



# How Employers Can Combat Timecard Fraud And Employee Wage Theft

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There is nothing so central to wage-hour laws than the sacred domain of “hours worked.” The concept is simple: employees record the time they spend working, and from this data employers generate labor budgets and employee pay checks.

Unfortunately for employers, employee theft through timecard fraud is a real cost that should be added to your labor expenses. This kind of theft is widespread, but especially thrives in those industries where employees entrusted with timekeeping are in a position to cheat.

There are practical solutions for addressing this costly problem, however. Before examining solutions, a closer look at the problem is helpful.

## Employees Stealing From The Government

Wage theft occurs both in private industry and the public sector. Not surprisingly, the government is particularly keen against employees stealing its money through false timecards. There are many examples of California public employees paying a steep price after being caught committing wage theft. For example, in the case of *People v. Spertl*, a California appellate court upheld the conviction of a Los Angeles County marshal for directing his subordinates to falsify time records so that deputies were shown to be working when they were absent.

And in the very recent case of *Schroeder v. United States* (July 16, 2015), the 9th Circuit Court of Appeals affirmed the trial court’s dismissal of a plaintiff’s claim under the federal False Claims Act because he himself had been convicted of bilking the government of \$50,000 through false time submissions.

## Employees Stealing From Private Employers

However, the story is a bit different in the private sector. Unless the timecard fraud involves significant losses, an employer is generally consigned to seek remedies for fraudulent timekeeping without assistance from government agencies.

In fact, most of the California regulations regarding timekeeping are directed toward an employer’s obligation to maintain accurate time records, not toward the remedies available to them when employees submit false timecards.

For example, employers are constantly being reminded that they cannot “steal” an employee’s wages, and are now being required to disclose to employees the basis for their pay in the Wage Theft Protection Act of 2011. This law requires, among other things, that employers provide detailed written notice to employees at the time of hire regarding a variety of pay conditions, such as whether the basis for pay is per hour, per shift, per day, per week, or by salary, piece, commission, or “otherwise.”

Despite the law’s focus on employers’ obligations as opposed to employee theft, California law does acknowledge that employees do occasionally steal through fraudulent timekeeping in a variety of ways, including:

- engaging in personal activities outside normal breaks while on the time clock;
- engaging in disloyal actions that constitute a conflict of interest while on the time clock;
- coming in late but recording time falsely as “on time;”
- recording time falsely for another employee;
- taking an extended meal period but recording less time for the meal period;
- falsely recording a meal period late or short in order to receive or claim additional meal period premiums; and
- reporting off-the-clock work that was not actually performed.

### **Common Types Of Wage Theft**

The most common cases of time fraud usually involve a nonexempt employee recording time for a coworker or falsifying a time record to cover up a missed work day, tardy arrival time, or an extended meal period. If you catch the issue within the same pay period as the falsification occurred, you can take disciplinary action and correct the time record before the time is entered and the wages are paid.

If you discover fraud after the wages have been paid, you should seek legal counsel before making a deduction from the employee’s wages. Although a deduction may be made unilaterally for an intentional or dishonest act under the Wage Order, these self-help methods could be challenged in California for a variety of reasons.

Most deductions from wages require a written authorization by the employee, subject to various restrictions such as protecting the minimum wage. California also provides additional protections against the recapture of overpayments or debts from a final pay check, even in some situations when there is a written authorization. Any such agreement that violates public policy may be set aside as void by a court.

The practical situation many employers face is weighing the probability of prevailing in a civil action versus the employee against the employee’s ability to repay the stolen amounts. In the end, even if

you prevail, you still may have to garnish the employee's wages over time, or you may not recover anything at all.

### **The Oft-Forgotten Duties Of Loyalty And Trustworthiness**

One of the more clever ways in which you can seek remedies in cases of wage theft is through the doctrine which requires employees to demonstrate loyalty and trustworthiness. An employer has a statutory right to rely upon employees to perform the ordinary timekeeping function honestly and accurately, as directed and required by the job.

Among other things, California Labor Code section 2856 provides: "An employee shall substantially comply with all the directions of his employer concerning the service in which he is engaged...." Labor Code section 2863 further requires that "an employee who has any business to transact on his own account, similar to that entrusted to him by his employer, shall always give the preference to the business of the employer."

Clearly, an employee who falsifies time records, which includes reporting time working when the employee actually is engaged in disloyal or personal activities, violates his statutory duty of loyalty and violates these laws. In severe cases involving breach of loyalty and fiduciary duty, an employee may actually be required to repay all of the salary and benefits paid while purporting falsely to be working for the employer's interests.

In the 2008 case of *Service Employees International Union, Local 250 v. Colcord*, an employee was working against his employer, a labor union, by secretly seeking the union's decertification. Once discovered and brought before the court, the employee was ordered, among other things, to repay to the union that portion of his salary and benefits paid during the period of his "breach" or wrongdoing.

The state court of appeal held that neither California nor federal wage and hour law "in any way controls the employer's legal right to recover salary and benefits previously paid to a faithless employee as damages or as restitution in a civil lawsuit for breach of fiduciary duty." Here, the wage fraud involved the more subtle kind, a salaried exempt employee pretending to work for his employer but actually working against the employer's interests.

### **Practice Points For Employers**

In addition to maintaining accurate time records, the California Legislature expects employers to take primary responsibility for monitoring the timekeeping process and for assuring that time records are accurate. Therefore, you should consider the following:

1. Develop a written policy regarding timekeeping, with specific instructions on the duty of honesty and various prohibitions on timekeeping fraud.
2. Train your supervisors on wage and hour laws pertaining to timekeeping and on ensuring that all assigned work is captured accurately.

3. No time should be submitted without a managerial review process, since employees who have direct access to payroll in their time submissions (without supervisory review) will be tempted to cheat more frequently.
4. Prove you care. Employees who are frequently asked questions about their time records will cheat less, because they will take fewer risks once they see that the time record is being reviewed carefully.
5. Establish clearly that no employee should be permitted to record time for another employee.
6. Although a manager may override an employee's time record if falsified, there should be an investigation regarding the time record. While the employee will often agree to most changes supported by an investigation by adding his or her initials, if the employee refuses to cooperate, this should be handled through the disciplinary process after consulting with legal counsel.
7. Require employees who are entrusted with timekeeping to sign an affirmation each pay period certifying that the time records are accurate, including the times when meal periods are taken.
8. Implement special procedures for employees who work remotely or in the field to ensure the reliability of the time records, including purchasing equipment and software for electronic time entries, or creating manual logs to supplement a regular time record for certain occasions (e.g., meal periods). GPS technology also may provide safeguards against fraud.
9. Contact legal counsel immediately when an investigation reveals that time or wage theft has occurred, including an overpayment that an employee has intentionally concealed. You will be advised on actions that can be taken to recover the lost funds and to prevent such losses in the future.
10. Finally, develop a system where your labor budget is fixed specific to each position so that variances can be quickly identified and investigated. This will only be the beginning of your inquiry, because employees may also commit fraud within a known budget that may not be readily apparent.

## **Conclusion**

Time theft will continue to be a hidden cost that you should address immediately. The above is only a general overview of solutions an employer should consider to prevent timecard fraud and wage theft. We recommend you frequently perform an in-house review and audit regarding timekeeping procedures to maintain an accurate and secure payroll. You should consult with legal counsel in difficult cases, including when terminations or overpayments are involved, and when the ability to find a lawful remedy for resulting losses is uncertain.

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## **Related People**

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