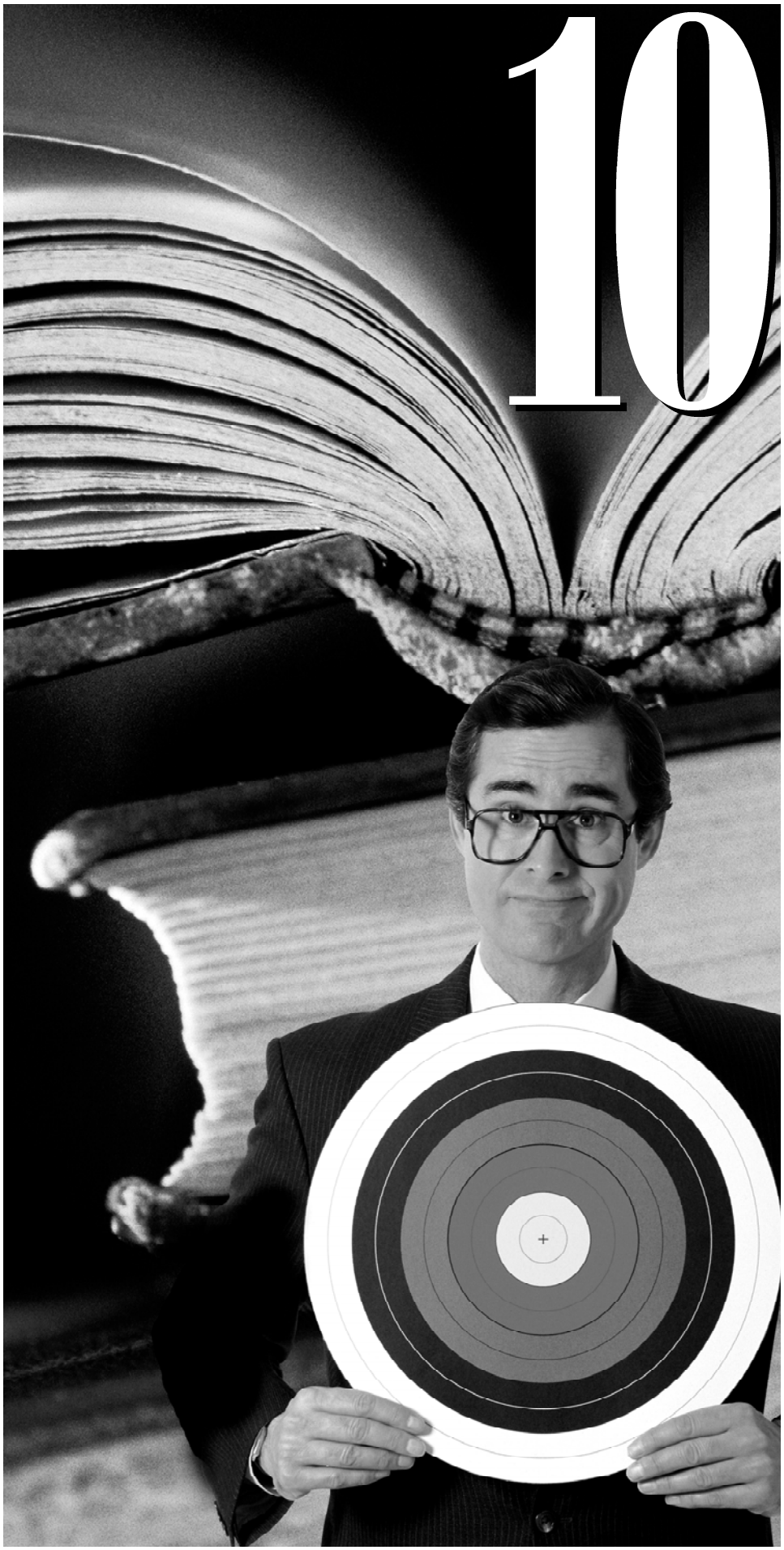

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10 Quirks Every Attorney Should Know About California Employment Law

by Tiffanny Brosnan and Brian Mills

Plaintiff's attorneys, defense attorneys, and in-house attorneys are all in the same boat when it comes to navigating the seas of California employment laws. It's tricky because there are a number of quirks that exist in California law that are unique or even contrary to federal or other states' laws. California employees are entitled to the "most generous" of either the state or federal rule on any given subject.

Although this list is far from exhaustive, every attorney should be familiar with the 10 quirks below.

1. Non-Compete Agreements

"Non-compete" clauses in contracts will generally not be enforced under California law.

(Bus. & Prof. Code § 16600.) In most states, non-competes are enforceable, as long as they are reasonable in time, scope, and do not contravene public policy. Other state courts may also blue pencil or modify non-compete clauses to make them enforceable. California does not follow these rules. Instead, California courts will only enforce non-compete agreements in very limited circumstances, including as part of the sale of the good will of a business or as part of the dissolution of a partnership. California courts uphold the strong public policy that employees should be free to work in their chosen occupations – even with a competitor across the street. Not only will a non-compete agreement be found unenforceable, but an employer who terminates an employee for *not* signing one can find themselves facing punitive damages as part of a claim for wrongful termination in violation of public policy. (*D'Sa v. Playhut*, 85 Cal. App. 4th 927 (2000).)

2. Protection under Anti-Discrimination Laws

In order for both state and federal anti-discrimination laws to apply, an employer must have a threshold number of employees – but that threshold number in California is different from that required by federal law. Federal law requires that an employer have 15 or more employees. (42 U.S.C. § 2000e(b).) California law requires only five employees. (Gov't. Code § 12926(d).) And to further complicate things, harassment – based, for example, on sex or race – is illegal if you have only one or more employees (the jokes about harassing oneself are almost too hard to pass up). (Gov't. Code § 12940(j)(A).) Additionally, the classes of protected employees vary under state and federal law. California's Fair Employment and Housing Act prohibits employment discrimination on the same bases as federal law (*e.g.,* race, national origin, sex, religion, age, and disability) but also prohibits marital status discrimination (Gov't. Code § 12940) and sexual orientation discrimination (Gov't. Code §§ 12926(m),(q) and 12940(a)-(d)). "Sexual orientation" is defined to mean "heterosexuality, homosexuality or bisexuality." (Gov't. Code §§ 12926(m),(q) and 12940(a)-(d).)

3. Individual Liability for Harassment

An employer will be liable for harassment in most circumstances under both the state and federal anti-discrimination laws. In California, however, the individual harasser can also be personally liable, regardless of whether the harasser is a supervisor or merely a co-worker of the victim. (Gov't. Code § 12940(j)(3).) This fact is an attention-grabber for individual employees both when being trained by their employers on how *not* to be subject to a harassment complaint and, of course, when named as an individual defendant in a lawsuit.

4. Pregnancy-related Leaves of Absence

The amount of leave time afforded to a pregnant woman is different under state and federal law. California has a unique statute authorizing a pregnant woman to take "pregnancy disability leave." (Gov't. Code § 12945(a).) Pregnancy disability leave must be allowed by employers with five or more employees. (Gov't. Code § 12926(d).) Depending on what is medically necessary, the pregnant employee may take up to four months off in large blocks of time or intermittently. Then, for employers of 50 or more employees, and in the case of an employee who has worked for the employer for at least one year and at least 1,250 hours in that year, the employee can take another 12 weeks of leave to bond with her child under the California Family Rights Act. (Gov't. Code § 12945.2(a).) Thus, an employee in California may be entitled to a leave of absence of nearly seven months (four months plus 12 weeks). Under federal law, the 12 weeks allowed under the Family Medical Leave Act run concurrently with the pregnancy disability leave and are not added on after the birth.

5. Daily Overtime

The federal Fair Labor Standards Act requires overtime pay only if more than 40 hours are worked in a work week. California's Labor Code requires payment of daily overtime. (Lab. Code § 510(a).) Even if an employee works less than 40 hours in a work week, overtime pay of one and one-half times the employee's regular rate must be paid for time worked above eight hours but less than 12 hours per day and for the first eight hours on the seventh consecutive day worked. (*Id.*) Double time pay is required for time over 12 hours in a day and for time over eight hours on the seventh consecutive day worked. (*Id.*)

6. Employee Wage Discussions

Many employers have written policies prohibiting employees from disclosing or discussing their wages with other employees. Some employers believe such discussions damage morale, cause jealousy or just lead to demands for higher pay. Whatever the rationale, such policies are unlawful under the California Labor Code. (Lab. Code § 232.) Further, it is unlawful to discharge, discipline, or take any adverse action against an employee for disclosing the amount of their wages.

7. Vacation Pay

California law does not require that employees be given any vacation time. In practice, however, most employers (in and outside of California) provide vacation time to their employees as a fringe benefit. What is unique in California is that the vacation time for California employees is vested as it is earned and it cannot be forfeited. (*Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982); Lab. Code § 227.3.) Policies stating that earned vacation time cannot be rolled over from one year into the next – sometimes called "use-it-or-lose-it" policies – are thus prohibited. Policies may, however, set a cap on the amount of vacation that can be accrued before more vacation is earned.

8. Kin Care

California employers are not required to provide sick leave (except for those in San Francisco), but if they do, they must allow employees to use sick leave to care for their sick child, parent, spouse, registered domestic partner, or the child of a registered domestic partner. (Lab. Code § 233.) This "kin care" rule includes time to care for the sick relative, time to attend doctor's appointments or for other medical needs. Employers must allow an employee to use up to one-half of their accrued sick leave for kin care. Unlike vacation pay, however, employers are

not required to roll over any accrued sick time to subsequent years. Employers who fail to allow employees to take kin care are subject to financial penalties and potential civil action.

9. Payment of Final Wages

Employers often get into trouble in California over an employee's final paycheck. We have very specific – and unique – rules regarding what must be included in an employee's final check and when it must be paid. Accrued but unused vacation time is considered "wages" and must be included in the final check. (Lab. Code § 227.3.) An employer cannot make deductions from an employee's final check for things such as unreturned equipment. Therefore, even when an employee walks off the job with the company-provided laptop, the company cannot deduct the price of that laptop from the employee's final check. Instead, the employer's best remedy will be found in Small Claims Court.

Now for the timing of the final check. When the employer terminates or lays off an employee, the employee must be given his final check on his last day of work – no waiting until the next payroll period. (Lab Code § 201(a).) The same is true for an employee who quits and gives *more* than 72 hours notice – that employee must be given his final check on his last day of work. (Lab. Code § 202(a).) When an employee quits with *less* than 72 hours notice, the final check is due within 72 hours of termination. (*Id.*) Every day that a check is late may subject the employer to an additional day's pay in penalties, up to a maximum 30 day's pay. (Lab. Code § 203.) Commissions or bonuses that cannot be calculated on the last day worked must be paid promptly – "as soon as they are ascertainable."

10. Payment of Arbitrator's Fees

Many employers are choosing arbitration to resolve disputes with their employees. Employees are typically given arbitration agreements as part of the application or "new hire" process. The California Arbitration Act provides that, unless the arbitration agreement provides otherwise, the parties shall each pay a *pro rata* share of the arbitrator's fees. (Code Civ. Proc. § 1284.2.) But the California Supreme Court has held otherwise, requiring employers to pay the full amount of the arbitrator's fees in most employment-related cases, including statutory discrimination cases and cases involving claims of wrongful termination in violation of public policy. (*Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000); *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1078 (2003).) Thus, while arbitration is generally considered to be a faster, cheaper route than civil litigation, the costs of arbitrating employment-related disputes have gone up for California employers.

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