



# California Employers Face Criminal Liability for Intentional Unpaid Wages Under Newly Signed Law

Insights

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California Governor Newsom signed into law yesterday a bill which makes *intentional* “wage theft” by employers a form of grand theft and thus a felony in the state of California. AB 1003 obviously ups the ante for employers when it comes to wage and hour compliance – as you could be facing criminal charges and potential imprisonment for workplace law violations once the statute takes effect on January 1, 2022. While the chances of such criminal prosecution might be low for the average California employer, the passage of this new law should serve as a reminder for you to ensure you are up to have best practices in place when it comes to state wage and hour law. What do you need to know about this latest workplace law?

## The Basics of the New Law

Wage theft under AB 1003 occurs when an employer fails to pay an employee their full wages, whether salaries, commission, tips, or other forms of compensation due and owed to the employee. This “theft” can come in many different fashions, whether it be by not paying for all hours worked, not correctly paying overtime, not paying minimum wage, or pocketing tips. Not only does this bill apply to your direct hires but also includes any independent contractors retained by your organization.

AB 1003 will make an employer’s *intentional* wage theft of more than \$950 from one employee, or \$2,350 total from at least two employees, within a 12-month period, punishable as grand theft. This crime carries a potential prison sentence of up to three years. Employees or the Labor Commissioner can also seek redress under this bill through civil action.

## Should You Be Concerned?

While this bill and its threat of jail time may seem troubling to employers, it is very unlikely that any well-meaning employer will ever actually face jail for garden variety wage and hour violations. This is because the wage theft must be *intentional* in order to be classified as a crime under the new law.

While the term “intentional” is not defined in the bill, we can take our cues from other provisions under the Labor Code. Other areas of state law in California require a deliberate act by an employer to be considered a violation, rather than simply an honest mistake. Given the criminal penalties that

could theoretically imposed by the statute, the likely standard that will be used is the Labor Commissioner's fairly lenient definition of "willful."

A willful failure to pay wages within the meaning of existing Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of penalties under existing state law. A "good faith dispute" occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover on the part of the employee. Even if the defense raised is ultimately unsuccessful, it will not preclude a finding that a good faith dispute did exist. The defense raised must be unreasonable or presented in bad faith to bar a good faith finding.

Again, while we do not know the exact definition of "intentional" at this time, it is unlikely that inadvertent errors will be considered intentional and subject you to time behind bars. In fact, many in the business community have retracted their opposition to this bill as the language sufficiently carves out well-meaning employers.

## **What Should You Do?**

Because this statute seemingly exempts well-meaning employers that attempt to comply with state wage and hour laws from criminal liability, you would be well served to ensure you are following best practices when it comes to compensation policies and practices in California. The steps you should take to put yourself in the best position to stay out of legal hot water in this area include:

- Require nonexempt employees to review and affirm by signature that their time entries are correct before submitting them to payroll;
- Enact policies to immediately correct any payroll errors brought to the company's attention, preferably with an option for same-day pay;
- Ensure that overtime hours are paid at the correct regular rate of pay, which can be complicated under California law;
- Review independent contractor agreements and/or invoices to establish the agreed upon and all compensation is being paid;
- Do not credit employees' tips against the local and/or state minimum wage;
- Meticulously track all gratuities received as required under the Labor Code; and
- Correctly delineate what constitutes a nondiscretionary bonus versus a discretionary bonus.

We will monitor developments related to this new law and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions on how to comply with AB 1003, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in any one of [our six California offices](#).

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**Gregory Blueford**  
Partner  
916.210.0372  
[Email](#)

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