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ON THE FRONT LINES OF WORKPLACE LAW

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“Ariel Needs a Watch: 5 Key Tips for Managing Excessive Absenteeism –Without Violating the Law.”

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OVERVIEW

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5 KEY TIPS ON MANAGING EXCESSIVE ABSENTEEISM

1. Understand the nature of an excused absence vs. unexcused absence;
2. Create a compliant and effective absence policy;
3. Consistently enforce the policy;
4. Train managers/supervisors on tracking and documenting absences as they occur;
5. Implement disciplinary measures when appropriate.

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WHAT IS AN EXCUSED ABSENCE?

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AN EXCUSED ABSENCE IS...

One protected by:

1. Law and/or,
2. Employer policy.

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WHAT ABSENCES ARE PROTECTED BY LAW?

THE BIG SIX:

1. Leave as an Accommodation Under FEHA/ADA
2. Family and Medical Leave
3. Paid Sick Leave
4. Pregnancy Leave
5. Military Leave
6. Work Injury Related Leave

NOTE: MORE INFORMATION ON THIS TOPIC IS AVAILABLE FROM THE LEXIS-NEXIS PUBLICATION "CALIFORNIA LEAVE LAW: A PRACTICAL GUIDE FOR EMPLOYERS"

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CALIFORNIA'S MISCELLANEOUS LAWS THAT PROTECT ABSENCES

1. Civil Air Patrol Leave
2. Crime Victims Leave
3. Domestic Violence/Sexual Assault and Stalking Leave
4. Emergency Duty Leave
5. Jury or Witness Duty Leave
6. Organ and Bone Marrow Donor Leave
7. Parental/Baby Bonding Leave
8. Rehabilitation Accommodation Leave
9. School Related Leave
10. Volunteer Firefighter/Law Enforcement Training
11. Voting Time Off

NOTE: All are UNPAID except California's Organ and Bone Marrow Donor Leave and Voting Time Off. Also note the issues surrounding jury duty and exempt employees.


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REQUIRED BY LAW


“THE BIG SIX”

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1.

LEAVE AS AN ACCOMMODATION




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LEAVE AS AN ACCOMMODATION

- Unpaid leave may be required as a reasonable accommodation to a disabled employee pursuant to the Fair Employment and Housing Act (FEHA)/Americans with Disabilities Act (ADA) (not technically leave statutes) if needed to enable the employee to recover sufficiently to be able to return to work and perform the essential functions of the job or to seek necessary medical care to recover sufficient to perform the essential functions of the job, and the accommodation does not pose an undue hardship on the employer.
- An interactive process must be conducted when an employee presents with work restrictions, requests an accommodation, or the employer is on notice of the need for an accommodation.

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2.
FAMILY AND MEDICAL LEAVE




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FAMILY AND MEDICAL LEAVE

- In general, employers with 50 or more employees, must provide eligible employees with up to 12 weeks of unpaid leave for their own serious health condition, the serious health condition of a family member (spouse, child or parent), military purposes, or for baby bonding time. This leave may be taken intermittently, in minimum increments of one hour.
- Federal law: Family and Medical Leave Act (FMLA).
- California law: California Family Rights Act (CFRA).



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INTERMITTENT LEAVE

- This is a challenge for employers because FMLA/CFRA can be taken in minimum increments of one (1) hour.
- Employers can require a second, and even third medical opinion, but must pay for the evaluation.

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**3.
PAID SICK LEAVE**




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PAID SICK LEAVE

- All California employers are required to provide paid sick leave of 3 days (24 hours) per twelve month period. May offer PTO in lieu of PSL.
- Accrual vs. frontloading method.
- Employees may carryover up to 48 hours, although annual use can be capped at 24 hours.
- Accrued amount of paid sick leave hours must be on paystubs for all employees.


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CAN THE EMPLOYER REQUIRE A DOCTOR'S NOTE?

NO

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CAN THE EMPLOYER ASK AN EMPLOYEE WHAT THEIR ILLNESS IS?

NO

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WHAT IS THE MINIMUM INCREMENT OF TIME FOR PAID SICK LEAVE?

TWO HOURS

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LOCAL ORDINANCES

- Be aware of local ordinances that may apply to your workforce such as in the City of Los Angeles, Santa Monica, San Francisco, San Diego, Oakland, Emeryville, and which provide for more paid sick days and different accrual caps.
- Failure to comply with local ordinances can result in significant penalties.

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PAID SICK LEAVE FAQ-QUESTION TO LABOR COMMISSIONER

- "If an employee has an absence that would otherwise violate the employer's attendance policy, and if the absence was for a reason not covered under the paid sick leave law, the employer is not required to allow the employee to use paid sick leave for that absence, and it is not a violation of the law for the employer to give an "occurrence" for such absence."
- "For example, if the employee is absent for a full eight-hour day of work, but elects to use only four hours of his or her accrued paid sick leave for the absence [which the employee is allowed to do], the employer would be allowed to give an "occurrence" (or 1/2 of an "occurrence") for the one-half day of unscheduled absence for which no paid sick leave was used. Only time that is properly taken as accrued paid sick leave is protected from disciplinary action."

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4. PREGNANCY LEAVE



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PREGNANCY RELATED LEAVE

• Unpaid leave provided to a pregnant employee for:

- Pregnancy Disability Leave (PDL) (17 1/3 Weeks- 4 months) (no length of service requirement); employers with 5 or more employees, no length of service requirement;
- Baby Bonding Time (12 Weeks-if eligible); employers with 20 or more employees; employee must meet eligibility requirements for CFRA;
- Leave provided as a reasonable accommodation for disability related to pregnancy under the Fair Employment and Housing Act (FEHA); employers with 5 or more employees.

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MEDICAL CERTIFICATION

- Employers should require medical certification of the need for pregnancy disability leave;
- It is recommended that the DFEH medical certification be used for pregnancy disability leave.

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5. MILITARY LEAVE



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MILITARY LEAVE

Five Types:

- FMLA leave for the service member's serious health condition (12 weeks); (Covered employers-50 or more employees)
- FMLA military caregiver leave (26 weeks); (Covered employers- 50 or more employees)
- FMLA Qualifying Exigency Leave (12 weeks); (Covered employers- 50 or more employees)
- California's Military Spouse Leave; (10 days) (Covered employers- 25 or more employees)
- USERRA leave for servicemember (up to five years) (Covered employers-all employers are covered.)

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6. WORK INJURY RELATED LEAVE



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WORK INJURY RELATED "LEAVE"

- Time off from work (temporary disability) which an employee takes due to a work injury, pursuant to California's workers' compensation laws.
- May run concurrently with other leaves (FEHA/FMLA/CFRA/PDL).

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ABSENCE POLICIES


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KEY CONSIDERATIONS FOR AN ABSENCE POLICY

- Definition of attendance (e.g., shifts, days, or weekly work hours);
- Method for tracking attendance (e.g., payroll timekeeping system or digital time card);
- List of approved absences and required documentation;
- Difference between an approved absence vs. an unexcused absence.


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KEY CONSIDERATIONS FOR AN ABSENCE POLICY

- The absence policy should address the necessity of regular work attendance.
- It should also require an employee to notify his or her supervisor as far in advance as possible for a requested absence, unless it is not possible due to an emergency.
- Paid sick leave laws must also be followed in terms of permissible advance notification for an absence due to illness or preventive care for the employee or covered family member.


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KEY CONSIDERATIONS FOR AN ABSENCE POLICY

- Will the policy be a no-fault (“occurrence” policy”) or a more traditional excuse-based system?
- Will a rolling year or a calendar year serve as the optimal performance measurement time period?
- What will the reporting/call-in procedures be for absences?
- What disciplinary measures will be implemented for violations?


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TWO TYPES OF ABSENCE POLICIES

- Excuse Policy
- No-Fault/Occurrence Policy


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WHAT IS AN "EXCUSE" POLICY

- This type of policy distinguishes between excused and unexcused absences. Unexcused absences can result in discipline.

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WHAT IS A "NO-FAULT" OCCURRENCE POLICY?

A "no-fault" system permits a specified number of absences — either days or occurrences — annually. The employer does not require or inquire as to a reason.

EXAMPLE:

- Each absence = 1 point
- Each tardy or early-out = 1/2 point
- Each no-show/no-call for work = 2 points
- Each employee starts fresh, with no points, each year.
- The employee is terminated after accumulation of 10 occurrences.

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OCCURRENCE POLICY AND PROGRESSIVE DISCIPLINE

An occurrence with progressive discipline policy allows both the employer and employee to know exactly what the consequences will be for poor attendance.

EXAMPLE:

- 7 points = verbal warning
- 8 points = written warning
- 9 points = 3 day suspension
- 10 points = termination

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PROS AND CONS OF AN "OCCURRENCE" POLICY

- **PRO:** Sets a clear and uniform standard for the consequences of a specific number of absences, regardless of the reason for the absence.
- **CON:** Can subject the employer to significant liability if employees are disciplined for absences protected by law such as family and medical leave, paid sick leave or pregnancy disability leave. Managers and supervisors must be trained so that the no-fault occurrence policy is properly managed.

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ABSENCE POLICIES AND HOURLY VERSUS SALARIED EMPLOYEES


- You must decide how your Company will manage hourly versus salaried employees in terms of absenteeism.
- Will they be treated the same or will you implement different systems for employees based on their classification as either salaried or hourly?

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UNEXCUSED ABSENCES AND EXCESSIVE ABSENTEEISM


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WHAT IS AN UNEXCUSED ABSENCE?

- An unexcused absence is one that is not protected by the law, or scheduled and approved according to employer policy.
- An unexcused absence is any absence for which the employer determines there isn't a valid reason.


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WHAT IS CONSIDERED EXCESSIVE ABSENTEEISM?

- No definitive answer.
- One example: "Two or more instances of unexcused absence in a calendar month. Such excessive absenteeism is subject to corrective discipline. Any eight instances of unexcused absenteeism in a calendar year are considered grounds for discharge."
- Consider what are you experiencing with your workforce, in terms of compliant attendance or excessive absenteeism?

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KEY TO ADDRESSING EXCESSIVE ABSENTEEISM

- Identify the reason for each absence;
- Only take disciplinary measures based on those absences that are unexcused.

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EXAMPLES OF UNEXCUSED ABSENCES

- Alarm clock failed
- Car trouble
- Childcare problems (that do not fall under the statute)
- “Sick” but no PSL, and no doctor’s note
- Missed the bus or other transportation
- Personal problems

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WATCH FOR “PATTERNS” OF ABSENCES

Example:

- Mondays or Fridays
- Around holidays

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NO-CALL/NO-SHOW

- No-call/no-show: do not automatically terminate even if 3 consecutive days have passed;
- If possible, find out what happened, what is the reason for the no-call/no-show; send out a letter requesting an explanation.
- If the employee provides a reason that could be excused, can that reason be verified with documentation or some other method of proof.

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BE CAREFUL ABOUT TERMINATIONS FOR "TECHNICAL VIOLATIONS"

- *Bareno v. San Diego Community College* is a reminder to employers about the risks of terminating an employee based on a "technical" policy violation and how easy it is for an employee to put an employer on notice that the employee is taking a protected California Family Rights Act ("CFRA") leave. In this case the employee, Leticia Bareno, requested and took a week long medical leave from work. She provided the required medical certification for the leave.
- When the leave expired, she did not return from work and was absent for an additional five consecutive days. Relying on the collective bargaining agreement between the parties, which stated that an absence from duty without authorization for five days constituted a voluntary resignation, the College terminated her employment. Although Ms. Bareno claimed to have sent a medical certification for the unexcused period, the College had not received it.
- Ms. Bareno had a history of unexcused absences.

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WHAT ABOUT A "SICK" DAY WHEN EE HAS USED ALL PAID SICK TIME AND FMLA/CFRA LEAVE?

- Employee calls in to report an absence due to a cold.
- Employee has used all paid sick time.
- Employee is on final warning for a pattern of unexcused absences.
- Employee returns to work with a doctor's note "excusing" her absence.
- Does termination pose a risk for the employer?

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MANAGERS AND SUPERVISORS MUST BE TRAINED TO PROPERLY MANAGE ABSENCES

- Must understand all applicable laws related to absences and understand the employer's absence policy;
- Must be trained on the interactive process;
- Must require that employees contact them to advise of an absence, or obtain authorization for a planned absence;
- Must maintain accurate, detailed and up-to-date records (date, nature of illness/reason for absence, the expected return to work date);
- Must consistently require documentation excusing absences when appropriate (doctor's note; note from the school);

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MANAGERS AND SUPERVISORS MUST BE TRAINED TO PROPERLY MANAGE ABSENCES

- Must require a release to return to work when appropriate;
- Must not require a physician's note for paid sick time;
- Must report to HR if there is a need for FMLA/CFRA/PDL;
- Must track absences and unusual absence patterns;
- Must address absence problems when they arise;

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MANAGERS AND SUPERVISORS MUST BE TRAINED TO PROPERLY MANAGE ABSENCES

- Must set a counseling/disciplinary meeting to discuss absence problem;
- Must impose discipline, timely and consistently, if appropriate;
- Must ensure that termination does not come as a surprise.


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KEY CASE
A GLANCE BACK IN TIME

SAMPER V. PROVIDENCE ST. VINCENT MEDICAL CENTER

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SAMPER V. PROVIDENCE ST. VINCENT MEDICAL CENTER, 675 F. 3D 1233

Question: When is attendance an essential function of the job?

The court held that the employer had met its burden of proving that regular attendance was an essential job function of a NICU nurse, ruling that as a NICU nurse, Samper’s job involved “the trinity of requirements that make regular on-site presence necessary for regular performance: teamwork, face-to-face interaction with patients and their families, and working with medical equipment.”


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A RECENT CASE

HIGGINS V. UNION PAC. R.R. CO

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HIGGINS V. UNION PAC. R.R. CO., NO. 18-1902 (8TH CIR. JULY 24, 2019)

- In *Higgins*, the Eighth Circuit affirmed summary judgment for Union Pacific ruling that the employee's regular, reliable attendance was an essential function of the job even though Union Pacific had accommodated Higgins' poor attendance for years.
- Employers should exercise caution because a pattern of excusing absences over a period of time, absent a statute protecting those absences, could support the argument that regular attendance is not an essential function of the job or that granting an accommodation that excuses the absences does not pose an undue hardship on the employer. Each situation will require an individualized assessment.

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CONCLUSION

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BIOS

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Bernadette M. O'Brien is a Partner at Floyd Skeren Manukian Langevin, LLP and SPHR/SHRM-SCP certified. Ms. O'Brien serves as counsel and advisor to the law firm's Human Resources Department and is Managing Attorney of the firm's Employment Law Department. Ms. O'Brien specializes in human resources consultation, compliance guidance, and policy implementation.

Ms. O'Brien defends employers in employment related disputes before the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission, and the California Labor Commissioner, including claims related to discrimination, harassment, retaliation, wage and hour, and leave of absence laws. Ms. O'Brien provides HR consultation to employers, human resource administrators, and risk managers on numerous HR topics including compliance with federal, state and local employment related laws; HR policy development including employee handbooks; personnel management including hiring, performance, discipline, and termination; ensuring EEO compliance; managing disability and leave of absence policies and procedures; and, wage and hour compliance. Ms. O'Brien also conducts management and employee training sessions throughout California.

Ms. O'Brien is author of the LexisNexis publication *Labor and Employment in California: A Guide to Employment Laws, Regulations and Practices*, co-author of *California Leave Law: A Practical Guide for Employers*, and co-author of *California Unemployment Insurance and Disability Compensation Programs*. She is also editor of Floyd Skeren Manukian Langevin's employment related websites: www.employmentlawweekly.com, www.worklawreport.com, and www.floydskerenhrtraining.com, which provide the latest news and information related to employment law.

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Alden Parker is the managing partner of the firm's Sacramento office and the co-chair of the Hospitality Industry Group. Alden represents employers in all facets of employment law matters. He has considerable experience defending employers in litigation involving claims under the California Fair Employment and Housing Act (FEHA), California's wage and hour laws, Family and Medical Leave Act (FMLA), California Family Rights Act (CFRA), and the Age Discrimination in Employment Act (ADEA). Alden has also defended employers against whistleblowing and retaliation claims, including claims under the California Whistleblower Act and various provisions of the California Labor Code.

Alden has extensive experience defending employers in federal and state court, as well as in investigations by the Equal Employment Opportunity Commission (EEOC), the California Department of Fair Employment and Housing (DFEH), United States Department of Labor (DOL) and the National Labor Relations Board (NLRB).

In addition to defending his clients in litigation, Alden frequently counsels employers to assist them in avoiding litigation. He regularly advises clients on leave management issues and the interactive process for employees with disabilities, reinstatement obligations under various leave laws and wage and hour compliance. Alden has prepared employee handbooks and a variety of agreements, including independent contractor, employment, confidentiality and trade secrets agreements.

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James Lodenquai is Human Resources Director for Vallarta Supermarkets.

Mr. Lodenquai has over twenty years of experience as an HR Professional. He provides a pragmatic and straight forward approach to handling the complex array of federal, state and local workplace regulations and laws, while managing a large workforce, with multiple facilities in Southern California.

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