

A Wage and Hour Breakfast Treat: Top Five Mistakes That Cost Employers Millions

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ON THE FRONT LINES OF WORKPLACE LAW™

Topics Covered



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

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Wage & Hour Litigation



- Plaintiffs' attorneys love it
- Costly judgments and settlements for technical violations
- Statute of limitations and potential back pay: 2-3 years
- Potential liquidated damages
- Automatic attorney's fees



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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

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Wage & Hour Litigation



Applicable Law

- FLSA
- California Labor Code
- Wage Orders
- Local Ordinances
- DLSE Guidance

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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


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California Division of Labor Standards Enforcement



- Administratively enforceable
- Employee-friendly
- Appeal to the Superior Court requires a bond

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Misclassification of Employees

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Misclassification

- Don't assume that all salaried employees and commission earners are exempt from overtime and/or minimum wage.
 - Salaried \neq Exempt



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Misclassification



Exemptions in California:

- Governed by IWC Wage Orders
- Must meet **both**
 - (1) Salary Basis Test; and
 - (2) Duties Test

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Misclassification



- Only a few kinds of employees are exempt
 - White collar exemptions (executive; administrative; professional)
 - Certain Department of Transportation employees
 - Certain sales employees
 - Certain software employees

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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;
 - Authority to hire or fire (or recommend hire/fire);
 - Primarily engaged in management duties;
 - Customarily and regularly exercises discretion and independent judgment;



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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 exercises discretion and independent judgment; 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

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Misclassification



Duties Exemptions in California

- Professional
 - Is licensed or certified by the State of California and primarily engaged in law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting or is primarily engaged in an occupation commonly recognized as a "learned" or "artistic" profession;
 - Prolonged course of specialized intellectual instruction and study;
 - Work that is original and creative in character;
 - Work that is predominantly intellectual and varied in character
 - Monthly salary of twice state minimum wage for full-time employment; and
 - Customarily and regularly exercises discretion and independent judgment

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Misclassification



- Other Exemptions
 - Outside Sales
 - Inside Sales (Wage Order 4 & 7 Only)
 - DOT drivers
 - Computer professionals

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Misclassification



- Properly classifying employees:
 - Fact-specific inquiry must be made
 - Salary basis test
 - Duties test
 - Job title is not determinative

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Meal and Rest Periods



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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.



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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

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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**.



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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)

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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*).



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Meal & Rest Periods



On-Call Rest Periods

- *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**



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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 meal or rest period (e.g., late, interrupted, short)
- Premiums are wages
- Could have one meal period penalty and one rest period penalty per day



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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.

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Wage Statements



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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
 - Sick leave (PTO)




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Wage Statements

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



- **A:** More than you think.

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Wage Statements

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- 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

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Piece Rate Compensation

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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; laborer paid by bushel of apples picked; truck driver paid by mile*

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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

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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

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More About Piece Rate



- Employee paid per widget produced must be compensated:
 - At the agreed upon rate for each widget produced;
 - 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 work)

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Self-Help Remedies and Deductions from Pay



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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

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Deductions From Pay-Employee Conduct



- Limited Exception to General Dislike of Deductions
 - Dishonest Acts
 - Willful Acts
 - Gross Negligence
- No simple 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

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Deductions From Pay-Common Unlawful Deductions



- Gratuities;
- Uniforms
 - When required, uniforms must 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?
- Business expenses

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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

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Final Questions

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Thank You!

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