{{ top\_date }}

*Via U.S. Mail:*

**{{ oc\_defendant\_name }}**

**Attention: Human Resources Department**

{{ defendant\_street\_address }},

{{ defendant\_state\_address }},

*{{ client\_full\_name }} v. {{ oc\_defendant\_name }}*

This correspondence is protected by California Evidence Code §1154 regarding settlement discussions. Please be advised that our firm represents **{{ client\_full\_name }}**(“Plaintiff”) regarding the potential workplace-related claims outlined below against **{{ oc\_defendant\_name }}** (“Defendant”). Kindly direct all future correspondence and documentation to my attention and refrain from contacting our client directly, whether through your representatives or otherwise, concerning this matter.

Legal Corner Law Office has been retained to represent {{ client\_full\_name }} ("Plaintiff") in {{ client\_subjective }} claims against {{ oc\_defendant\_name }} ("Defendant") for:

{{ claims }}

# **Statement of Facts**

Defendant hired {{ honerif\_ics}}.{{ client\_full\_name }} on or around {{ start\_date }} as a {{ job\_title }}. {{ honerif\_ics}}.{{ client\_full\_name }} was compensated with an {{ wage }} of ${{ pay\_rate }} and last worked at Defendant on {{ end\_date }}.

As detailed below, Defendant is liable to {{ honerif\_ics}}.{{ client\_full\_name }} for the following violations of California law.

# **Retaliation in Violation of Labor Code § 98.6**

Labor Code §98.6 states, "A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including… or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to [Section 2699](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000215&refType=LQ&originatingDoc=I6b3139e29b5f11ed9622de08dbb40fb0&cite=CALBS2699), or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her."

# **Retaliation in Violation of Labor Code § 1102.5**

Labor Code §1102.5 prohibits retaliation by an employer against an employee for disclosing any information to any person with authority to investigate, or any public body investigating, violation of a state or federal statute or regulation if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

“In order to establish a prima facie case of retaliation against an employee under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), a plaintiff must show (1) he or she engaged in a protected activity, (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.” (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028).

In order to establish a prima facie case of retaliation under § 1102.5(b), plaintiff must demonstrate that he or she engaged in a protected activity as set forth in § 1102.5, that the employer subjected him or her to an adverse employment action, and a causal link between the two. (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th443,468). A Plaintiff who successfully prosecutes for retaliation in violation of § 1102.5 may recover compensatory damages, including economic and emotional distress damages. (*Gardenhire v. Housing Authority of the City of Los Angeles* (2000) 85 Cal.App.4th 236,237, 240-241).

# **Retaliation Under Labor Code § 132(a)**

California Labor Code §132(a) states, "Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.”

**Retaliation Under Labor Code § 230(a)**

California Labor Code §230(a) states, “An employer shall not discharge or in any manner discriminate against an employee for taking time off to serve as required by law on an inquest jury or trial jury, if the employee, prior to taking the time off, gives reasonable notice to the employer that the employee is required to serve.”

**Retaliation in Violation of Labor Code §230.8**

As per Labor Code §230.8(a)(1), “An employer who employs 25 or more employees working at the same location shall not discharge or in any way discriminate against an employee who is a parent of one or more children of the age to attend kindergarten or grades 1 to 12, inclusive, or a licensed child care provider, for taking off up to 40 hours each year.”

Particularly, subsection (A) states, “To find, enroll, or reenroll his or her child in a school or with a licensed child care provider, or to participate in activities of the school or licensed child care provider of his or her child, if the employee, prior to taking the time off, gives reasonable notice to the employer of the planned absence of the employee. Time off pursuant to this subparagraph shall not exceed eight hours in any calendar month of the year.” Subsection (B) adds, “To address a child care provider or school emergency, if the employee gives notice to the employer.”

**Retaliation in Violation of Labor Code §6399.7**

Labor Code §6399.7 provides, "No person shall discharge or in any manner discriminate against, any employee because such employee has filed any complaint or has instituted, or caused to be instituted, any proceeding under or related to the provisions of this chapter, or has testified, or is about to testify, in any such proceeding, or because of the exercise of any right afforded pursuant to the provisions of this chapter on such employee's behalf or on behalf of others, nor shall any pay, seniority, or other benefits be lost for exercise of any such right. A violation of the provisions of this section shall be a violation of the provisions of Section 6310."

# **Unsafe Working Conditions**

As per California Labor Code Section 6400, "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." Employers have a general duty under the Occupational Safety and Health Act (OSHA) to provide a workplace free from "recognized" hazards.

California Labor Code Section 6311 states, "No employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including [Section 6400](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000215&refType=LQ&originatingDoc=Ia17934e0a5cc11ed98a8eb36ba7fb35d&cite=CALBS6400), any occupational safety or health standard, or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or their fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because the employee refused to perform work in the performance of which this code, any occupational safety or health standard, or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or their fellow employees shall have a right of action for wages for the time the employee is without work as a result of the layoff or discharge."

# **Retaliation in Violation of California's Paid Sick Leave**

As per Labor Code §246, “An employee who, on or after July 1, 2015, works in California for the same employer for 30 or more days within a year from the commencement of employment is entitled to paid sick days as specified in this section.”

Labor Code §246.5 provides, “Upon the oral or written request of an employee, an employer shall provide paid sick days for the following purposes: Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member.” The statute also adds in subsection (b), “An employer shall not require as a condition of using paid sick days that the employee search for or find a replacement worker to cover the days during which the employee uses paid sick days.” Lastly, section (c) provides, “An employer shall not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the department or alleging a violation of this article, cooperating in an investigation or prosecution of an alleged violation of this article, or opposing any policy or practice or act that is prohibited by this article.”

## **Retaliation Regarding Domestic Violence**

Labor Code §230(c) states, "An employer shall not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child."

§230.1(c) provides, "An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by their employer because the employee has taken time off for a purpose set forth in subdivision (a) is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, as well as appropriate equitable relief. An employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure or hearing authorized by law is guilty of a misdemeanor.”

**Retaliation in Violation of the California Family Rights Act**

Government Code §12945.2(l) states, “It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of an individual's exercise of the right to family care and medical leave.”

Regarding The California Family Rights Act (CFRA), “Its purpose is to allow employees to take leave from work for certain personal or family medical reasons without jeopardizing their job security. The CFRA has two principal components: a right to leave of up to 12 weeks in any 12-month period to care for a family member or for the employee's own medical condition under [§ 12945.2](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5F5X-FY41-F04B-P000-00000-00&pdcontentcomponentid=4861&ecomp=&earg=&prid=1e1a541c-c540-4d82-9b30-7a31f46dc05c&crid=da96bd97-ee99-446e-9982-a31eee96681f&pdpinpoint=PAGE_919_3061&pdsdr=true#), and a right to reinstatement in the same, or a comparable, position at the end of the leave. [§ 12945.2, subd. (a)](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5F5X-FY41-F04B-P000-00000-00&pdcontentcomponentid=4861&ecomp=&earg=&prid=1e1a541c-c540-4d82-9b30-7a31f46dc05c&crid=da96bd97-ee99-446e-9982-a31eee96681f&pdpinpoint=PAGE_919_3061&pdsdr=true#). The right to reinstatement is unwaivable but not unlimited. Employers must not deny employees reinstatement unless the refusal is justified by the defenses stated in [Cal. Code Regs., tit. 2, § 11089, subd. (c)(1)](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5F5X-FY41-F04B-P000-00000-00&pdcontentcomponentid=4861&ecomp=&earg=&prid=1e1a541c-c540-4d82-9b30-7a31f46dc05c&crid=da96bd97-ee99-446e-9982-a31eee96681f&pdpinpoint=PAGE_919_3061&pdsdr=true#), [(2)](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5F5X-FY41-F04B-P000-00000-00&pdcontentcomponentid=4861&ecomp=&earg=&prid=1e1a541c-c540-4d82-9b30-7a31f46dc05c&crid=da96bd97-ee99-446e-9982-a31eee96681f&pdpinpoint=PAGE_919_3061&pdsdr=true#). [§ 11089, subd. (a)](https://plus.lexis.com/document?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5F5X-FY41-F04B-P000-00000-00&pdcontentcomponentid=4861&ecomp=&earg=&prid=1e1a541c-c540-4d82-9b30-7a31f46dc05c&crid=da96bd97-ee99-446e-9982-a31eee96681f&pdpinpoint=PAGE_919_3061&pdsdr=true#).” *Richey v. Autonation, Inc.*, 60 Cal. 4th 909, 919 (2015). Its two primary parts guarantee a right of up to twelve weeks' annual leave to care for a family member or one's own medical condition and a concomitant "right to reinstatement in the same, or a comparable, position at the end of the leave." Id. (citing Cal. Gov. Code §12945.2). In order to circumvent this right, the employer alone bears the burden of proving "that an employee would not otherwise have been employed at the time reinstatement was requested." Cal. Code Regs., tit. 2, § 11089, subd. (c)(1).

"...the elements of a cause of action for retaliation in violation of CFRA under the circumstances of this case are as follows: (1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA leave; (3) the plaintiff exercised his right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA leave." (*Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 261 [108 Cal.Rptr.2d 739].)

# **Employer Liability for Harassment and Hostile Work Environment**

In order to prevail on a hostile work environment claim, plaintiff must show that his "workplace was permeated with discriminatory intimidation . . . that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment." *Harris*, 510 U.S. at 21, 114 S.Ct. 367. Furthermore, courts evaluate the totality of the circumstances test to determine whether a plaintiff's allegations make out a colorable claim of a hostile work environment. In *Harris*, the court listed frequency, severity and the level of interference with work performance among the factors particularly relevant to the inquiry. When assessing the objective portion of a plaintiff's claim, courts assume the perspective of the reasonable victim. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

Every individual is entitled to work in a harassment-free environment and an employer's failure or refusal to provide this, in and of itself, is the denial of "terms, conditions, privileges of employment" and is a violation of the law. (Government Code Sections 12940, et seq.; 2 Cal. Admin. Code 7287.6; *DFEH v. Fresno Hilton Hotel*, (1984) FEHC Dec. No. 84-03, p. 29; and see also *Harris v. Forklift Systems, Inc.* (1993) 114 S.Ct. 367.

Although FEHA Section 12940(j)(1) prohibits any "person" from harassing an employee, FEHA Section 12940(k) imposes on the employer the duty to take all reasonable steps to prevent this harassment (as well as discrimination) from occurring in the first place and to take immediate and appropriate action when it is or it should be aware of the unlawful conduct. Carrisales v. Department of Corrections (1999) 21 Cal.4th 1132, 1140.

To establish harassment under FEHA, an employee must demonstrate: (1) membership in a protected group, (2) that she was subjected to harassment because she belonged to this group, and (3) the alleged harassment was so severe that it created a hostile work environment.

# **Discrimination in Violation of FEHA**

California Government Code §12940(a) (the Fair Employment and Housing Act, or “FEHA”) provides that it is unlawful employment practice “[f]or an employer because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person…to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”

California uses a three-stage test, established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, to resolve discrimination cases. Once the employee establishes a prima facie case of discrimination using the three-stage test, a presumption of discrimination is established, shifting the burden to the employer to show that the action was motivated by legitimate, non-discriminatory reasons. If the employer meets this burden, the burden shifts to the employee to show that the employer's reasons are pretext for discrimination or to produce evidence of intentional discrimination. *Guz v. Bechtel* (2000) 24 Ca1.4th 317,354-356.

To establish a prima facie case of discrimination under FEHA, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position she sought or was performing competently in the position she held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. *Guz v. Bechtel* (2000) 24 Ca1.4th at 355.

# **Retaliation in Violation of FEHA**

California Government Code §12940(a) (the Fair Employment and Housing Act or “FEHA”) states, “It is unlawful employment practice… for an employer because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person…to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”

Further, §12940(h) provides that it is unlawful to retaliate against a person “because the person has opposed any practices forbidden under [FEHA] or because the person has ﬁled a complaint, testiﬁed, or assisted in any proceeding under [FEHA].” It is also unlawful to retaliate or otherwise discriminate against a person for requesting an accommodation for religious practice or disability, regardless of whether the request was granted. Gov. Code, § 12940(l)(4), (m)(2).

The essential elements for retaliation in violation of FEHA are met when (1) an employee complains of or somehow opposes any practice forbidden under FEHA; (2) the defendant subsequently subjects the employee to an adverse employment action; and (3) the employees complaint or opposition to the forbidden practice was a substantial motivating factor for defendant taking the adverse employment action against the employee. See, e.g., CACI No. 2505. Retaliation (Gov. Code, § 12940(h)).

# **Failure to Accommodate in Violation of FEHA**

Government Code §12940(m)(1) provides that it is an unlawful employment practice "For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship." (Cal. Code Regs., tit. 2, §7293.9.)

Government Code §12926(n) states, "Reasonable accommodation" may include restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Government Code §12940(m)(2) makes it unlawful “for an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.” The Fair Employment and Housing Commission’s regulations provide that “it is unlawful for an employer or other covered entity to demote, suspend […], fail to give equal consideration in making employment decisions, […], adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act […].” Cal. Code Regs., tit. 2, § 7287.8(a).

# **Failure to Engage in the Interactive Process in Violation of FEHA**

Government Code §12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.”

A plaintiff has a prima facie case for failure to engage in the interactive process when she (1) was an employee of or seeking employment with the defendant; (2) she had a disability or limitation that was known to the defendant; (3) she requested a reasonable accommodation from her employer or potential employer so that she would be able to perform her job; (4) she was willing to participate in an interactive process to determine whether a reasonable accommodation could be made; and 5) the defendant failed to participate in a timely good faith interactive process with the plaintiff. *See, e.g., Judicial Council of California Civil Jury Instructions (2017)*.

**Violation of California’s Lactation Accommodation Law**

California Labor Code § 1031 requires that “employer shall make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee’s work area, for the employee to express milk in private. The room or location may include the place where the employee normally works if it otherwise meets the requirements of this section.” Labor Code § 1031 (c)(1) also provides that the lactation room must be “clean”.

Additionally, per Labor Code, § 1033, subd. (a) An employer who violates any provision of this chapter shall be subject to a civil penalty in the amount of one hundred dollars ($100) for each violation.

# **Employer Liability for Failure to Provide COBRA Notification**

The Consolidated Omnibus Reconciliation Act of 1985 (COBRA) imposes a statutory requirement that a plan administrator notify an employee when group health coverage is lost due to certain specific qualifying events. COBRA requires that employers with covered group health plans "provide . . . that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan." 29 U.S.C. §1161(a). In the case of an employee, a qualifying event is (i) voluntary or involuntary termination of employment for reasons other than gross misconduct or (ii) reduction in the number of hours of employment. An employer must notify a plan administrator of a qualifying event within 30 days, and upon notification a plan administrator is required to send a COBRA notification within 14 days; thus, the statutory maximum time allotted to send a COBRA notification is 44 days of a qualifying event. Failure to provide a COBRA notice carries a penalty for damages of up to one-hundred and ten dollars ($110.00) a day from the date of the failure, in addition to any other relief and damages the court deems proper, such as medical costs incurred as a result of the failure to provide the notification.

# **Liability for Defamation**

Cal. Civ. Code §44 provides that defamation is affected by either libel or slander. Slander is defined as a "false and unprivileged publication, orally uttered, … which: … (3) Tends indirectly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits, … or (5) Which, by natural consequence, causes actual damage." Cal. Civ. Code §46.

An employer may be held vicariously liable for defamatory statements made by supervisors or coworkers in the course and scope of employment regarding their employees. *Kelly v. General Tel. Co.*, (1982) 136 Cal.App.3d 278 at 284.

"Negative job performance evaluations are usually held to be statements of opinion, rather than fact, and hence not properly the subject of a defamation action: "unless an employer's performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence or reprehensible personal characteristics or behavior …" *Jensen v. Hewlett Packard Co.* (1993) 14 Cal.App.4th 958, 964-965.

To prove a prima facie case of defamation, the plaintiff must show that the defamer made a defamatory statement to at least person; the statement was a false statement of fact; the hearer reasonably understood that the statement referred to the victim; the hearer reasonably understood that the statement meant something defamatory; and that the defamer failed to use reasonable care to determine whether the statement was true or not before making it.

## **False Inducement of Employment**

Labor Code § 970 states, "No person, or agent or officer thereof, directly or indirectly, shall influence, persuade, or engage any person to change from one place to another in this State or from any place outside to any place within the State, or from any place within the State to any place outside, for the purpose of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in printed form, concerning either: (a) The kind, character, or existence of such work; (b) The length of time such work will last, or the compensation therefor; (c) The sanitary or housing conditions relating to or surrounding the work; (d) The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought."

Labor Code § 972 states, "Any person, or agent or officer thereof who violates any provision of § 970 is liable to the party aggrieved, in a civil action, for double damages resulting from such misrepresentations."

# **Wrongful Termination in Violation of Public Policy**

"[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1090-1091.

Damages for wrongful termination in violation of California public policy are calculated based on the following: front pay, which is the present cash value of any future wages and benefits that the employee would have earned for the length of time the employment would have been reasonably certain to continue, back pay, which is what employee would have earned up to today, including any benefits and pay increases, and emotional distress damages.

# **Constructive Discharge as Wrongful Termination in Violation of Public Policy**

"[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170. When the employer's conduct effectively forces an employee to resign, it is treated as a firing rather than a resignation. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238.

Damages for wrongful termination in violation of California public policy are calculated based on the following: front pay which is the present cash value of any future wages and benefits that the employee would have earned for the length of time the employment would have been reasonably certain to continue, back pay which is what employee would have earned up to today, including any benefits and pay increases, emotional distress damages, and $10,000 punitive civil penalty.

# **Misclassification as Independent Contractor**

In California, there is a rebuttable presumption that a worker is an employee (Labor Code §3357). Labor Code §226.8. explicitly states that (a) It is unlawful for any person or employer to engage in any of the following activities: (1) Willful misclassification of an individual as an independent contractor. (2) Charging an individual who has been willfully misclassified as an independent contractor a fee, or making any deductions from compensation, for any purpose, including for goods, materials, space rental, services, government licenses, repairs, equipment maintenance, or fines arising from the individual's employment where any of the acts described in this paragraph would have violated the law if the individual had not been misclassified.

California courts and administrative agencies use a multi-factor test to determine if an individual is an employee or an independent contractor. In the case of *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) the California Supreme Court outlined the underpinning of the test as considering whether the person to whom service is rendered has control or the right to control the worker both as to the work done and the manner and means in which it is performed.

In the case of *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* (2018 Ct. App. 2/7 B249546), the court concluded that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the 'ABC' test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under this test, "a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." Id.

# **Labor Code Violations**

## **Violation of California Equal Pay Act**

Pursuant to California Labor Code Section 1197.5: Delete (a) or (b) if not applicable

(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

(c) Any employer who violates subdivision (a) or (b) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages.

(h) An employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

## **Violation of California's Paid Sick Leave**

Labor Code §246 requires employers to provide paid sick leave to employees who have worked in California for the same employer for 30 or more days within a year of commencement of employment. Labor Code §246.5 provides that an employee may use sick days for the “diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee’s family member.” The employer cannot require the employee to search for or find a replacement worker to cover the days during which the employee uses sick days and cannot retaliate or in any way discriminate against an employee for using accrued sick days or attempting to use accrued sick days (Labor Code §246.5(b)and (c)). As long as the employee has accrued sick leave available, the employer cannot count sick leave taken as an absence that may lead to discipline such as under a company attendance policy (Labor Code §234).

## **Failure to Pay Minimum Wage**

Labor Code § 1197 requires that all employees be paid at least the minimum wage set by applicable state or local law. Labor Code § 1197.1 provides, "1) For any initial violation that is intentionally committed, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee is underpaid. This amount shall be in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation for the same specific offense, two hundred fifty dollars ($250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. This amount shall be in addition to an amount sufficient to recover underpaid wages. (3) Wages recovered pursuant to this section shall be paid to the affected employee."

Labor Code § 1194.2 provides that in an action "to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission or by statute, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully paid and interest thereon."

For every pay period that the total paid by Defendant in wages and/or commissions is not equal to or greater than the applicable minimum wage, Plaintiff is owed not only the unpaid wages but also liquidated damages in an amount equal to the unpaid wages.

## **Unpaid Wages/Overtime Wages**

An employer is required to pay an employee for all hours worked. "Hours worked" means the time during which an employee is subject to the control of an employer and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

Pursuant to the applicable IWC Wage Orders, and California Code of Regulations, Title 8, Section 11010 no employee shall be employed for more than eight hours in any workday or forty hours in any workweek unless the employee receives overtime wages. Employment beyond eight hours in any workday or more than six days in any workweek is permissible provided the employee is compensated for such overtime at not less than: 1) One and one-half times the hourly rate of pay for all hours worked in excess of eight (8) hours per day, forty (40) hours per week, and/or the first eight (8) hours of the seventh consecutive workday; and twice times the rate of pay for all hours worked in excess of twelve (12) hours per day and/or eight (8) hours on the seventh consecutive workday; and 2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh consecutive day of work in a workweek. Labor Code § 510.

## **Waiting Time Penalties for Unpaid Wages**

Labor Code §201 provides, "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

In *Smith v. L'Oreal USA, Inc.* (2006) 39 Cal.4th 77, the California Supreme Court emphasized the importance of paying California employees promptly, as follows:

"Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public.' (Citation.) California has long regarded the timely payment of employee wage claims as indispensable to the public welfare: It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (Citations.)

Failing to immediately pay an employee's wages upon termination is an expensive violation. If upon termination the employer does not immediately pay an employee what he or she is owed, Labor Code §203 imposes upon the employer a severe penalty. Labor Code §203 provides:

"If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201…, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

The word "willful" does not require proof of a "deliberate evil purpose" on the part of the employer. *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1. "Willful" merely means the employer intentionally failed or refused to perform an act which was required to be done." Id. at 7. Once a court determines wages are late, penalties are imposed without much regard for an employer's argument its failure to pay was not willful.

## **Noncompliant Wage Statements**

California Labor Code § 226(a) states, “An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in [subdivision (b) of Section 1682](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000215&refType=SP&originatingDoc=I59267370a8e611edabeac2a8a4ee38cb&cite=CALBS1682), the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, beginning July 1, 2013, if the employer is a temporary services employer as defined in [Section 201.3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&originatingContext=document&transitionType=DocumentItem&pubNum=1000215&refType=LQ&originatingDoc=I59267371a8e611edabeac2a8a4ee38cb&cite=CALBS201.3), the rate of pay and the total hours worked for each temporary services assignment.”

California wage orders require that every employer must keep accurate records for each non-exempt employee for at least two years identifying when he/she begins and ends work each period, when he/she takes a meal period, unless all work at the location ceases, his/her total daily hours worked, and the total hours he/she worked in the payroll period and all applicable rates of pay.

Labor Code Section 226(e)(1) states, (e)(1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.

## **Meal Period Violations**

In *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, the California Supreme Court held that a California employer must ensure that its employees are actually free of job duties and must provide the opportunity for employees to take a full, uninterrupted off-duty meal period. The Court was unequivocal in specifying that an employer only "satisfies this 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." A discernable piece of evidence must be shown to prove an employer did not impair or impede an employee's meal period. Additionally, if the employee works over ten (10) hours she is entitled to a second timely uninterrupted meal period, subject to the same penalties.

In describing and defining "impede or discourage," the Brinker Court recommended that employers adopt formal policies and practices to ensure scheduled meal periods and not use common scheduling that makes it difficult for employees to take breaks but rather to have overlapping schedules where one employee covers for others and to not write up, reprimand or ridicule employees that took breaks when it was their break times. There remain several cases proving meal period violations based on employers' practice to implicitly or explicitly coerce employees not to take their meal periods. *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949; *Jaimez v. DAIOHS USA Inc.* (2010) 181 Cal.App.4th 1286; and *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D.Cal.2010). Thus, a meal period violation will occur if the employer does not ensure an employee is free from their job duties.

## **Rest Break Violations**

Labor Code §226.7 requires that an employer must provide its employees with a ten-minute duty-free rest break commencing in the middle of a four-hour shift. Labor Code §§ 226.7, IWC Wage Order. Failure to authorize or permit employees to take ten-minute rest breaks similarly triggers another obligation to pay one-hour's pay to that employee.

Section 12 of the Industrial Welfare Commission Wage Orders requires that:

"(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided."

A rest period is designated as a full ten-minute rest break. The IWC has provided that the rest period is net - in other words, the rest period begins when the employee reaches an area away from the work station that is appropriate for rest. The employee is entitled to one rest period per work period. This means than an employer may not (except in the case of certain workers in extended care homes under Order 5) count periods of less than 10 minutes as rest periods meeting the requirements of Section 12 of the IWC Orders. (Opinion Letter February 22, 2002; and Opinion letter of January 3, 1986).

## **Failure to Indemnify**

Labor Code § 2802(a) states, "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." This Labor Code section requires employers to reimburse employees for all out-of-pocket expenses the employee incurs during the performance of their job. *See Cochran v. Schwan’s Home Services (2014) 228 CA.App.4th 1137.*

## **Unlawful Wage Deductions**

§221 states, "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

Labor Code § 225.5(a) states, "For any initial violation, one hundred dollars ($100) for each failure to pay each employee. (b) For each subsequent violation, or any willful or intentional violation, two hundred dollars ($200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld."

## **Unlawful Gratuity Deductions**

Labor Code § 351 states, "No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer.”

## **Failure to Provide Records**

Under California Labor Code §1198.5, employees have the right to request and obtain copies of their personnel files and related employment records. If an employer fails to provide these records, they may face a penalty of $750 for non-compliance.

Additionally, according to California Labor Code §226(b), employees can review and copy their pay records within 21 days of making a request. If an employer does not allow a current or former employee to inspect or copy their payroll records within this timeframe, the employee is entitled to a $750 penalty, as outlined in Labor Code §226, subdivisions (c) and (f).

# **Punitive Damages**

California Civil Code §3294 provides, "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

"Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds." *College Hospital, Inc. v. Superior Court* (1994) 8 Ca1.4th 704, 712.

For corporate punitive damages liability, §3294(b) requires that the wrongful act giving rise to the exemplary damages be committed by an "officer, director, or managing agent." *White v. Ultramar, Inc.* (1999) 21 Ca1.4th 563, 572. Importantly, "malice does not require actual intent to harm." *Angie M v. Sup. Ct.* (1995) 37 Cal.App.4th 1217, 1228.

Even "[n]onintentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages when a party intentionally performs an act from which he knows, or should know, it is highly probable that harm will result." *Ford Motor Co. v. Homes Ins. Co.* (1981) 116 Cal.App.3d 374,381; Angie M, 37 Cal.App.4th at 1228.

# **California Attorney's Fees Provisions**

In wage and hour employment law claims, particularly those under Labor Code §§226, 203, and 2802, plaintiffs are entitled to mandatory attorneys' fees. For discrimination and retaliation claims under California law, specifically those brought under FEHA, prevailing plaintiffs typically receive attorney’s fees (Gov. Code §12965, subd. (b)). Similarly, in whistleblower cases, prevailing plaintiffs are also entitled to attorneys' fees. Therefore, please be aware that my hourly rate for this employment-related matter is court-approved at $500 per hour.

Defendant's full liability estimation is calculated below.

# **Damages**

***Harassment and Discrimination/Wrongful Termination***

$ = Lost wages, front and back pay Wrongful Term ONLY

$X = Emotional distress damages (for FEHA Discrimination)

$10,000.00 = Civil penalty as per Labor Code § [98.6/1102.5/132(a) each]

***Violation of California Equal Pay Act - Labor Code § 1197.5***

$XXX.00 = Lost Wages based on unequal pay

$XX.00 = Interest [10% of Lost Wages based on unequal pay]

$XXX.00 = Liquidated Damages [do not include interest]

***Unpaid Wages/Overtime***

$XXX = XX Hours at $XX per hour

$XXX = XX hours at $X overtime rate

$XXX = Liquidated Damages (Liquidated Damages = Unpaid Wages + OT Wages)

***Labor Code § 203 Waiting Time Penalties***

$X = $X per day for X days (30 day max penalty)

***Noncompliant Wage Statements***

$X = $50 for first pay period and $100 for X subsequent pay periods (Max, $4,000.00)

***Missed Meal Periods***

$X = $X per hour for X missed meal breaks

***Missed Rest Breaks***

$X = $X per hour for X rest breaks

***Labor Code § 2802 Failure to Reimburse***

$X = Personal [Device Name] use($50 each Device, per Month)

$X = XX miles at 67 cents per mile

$X = OTHER EXPENSES

***Attorney fees and costs***

$X (Labor Violations Only = $10,000; less than $100,000 = $5-8,000; over $100,000 = $10,000)

***Punitive Damages, to be determined***

# **TOTAL: $XXX,XXX.00**

# **Conclusion**

[MEDIATION: IF APPLICABLE]: At this point in the case, in an effort to resolve the matter before entering into costly and time-consuming litigation, {{ honerif\_ics}}.{{ client\_full\_name }} has authorized our office to propose that both parties engage in a half-day mediation. The mediators I typically work with have a 90% success rate in settling cases like this, which can save both sides considerable resources that would otherwise be spent on litigation. I believe it would be more cost-effective for the Defendant to address its liability before the trial preparation and depositions begin. In fact, accumulating defense costs may encourage settlement discussions sooner rather than later.

As liability becomes clearer and witness testimony solidifies, the value of this case will increase significantly, along with attorneys' fees and the potential for larger settlement demands. Before this case escalates into full litigation, please let me know by **{{ three\_weeks\_later }}** whether you are interested in scheduling a half-day mediation with a neutral third-party mediator.

{OR}

SETTLEMENT [IF DAMAGES AMOUNT IS LESS THAN $200,000.00]: At this stage of the case, and in an effort to reach a resolution before engaging in costly and time-consuming litigation,{{ honerif\_ics}}.{{ client\_full\_name }} has authorized our office to extend a settlement offer of **$XXX.00** to resolve their claims. As liability becomes clearer and witness testimony is further established, the value of this case will undoubtedly rise, leading to increased demands, along with accumulating attorneys' fees.

If we do not receive a serious settlement proposal from your office by **{{ three\_weeks\_later }}**, this offer will be permanently withdrawn.

(BOTH - IF DAMAGES ARE $200,000.00 OR HIGHER)

At this point in the case, in an effort to resolve the matter before entering into costly and time-consuming litigation, {{ honerif\_ics}}.{{ client\_full\_name }}has authorized our office to propose that both parties engage in a half-day mediation. The mediators I typically work with have a 90% success rate in settling cases like this, which can save both sides considerable resources that would otherwise be spent on litigation. I believe it would be more cost-effective for the Defendant to address its liability before the trial preparation and depositions begin. In fact, accumulating defense costs may encourage settlement discussions sooner rather than later.

Alternatively, {{ honerif\_ics}}.{{ client\_full\_name }} has authorized our office to offer the settlement of her claims for **a one-time payment of $XXXX**.

As liability becomes clearer and witness testimony solidifies, the value of this case will increase significantly, along with attorneys' fees and the potential for larger settlement demands. Before this case escalates into full litigation, please let me know by **{{ three\_weeks\_later }}** whether you are interested in scheduling a half-day mediation with a neutral third-party mediator or informal negotiations.

**Evidence Preservation & Demand for Employment File**

The remainder of this letter is intended to inform you of the following legal obligations that Defendant is required to comply with: **(1) evidence preservation; (2) production of our client’s employee records; and (3) notice of lien.**

1. **Evidence Preservation**

Given pending litigation, this letter serves to remind you of your obligation under California law to preserve evidence and instructs you to adhere to those requirements.

Under discovery rules, Defendant has a duty to preserve any potentially relevant evidence when litigation is reasonably anticipated. Accordingly, **{{ oc\_defendant\_name }}**

is required to preserve all documents and materials related to **{{ client\_full\_name }}**

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This obligation extends to, but is not limited to, all internet search histories, browsing data, active and/or deleted electronic media, and any data stored on electronic devices such as computers, hard drives, removable media (e.g., USB drives), and any other devices or equipment used by Defendant or its agents to produce, store, or access data related to Plaintiff and Defendant. This includes all hard drives, directories, files (including data in the Recovery/Recycle Bin), internet histories, data files, servers, logs, audit trails, backup software, encryption software, and access control records. All data, devices, and equipment must be preserved to ensure the retention of computer evidence and to protect against deletion, alteration, or corruption.

Because electronically stored information is easily altered, deleted, or corrupted, any destruction of such data may result in suspicion of spoliation of evidence, potentially leading to monetary damages or "adverse inference" instructions to a jury. Defendant must therefore preserve all relevant materials related to Plaintiff, including, but not limited to, personnel files, employee handbooks, time and payroll records, and any documentation related to Plaintiff’s employment. Additionally, any communication or documentation regarding meal and rest breaks, time policies, or Plaintiff’s termination, including emails, video footage, or text messages, must be preserved.

Plaintiff reserves the right to seek all available remedies, including damages and evidentiary and monetary sanctions, should Defendant fail to take steps to preserve such information.

1. **Demand for Employment File**

Time and Pay Records

Labor Code § 226 and Wage Order § 7 require that employers keep the following information on file for each employee for a minimum of three years: the employee's dates of employment; when the employee begins, and ends, each work period (including meal periods and split shift intervals); the employee's hourly rates and the corresponding number of hours worked by the employee at each hourly rate; total hours worked by the employee; all deductions; gross wages earned; net wages earned.

Under Labor Code § 226, employers must provide former employees with access to these records "as soon as practicable," but no later than 21 days after a request. Failure to do so entitles the employee to a $750 penalty.

Personnel Records

Labor Code § 1198.5 grants current and former employees, as well as their representatives, the right to inspect and receive copies of their personnel files, and Section 432 requires employers to furnish copies of all signed employment records. Employers must make personnel files available within a "reasonable" timeframe, but no later than 30 days from receiving a written request. Failure to comply also subjects the employer to a $750 penalty.

Pursuant to our client’s signed Authorization (attached), please provide the complete employment and payroll files within 30 days of receiving this letter. These documents include all employment, personnel, payroll, and time records, as well as any other documents related to our client that are in your possession. Please be aware that failure to comply with this request may result in penalties under the Labor Code.  We look forward to these full contents no later than the statutory deadlines as set forth above.

1. **Notice of Lien**

Lastly, this letter serves to notify you that our firm retains a lien for attorneys' fees and costs in this matter. Therefore, our firm must be included in any settlement discussions, and any settlement or judgment payments must list our firm as a payee. Failure to do so may result in further legal action due to this lien.

I look forward to receiving the requested documents promptly. Please reach out if you have any questions or wish to discuss this matter further. **Our phone number is (818) 900-6255 and** **my email is hassanhalawi@legalcorner.com.**

Sincerely,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Hassan Halawi, Esq.

**LEGAL CORNER LAW OFFICE**