

## **An Employer's Nightmare: The Wage and Hour Issue**

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It will come as no surprise that the poor economy, which has resulted in massive layoffs and terminations, has caused employment-related claims and lawsuits in general to increase. Wage and hour litigation seems to be increasing the fastest; the Department of Labor estimates that wage and hour complaints increased 15% from 2009 to 2010. That is not surprising when you consider the complexity of the laws applying to who is exempt and who isn't, and how to calculate overtime for those employees who are non-exempt. Even the most diligent employer has difficulty sorting through the morass of rules and regulations, let alone enforcing them.\* Another reason for the growth of wage and hour claims is the ease with which one may establish a class action suit under the Fair Labor Standards Act (FLSA). While not everyone may be harassed or discriminated against, everyone gets a paycheck and may be easily incorporated into a group. Attorneys don't need to consult an "expert," and class action status can usually be certified pretty quickly. In addition, unlike a harassment or discrimination lawsuit that must first be presented to

\*The IWC (Industrial Welfare Commission) publishes the Wage & Hour Orders for all businesses. There are 17 orders and each company is required to follow the rules for their industry. Here is a link to the IWC page that shows all of the orders. Employers are required to post their order with the other required posters so employees can access this information.  
<http://www.dir.ca.gov/iwc/wageorderindustries.htm>



the Equal Employment Opportunity Commission, a plaintiff attorney can go straight to litigation when working on a wage and hour issue.

The FLSA was a bill signed in 1938 by President Franklin D. Roosevelt to protect industrial workers from exploitation by their employers. It guarantees employees one and one half times the value of their hourly wage for time worked beyond 40 hours in a week. The exception to this is for employees who are considered "exempt" (meaning they are exempt from wage and hour laws). An exempt employee generally must receive, each pay period, a predetermined amount constituting all or part of his/her compensation. While there are six types of exemptions, most employees fall into one of the three main categories: professional, executive or administrative. Unfortunately when trying to determine who is and is not exempt, there is no black and white answer. It's difficult to comply, even for a good employer.

### **Main Reasons for Wage and Hour Law Suits**

There are two main reasons for wage and hour

**Wage and Hour** (continued on page 2)

**In This Issue...**

**Wage and Hour  
Issue**

**Excerpts From the  
Industrial Welfare  
Commission**

**Live Well,  
Work Well**

**Community  
Bulletin Board**

lawsuits. The first is misclassification. The exempt vs. non-exempt issue and the resulting improper accounting of overtime wages opens the door for claims by employees. The second is the failure to properly provide and account for rest and meal breaks. An employer needs to understand if someone is in fact non-exempt. Clear policies and procedures as well as information related to when breaks and meal periods are to be taken need to be incorporated into the employee handbook. Employees need to understand the rules and the employer needs to enforce them (easier said than done, as any employer knows!). A corollary issue to misclassification is whether or not someone is an "independent contractor." State and Federal governments are cracking down on employers seeking to avoid payroll taxes by incorrectly classifying someone as an independent contractor versus an employee.

Tracking rest and meal breaks is another challenge. Many employers don't want to monitor all their employees all the time; they don't want to be the Wage and Hour Cop. Yet, making certain people are taking their breaks is a challenge, and additionally, many employers are not good about providing these breaks (in this instance, the employee would be owed an additional hour of pay – many employers are unaware of this). Did they take their breaks in the morning and afternoon? Did they take their obligatory 30 minute lunch break? How do I know if they are working from home?

California has some of the most stringent and confusing laws. So many specific wage and hour rules and regulations exist that it is all but impossible for an employer to comply with all the technicalities.

Insurance coverage is unfortunately not a good answer for wage and hour claims. Many insurers flat out exclude this type of claim, and those that do provide coverage generally provide "defense" only, subject to a relatively modest sub-limit (\$50,000-100,000 is common).

## Best Practices

- Do your best to understand and follow the rules and regulations dealing with wage and hour. Make

Wage and Hour (Continued on page 3)

## Excerpts from the

### INDUSTRIAL WELFARE COMMISSION ORDER NO. 4-2001 REGULATING WAGES, HOURS AND WORKING CONDITIONS IN THE PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL AND SIMILAR OCCUPATIONS

#### 3. Hours and Days of Work

##### (A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than: (a) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek. (c) The overtime rate of compensation required to be paid to a non-exempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

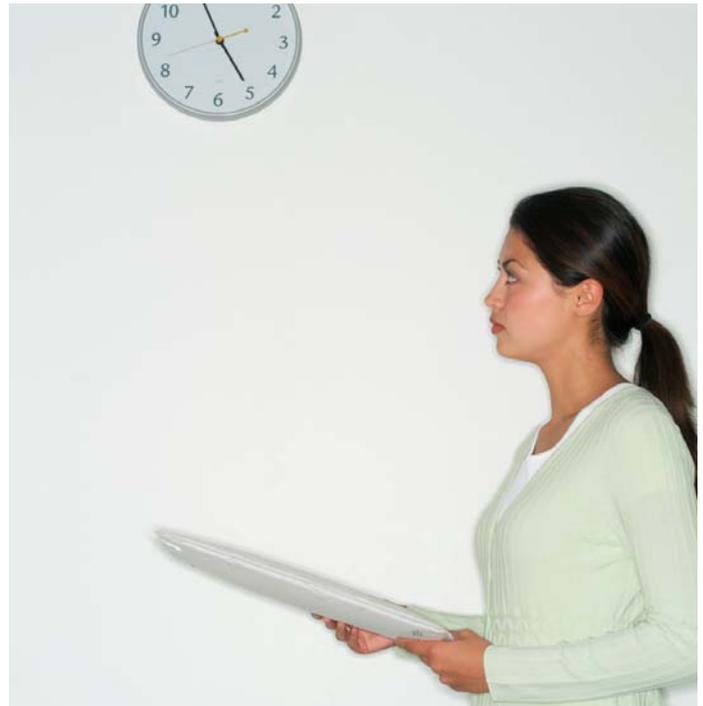
#### 12. Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.✂

sure you stay current.

- Carefully determine, using federal and state qualifying criteria, the correct classification of each position on your company. Inform each employee, before hiring, whether their position is classified as exempt or non-exempt.
- Review the format of your company timesheet to ensure it provides space for the employee to indicate when they took their meal break and when they returned from that meal break.
- Educate your managers about these rules and make sure they understand to keep accurate record of hours worked and document any exceptions.
- Make certain your employees understand the rules and their responsibilities pertaining to their employment.
  - Make employees aware that they are entitled to a minimum 10 minute rest break to be taken by the 4<sup>th</sup> hour worked. Understand that if you prevent employees from taking their 10 minute rest break the penalty is an additional hour of pay.
  - Ensure that employees take their minimum 30 minute meal break by the 5<sup>th</sup> hour worked (reprimand those who don't). Don't interrupt or ask employees to attend to company business when they are on break. Employees are entitled to an uninterrupted, duty-free 30 minute meal break. If this break is interrupted the employer is obliged to pay the employee



an additional hour of pay.

- The employee's responsibilities include accurately reflecting their time worked on the timesheet; taking breaks within the first 4 hours worked; taking their meal break by the 5<sup>th</sup> hour worked; taking or waiving a second meal break on those days they work at least 10 hours and getting authorization for overtime in advance of working it.
- Keep job descriptions up to date.
- Do not require or allow employees to work off the clock.
- Make sure your independent contractors are in fact independent contractors.
- Institute an internal procedure to handle complaints.

### **Final Comments**

Wage and hour lawsuits are a significant exposure for all employers. Although you cannot eliminate the exposure, understanding the law and your responsibilities, as well as enforcing a well written policy pertaining to this issue will help you lower your exposure.✂

Disclaimer: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.





Articles courtesy of Cavignac & Associates Employee Benefits Department

## LIVE WELL, WORK WELL

### Banish Holiday Weight Gain

The holidays are full of hearty meals, sweet treats and fat-laden snacks – which quickly add up to extra pounds. Navigate holiday eating with these tips:

- Enjoy your favorite foods, just be mindful of your portion sizes. Depriving yourself just makes you more likely to binge later.
- When possible, choose a smaller plate to help control portions.
- Wait 20 minutes before getting seconds, to give your body time to signal if you are full.
- Don't feel obligated to eat everything offered to you, or to clean your plate.
- If you have leftovers, freeze them for another time rather than indulging again for breakfast.
- Eat plenty of vegetables throughout the season to help you feel fuller and control your appetite.
- Eat a small, healthy snack before each get-together. If you starve yourself all day, you'll eat even more of the unhealthy food.
- When going to a party, bring a nutritious dish with you, such as nuts, veggies or even a healthier dessert alternative (such as the Peach Apple Crisp on page two).
- Eat slower and take time to enjoy your food. Try eating with your non-dominant hand or setting your fork down between bites.
- Go easy on gravy, sauce and dressing.
- Reduce or eliminate your alcohol intake to save a lot of calories.
- Focus on the people and activities at the party, rather than the food.
- When baking, use low- or non-fat dairy. Swap sour cream for plain yogurt, for example, and always choose fat-free milk.

- Buy lean cuts of meat whenever possible. When eating poultry, opt for white meat over dark meat.
- Don't forget to be active! Try to fit some extra activity in to counteract the extra calories this time of year.✂



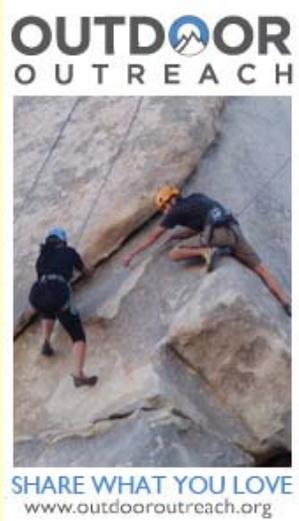
### Outsmart the Flu

Looking forward to your annual bout of feeling miserable and being forced to miss work? This year, avoid the flu:

- Get the flu vaccine and encourage others to do the same. It's the most important step to prevent the flu.
- Try to avoid touching your face – germs are easily spread this way.
- Wash your hands thoroughly and often.
- Avoid contact with sick people when possible. Encourage those with the flu to cover their nose and mouth when coughing or sneezing.
- Teach your kids these good habits.✂

#### DID YOU KNOW

The Centers for Disease Control and Prevention recommends that everyone over the age of 6 months get a flu vaccine each year, even if you got vaccinated last year. It's not too late in the season to get vaccinated! The small discomfort and/or inconvenience of a flu vaccine will be worth avoiding several days stuck in bed with the flu.



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