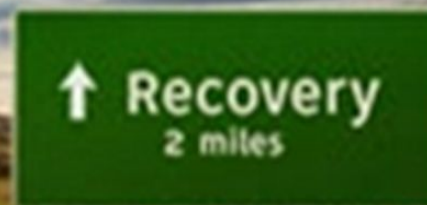


# Employment Law Issues In Addiction Treatment



Presented by:

Zachary Rothenberg  
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# *But first, a few disclaimers . . .*

- General discussion, not specific legal advice
- No attorney-client relationship
- Seek legal counsel in applicable jurisdiction



# Roadmap



- The Employee Interview & Hiring Process
- The Nature of the Working Relationship
- Policy, Procedure & Notification Obligations
- Employment Discrimination
- Harassment
- Wage & Hour Obligations
- Employee Discipline and Personnel Files
- Termination
- Post-Termination Pitfalls and Issues

# *Q: May I conduct background checks on job applicants?*

- Yes, but... there are limitations
  - Employers must be familiar with the requirements of the Federal Fair Credit Reporting Act (FCRA), the California Investigative Consumer Reporting Agencies Act (ICRAA), and the California Consumer Credit Reporting Agencies Act (CCRAA).
  - Background checks should be conducted uniformly.
  - Employers cannot require that Employees pay costs of pre-employment drug screening or medical or physical exams.





# May I refuse to hire an applicant if he/she has been arrested? Convicted?

Sometimes. But generally *not until a conditional offer of employment has been made.*

- **“Ban-the-Box” law:**
  - No pre-offer inquiry into conviction history
  - No consideration of most misdemeanors and distant felonies
  - Prior conviction can support denial of employment only where it has “direct and adverse relationship” to job
- **“Fair Chance Initiative for Hiring” (LA only)**
- **Purpose:**
  - Individual assessment
  - Face-to-face consideration



# May I ask a prospective employee about his/her salary history?



- Employers are prohibited from seeking salary history information from job applicants.
- Further, if requested by a potential employee, the employer must provide candidate a “pay scale” for the position being sought.
- Candidates may *voluntarily* disclose prior salary, but the new law reaffirms prior law prohibiting use of salary history to justify pay disparity.

# *Can I order a credit report?*

Labor Code section 1024.5 limits employers' right to order credit checks, to certain positions:

- A “managerial position”
- A position that affords regular access to bank or credit card info, social security numbers **and** dates of both;
- A position where the individual is or will be a signatory on a bank or credit card account or authorized to enter into financial contracts on the employer's behalf
- A position that affords access to confidential/proprietary info
- A position that affords regular access to employer/s customer's, or client's cash totaling at least \$10,000

Employer must notify individual in writing that credit report is being ordered, and why.

# *May I research a prospective employee using social media, etc.?*



Yes, but...

- Be mindful of aforementioned “ban the box” ordinances.
  - For example, Los Angeles’s ordinance prohibits “direct and indirect” activity to gather criminal history on an applicant using any form of communication. This could include internet searches.
  - Also beware protected categories (e.g. age, race, sexual orientation, transgender status)



*Can I test employees for drugs?  
What are permissible drug-testing  
policies?*



# *What's the difference between an "employee" and an "independent contractor"?*

- “**Misclassification**” is a term used for employers who improperly label employees as independent contractors to evade certain employer obligations and tax consequences.
- Historically, independent contractors are considered self-employed, while employees are subject to the employer’s **control** over the **“manner and means”** by which the worker performed the work.
  - Control over: hours, location, dress, materials, etc.
  - Also considered factors like level of skill required to perform work

# *But see, Dynamex Operations, West v. Superior Ct. & AB5/AB2257*

- The “ABC Test” holds that a worker is an independent contractor only where he/she is **all** of the following:
  - (A) free from control & direction
    - Similar to historic control-based test
  - (B) performs work outside business’s usual work
    - Work must be ancillary to employer’s “usual course of business”
  - (C) customarily engaged in independent business providing same services as those being provided
    - Lack of “exclusivity” agreement alone insufficient
    - Evidence of “independent decision to go into business for himself or herself”
      - Incorporation; independently licensed; public advertising

# Why does this distinction matter?



- Taxes and withholding
  - Income tax
  - Social Security
  - Medicare, etc.
- Employer “wage and hour” obligations for certain (non-exempt) employees
  - Minimum wage
  - Overtime
  - Meal Periods and Rest Breaks
  - *And more*

# What is “exempt” vs. “non-exempt”?

- *Is this the same as employee vs. independent contractor?*
  - No!
- *If an employee is salaried, is he/she exempt?*
  - Not necessarily!
- *Then what does it mean to be “exempt”?*
  - Exempt from wage & hour laws (meal and rest breaks, overtime, minimum wage . . .)
- *Ok, so then who is “exempt”?*
  - Various categories of Exempt Employees:
    - (1) primarily engaged in “exempt” work (i.e. exercise discretion and independent judgment) more than fifty percent of the time (e.g., “Managers” and “Administrators”); and
    - (2) earn a minimum monthly salary of no less than double California’s minimum wage for full-time employment



# California salary thresholds

Date	Minimum Wage for Employers with 25 Employees or Less	Minimum Wage for Employers with 26 Employees or More
January 1, 2017	\$10.00/hour	\$10.50/hour
January 1, 2018	\$10.50/hour	\$11.00/hour
January 1, 2019	\$11.00/hour	\$12.00/hour
January 1, 2020	\$12.00/hour	\$13.00/hour
January 1, 2021	\$13.00/hour	\$14.00/hour
January 1, 2022	\$14.00/hour	\$15.00/hour
January 1, 2023	\$15.50/hour	\$15.50/hour

# What are my obligations to “non-exempt” employees?



- Obligations include (but are not limited to) the following:
  - Minimum Wage
  - Overtime (or Double-Time)
  - Meal Periods and Rest Breaks
  - Pay stubs (for all employees) that meet the stringent requirements of California Labor Code Section 226.
  - Reimbursement for business-related expenses (also for all employees)
    - Mileage Business-related travel
    - Tools and equipment
    - Uniforms
    - Cell phones (when employees are required to use personal cell phones for work)

# *What are my meal period obligations?*

- A duty-free, 30-minute (unpaid) meal period must be provided no later than the employee's fifth hour of work.

Time Worked	Hour
8:00 a.m. to 9:00 a.m.	1st hour
9:00 a.m. to 10:00 a.m.	2nd hour
10:00 a.m. to 11:00 a.m.	3rd hour
11:00 a.m. to 12:00 p.m.	4th hour
12:00 p.m. to 1:00 p.m.	5th hour (break must be before the end of the 5th hour, i.e. 12:59 p.m.)



# *What are my rest break obligations?*

- Separate from the meal periods, 10 minutes of (paid) rest must be authorized and permitted for every four (4) hours of work as follows:

Hours Worked	Number of 10 Minute Rest Breaks
0 to 3.5 hours	0
3.5 to 6 hours	1
6 to 10 hours	2
10 to 14 hours	3

# *What else do I need to know about meal periods and rest breaks?*

- *Are meal periods and rest breaks paid?*
  - Meal periods are generally unpaid; rest breaks are paid
- *Must employers **require** non-exempt employees to take meal periods and rest breaks, or just “**provide**” them?*
  - No. Employers just have to give employees the opportunity to take breaks. (Though you may have to pay for it!)
- *Can employees do **any** work on their breaks?*
  - No. Cannot be required to carry cell phone, pager, etc.
- *What if there is an employee working completely alone?*
  - There is an exception for “on duty” meal periods, but only in limited circumstances where the nature of the job requires it. (e.g., only security guard on-site) But must agree in writing and must be paid.
- *What if I don’t provide breaks?*
  - “Premium pay” of an hour per day (for a missed meal **or** rest break)



# Private Attorney General Act

- What is “PAGA” and why should I care?
  - Bounty Statute
  - Civil Penalties
  - Arbitration?
  - Rhymes with Gaga



# *Am I required to give employees vacation/paid time off (“PTO”)?*



- No.
- However, if employer does provide vacation/PTO, this triggers certain wage obligations.
- Further, it is a best practice to separate this vacation/PTO from the *required* paid sick days.



# *Must I provide sick days to employees? If so, how many days/hours per year?*

Employers must provide paid sick days to employees who work 30 or more days within a year, via one of two methods:

- **Accrual:**
  - At the rate of not less than one hour per every 30 hours worked.
- **Upfront Award:**
  - *This may be the easier method to document.*



*Do I need to provide non-exempt employees with a break room?*





# Break Time

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# *What are “protected classes” in the employment context?*

These are groups specifically protected from employment discrimination. California has more “protected classes” than any other state:

The current list of protected categories under California’s FEHA includes 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. See Cal. Gov’t Code § 12940(a).

# *What is Employment Discrimination?*

- Unfavorable treatment in the hiring, discharge, promotion, referral or other facets of employment based on color, race, religion, sex, gender, gender identity, nationality, age, disability, etc.
- Federal anti-discrimination laws:
  - Title VII of the Civil Rights Act of 1964 (15+ employees)
  - Americans with Disabilities Act
  - Age Discrimination in Employment Act
- California anti-discrimination laws:
  - Fair Employment and Housing Act (FEHA) (5+ employees)
  - Medical leave claims under Cal. Family Rights Act

# *Employment Discrimination*

## *(Cnt'd)*

- *What must an employee show to prove a claim of discrimination?*
  - Membership in a protected class
  - Discriminatory intent
  - Adverse employment action (termination, demotion, passed over for promotion, etc.)
  - Causal link between discriminatory intent and adverse action
  - damages
- *What are remedies for discrimination/wrongful term?*
  - *Lost past wages*
  - *Lost future wages*
  - *Emotional distress*
  - *Punitive damages*
  - *Attorney's Fees*

# *Do I need a formal, written anti-harassment policy?*

Yes; unless the employer has fewer than five employees.

The Fair Employment and Housing Act (FEHA), generally requires employers to “take all reasonable steps to prevent harassment from occurring.”

Effective April 2016, employers must have a written policy satisfying specific requirements (e.g. lists all protected classes, creates a complaint process, guarantees fair and timely investigation, includes confidentiality provisions, designates a company representative, safeguards against retaliation, etc.)

# *What are the sexual harassment training requirements for managers?*

Since 2004, California has required that employers with 50 or more employees provide biennial and continual sexual harassment prevention training. Recent regulations impose *new* training and record-keeping requirements for those employers.

- The required interactive training may include webinars, etc. and should include questions to assess learning.
- A “trainer” should be an attorney with sufficient employment law background, an HR professional, and/or certain professors/instructors.
- Frequency: Two hours every two years, subject to certain tracking requirements.
- See Cal. Code Regs. tit. 2, § 11024(a)(2).



# *How do I respond to a claim of harassment?*

- Call your lawyer!
- Act swiftly, decisively, and transparently. This helps both in the short-term and in the long-term.
- Establish policies & procedures. Have a plan!
- Proactive interim solutions
- Investigate using neutral parties (whether external or internal).
- Tie findings to company policy, not legal concepts
- Re-think company policies if necessary
- Don't retaliate!
- Call your insurer.
- Damage control (internally and externally)
- Document! Document! Document!

# *What is a claim for “Retaliation”?*

- **The most common** type of discrimination claim, making up 44.5% of all EEOC claims.
- Punishment for “protected activities” including:
  - reporting illegal conduct;
  - Reporting fraud/initiating “whistle-blower” action;
  - Filing a wage claim;
  - Filing discrimination lawsuit;
  - Reporting harassment;
  - Participating in workplace investigations
- Retaliatory acts include: Termination, Demotion, Passing over for promotion, Etc.

# *What posters/notices must I display in the workplace?*

The Department of Industrial Relations (DIR) requires all employers to post the following in an area frequented by employees where it can be easily read during the workday. These posters can be downloaded from the Internet.

- Wage Order(s) (depending on industry)
- State minimum wage law
- Paid sick leave
- Payday notice
- Safety and health protection on the job
- Emergency phone numbers
- Notice to employees—injuries caused by work
- Notice of workers' compensation carrier and coverage
- Whistleblower protections
- No smoking signage
- Log and summary of occupational injuries and illnesses
- See <https://www.dir.ca.gov/FAQworkplacepostings3.htm>

# Posters, continued

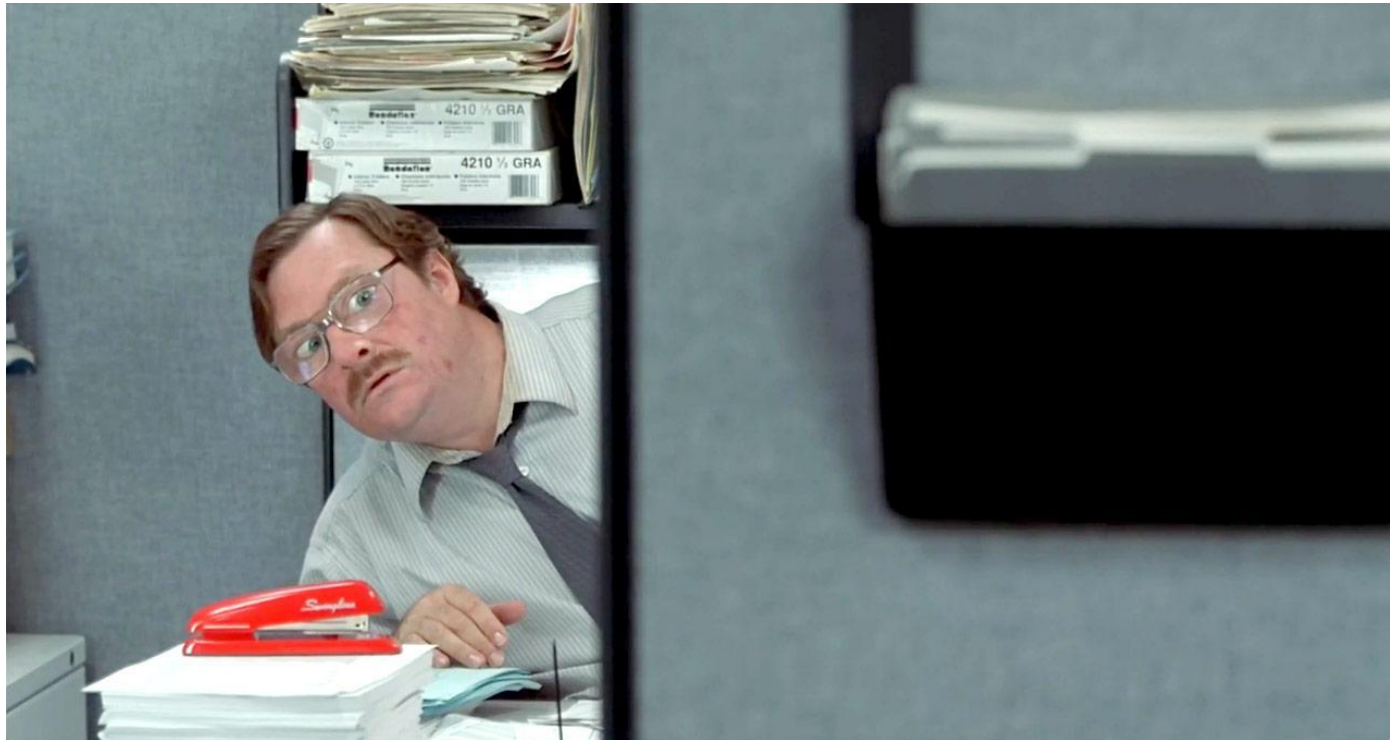
- Requirements by other state and federal agencies:
  - Discrimination and Harassment in Employment are Prohibited by Law (the latest information and posters can be obtained from DFEH)
  - Pregnancy disability leave (employers of five to 49 employees)
  - Family care and medical leave (CFRA leave) *and* pregnancy disability leave (employers with 50 or more employees and all public agencies)
  - Notice to employees (potential unemployment insurance, disability insurance and paid family leave insurance benefits)
  - Notice to employees: unemployment insurance benefits
  - Notice to employees: time off to vote
  - Equal Employment Opportunity; includes Americans with Disabilities Act (ADA) poster
  - Minimum wage (Federal Fair Labor Standards Act)
  - Notice: Employee Polygraph Protection Act (Federal Department of Labor)
  - Family and Medical Leave Act (Federal FMLA) (employers with 50 or more employees and all public agencies)

# *How should I document a bad employee?*



- Consistently, and not just right before termination.
- Even small infractions add up to support your justification for the adverse employment action
- Establish a policy for what gets written-up and what doesn't (treat everyone the same)
- When in doubt, document!
  - Oral warnings
  - Unofficial warnings
- Employee doesn't need to sign, but it's a good idea to document the "coaching"
- Employers should maintain personnel files for a minimum of three years after termination
- "Progressive discipline policy"???

*What's the difference between a  
“layoff” and a “termination”?*





*How should I terminate? (By whom? What should I say? When?)*



# *When is severance pay appropriate?*

- Severance pay is not required.
- But it might be a good idea if the employee is a member of a “protected class.”



- Again: 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. See Cal. Gov't Code § 12940(a).

# *When must I issue the final paycheck?*

- In most cases: immediately!
- This is especially true if the employer terminates employee.
- However, if the employee quits, the Labor Code generally gives employers 72 hours following employee's notice to employer.
- In addition to regular compensation, the employee should be reimbursed for accrued and outstanding business expenses, unused vacation/PTO accrued pursuant to company policy, and any other benefits owed to employee
  - Note that Labor Code Section 203 provides for “waiting time penalties” for failure to pay final (and other) wages on time; these could add up and be very costly
- Pop quiz: Is employer required to compensate employee for unused sick days?

# *What should I do if I receive an EEOC charge?*

- “Notice of Charge”- Notice that a complaint has been filed by a current or former employee with the EEOC
- Check the Notice of Charge for deadlines
- Retain an attorney
- EEOC May Request:
  - Position Statement
  - Request for Information
  - On-Site Visit
  - Witness Interviews
- Mediation Option
- No Retaliation



# *What should I do if I receive an EEOC charge? (cont.)*

- The EEOC has completed its Investigation:
  - Dismissal and Notice of Rights
  - Letter of Determination
  - \*Remember that the employee has a right to sue if the EEOC does not pursue the complaint against the employer.
- Purpose: low-cost opportunity to resolve the claim

# *Can employee be prohibited from working for competitor? Can a contract include non-compete and/or non-solicitation pro*



Generally, no – not under California law. California will not enforce a non-compete agreement against a former employee.

- Subject to a few exceptions, “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” Cal. Bus. & Prof. Code § 16600.
- Including non-compete and/or non-solicitation provisions in California could potentially invalidate an entire agreement.
- But former employees *can* be barred from divulging “trade secrets” (see next slide).

# *What if a former employee poaches clients and/or steals trade secrets?*



California has adopted the Uniform Trade Secrets Act.

A “trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Cal. Civ. Code § 3426.1(d)



# *What should I say if another employer contacts me as a job reference?*



Nothing prohibits an honest review; but a misrepresentation could result in a defamation action (i.e. beware false factual misstatements).

Sometimes the severance agreement includes mutual non-disparagement clause and/or states that employer will only confirm the dates that an employee worked there.

# *What if a an employee requests his/her personnel records?*

“Every current and former employee, or his or her representative, has the right to inspect and receive a copy of the personnel records that the employer maintains relating to the employee’s performance or to any grievance concerning the employee.” (Lab. Code § 1198.5)

*See also, Labor Code 432, 226*



# *Can I get insurance to cover any of these issues?*

- General Liability policies usually specifically **exclude** employment practices from coverage.
- Employment Practices Liability Insurance (“EPLI”) provides coverage to employers against claims made by employees alleging: discrimination, wrongful termination, harassment, retaliation, etc.
- EPLI coverage generally covers owners/spouses in sole proprietorships; all partners/members in partnerships or JVs; all members/managers in LLCs; all officers/execs/directors in corps.
- “Wage & hour” claims were historically excluded, but some insurers are adding modest coverage for defending (but not indemnifying) such claims.
- Willful acts are generally excluded from EPLI coverage.

# *Workers' Compensation*

- Workers' compensation benefits employees when they suffer occupational injury and illness. Workers' compensation insurance is part of employers' cost of doing business. An employer cannot ask employees to help pay the insurance premium.
- Bottom Line: Get your policy in place and stay current!

# Questions?

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