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On being solo

LAWYERS STARTING THEIR OWN PRACTICE MAY FORGET THEY ARE A SMALL BUSINESS, SUBJECT TO THE SAME EMPLOYMENT LAWS AS ALL OTHER BUSINESSES

Starting your own practice can be both a fun and frightening experience. It's also very rewarding. First and foremost, when you plan to start your own practice, you need to be part of a community. If you're reading this, you are likely a member of CAALA and that is a fantastic community. One of the most important things for new solo attorneys is to have a mentor on speed dial. Someone who will respond to your call or text immediately, like when you're in trial facing sub rosa for the first time, or when you are in a contentious meet and confer with a recalcitrant opposing counsel (both of which I have experienced).

After securing a mentor, at some point you will need some sort of assistance. Whether this assistance is virtual, in person, a legal assistant or a paralegal, you have to have a plan or at least an idea on how you wish to disperse responsibilities between yourself and your assistant. As a solo, *all* of the work and responsibilities fall on you since you are the lawyer, the CEO, and the CFO all in one.

Independent contractors

Once you decide that you are going to hire someone, however, one very important issue to be alert about is the idea of hiring someone and labeling them as an independent contractor. California law is very protective of employees and the law does not allow the parties to agree as to whether or not an employee is an independent contractor. There is a test that you must follow in order to determine whether or not your employee is properly classified as an independent contractor.

In California, a worker is presumptively an employee *unless proven otherwise*. A worker is considered an employee and not an independent contractor, unless the hiring entity meets all three conditions of the ABC test:

1. The person is independent of the hiring organization in connection with the performance of the work, both under the contract for the performance of the work and in fact.
2. The person performs work that is outside the hiring entity's business.
3. The person is routinely doing work in an independently established trade, occupation, or business that is the same as the work being requested and performed.

Labor Code section 226.8 sets forth harsh penalties for employers that willfully misclassify workers as independent contractors. An employer can be subject to fines up to $25,000 per violation if the state finds that the employer committed a pattern or practice of misclassification.

Unpaid internships

Another similar pitfall is the use of law clerks in unpaid internships. Unpaid internships can be beneficial for both the firm and the student. However, there are some conditions that must be met before you can take on an unpaid intern. The first and most important thing is it that the intern must be in a program where the intern receives credit for the time spent working with you.

I use the word *with* instead of *for* for a very important reason. The intern cannot replace an employee because the intern's experience must benefit the intern in their learning and growth and not solely be for the benefit of your business. The California Division of Labor Standards Enforcement opinion letter on this is 2010.04.07, and generally, California follows federal guidelines. In January 2018, the Department of Labor clarified through new guidance who the "primary beneficiary" of an internship would be. These updated guidelines detail seven factors to look for, and they are as follows:

1. The intern and the employer understand that there is no expectation of compensation during the internship.
2. The extent to which the internship provides training that is similar to the experience and training given in a traditional educational environment. This can include hands-on experience and clinical experiences.
3. The extent to which the internship is connected to the intern's educational program. Often, this is through an experience that will count as class credit.
4. The extent to which the internship is designed around the intern's educational commitments and academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements the work duties of paid employees while providing significant educational benefits to the intern. The work should not displace paid employees.
7. The extent to which the intern and the employer are in agreement that the internship does not mean that there will be an employment opportunity at the conclusion of the internship.

Use these guidelines along with the guidelines set forth by the California Division of Labor Standards Enforcement (DLSE) to determine whether or not you are required to provide a wage to your intern. The DLSE holds video seminars twice monthly that cover common issues for employers, including record-keeping, common wage and hour violation, sick leave and the issue of employee vs. independent contractor. Sign up at https://www.dir.ca.gov/dlse/Training.htm.

At-will employment

When adding staff, keep in mind that California is an at-will state. Labor Code section 2922 provides in part that "[a]n employment, having no specified term, may be terminated at the will of either party." That statute "establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677.)

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But if you make any written or oral promises about the duration of the employment or state or imply that an employee will only be terminated for good cause, you will be required to abide by the contract and may be prevented from terminating the employee. If your intent is to maintain the presumption of employment at will, you should state this in your employee handbook.

In the same vein, Labor Code section 970 forbids employers from persuading employees to change residences (within the state or to/from California) by falsely representing the type or availability of work they have to offer, the length of time for which that work will last, the compensation to be given for the work, the sanitary and housing conditions surrounding the work, or the existence or nonexistence of any kind of labor dispute that might affect the work. If you convince your new case manager to move to DTLA from Riverside by promising them a full-time position, but only provide part-time hours, you are liable under Labor Code section 972 for double damages (and will have committed a misdemeanor under Lab. Code § 971).

Discrimination and harassment

The State of California has decided that it is a public policy of the state to make sure that workplaces are accessible and free from discrimination against those with protected characteristics. The Fair Employment and Housing Act (FEHA), Government Code section 12940 et seq., bars discrimination and harassment in the workplace on the basis of gender, race, religion, sexual orientation, gender expression, medical condition, pregnancy, military and veteran status, disability and age. The requirements of the FEHA are triggered once you regularly employ five or more employees. However, it is a good idea to follow those requirements even if you have fewer than five employees.

Government Code section 12950 mandates that "every employer shall act to ensure a workplace free of sexual harassment" by implementing certain minimum requirements. You need to read the code section and be familiar with its "minimum" requirements. Make sure your staff are aware of the requirements under the FEHA.

One of the more recently updated requirements for California employers is to provide sexual-harassment training. (Gov. Code, § 12950.1.) Every two years a California employer must provide sexual-harassment training to supervisory and non-supervisory employees. For non-supervisory employees, it is one hour of training every two years; for supervisory employees it is two hours of training every two years. The Department of Fair Employment and Housing provides free, online training courses that meet the statutory requirements in six languages. The videos can be found at https://www.dfeh.ca.gov/shpt/.

Best HR practices may include employing the services of an outside firm that can help handle complaints and provide guidance. If your firm is covered under the FEHA, you are required to take all reasonable steps to prevent discrimination and harassment. (Gov. Code, § 12940, subd. (k).) Further, "An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (Gov. Code, § 12940, subd. (j)(1).)

You need to have a well-defined anti-harassment policy as well as defined steps for your employees to take if they have complaints. If your employee has a concern about you, it is not reasonable to expect them to bring the concern to you, the employer. Your complaint policy should include someone else to whom complaints can be reported.

Business-expense reimbursements

Labor Code section 2802 explicitly requires employers to reimburse their employees for the necessary business expenses that they incur, so as not to pass certain operating expenses on to employees. Specifically, employees must be reimbursed for expenses that are *necessarily* incurred in direct consequence of their job duties or in complying with an employer's directions.

In general, the law only requires reimbursement of necessary and reasonable expenses; unnecessary or unreasonably exorbitant expenses need not be reimbursed. Further, section 2804 provides that this indemnification requirement cannot be waived by contract. (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 951- 952.)

There are currently a number of cases making their way through the courts seeking reimbursement (and attorney's fees) for work-from-home employees who were required to stay out of their offices during COVID. Generally, computers, printers, paper supplies, pens, internet, and cell phones are all necessary items employers should be paying for if they have mandated an employee work from home.

If the employee has the option to work from an office, but chooses to work remotely, reimbursements may not be required (as they are not "necessary"). Keep in mind that the employee is eligible for reimbursement even if they had no additional out-of-pocket expenses. For example, in *Cochran v. Schwan's Home Service, Inc*. (2014) 228 Cal.App.4th 1137, the court stated, "We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills."

Paralegals must be paid hourly

Under Business & Professions Code section 6450, paralegals work under the direction and supervision of active members of the State Bar of California and do not generally qualify as exempt

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employees and are therefore entitled to overtime.

In order to be properly classified as exempt, an employee has to fit into an exemption. There are wage laws regarding exemptions at both the state and federal levels. California covers the same general areas of exemption as does the federal Fair Labor Standards Act (FLSA), but divides the areas somewhat differently, places additional requirements on some of the exemptions and also has several unique exemptions.

In California, white-collar exemptions (executive, administrative and professional) have both salary and duty criteria that differ from those under the FLSA. Workers must meet both the federal and state salary minimums for a position to be exempt from all minimum wage and overtime laws.

Even under the highly compensated employee provision, paralegals still will have difficulty satisfying the exemption criteria of the executive, administrative, and professional exemptions.

First, with respect to the executive exemption, a paralegal would have to either supervise two or more other employees, have the authority to hire or fire employees, or manage the company or a customarily recognized department within the company (e.g., the company's legal department).

Second, to satisfy the administrative exemption, the paralegal would either have to show that he or she performs work directly related to the management or general business operations of the company or its customers, or that he or she exercises independent judgment and discretion with respect to matters of significance. This is in conflict with the requirement that a paralegal be closely supervised by an attorney.

In 2005 the U.S. Department of Labor issued an opinion letter regarding the question of whether paralegals and legal assistance could be considered exempt under the federal learned professionals' exemption – 29 CFR § 541.301. The Department analyzed the issues and stated that, unless a paralegal possesses an advanced specialized degree in another professional field, and that degree is a standard prerequisite for entry into that field, and the paralegal applies that advanced knowledge in that field in the performance of the paralegal duties, the position of a paralegal cannot qualify for the professional exemption under federal regulations. Not much has changed in that regard and, under most circumstances your paralegal should be compensated as a non-exempt employee.

Meal and rest periods

Whether your employees report to an office or work remotely, you must ensure that they are able to take the necessary meal and rest breaks. Under California law, non-exempt employees are entitled to one unpaid 30-minute meal break, and two paid 10-minute rest breaks, during a typical eight-hour shift. Employees must receive their off-duty meal breaks before the end of the fifth hour of work. If the employee is prevented from taking their break, they are entitled to a "premium" penalty equal to one hour's wage. In *United Parcel Service v. Superior Court of Los Angeles County*, a California Court of Appeal ruled that if the employee misses both a meal and a rest break in the same day, the employee is entitled to two hours of pay as the "premium" penalty for the missed breaks. (*United Parcel Service v. Superior Court of Los Angeles County* (2011) 196 Cal.App.4th 57.)

In a decision hot off the press, the California Supreme Court has declared that meal and rest break premiums are wages. *Naranjo v. Spectrum Security Services, Inc.*, decided on May 23, 2022, held that failure to provide missed meal and rest break premium pay is a wage and therefore does in fact entitle employees to pursue waiting time penalties under Labor Code section 203 and paystub violation penalties under Labor Code section 226.

Relying heavily on *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, the Court equated break premiums to overtime premium pay, which serves to both compensate employees for work and deter employers from imposing overtime obligations on employees.

This means, essentially, that a violation of meal and rest break laws will be much more costly for an employer. However, the California Supreme Court clarified in *Brinker*: "We conclude that under Wage Order No. 5 and Labor Code section 512, subdivision (a), an employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1034.)

Practically speaking, this means that if you have only one assistant, you must provide phone coverage for the assistant's break or answer them yourself. If your employee is remote, you must provide the opportunity for meal and rest breaks and not have any policy that would prevent them from being taken. For example, a policy punishing the employee for missed phone calls would be incompatible with the requirement that you relieve your employee of all duties for an uninterrupted 30-minute lunch break.

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