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Top Five Wage and Hour Mistakes That Cost Hoteliers Millions



NORTHERN CALIFORNIA
TUESDAY, MAY 22, 2018
DOUBLETREE SAN JOSE

**NORTHERN & SOUTHERN
CALIFORNIA
HOTEL & LODGING
CONFERENCES**



SOUTHERN CALIFORNIA
THURSDAY, MAY 24, 2018
BUSINESS EXPO CENTER

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Topics Covered

- Misclassification of Employees
- Meal and Rest Periods
- Wage Statements
- Piece Rate Compensation
- Overtime and Independent Contractor
- Self-Help Remedies and Deductions from Pay

Wage & Hour Litigation

- Plaintiffs' attorneys love it
- Results in costly judgments and settlements against major employers for overtime and technical violations
- Statute of limitations and potential back pay: 2-3 years
- Potential Liquidated Damages: **DOUBLE** back pay
- Automatic attorney's fees

Wage & Hour Litigation

“Why Should I Care?”

- Class actions equal huge penalties which reach into the seven figures for even relatively small employers
- Wage and hour class actions represent the single largest group of class action cases filed
- Attorneys’ fees can be substantial

Wage & Hour Litigation

Applicable Law

- FLSA
- California Labor Code
- Wage Orders
 - Wage Order 5: Public Housekeeping Industry

Wage & Hour Litigation

PAGA Claims

- Plaintiffs act as “private attorney generals
- Aggrieved employees may recover civil penalties on behalf of other similarly situated employees for Labor Code violations
- Number of claims filed and amount of penalties on the rise
 - Penalties collected in 2014-2015 nearly doubled from just four years prior

Misclassification of Employees



Misclassification

- **DON'T** just assume that all salaried employees and commission earners are exempt from overtime and/or minimum wage.
 - Paying an employee a salary does not make them exempt!
 - Paying an employee a salary does not change any wage/hour law requirements that you must comply with



Misclassification

Exemptions in California:

- Governed by IWC Wage Orders
- Must meet **BOTH** (1) Salary Basis Test and (2) Duties Test
 - Salary component
 - Monthly fixed salary equivalent to no less than two times the state minimum wage (\$45,760)
 - Duties test = “primarily engaged in” certain duties. More than one-half of his or her time engaged in exempt work (quantitative test)
 - In California, this means more than 50%

Misclassification

- Only a few kinds of employees should be paid a salary.
- If the employee is not exempt from overtime (discussed in upcoming slides), it is **NOT** a good idea to pay them a salary

Misclassification

Duties Exemptions in California

- Executive
 - Monthly salary of twice state minimum wage for full-time employment
 - Management of an enterprise or department;
 - Customarily and regularly directs the work of 2+ other employees; and
 - Who has authority to hire or fire other employees or whose suggestions to these items will be given particular weight
 - Who customarily and regularly exercises discretion and independent judgment



Misclassification

Duties Exemptions in California

- Administrative
 - Monthly salary of twice state minimum wage for full-time employment
 - Duties or responsibilities involve office or non-manual work directly related to management or general business operations of employer or its customers
 - Customarily and regularly directs the work of 2+ other employees; and either:
 - Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or
 - Performs only under general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or
 - Who executes under only general supervision special assignments and tasks

Misclassification

Exemption Pitfalls for Hoteliers

- Sales Managers
- Catering Managers
 - *Wage Order 5 - **NO** “inside sales exemption”*
 - *Job title is not determinative*
 - *A fact-specific inquiry must be made*
 - *Salary basis test*
 - *Duties test*

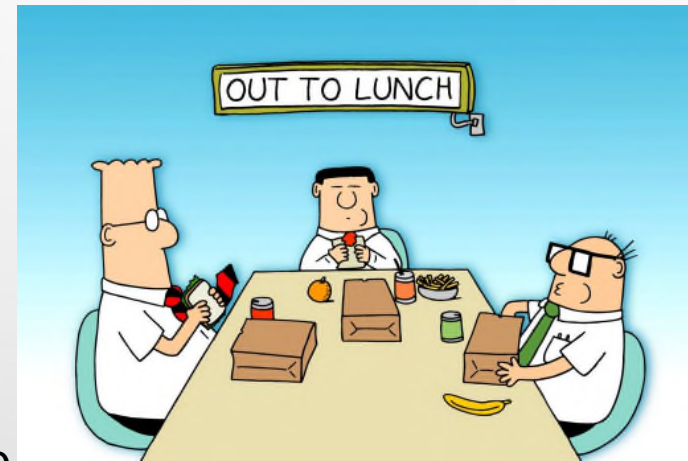


Meal and Rest Periods

Meal & Rest Periods

Meal periods must be:

- Within the first 5 hours
- At least 30 minutes in duration
- Uninterrupted
- Second meal period (more than 10 hours)
- Off duty (unless valid on duty agreement)
 - “Off duty” generally means relieved of all duty and free to leave premises.



Meal & Rest Periods

- To provide a meal period does not require that the employer ensures it is taken
 - **DO** implement a meal period policy
 - **DO NOT** impede taking of a meal period
 - **DO** have employees clock in and out
 - **DO** use preventative measures such as discipline
 - **DO** use waivers for shifts up to 6 hours

Meal & Rest Periods

Rest Periods:

All employees not covered by an exemption must be authorized and permitted to take ten (10) minutes of “net” or actual rest for every four hours (or major fraction thereof) of work, which should be taken so far as practicable in the middle of each **work period.**



Meal & Rest Periods

Hours Worked	Rest Period
3.5 and up to 6 hours	1 rest period (1 x 10)
More than 6 hours and up to 10 hours	2 rest periods (2 x 10 = 20 minutes)
More than 10 hours and up to 14 hours	3 rest periods (3 x 10 = 30 minutes)
More than 14 hours and up to 18 hours	4 rest periods (4 x 10 = 40 minutes)

Meal & Rest Periods

Rest Periods:

- “Authorized and permitted”
- Must be paid time
- No waiver allowed
- Employees cannot be pressured to waive rest periods (*e.g., tight schedules*).
- Does not have to be fully “off duty”



Meal & Rest Periods

On-Call Rest Periods - Big Time No No

- *Augustus v. ABM Security Services, Inc.*: 2016 CA Supreme Court Case
 - State law prohibits on-duty and on-call rest periods
 - Employers must relieve their employees of all duties and relinquish any control over how employees spend their break time
- “The rest period, in short, must be a period of rest.”
- No waiver allowed



Meal & Rest Periods

Premium due for non-compliance:

- One additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided. (*Labor Code § 226.7(b)*)
- *Also applies for other violations aside from not providing the rest period*
- *Example: one or more untimely, interrupted, or short rest periods each day*
- Could have one meal period penalty and one rest period penalty **per day!**

Meal & Rest Periods

On-duty meal periods:

- Nature of work prevents employee from being relieved of all duty
- Employee signs a voluntary written waiver with a revocation clause
- Employee is compensated (including overtime); and
- Employee is able to actually eat a meal



Wage Statements

Wage Statements

- Wage Statements must contain the following information:
 - Employer's name and address
 - Employee's name and last four digits of social security number
 - Inclusive dates for which the employee is being paid
 - Gross wages earned
 - Applicable hourly rate (including OT)
 - Total hours worked
 - All deductions
 - Net wages earned
 - For piece rate: piece rate and number of pieces earned
- Practical Tip

Wage Statements

Q: How much will it cost you if you
fail to comply?



A: More than you think.

Wage Statements

- Remedy for inaccurate pay stubs:
 - Knowing and intentional violations: greater of all actual damages or \$50 for the initial pay period in which the violation occurs and \$100 per employee for each violation in a subsequent pay period
 - Not to exceed aggregate penalty of \$4,000
- Civil Penalties
 - Can be assessed even for inadvertent violations
- Attorney's Fees
- Rest and Meal Break Violations: Rest, recovery and meal break violations can turn into pay stub violations

Wage Statements

- **DON'T** automatically assume that the payroll company you hired is issuing your wage statements correctly
 - Payroll companies don't always comply with wage and hour laws regarding wage statements
 - Even standard formats that the payroll companies use can miss something basic like the total hours worked
 - Usually written contract that relieves them of liability
 - May even require the employer to defend and indemnify the company if it is named in wage and hour litigation
 - Look at your contracts!

Piece Rate Compensation

Piece Rate

- Work paid for according to the number of units turned out
- Based upon an ascertainable figure paid for completing a particular task or making a particular piece of goods
- *Example: Housekeepers paid by room cleaned*

More About Piece Rate

- Labor Code § 226.2 effective January 1, 2016
- Employees must be compensated **separately** for rest and recovery periods
- **Higher** of *either* average hourly rate
 - Divide total compensation for the workweek exclusive of compensation for rest and recovery periods and any overtime compensation by total hours worked exclusive of rest and recovery periods
- OR applicable minimum wage

More About Piece Rate

It is NOT sufficient to just pay minimum wage or whatever the base rate is for rest breaks if the employer pays a base hourly rate for all hours worked!

- Must also compensate for nonproductive time separate from piece rate compensation
 - Unless you pay base hourly rate that is at least as much as minimum wage for all hours worked in addition to any piece rate compensation

More About Piece Rate

- Housekeeper example, housekeeper paid per room cleaned must be compensated:
 - At the agreed upon rate for each room cleaned
 - For all applicable rest and recovery periods
 - For all non-productive time, i.e., any time spent subject to the employer's control but not spent performing piece rate work (think employee meetings, time spent waiting for customers to vacate rooms)



Vaquero and Commissioned Employees

- Employers must separately pay for:
 - Rest periods
 - “Non-productive” time: non-”sales activity”
 - Exposure for “inaccurate” or “incomplete” paystubs

Overtime and Independent Contractor Issues

Alvarado v. Dart Container

- CA Supreme Court decision effecting employers who pay employees a flat rate bonus
 - Employers must divide total compensation earned in a pay period by only non-overtime hours (just 40 hours)
- Breaks from the federal manner of calculating overtime which allows for dividing total compensation by total hours worked
- All California employers who pay such bonuses must review policies and pay practices to ensure compliance

ABC Test - Classifying Independent Contractors

- California Supreme Court adopted a new legal standard that will make it much more difficult for businesses to classify workers as independent contractors
- The decision directly affects the trucking and transportation industry with delivery drivers, but also has the potential to affect nearly every other industry—including the emerging gig economy
- New standard for determining whether a company “employs” or is the “employer” for purposes of the California Wage Orders

ABC Test - Classifying Independent Contractors

- Under the new “ABC” test, a worker is considered an employee under the Wage Orders unless the hiring entity establishes all three of these prongs:
 - the worker is **free from the control and direction** of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact
 - the worker performs work that is **outside the usual course** of the hiring entity’s business; and
 - the worker is **customarily engaged in an independently established trade, occupation, or business** of the same nature as the work performed for the hiring entity

Self-Help Remedies and Deductions from Pay

Deductions From Pay

- ***Limitations***

- Deductions cannot be taken when to do so would result in the employee receiving less than the applicable minimum wage for all hours worked
- Losses of employer as a result of **simple negligence**—shortages and other losses occurring without fault by employee or simple negligence inevitable and employer must bear as cost of doing business

- ***Self-Help Remedies Not Allowed in California***

- California courts look closely at any attempt by employers to recover back wages earned by employees
- Any employer who resorts to self-help to take deductions does so “at its own risk.”

Deduction From Pay

- ***Labor Code 224 Allows for Deductions in Limited Instances:***
 - When the employer is required or empowered to do so by state or federal law (taxes, SSI, etc.)
 - When deduction is expressly authorized **in writing** by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute
 - When a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement

Deductions From Pay-Employee Conduct

- ***Limited Exception to General Dislike of Deductions***
 - Dishonest Acts
 - Willful Acts
 - Gross Negligence
- ***If it is determined that the employee was not guilty of a dishonest or willful act or gross negligence, employee entitled to recover not only amount withheld, but waiting time penalties as well—BEWARE***

Deductions From Pay Uniforms/Badges

- **General Rule**

- IWC Wage Orders, Section 7, 9(A): when uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided **and** maintained by the employer
- “Uniform” includes wearing apparel and accessories of **distinctive** design or color. All white, or all black, which can be worn generally, would not be in this category

- **Lost Uniforms?**

- Employers may deduct from an employee’s final wages for the cost of uniform not returned. But deduction must be authorized **by prior written authorization**

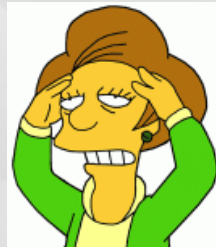
Payment of Wages- End of Relationship

- ***Termination***
 - Employee must be paid immediately at the place of employment all earned and unpaid wages
- ***Resignation***
 - If the employee resigns, payment must be made within 72 hours of the date of resignation if no advance notice is provided
- ***Late Payment Penalty***
 - Labor Code § 203

Final Point of Caution

If you question the importance of operating within legal rules and guidelines, **DO** ask yourself this question:

**How many rooms must my company
sell/rent for me to pay for a major lawsuit?**





Thank You!



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