

TURNING OVER EVERY STONE: DON'T IGNORE POSSIBLE EXEMPTIONS AND WAIVERS

Publication
Jun 30, 2017

Many employers fail to fully appreciate the existence of a variety of exemptions from, or waivers of, some of California's strict wage and hour regulations. A quick survey of common issues includes the following escape hatches:

MULTIPLE EXEMPTIONS

Many employers have certain jobs subject to more than one exemption, yet they structure the job so that only one exemption will apply. Examples include IT managers who may qualify for the salaried executive, salaried administrative, or computer professional exemptions; or sales managers who may qualify for the salaried executive, commissioned salesperson, or outside salesperson exemptions.

Some exemptions are broader than others, including overtime, minimum wage, timekeeping, and meal and rest periods, whereas others are limited or "partial" exemptions which extend only to overtime pay. Sometimes you can obtain the best protection by patching together certain federal and state exemptions in such a way that they compensate for gaps in an exemption. It behooves you, therefore, to structure job elements and employment agreements with the broadest protection available.

ALTERNATIVE WORKWEEK SCHEDULES

Many employers forget they have the option of conducting secret ballot elections to move specific work units to an

Related People



John K. Skousen

Senior Counsel

214.220.8305

Service Focus

Wage and Hour

alternative workweek schedule of up to 10 hours (or 12 hours in limited cases) per day and 40 hours per week without overtime, provided two-thirds of the affected employees agree to the schedule. Properly implemented alternative workweek schedules, which come in many varieties, provide for a powerful exemption from overtime.

MAKE-UP TIME

Non-exempt employees who miss work because of a personal obligation can enter a make-up time agreement, whereby they are permitted to work up to 11 hours per day and 40 hours per week without overtime (working at straight time rates), as long as the time is made up in the same workweek in which it was lost. This requires a written agreement, but the arrangement cannot be solicited by the employer.

MEAL PERIOD COMPLIANCE

In California, employers can obtain valid waivers from employees of their right to at least 30 minutes of relief from duty for meal periods, subject to certain conditions. State law requires at least two meal periods when an employee works more than 10 hours, with each meal period to commence before the employee completes five or 10 hours of work, respectively. If employees are working no more than six hours, they can waive their first meal period. Or, if they are working no more than 12 hours, they can waive their second meal period, provided they did not waive the first meal period that day. These waivers need not be in writing, but a fully revocable written agreement is recommended.

Alternatively, if the nature of the job prevents the employee from being relieved of duty, the employee can agree to an on-duty meal period agreement, which does require a fully revocable written agreement. Many employers neglect to systematize waiver agreements with memorializing documents, then face extreme difficulties in litigation when they have no documentary support for their waivers.

REST PERIOD COMPLIANCE

Employees are entitled to a paid rest period of 10 minutes for every four hours or major fraction of four hours worked, in the middle of the work period if "practicable." These rest

periods may be freely waived by employees, but employers cannot pressure employees to skip them. Because rest periods generally are not documented separately from hours worked, employers should obtain acknowledgments on a regular basis confirming rest periods were authorized and permitted without regard to whether the employee chose to utilize it. Some employers require proof by making documentation of acknowledgements mandatory.

Rest periods must be off-duty. If the nature of the job prevents the employee from being relieved of duty, there is no "on-duty" rest period available by private agreement in California. However, a blanket waiver may be obtained from the Division of Labor Standards Enforcement by application of an employer or an employee, subject to the satisfaction of certain conditions. These include an investigation addressing whether the action would "not materially affect the welfare or comfort of employees" or "work an undue hardship on the employer."

OTHER EXEMPTIONS

Many other kinds of exemptions to the requirements of the California Wage Orders may be available for certain occupations or industries. Generally, if a Wage Order applies to an industry, provisions will apply to all occupations within the covered business (e.g., drivers in manufacturing operations).

CONCLUSION

Relying on an exemption is not necessarily without risk, as you generally bear the burden of proving the requirements of the exemption have been satisfied. However, the potential rewards may make exploring these options further worth the trouble. To implement any of these systems in your workplace, or determine whether they are feasible, feel free to contact any of the California attorneys at Fisher Phillips.

For more information, contact the author at JSkousen@fisherphillips.com or 949.798.2164.