury, an employer must give the injured employee a claim form and a notice of potential benefit eligibility. The completed claim form must be filed with the employer by the injured worker or, in the case of death, by a dependant of the decedent employee, or by an agent of the employee or dependant.

Form to Indicate Physician or Chiropractor: An employee may be treated by his or her own personal physician or personal chiropractor for an injury requiring more than first aid immediately after the injury if, before the injury, the employee notified the employer in writing of the name of the regular personal physician or personal chiropractor who previously directed the employee's medical treatment and who has the employee's medical history and records. The completed form, if completed by an employee must be filed for future reference.

Child Labor

Permit to Employ and Work Permit: An employer that directly or indirectly employs a minor under 18 years of age (other than a high-school graduate or equivalent) must keep a "Permit to Employ" and a "Work Permit" on file throughout the minor's employment.

Date of Birth: An employer must keep for 3 years a record of the birthdate of one who was a minor when hired; copy of work permit is acceptable.

Checklist of Forms and Reports

Here is a checklist of forms that must be completed for each new employee and the subjects of which they must be informed when they are hired.

1. Issue Disability Insurance Pamphlet DE-2515: given to employee
2. Issue Paid Family Leave Pamphlet DE-2511: given to employee
3. IRS Form W-4: completed by employee
1. INS Form I-9 (Employment Eligibility Verification): completed by employee and employer
2. Pesticide Hazard Communications & Training for Field Workers and Pesticide Handlers
3. Work Permit: on file for each minor employee
4. Payroll deduction authorization for any payroll deduction not required by law: signed by employee
5. Wages and benefits: explained to employee
6. Safety Training: provided to employee
7. Sexual Harassment Handout or Company Harassment Policy included in employee handbook: given to employee
8. Hazard Communication Program and MSDS's: explained to employee
9. Location of Field Sanitation Facilities: notify employee
10. Good Hygiene Practices: explained to employee
11. Family Care & Medical Leave Notice: posted and in employee handbook
12. Workers' Compensation Orientation: give compensation carrier's pamphlet to employee
13. New-Employee Registration Act Form DE-34: complete and mail to EDD within 20 days
14. Report of Independent Contractors Form DE 542: complete and mail to EDD within 20 days

Notes