12 Facts About Employment Law

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1. A termination that is unfair is not necessarily illegal.

   In most circumstances, employers can terminate employees “at will,” meaning at any time for any reason. And they are not even required by law to give the reason for a discharge. However, there are exceptions to the “at will” rule. It is illegal for your employer to terminate you:

   - because of your race, sex, color, national origin, religion, gender, sexual orientation, gender identity (such as transgender status), age or disability (including pregnancy), medical condition, language (or accent), or marital status;
   - in violation of a contract (such as a union agreement). There may be an “implied contract” if you have a reasonable expectation of continued employment (usually based on lengthy employment, promises of job security, continued promotions and positive performance evaluations);
   - in retaliation for enforcing your own legal rights (such as filing a claim for unpaid wages);
   - because you have reported your employer to a government agency or to the police.

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2. You have the right to see your personnel file.

   Private employees, including former employees, have the right to inspect their personnel files to see what information their files contain about them and their job performance (California Labor Code Section 1198.5). Your employer must allow you to inspect your file within a “reasonable” amount of time after you ask to see it. Private employees also have the right to a photocopy of any document that has their signature (California Labor Code Section 432). You can ask to add your own documents to your personnel file if you disagree with some of the information in the file. Different laws provide similar rights to most government employees.

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3. You may be entitled to "waiting time penalties" if your final wages are late.

   If you are fired, your employer must pay all wages due to you immediately upon termination (California Labor Code Section 201). If you quit, and gave your employer 72 hours of notice, you are entitled on your last day to all wages due. If you quit with less than 72 hours of notice, your wages are due within 72 hours after you notified your employer that you will be quitting (California Labor Code Section 202). If your employer willfully refuses to pay you within these time limits, it may have to pay you a penalty for each day that your wages are late, for up to 30 days. (Government employees are not covered by this rule.) Claims for late final pay are filed with the “Labor Commissioner” (California Department of Industrial Relations, Division of Labor Standards Enforcement).

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4. "Use it or lose it" vacation policies are illegal.

   You do not forfeit unused vacation when your employment ends. When you are terminated or you quit a job, you are entitled to your unused vacation pay, just like unpaid wages (California Labor Code Section 227.3). Although your employer might not allow you to actually take vacation until you’ve worked for a certain amount of time, you may be “earning” vacation pay from your first day of work. Your employer, however, may impose a “reasonable” *cap* on the total amount of vacation that you can accrue over time.

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5. A former employer can say *bad*, but not *false*, things about you when giving a reference.

If you apply for a job and your former employer is contacted for a reference, that employer is legally able to say bad things about you or your work performance as long as the employer's comments are truthful. On the other hand, your former employer cannot knowingly give false information about your work performance to try to prevent you from getting a new job. (California Labor Code Section 1050). Also, your former employer can give his *opinion* about your work performance (such as "he was unreliable") but cannot provide false factual statements (such as "he was stealing"). Because there is such a fine line between what is legal and illegal, many employers have adopted a policy not to provide any information other than the dates of employment for former employees. Although these policies are widespread, they are not actually required by law.

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6. Many workers can get 12 weeks of unpaid medical leave, with the right to return to work.

Under family/medical leave laws, you are entitled to 12 weeks (used consecutively or intermittently) of unpaid leave from work to "bond" with a newborn baby *or* if you, your children, your parents, your spouse or your registered domestic partner have a "serious health condition" (including a serious health condition caused by domestic violence). During your leave, your employer must maintain your health benefits and must reinstate you to the same or equivalent position when you return. To qualify, you must meet the following criteria:

- Your employer must have 50 employees within a 75-mile radius of your worksite;
- You have worked at your job for at least one year;
- You have worked at least 1,250 hours during the previous 12 months;
- If the leave is for a "serious health condition," the condition must last for more than three days and involve continuing treatment by a health care provider.

Regardless of whether they meet the above employer-size or employment-length rules, workers who participate in the State Disability Insurance (SDI) Program are entitled to a maximum of six weeks of partial pay each year while taking time off from work to bond with a newborn baby, newly adopted foster child, or to care for a seriously ill parent, child, spouse or registered domestic partner.

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7. Your employer cannot deduct money from your pay if you make a reasonable mistake.

It is illegal for an employer to deduct money from an employee's paycheck to offset an inadvertent error, cash shortage, or breakage (in other words, a loss caused by a simple mistake or accident). To legally make a deduction, the employer must show the error, cash shortage, or breakage was caused by the employee's dishonesty, willful misconduct or gross negligence. It is also illegal, in most occupations, for an employer to deduct the cost of a uniform or tools (exceptions include tools or equipment used in certain trades or crafts, and implements used by barbers, hair stylists and manicurists).

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8. You may be an "employee"; even if you are called a "contractor."

Your designation as an "employee" or as an "independent contractor" is determined by how you do your work, not by your job title. If you are an employee, you are eligible for unemployment insurance, workers' compensation,

health/safety protection by Cal/OSHA, and protection against discrimination. You do not have these protections if you are an independent contractor.

What is the difference between an employee and an independent contractor? There is no one simple test; it is necessary to weigh a number of factors. Answers of "yes" to the following questions make it more likely you should be an independent contractor; "no" answers make it more likely you should be designated as an employee:

- Do you supply the materials, tools, and/or place of work?
- Does your occupation require a lot of skill? Is it usually done without supervision?
- Are you employed for a short amount of time?
- Are you paid by the job? (as opposed to payment by the hour, week, or year)
- Is your work outside the regular business that is paying you? (For example, a painter at a school is more likely to be an independent contractor than a teacher.)
- Is there an opportunity for profit or loss depending on your managerial skill?
- Do you believe you are creating an independent contractor relationship?

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9.

Whether you should receive overtime pay depends on what you do, not on your job title.

As “exempt” employees do not receive overtime pay, it may be in an employer’s interest to classify a worker as exempt. To be legally exempt from overtime pay, however, employees must earn at least $2,733.33 per month *and* fit in one of the following categories:

- *Executive* or *Administrative* employees are exempt from overtime pay only if, at least 50% of the time, they perform intellectual, managerial, or creative work which requires independent judgment on matters of significance.
- *Professional* employees are exempt from overtime pay only if they are state licensed or certified in a profession (such as law, accounting, teaching) or are in what is commonly recognized as a “learned” or “artistic” profession (such as editor or musician).
- *Executive* employees are exempt from overtime pay only if, at least 50% of the time, they are involved in managerial activities outside the activities of regular employees; they usually direct the work of 2 or more full time employees; they can hire or fire workers; and regularly use your discretion on significant matters.

If your title is “Executive File Administrator,” but your duties involve primarily filing and copying, you should not be classified as “exempt,” even though your title has the word “executive” in it. If you do not fit in one of the categories above, you should not be exempt from overtime pay, even if you are paid a flat salary for your regular work (overtime pay is then based on your hourly pay, which is your salary divided by the number of hours in the pay period.)

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10. ou may be eligible for unemployment insurance if you are fired or quit your job for "good cause."

Being fired from a job does not disqualify you from receiving unemployment insurance unless you are terminated for “misconduct;” showing serious or intentional disregard for your employer’s interests. Repeated tardiness or unexcused absences from work may qualify as misconduct; “poor performance” is not misconduct and should not disqualify you from unemployment benefits.

If you quit a job for a good reason, you can still collect unemployment insurance. The “good cause” standard for quitting a job can be difficult to meet. The following circumstances are considered to be “good cause” to quit a job:

- Domestic reasons (leaving your job in order to maintain a marriage or family situation);
- You are offered a better job (if you are offered another job with better wages, benefits and potential, and then the job falls through);
- Health reasons (before quitting, you must inform your employer of the health problem and ask for a leave of absence or a less demanding job);
- Intolerable working conditions (such as safety, harassment, significant demotions or pay cuts).

To avoid being disqualified for unemployment insurance if you quit the job, you must also make all reasonable attempts to notify your employer and attempt to solve the problem before you quit.

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11. You can "pre-choose" your workers' compensation doctor.

If your employer offers a group health plan, you can pre-designate your primary care physician to treat you if you become injured on the job. The advantage to selecting your own physician ahead of time is that he/she, rather than the employer’s choice of doctor, will be primarily responsible for examining and treating you if you suffer an on-the-job injury. Pre-selecting your physician is easy: just make sure your doctor agrees to be your pre-designated physician and then notify your employer in writing of your selection. (See http://www.dir.ca.gov/InjuredWorkerGuidebook/InjuredWorkerGuidebook.html - for more information.)

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12. You can reasonably refuse to do unsafe work.

The California Labor Code (Section 6311) allows you to refuse to perform unsafe work as long as it is hazardous enough that any reasonable person would think his/her health or safety would be in danger by doing the work. Before you refuse to perform unsafe work, however, make sure you inform your supervisor about the unsafe condition, and give the company a chance to correct it. If the company does not correct the unsafe condition, and you decide to refuse the work, make sure that you inform your supervisor, preferably in writing or in front of others, exactly why you are refusing to do the work, and that you will return to work as soon as the condition is fixed. Finally, you should contact Cal/OSHA (http://www.dir.ca.gov/DOSH) to file a complaint against your employer.

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For further information about your employment rights, contact the Workers' Rights Clinic.

Disclaimer

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