EMPLOYEE STATUS
EMPLOYEE STATUS

- **Employee**
  - Employer has the right to control the work (eg. plumber working for a plumbing company)

- **Independent Contractor**
  - Individual contracts to perform a particular job (eg. plumber advertises services and is hired by a computer company to fix the sink)

- **Factors to Consider**
  - Control of method and means of work
  - Amount of supervision
  - Is training provided?
  - Is work integrated into business?
  - Can person hire someone else to do the work?
Other Factors to Consider

- Is relationship temporary or continuing?
- Does employer set hours of work?
- Is individual paid by the task or by the hour?
- May individual work for other firms?
- Does individual have a separate business from the employer’s business or does the individual offer no services separately from the employer?
- May employer terminate the individual at will?
EMPLOYEE STATUS cont.

- Independent Contactors are not covered by most statutes including the CA Labor Code, the federal FLSA, SDI, Workers’ Comp, unemployment insurance code, federal and state anti-discrimination laws, OSHA, or Social Security.

- Exceptions: Under Title VII, a business may be liable for discriminatory acts against an independent contractor that interfere with employment opportunities of the individual. Gomez v. Alexian Brothers Hospital, 698 F.2d 1019 (9th Cir. 1983). FEHA protects independent contractors from harassment. Cal. Gov’t. Code Section 12940(j).

- Independent Contactors receive a Form 1099.

- Penalties for willful misclassification ($5,000 - $15,00 per violation and $10,000 to $25,000 if pattern (CA Labor Code).
EMPLOYEE STATUS cont.

Temporary or Leased Employees

- Temporary or Leased Employees are covered by all employment laws. Exception: FMLA/CFRA requires that an employee work 1 year and at least 1250 hours (approximately 25 hours per week) in the prior year.

- Temporary/leased employees are normally considered jointly employed by the leasing firm and the recipient employer.

- Seasonal workers and day laborers are covered by most employment laws.
WRONGFUL DISCHARGE
Presumption that employees are employed “at will.” California Labor Code Section 2922

Employees may be discharged at any time for any reason or no reason but not for an unlawful reason

Evaluate whether there is an exception to the “at will” presumption. Exceptions are as follows:

- Express contracts
- Implied in fact contracts
- Wrongful termination in violation of public policy
- Statutory claims such as discrimination
CONTRACT EXCEPTIONS TO “AT WILL” PRESUMPTION

- **Express Contracts** – Written contracts requiring “good cause” for termination eg. union contracts


- **Provision in employee handbook** eg. progressive discipline procedures (eg. two tardies in 6 months = written reprimand; three tardies = suspension; four tardies = termination)

- **Exception to Implied Contract**: Prominent “at will” provision in handbook or provision in separate document employee signs
EXCEPTIONS TO “AT WILL” PRESUMPTION

- Statutory Protections
  - Employment Discrimination Statutes (eg. Title VII, FEHA)
  - CA Labor Code Whistleblower statutes – CA Labor Code Section 1102.5(b) – employer may not retaliate against an employee who discloses information to a government agency (must have reasonable belief it is unlawful)(retaliation claim at Labor Commission or file suit)
  - ERISA 510 – no interference with attainment of right under an employee benefit plan eg. termination when pension about to vest or employee needs kidney transplant (only back pay, reinstatement, attorney’s fees)
Wrongful Termination in Violation of Public Policy (Tameny Claim)

- A public policy supported by a statutory or constitutional provision or an administrative regulation that inures to the public interest – Green v. Ralee Engineering Co., (1998) 19 Cal. 4th 66.

- An adverse employment action such as a termination

- Damages resulting from the adverse action

- Exception: Employee who reports theft is not reporting a public policy violation because it benefits only the company. American Computer Corporation v. Superior Court, (1998) 213 Cal.App. 3d 665. (If it is a violation of Sarbanes Oxley, then there would likely be a Tameny claim).
Wrongful Termination in Violation of Public Policy (Tameny claim)

EXAMPLES

- Express prohibition by statute, the Constitution, or an administrative regulation e.g. Labor Code 230 (jury service)

- Refusal to engage in unlawful activity – public policy in CA Labor Code 1102.5(c); (Tameny v. Atlantic Richfield, (1980) 27 Cal.3d 167 (activity must be unlawful))

- Whistleblower – reporting unlawful activity to government agency or supervisor; public policy in 1102.5(b) or public policy in another statute, constitutional provision, or regulation (must have good faith belief that conduct is unlawful)
WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY (TAMENY CLAIM)

HYPOTHETICAL

Paula Plaintiff worked for Delta Company for 5 years. Her supervisor asked her to machine a chunk of asbestos. She called OSHA. Two weeks after the employer received the OSHA complaint, Paula was fired. She had excellent performance evaluations.

Paula could file a claim with the Labor Commission for violation of Labor Code Section 6310 et seq. (health & safety) and 1102.5(b) (retaliation for complaining to a gov’t. agency). The statute of limitation is 6 months. Alternatively, she could file a tort for wrongful termination in violation of public policy for the public policy in the statutes. The statute of limitations is 2 years.
Breach of “good cause” contract (express or implied) – contract damages (back/front pay, reinstatement)

Statutory violations – damages defined by statute

Wrongful termination in violation of public policy – tort damages including emotional distress and punitive damages; no attorney’s fees
STATUTE OF LIMITATIONS

- **Contract claims** – Written contract – 4 years; Oral/implied contract – 2 years.

- **Statutory Violations** – Time limit defined by statute eg. 6 months to file retaliation claim with Labor Commission

- **Wrongful Termination in Violation of Public Policy** – 2 year statute
CONSTRUCTIVE DISCHARGE

- An employee must plead and prove that the employer either intentionally or knowingly permitted working conditions that were so intolerable that a reasonable person in the employee’s position would be compelled to resign. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238

- No separate cause of action

- Constructive discharge may be claimed in place of actionable discharge in wrongful termination in violation of public policy claims or statutory violations eg. anti-discrimination claims

- Eg. Employee quits because of supervisor’s use of “n” word, picture of noose, or rape construed as constructive discharge.
WAGE & HOUR LAW
WAGE & HOUR LAW

SOURCES OF LAW

- **Federal** – Fair Labor Standards Act (FLSA)

- **California**
  - California Labor Code
  - Industry & Occupational Wage Orders (from the Industrial Welfare Commission)
  - California case law
  - Division of Labor Standards Enforcement (DLSE or Labor Commission) Opinion Letters and Policies and Interpretation Manuals
  - See also Local Ordinances – San Jose Minimum Wage Law effective March 11, 2013 - $10.00 per hour; S.F. Minimum Wage Ordinance - $10.24 per hour
WHITE COLLAR EXEMPTIONS IN CA

- **Salary Basis Test** – Employee must be paid in the form of a salary. The salary must be twice the minimum wage **AND**

- **Duties Test**
  - **Professional Exemption** – licensed in law (not paralegals); medicine (some nurses excluded), dentistry, optometry, architecture, engineering, teaching, or accounting & must exercise discretion and independent judgment and perform these duties at least 50% of the time
  - **Executive Exemption** – manage 2 or more employees; real input in hiring and firing; perform these duties at least 50% of the time (eg. Burger King manager who flips burgers over 50% of the time is nonexempt)
  - **Administrative Exemption** – high level administrator whose work is directly related to management policy or general business operations; performs this work over 50% of the time
OTHER EXEMPTIONS

- Close Relatives
- Outside Sales Persons
- Personal Attendants – (IWC Wage Order 15) - if personal attendant performs tasks other than feeding, clothing, and supervising the client over 20% of weekly work time, then personal attendant is not exempt from overtime rules; housework that is not confined only to the client’s personal space might also qualify the employee for overtime
- Truck drivers – special rules
COMPENSABILITY TIME

- The time “under the control” of the employer or the time when “suffered or permitted” to work (whether or not required to do so) IWC Wages Orders 1-17, sec. 2

- Reporting Time – pay of ½ regularly scheduled day’s work but not less than 2 hours or more than 4 hours pay (exception – sent home because of Act of God)

- Split Shift – additional one hour pay at minimum wage

- No less than minimum wage whether pay is measured by time, piece rate, or commission

- Tips don’t count as payment toward minimum wage
**MINIMUM WAGE**

- **Federal** - $7.25 per hour - Federal Minimum Wage Act of 2007
- **California** - $8.00 per hour – CA IWC Minimum Wage Order – MW-2007
- **San Jose** - $10.00 per hour as of March 11, 2013 (may file complaint with Office of Equality Assurance, SMWO@sanjoseca.gov or (408) 535-8430 or file suit)
- For claims before the Labor Commission or in court for failure to pay CA minimum wage, **liquidated damages** are payable on amount of minimum wage (CA Labor Code Section 1194. 2); liquidated damages on all wages owed are payable under the FLSA (29 U.S.C. 216(b)).
OVERTIME

- 1.5 times regular rate for hours in excess of 8 hours per day and 40 regular hours in a week and the first 8 hours on the seventh consecutive work day in a work week

- 2.0 times regular rate for hours in excess of 12 hours in a work day and for hours in excess of 8 hours on the seventh consecutive work day

- If not otherwise designated, the work week is Sunday to Sunday

- No premium pay is required for work performed on holidays
## Calculating Overtime Pay

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**MEAL & REST PERIODS**

- **Labor Code Sections 226.7 and 510; Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004**

- **Meal Periods** – Employer must provide 30 minute unpaid meal period every 5 hours of work (2 meal periods for 10 hrs.), but employee can consent to waive meal period if shift 6 hrs. or less; employer must relieve worker of all work.

- **Rest Breaks** – Employer must authorize or permit 10 minute rest periods if work between 3.5 and 5 hours (2 rest periods if work between 6 and 10 hours, and 3 rest periods if work between 10 and 14 hrs.)

- **Remedy** – 1 hr. of pay at regular rate for each day of violation capped at 1 hr. for meals & 1 hr. for rest periods (total cap of 2 hrs. per day for missed meal and rest periods for up to 3 years)
PAYMENT OF WAGES & NOTICES

- Most employees must be paid twice a month
- Payment must be by cash or check; pay stub with certain information including hours worked and amount earned
- At time of hire, all nonexempt employees must receive written notice of rate of pay, pay day, name of employer, address, and phone number of employer and Workers’ Comp carrier
- All employees paid on commission must receive a written contract at time of hire specifying method of payment of commission
- Penalty for bounced checks is one day’s pay for 30 days (CA Labor Code Section 203.1)
REIMBURSEMENTS & DEDUCTIONS

- Employees should be reimbursed for all work related expenses (Cal. Labor Code Section 2802)

- Unlawful to deduct for loss or to collect back wages paid to employee

EXCEPTIONS:

- Required by law eg. wage garnishments (CA Code of Civil Procedure Sections 706.050 and 706.122)

- Requested by employee for employee’s benefit

- Loss due to dishonest or willful act or to gross negligence
FINAL PAY and ACCRUED VACATION (LABOR CODE Sections 202 and 203)

- If discharged or laid off, final pay and accrued vacation is due at time of discharge.
- If employee quits with no notice, final pay and accrued vacation is due within 72 hours; due on last day if employee gives 72 hours’ notice.
- If all wages due are not paid, there are waiting time penalties of one day of wages for each calendar day employer willfully failed to provide final wages (with a cap of 30 days).
- Willfulness only requires knowledge and not malice.
STATUTE OF LIMITATIONS

- **Statutory Claims** – 3 years (includes minimum wage, overtime, meal and rest period penalties, waiting time penalties)

- **Contract Claims** – Written - 4 years; Oral - 2 years

- If employee sues for wage and hour violations, the statute of limitations is 4 years (*Business and Professions Code Section 17200*)

- If employee sues for Labor Code violations, he or she may bring a **PAGA** (Private Attorney General Act) claim. (*Cal. Labor Code Section 2698 et seq.*) The statute of limitations is 1 year.
HOW TO PROCEED IF YOU DISCOVER VIOLATIONS

- Request payroll records (Cal. Labor Code Section 226(b)) and personnel file (Cal. Labor Code Section 1198.5)


- Send demand letter

- May file a claim with the Labor Commission or go to Small Claims Court if amount is under $10,000 or go to court

- Beware of retaliation (Labor Code 98.6 and 1102.5); may file retaliation claims with Labor Commission (6 months) or court (*Tameny* claim – 2 years)
EMPLOYMENT DISCRIMINATION
EMPLOYMENT DISCRIMINATION

FEDERAL LAW

- **Title VII** (race, color, sex (includes pregnancy and gender stereotyping), religion, national origin)
- **ADEA** (age – over 40)
- **ADA** (disability)
- **Equal Pay Act (EPA)** (gender based pay differences)
- **Genetic Information Non-Discrimination Act (GINA)**

- Must exhaust administrative remedies by filing claim at EEOC within 300 days for Title VII, ADEA, and ADA. You do not have to file with the EEOC before filing suit under the EPA
STATE LAW

- Fair Employment and Housing Act (FEHA) (Cal. Gov’t. Code 12940 et seq. covers gender (includes pregnancy and gender stereotyping), disability, age (over 40), race, religion, national origin, medical condition (cancer or genetic conditions), sexual orientation

- Stronger protections under state law

- Must exhaust administrative remedies by filing at the DFEH (Department of Fair Employment and Housing) within 365 days.
**Covered Employers & Employees**

**Covered Employers**
- Government and private employers
- Unions
- Temp Agencies

**Covered Employees**
- An employee
- A temporary worker
- A job applicant
- An undocumented worker
MINIMUM SIZE REQUIRED

- **Title VII, ADA**: 15 employees
- **ADEA**: 20 employees
- **FEHA**: 5 employees (1 employee for harassment)
Disparate Treatment

*McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*

- Shifting burdens
- Employee must prove prima facie case – 1) member of protected class; 2) suffered adverse employment action; 3) performed at a level that met employer’s legitimate expectations; and 4) position filled by similarly qualified applicant outside the protected class or continued to look
- Employer must show legitimate, non-discriminatory reason
- Employee must show the employer’s reason was a “pretext”
Disparate Impact

- Plaintiff need not show intent but must show that the employment practice has a disproportionate impact on a protected class.

- Employer must show the practice is required by business necessity.


- Example: Height requirement has disparate impact on women.
RETAIATION

- Separate Claim from Discrimination
- Plaintiff Need Not Be in a Protected Class
- Prima Facie Case (employee’s burden of proof)
  - Protected activity (reasonable belief)
  - Adverse employment action
  - Causal link (temporal proximity is important – generally within 6 months)
- Business reason (employer’s burden of production)
- Pretext (employee’s burden of proof)
RELIGIOUS DISCRIMINATION

- Less favorable treatment due to religious belief or non-belief
- Denial of reasonable accommodation for religious practices unless undue hardship eg. voluntary swaps, flexible scheduling, lateral transfer, or change of assignment
- Covers persons of all faiths with sincerely held beliefs as well as atheists
- Narrow exception for religious institutions
NATIONAL ORIGIN DISCRIMINATION

- Less favorable treatment due to place of birth, ancestry, or background

- Accent/language - if the language policy has a disproportionate impact on employees based on national origin, employer must show business necessity

- English only rules - Cal. Gov’t Code Section 12951 (policies that prohibit or limit the use of any language must be justified by business necessity, and employer must tell employees when they must observe the restriction); under Title VII – disparate impact but case law is less favorable to employee

- Covers workers regardless of citizenship or work authorization
AGE DISCRIMINATION IN EMPLOYMENT ACT

- Covers individuals age 40 and over
- No upper age limit (minor exceptions)
- All aspects of employment covered
- Prohibits retaliation
- Older Worker Benefit Protection Act (OWBPA) – waiver of rights in releases and severance agreements must contain provision with 21 days to consider agreement (or 45 days if layoff of class of employees), 7 days to rescind after signing, and must inform of right to consult an attorney
DISABILITY DISCRIMINATION

- ADA & FEHA – prohibit discrimination due to disability
- Prohibits discrimination against qualified individual with a disability ("quid")
- Qualified = able to perform the essential functions of the job with or without reasonable accommodation
- Disability = 1. physical or mental impairment that substantially limits a major life activity (ADA) or limits a major life activity (FEHA); or 2. record of such an impairment; or 3. regarded as having such an impairment
Employer must make reasonable accommodation for qualified individual with a disability unless it is an undue hardship.

Accommodations are changes to the work environment that enable the individual to work.

Examples are:
- Job restructuring
- Reassignment of duties
- Flexible leave
- Modified or part-time schedule

Leave may be a reasonable accommodation (even after employee has exhausted FMLA/CFRA leave).
WAGE DISCRIMINATION

EQUAL PAY ACT

- Requires that men and women be given equal pay for substantially equal work (substantially equal skill, effort, and responsibility and performed under similar working conditions)

TITLE VII, FEHA, ADA, & ADEA

- Title VII & FEHA - prohibit wage discrimination due to race, color, religion, sex, or national origin (sexual orientation: FEHA only)
- ADA & FEHA – prohibit wage discrimination based on disability
- ADEA & FEHA – prohibit wage discrimination based on age
SEXUAL HARASSMENT

- **Hostile work environment sexual harassment**
  - Unwanted or unwelcome visual, verbal, or physical conduct based on sex
  - Severe or pervasive
  - Reasonable person in victim’s position
  - Does not have to be directed at person personally

- **Quid Pro Quo sexual harassment**
  - Request for a sexual favor in return for giving an employee an employment-related benefit eg. raise or promotion,
  - May involve a direct or implied threat of retaliation if the employee does not agree to the request eg. sleep with me or you will not be promoted
Anyone found to have unlawfully harassed a co-worker, applicant or contractor is personally liable for the damages caused by the harassment.

If the harasser was a supervisor, the employer is strictly liable for those acts; the employer is vicariously liable for harassment by employees that the employer knew or should have known about.

Employer must take all reasonable steps to prevent harassment (separate cause of action)

Government Code section 12940, subdivision (j).
SEXUAL HARASSMENT UNDER TITLE VII

● If harasser is a supervisor, strict liability for sexual harassment that results in tangible employment action eg. hiring, firing, failure to promote, demotion, undesirable assignment, significant change in benefits, compensation decision or work assignment decision

● If harasser is a supervisor, liability for hostile work environment sexual harassment unless
  – Employer took reasonable care to prevent and promptly correct AND
  – Employee unreasonably failed to use preventive or corrective measures provided by employer, i.e. failed to complain
Co-Worker or Non-Employee Sexual Harassment

- Under Title VII and FEHA if harasser is a co-worker, there is no liability unless employer
  - Knew of the harassment OR
  - Should have known about the harassment AND
  - Failed to take immediate and appropriate corrective action

- Under Title VII and FEHA if harasser is a non-employee, there is no liability unless
  - Employer knew of the harassment OR
  - Employer should have known of the harassment
  - Employer failed to take immediate and appropriate corrective action
  - Employer had some control over the harasser under Title VII (extent of control shall be considered under FEHA)
DEADLINES

- **DFEH** - 365 days to file claim
- **EEOC** – 300 days to file claim
- 1 year from DFEH right to sue to file suit
- 90 days from EEOC right to sue to file suit
LEAVE LAWS
LEAVE LAWS

**Job Protection**
- Family & Medical Leave Act
- California Family Rights Act
- California Pregnancy Disability Leave Law

**Wage Replacement**
- State Disability Insurance or Workers’ Compensation
- Paid Family Leave Act
- Company’s Short Term Disability Plan (in lieu of State Disability Insurance or as a supplement) and/or Company’s Long Term Disability Plan
WHAT DO THE FMLA/CFRA PROVIDE

- Up to **12 weeks** of unpaid leave per year for eligible employees
- 12 weeks may be taken **intermittently** (in 1 hour increments except for bonding which must be in 2 week increments)
- **Job Protection**
- **Continuation of health benefits**
ELIGIBILITY & QUALIFYING REASONS FOR FMLA/CFRA LEAVE

WHO IS ELIGIBLE FOR FMLA/CFRA LEAVE

- Worked for 1 year
- Worked 1250 hours in the prior year (25 hours per week)
- Employer has 50 employees within 75 mile radius

QUALIFYING REASONS

- Your own serious health condition
- Care for family member with serious health condition
- Bond with a newborn child, adopted child, or foster child (within 1 year)
WHAT IS A SERIOUS HEALTH CONDITION

- A condition requiring overnight, in-patient hospital stay
- Incapacity for more then 3 days
- Chronic health condition eg. asthma, migraines
- Terminal/incurable illness eg. terminal cancer
- Multiple treatments eg. chemotherapy for cancer
- Minor illnesses are NOT serious health condition eg. cold
WHO IS FAMILY AND WHAT IS CARE?

- Parents, minor or adult dependent children, and spouses
- Leave taken to care for a registered domestic partner (CFRA not FMLA)
- Caring for is driving to doctor’s appointments, psychological comfort and care, and providing for medical, hygienic, and nutritional needs
- Making arrangements for changes in care
PROTECTIONS UNDER FMLA/CFRA

- Right to return to the same or equivalent job
- Exception for “key” employees
- Exception if job was eliminated for legitimate business reasons (burden is on the employer)
- No retaliation for requesting/taking leave or complaining about violation of the leave laws
- No harassment for taking leave
- No treatment of leave as negative factor in evaluations
- Can’t refuse to promote employee who takes leave
NOTICE REQUIREMENTS

- Foreseeable leave – 30 days notice; if less than 30 days notice employer can require explanation
- Unforeseeable Leave – as soon as practicable
- Need not expressly assert rights under FMLA/CFRA
- Enough information to put employer on notice that leave may qualify under FMLA/CFRA
Employer may require medical certification with date condition began, probable duration, and statement that due to serious health condition employee is temporarily unable to perform essential functions of job.

Employer must request certification in writing, provide notice of FMLA/CFRA rights, and explain consequences of not providing certification.

Allow employee 15 days to comply.

Notify employee if certification is inadequate and give reasonable opportunity to correct it.
PRIVACY REQUIREMENTS OF CFRA

- Employer may not require employee to disclose diagnosis under CFRA because of California’s privacy laws.
- Employer may not demand release of medical records.
- Employer may not request more information than the date condition began, probable duration, and statement that due to serious health condition employee is temporarily unable to perform essential functions of job.
For employee’s own health condition, if an employer has reason to doubt a medical certification, employer may request a second opinion from a doctor of its choice at its expense.

The doctor may not be regularly employed by the employer.

If the employee’s doctor and the second doctor’s opinions conflict, the employer may require a third opinion from a mutually agreed upon doctor at the company’s expense.

The opinion of the third doctor is binding.
COMPENSATION WHILE ON FMLA/CFRA

- FMLA/CFRA is generally unpaid
- Compensation for own serious health condition through SDI, Workers’ Comp or company’s disability plans
- Paid Family Leave Act
- Employer may require or employee may choose use of vacation pay
- Employees may choose or employer may require use of sick pay
- Employers may allow use of sick pay for family care leave or to bond with a new child
FMLA/CFRA ADMINISTRATIVE DEADLINE

● **FMLA**
  - No administrative exhaustion
  - May file with DOL
  - 2 yr. statute of limitations for filing suit
  - 3 yr. statute of limitations if willful violation

● **CFRA**
  - **Must file administrative complaint** with the DFEH
  - Must file claim with the DFEH within 365 days
  - Must file in court within one year of right to sue
FMLA/CFRA REMEDIES

- Injunctive relief & reinstatement
- Declaratory relief
- Compensatory damages
  - Wages and benefits
  - Actual monetary loss (cost of providing care equal to 12 weeks of wages)
  - Emotional distress under CFRA but not under FMLA
- FMLA: Liquidated damages equal to lost compensation or actual monetary loss (unless employer shows good faith)
- Attorney’s Fees
- Interest
PREGNANCY DISABILITY LEAVE ACT

- California law that provides pregnancy disability leave and prohibits discrimination – CA Gov’t. Code Section 12945
- Covers all employers with 5 or more employees
- Provides up to 4 months of job-protected, unpaid leave for medical conditions related to pregnancy or childbirth
- PDL is separate from, and can be taken in addition to, the 12-week bonding leave under the CFRA if CFRA is applicable
- Must be returned to same or comparable job
- Employees are entitled to continued health insurance
Partial wage replacement for up to 52 weeks for non-industrial illness, injury, or disability

Up to 55% of weekly wage, maximum of $1067 per week in 2013

7 day waiting period

For normal birth – 4 weeks before & 6 weeks after

For caesarean birth – 4 weeks before & 8 weeks after

Administered through EDD

Appeal denial to CUIAB within 20 days
PAID FAMILY LEAVE ACT (PFL)

- Covers almost all California workers
- Administered through EDD
- 100% employee funded
- Available to care for a child, spouse, domestic partner, or parent with a serious health condition OR to bond in first year after child is born
- 6 weeks max per year (55% of wages, up to $1067 max per week in 2013)
- 7 day waiting period and employers may require employee to use up to 2 weeks accrued vacation pay
COBRA

- Employee paid continuation of health insurance after termination unless terminated for gross misconduct
- Employer must notify employee of COBRA rights within 44 days of termination
- Must elect COBRA within 60 days of notification & pay premium within 45 days of election (subsequent premiums must be made within 30 days of due date)
- If plan is fully insured, COBRA for 36 months (18 months of COBRA and 18 months of CAL-COBRA); if plan is self-insured, COBRA for 18 months
UNEMPLOYMENT INSURANCE
To be eligible you must have sufficient base period earnings

Unemployment benefits = 26 weeks; can be extended if federal or state declaration of overall economic emergency

Eligible for unemployment if laid off, discharged for reasons other than misconduct, or voluntary quit for good cause

If EDD denies claim, must appeal to CUIAB within 20 calendar days of date EDD mailed the Notice of Determination

If appeal is denied, 20 days to appeal to CUIAB in Sacramento

If appeal is denied, must file writ of mandate within 6 months
RIGHTS OF UNDOCUMENTED WORKERS
RIGHTS OF UNDOCUMENTED WORKERS

**Substantive Rights Are the Same**
- NLRA (but no back pay if fired for union activity – *Hoffman Plastics*)
- FLSA
- California Labor Code
- Title VII, ADA, ADEA, Equal Pay Act
- FEHA
- FMLA/CFRA
- Workers’ Comp
- State Disability Insurance

**Substantive Rights Are Not the Same**
- No Unemployment Insurance
REFERRAL GUIDE
Workers’ Rights Clinics – Legal Aid Society – Employment Law Center
- South Bay Clinic – Katharine & George Alexander Community Law Center, 1030 The Alameda, San Jose, CA 95126 (by appointment only: call (408) 288-7030)
- San Francisco Clinic, Hastings Law School, 200 McAllister Street, S.F. (by appointment only: call (415) 864-8848)
- East Bay Clinic – Neighborhood Justice Center, 3130 Shattuck Avenue, Berkeley, CA (by appointment only: call (415) 864-8848)

Santa Clara County Bar Association Lawyer Referral Service – (408) 971-6822
REFERRAL GUIDE - GOVERNMENT AGENCIES

- **Discrimination, Harassment, & Retaliation Claims**
  - **STATE:** Department of Fair Employment and Housing (DFEH), [http://www.dfeh.ca.gov/](http://www.dfeh.ca.gov/), 39141 Civil Center Drive, Suite 250, Fremont, CA, (510) 789-1085 – Can also bring CFRA claims

- **Wage & Hour Claims & Retaliation Claims**
  - **STATE:** “Labor Commissioner” (Dept. of Industrial Relations, Division of Labor Standards Enforcement (DLSE)), [http://www.dir.ca.gov/dlse/dlse.html](http://www.dir.ca.gov/dlse/dlse.html), 100 Paseo de San Antonio, Suite 120, San Jose, CA 95113, (408) 277-1266
  - **FEDERAL:** Department of Labor, Wage and Hour Division, [http://www.dol.gov/esa/whd/](http://www.dol.gov/esa/whd/), 60 S. Market St., Suite 420, San Jose, CA 95113, 408-291-7730
UNEMPLOYMENT INSURANCE
- Employment Development Department (EDD); (800) 300-5616; Spanish: (866) 3326-8937; http://www.edd.ca.gov/eddhome.htm

APPEAL OF UNEMPLOYMENT INSURANCE CLAIM
- California Unemployment Insurance Appeals Board (CUIAB); http://www.cuiab.ca.gov, 2665 N. 1st Street, Suite 100, San Jose, CA 95134, (408) 232-3036

STATE DISABILITY INSURANCE
- Employment Development Department (EDD) – (800) 480-3287, TTY (800) 561-2441; Spanish: (866) 658-8846; http://www.edd.ca.gov/eddhome.htm

CALIFORNIA PAID FAMILY LEAVE
- Employment Development Department (EDD); http://www.edd.ca.gov, (877) 238-4373; Spanish: (877) 379-3819
WORKERS’ COMPENSATION

- Dept. of Industrial Relations, Division of Workers’ Compensation, Information and Assistance Bureau, [http://www.dir.ca.gov/DWC/](http://www.dir.ca.gov/DWC/), 100 Paseo de San Antonio, Rm. 241, San Jose, CA 95113, (408) 277-1246
- Workers’ Compensation Appeals Board, [http://www.dir.ca/WCAB](http://www.dir.ca/WCAB), 100 Paseo de San Antonio, Rm. 241, San Jose, CA 95113, (408) 277-1246

HEALTH AND SAFETY

- Dept. of Industrial Relations, Divisions of Occupational Safety and Health (Cal.OSHA), [http://www.dir.ca.gov/DOSH/](http://www.dir.ca.gov/DOSH/), 39141 Civil Center, Dr., Suite 210, Fremont, CA 94538, (510) 794-2521
- Retaliation claims must be filed with the “Labor Commissioner,” 100 Paseo de San Antonio, Suite 120, San Jose, CA 95113, (408) 277-1266
UNION MATTERS & PROTECTED CONCERTED ACTIVITY

- Private Employer - National Labor Relations Board (NLRB),
  [http://www.nlrb.gov](http://www.nlrb.gov), 1301 Clay St., Suite 300-N, Oakland, CA 94612-5217
  (San Jose Claims), (510) 637-3315
- Public Employer – Public Employee Relations Board (PERB), [www.Perb.ca.gov](http://www.Perb.ca.gov), Bay Area, 1330 Broadway, Suite 1532, Oakland, CA 94612, (510) 622-1016

WHISTLEBLOWING

- Private Employer: California Attorney General Hotline, 1-800-952-5225;
- State or Government Agency - State Auditor Hotline – 1-800-952-5665
SMALL CLAIMS COURT

- Santa Clara County Superior Court, 1919 N. 1st St., San Jose, CA 95113, (408) 882-2100, press 2, http://www.scscourt.org
- Claims are limited to disputes of $10,000 or less
- If a claim is for more than $10,000, the claimant can agree to waive the portion of the claim that is higher than the jurisdictional limit
- A claimant cannot sue on only part of what is basically a single claim. Suit on any part bars later suit on the balance
- In choosing Small Claims Court, the claimant gives up the right to appeal. The defendant has the right to appeal to Superior Court
- No party may be represented by an attorney
- No discovery; relevant hearsay is admissible; no collateral estoppel
QUESTIONS?

Contact Ruth Silver Taube
RSilverTaube@scu.edu