# Dealing With The Labor Commissioner

Insights
7.01.10

(California Wage/Hour Update No. 3, July 2010)

California wage/hour law is governed by the California Labor Code, the Industrial Welfare Commission's Wage Orders, and appellate or California Supreme Court decisions which interpret these laws. These laws are enforced by the California Labor Commissioner. Any employer doing business in California must be familiar with the Labor Commissioner's enforcement agency, the Division of Labor Standards Enforcement (DLSE). This article takes a closer look at an employer's dealings with the Labor Commissioner.

**An Overview**
The DLSE hires and trains wage/hour enforcement officers to conduct hearings on individual claims, bring civil actions against employers violating the law, and to conduct field audits. Most of these officers are not attorneys, which can be frustrating for legal counsel. Sooner or later, all California businesses will have encounters with officers from the DLSE, who are vested with considerable authority.

They may issue "citations," or fines, against employers, or they may hand down money awards in favor of employees, which can be converted to judgments and enforced by California courts. Certain appeals are available, but your redress may be limited if you don't comply with procedural requirements. Ignorance of California law, the DLSE, or its procedures is no excuse, so it's generally a good idea to retain legal counsel promptly when dealing with this agency.

**A Hypothetical**
Here's how a typical scenario can play out.

*The Audit*

It started out as just another Monday for Jane Doe, plant manager of a small manufacturing company in central California. Just as workers started to arrive at their stations, and as machines started running, Doe was paged to come to the front office, where she was greeted in the waiting room by an individual introducing himself as a deputy labor commissioner for the DLSE. The deputy stated that he was doing a "routine audit" triggered by a complaint from an employee regarding overtime compensation, and also violations of meal and rest period laws. The deputy displayed a

business card and a shiny officer's badge. When she asked what the audit would entail, he responded that he wanted to review all time records and talk with a few employees.

Although impressed by his show of authority, Doe resisted, knowing that the company had always scheduled proper meal and rest periods and that this audit would be disruptive of business operations. Unfamiliar with the extent of the DLSE's authority, Doe refused to cooperate and told the deputy that she would look into the matter.

After the deputy left, she consulted with the company's attorneys to seek advice regarding what to do. They advised her to cooperate with the DLSE and work out a convenient date for the audit. An audit was later scheduled at a time convenient to the company. The deputy reviewed a sample of time records and spoke with a few employees. The audit resulted in a *Notice to Discontinue Labor Code Violations*.

The list of violations consisted of the company's failure to properly post the applicable California Wage Order in a place frequented by employees, and its failure to post the name of the Workers' Compensation provider with the necessary emergency contact information. Although a few employee time cards reflected that meal periods had not been documented, the records showed that a vast majority of employees had properly documented their meal times on their time cards. With the necessary assurances that all isolated problems would be resolved, the deputy closed the matter.

*An Individual Claim*

Doe thought the company was out of the woods. But three weeks later, a *Notice of Claim* from the DLSE came in the mail from Joe Bagodonuts, a former employee, indicating that he had been denied proper meal and rest periods on 20 occasions. The DLSE often encourages employees to file individual claims, and the DLSE hires civil servants to staff their offices to assist employees who want to file such claims.

Under California law, employers are required to pay employees a one-hour premium at the employee's regular rate for being denied a rest or meal break. This payment is treated as a "wage," and thus, should be paid during the same pay period when the rest or meal break was denied. Joe, whose hourly rate was $10 per hour, sought premium pay of $200 for missed meals and $200 for missed rest periods. He also demanded "waiting time" penalties of $2,400, for a total of $2,800. The notice stated that the payment of the amounts claimed would resolve the matter. Doe believed the claims to be fraudulent because Joe had been fired for his failure to properly keep time records and for asking another employee dishonestly to punch his time card for him.

*Notice of Claim and Conference*

The DLSE set the matter for a *Notice of Claim and Conference*, accompanied by formal notice, which gave the parties the opportunity to resolve or settle the claim. Doe appeared on behalf of the company and refused to settle the claim, although the employee offered to settle for $1,500. In

addition to believing the claim to be fraudulent, Doe believed that knowledge of the settlement somehow would leak out to other employees and encourage other employees to file meritless rest-period claims. Importantly, because rest periods are not documented, each claim for rest periods would be a classical fact dispute ("he said, she said"). Facts being in dispute here, the matter was set for an evidentiary hearing before a new deputy labor commissioner, called a "hearing officer."

*The Hearing*

The evidentiary hearing at the DLSE (called a "Berman" hearing) is less formal than a court trial, although testimony is taken under oath. Hearing officers usually permit the employee to state the claims, which can then be rebutted by the employer. No legal representation is required and attorneys' fees generally are not awarded at this stage.

At the evidentiary hearing in this case, both parties presented evidence, including witnesses from the company stating that Joe had violated timekeeping rules, and witnesses who saw him taking meal and rest breaks regularly. The hearing officer tried to keep order, although parties frequently interrupted each other or the hearing officer. The proceedings are recorded, and parties may request a copy, but deciphering or transcribing these sometimes noisy proceedings can be very difficult. Ironically, Joe had never complained about missed breaks while employed.

Because there is no formal discovery process, the DLSE hearings allow surprises that may hurt an opposing party. In this case, Joe introduced evidence that his supervisor told him on a few occasions that he could not take a rest break because he had not cleaned up his area properly. The company believed that, in reality, Joe was asked only to tidy up his work area *before* taking his rest break, but there were no direct witnesses on this issue.

The supervisor who had first-hand knowledge about this was no longer employed and was not a witness in the case. Sadly, the company could have *subpoenaed* the former supervisor to appear, but was unaware of Joe's story about the supervisor's alleged comments until the employee testified at the hearing. Much to the company's chagrin, this became a major issue for the hearing officer in the case.

*An Award*

Several days after the hearing, the hearing officer issued an opinion, called an *Order, Decision, and Award* (ODA), dismissing the employee's meal period claims but awarding the employee for all of his alleged missed rest breaks ($200 plus interest). In addition, the employee was awarded "waiting time" penalties, which are calculated at the employee's daily rate ($80) for a maximum of 30 days, or $2,400, for a total of $2,600 (plus interest on $200). "Waiting time" penalties are designed to punish employers who willfully fail to pay an employee all wages due upon termination until the employee is actually paid, up to a maximum of 30 days. Here, more than 30 days had passed since the employee's termination.

*The Appeal Question*

Doe was furious that this former employee was being awarded $2,600. She firmly believed that Joe actually had been provided all breaks and paid all wages due when terminated. The ODA informed her that the company essentially had 10 days to pay the award unless the company appealed the decision to the superior court for a new trial decided by a judge. Otherwise, the ODA would be filed in court and converted to an enforceable judgment. Ms. Doe wanted to appeal, but because the appeal would be in court she needed legal help. The question was: *What are the odds of coming out better on a court trial?*

Consulting with the company's attorney, Doe learned that the appeal would result in a new trial, but also learned that a bond or cash deposit for the amount of the award would have be filed or deposited with the court together with the appeal. Even more troubling, the company as the appealing party would have to be *"successful"* on the appeal or be required to pay the other party's costs and attorneys' fees incurred in defending the appeal.

When she asked what "successful" meant, her attorney told her that the court would have to determine that the employee was not entitled to *any relief whatsoever*, i.e., that all meal and rest periods were provided as required by law. (By contrast, if an employee appeals, "success" means only that the employee recovers more than zero). The odds are therefore stacked against the employer.

*Jane Doe's Decision*

When she asked about the cost to her company to hire an attorney for the court appeal, her attorney estimated approximately $3,000 – more than the award. She assumed that the employee's attorney would incur the same amount of fees, although she knew there was a chance that Joe would not retain an attorney. Nonetheless, Doe calculated that potential exposure on appeal could be anywhere from $3,000 (the company's fees) if the company prevailed, to $8,600 if it did not prevail. With the potential added exposure, and with odds stacked against the company, Doe decided simply to pay the award ($2,600) rather than risk being required to pay the award, plus both sides attorney's fees, following a new trial.

This situation – where employers simply pay to avoid potential exposure on appeal – is very common. But it is a bitter pill to swallow. Other situations exist where employers feel compelled to (and probably should) appeal where the amount of the award is much larger, such as in excess of $100,000. It further brings home the point that employers should be familiar with the Labor Commissioner's enforcement policies and guidelines so that they can stay clear of a determination of liability in the first place.

**Some Practical Advice**

The above hypothetical provides a simple illustration regarding some of the practical choices facing an employer when dealing with the California Labor Commissioner. For sure, the Labor

an employer. When dealing with the California Labor Commissioner? For sure, the Labor Commissioner potentially provides a swifter path to resolution of wage claims at the administrative stage, although appealing from an adverse ruling by the Labor Commissioner raises definite disadvantages and pitfalls for either party, but especially for employers.

That's why you should take proceedings before the Labor Commissioner seriously, just like a court case. At every stage before the Labor Commissioner, you should be well prepared and informed regarding the issues and potential liability. That generally means seeking legal counsel early, and preventive training for your supervisors. Become well informed about your options and you can help avoid or minimize liability or other risks.

## *Related People*

**John K. Skousen**
Senior Counsel
214.220.8305
Email