

# Avoiding Wage and Hour Litigation

Laura A. Wolfe

559-433-1300



McCORMICK  
BARSTOW LLP  
ATTORNEYS AT LAW

# Wage and Hour Lawsuits Have Increased by More than 400%

Most common allegations are:

- Failure to pay overtime/double time
- Failure to pay pre- and post-shift “off the clock” activities
- Failure to provide meal and rest breaks
- Misclassification of employees as “exempt” or independent contractors
- Failure to reimburse for business-related expenses



# Primary Sources of Wage and Hour Law

- Federal Fair Labor Standards Act
- Code of Federal Regulations
- California Labor Code
- Industrial Welfare Commission Wage Orders

**EMPLOYERS MUST FOLLOW LAW THAT IS MOST FAVORABLE TO EMPLOYEES**

# Fair Labor Standards Act (FLSA)

- Applies to employees of enterprises engaged in commerce or in the produce of goods for commerce
- Broad definition
- Applies to most all employers in California

# FLSA Regulates

- Federal minimum wage
- Overtime after 40 hours in a workweek
- Employment of minors
- Recordkeeping
- Bona fide breaks

# California Labor Code

- Applies to all employers in California
- Minimum wage (\$10 or \$10.50 if over 25 employees)
- Overtime after 8 hours in a workday or 40 in a workweek unless Wage Order 14
- Double time after 12 hours in a workday
- Record keeping, wage statements, vacation, paid sick leave



# Allegation 1: Failure to Pay Overtime



# Overtime

- 1 ½ times regular rate of pay for all hours worked beyond 8 in a workday\*
- 1 ½ times regular rate of pay for all hours worked beyond 40 in a workweek\*
- 2 times regular rate of pay for all hours worked in excess of 12 in a workday\*
- 1 ½ times regular rate of pay for first 8 hours on the seventh consecutive day of work in a single workweek
- 2 times the regular rate of pay for all hours beyond 8 on the seventh day

\*Except Wage Order 14 (Ag. workers – but note change beginning in 2019)

•

•



# Overtime

- California law requires that you pay employees for overtime whether authorized or not.
- Policies where overtime is not allowed unless “pre-authorized by employer” do not mean you do not have to pay overtime – if the employee is “suffered or permitted” to work, then you must pay.
- You can discipline any employee who does not follow your policy of pre-authorization.



# Seven Day Rules

- Labor Code sec. 552: “No employer of labor shall cause his employees to work more than six days in seven.”
- This does not prevent an accumulation of days of rest “when the nature of the employment reasonably requires that the employee work seven or more consecutive days”, if in each calendar month the employee receives days of rest equivalent to one day's rest in seven.



# Seven Day Rules (cont'd)

- The Labor Code's Seven-Day rule is not limited to a "workweek"
- Wage Orders require seventh day overtime only for hours worked "on the seventh consecutive day of work in a workweek"



# Workweek

- Any seven consecutive 24 hour periods starting on the same calendar day each week
- If not defined by the employer, workweek runs from Sunday through Saturday
- Possible to work seven or more days straight depending on how the days worked fall within a defined workweek
  - **Example:** Workweek runs Sunday-Saturday. Employee can work Monday, Tuesday, Wednesday, Thursday, Friday, Saturday in week 1 AND Sunday, Monday, Tuesday, Wednesday, Thursday and Friday in week 2 without accruing seventh day overtime

# Workweek

- Mendoza v. Nordstrom, Inc. – May 2017
- California Supreme Court answered the question about the difference between wage order workweeks and day of rest requirement under Labor Code.
- “A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited.”



# Workweek

- Mendoza v. Nordstrom, Inc. – May 2017
- CA Supreme Court also decided the issue relating to the six-hour rule under LC 556 (Sections 551 and 552 (7<sup>th</sup> day rest rules) shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.)
- Q: Which is an accurate reading? 1) So long as an employee is given at least one day of no more than 6 hours during a one-week period, he may be required to work all 7 days without a day of rest; or 2) elimination of the 7<sup>th</sup> day of rest only applies to employees who work no more than 6 hours each and every day of the week.
- SC Held: " [W]e conclude the 'six hours or less' daily exception is satisfied only if every daily shift that week has entailed six hours or less of work."

•

•

# Workday

- A consecutive 24 hour period starting at the same time each calendar day;
- Can be defined by employer;
- Can have different workdays for different positions;
- If not defined by employer, workday runs from 12:01 a.m. to midnight



# Regular Rate of Pay

- Hourly rate paid for employee's work including agreed rate (base pay) plus all other forms of compensation
  - **Includes** commissions, nondiscretionary bonuses, piecework earnings.
    - Example: employee earns \$10/hour plus \$1 for every widget made. Employee worked 60 hours and made 200 widgets in a workweek. For purposes of calculating overtime:

$(60h \times \$10) + \$200 = \$800$ .  $\$800/60 \text{ hours} = \text{Regular rate of } \$13.33 \text{ an hour.}$

Premium pay for overtime:  $\$13.33 \times .5 \times 20 = \$133.33$

Total weekly compensation:  $\$800 + \$133.33 = \$933.33$ .

- **Does not include** gifts; hours paid but not worked (vacation, sick, holiday, etc.); expense reimbursements; discretionary bonuses; ERISA plan payments; overtime pay



# Off-the-Clock Work

Employees must be compensated for all closely related duties and tasks, even if those activities are performed outside of regularly scheduled hours.

- Phone calls, text messages, e-mails outside of work
- Making work-related stops on the way to or from work
- Performing any work during meal periods or rest breaks
- “Donning and Doffing”



# Travel Time

- Ordinary travel time between home and work does not need to be compensated. However, home to work travel is compensable in an emergency travel situation during non-regular hours to a customer's place of business.
- Travel during the workday that is part of the employee's principal activity is considered hours worked and must be compensated.



# On Call Time

There is a distinction between time spent “on-call” but not actually performing work and the time spent working as a result of being on-call.

Under both state and federal law, a non-exempt employee must be compensated for the time spent working, but whether compensation is required for simply being “on-call” depends on the facts of each case and in California it will depend on “control”.



# Allegation 2: Failure to Provide Meal Periods or Rest Breaks



# Meal Periods and Rest Breaks

- Almost always included with allegations of other wage and hour violations
- Penalty for violation is payment of one hour's wage (meal period/rest period "premium")
  - Meal period and rest breaks are separate violations
  - If employees misses more than one rest period, there is only one penalty per day; assumption is meal period violations are the same but this has not yet been expressly codified or ruled on by the courts.
  - Thus, an employer can be liable for up to 2 hours of the employee's regular rate of pay, per day, for missed meal and rest periods.



# Rest Breaks

- Non-exempt employees are entitled to 10 minutes of net rest for each four hours worked, or major fraction thereof (i.e., 2 hours)
- Rest period should be as close to the middle of each four hour period as reasonably practicable
- Rest periods are paid- employees must not clock in and out
- Even though rest periods are “on-duty” the employee cannot be subject to the employer’s control



# Meal Period

- Non-exempt employees who work a shift of more than 5 hours are entitled to at least 30 minutes for the meal period and are entitled to additional 30 minutes for every five hours of work
- Meal period must commence before the **end of the fifth hour**
  - Employee is scheduled from 8 a.m. to 5 p.m. Meal period must begin by 12:59 p.m.
- Meal Periods are off-duty, not paid, and employees must clock in and out



# Meal Periods

- Employee may waive the meal period if 6 hours will complete the days' work – no requirement that the waiver be in writing but it's a good idea
- An employee who works 10 or more hours is entitled to a second meal period that must be taken before completion of the 10<sup>th</sup> hour
- Second meal period can be waived if
  - Employee did not waive the first meal period
  - Employee works 12 hours or less
  - Again, not required to be in writing but a good idea





# Wage Statement Requirements

- Labor Code 226 requires that employers include the following items on an employee's wage statement:
  - gross wages earned
  - total hours worked by the employee
  - the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis
  - all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item
  - net wages earned
  - the inclusive dates of the period for which the employee is paid
  - the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number
  - the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer
  - all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee and, if the employer is a temporary services employer, the rate of pay and the total hours worked for each temporary services assignment

# Wage Statement Requirements

Additional items to include:

- Meal period and rest period premium pay
- Paid Sick Leave
- Paid vacation
- Anything paid from a prior pay period must identify in which pay period it was earned.

# Allegation 3: Misclassification



# Exempt vs. Non-Exempt

- “Exempt” from what?
  - Overtime
  - Meal Periods
  - Rest Breaks
  - Wage statement requirements of Labor Code section 226(a)

# Exemptions

- “White collar” exemptions: Executive, Administrative, Professional
- Outside sales
- Highly Compensated Employees (Federal only)
- Inside sales
- Computer software engineers (treated like professional exemption but paid hourly)



# White Collar Exemptions

Three tests determine exempt status for “white collar” exemptions:

- 1) Salary Test
- 2) Salaried Basis
- 3) Duties Test



# Salary Test

Exempt employees must make two times the minimum wage, currently \$43,680



# Salary Basis Test

- Paid predetermined compensation weekly ("salary")
- Salary cannot be reduced:
  - because of variations in quality or quantity of work
  - For absences required by the employer
  - Because no work is available





# Salary Basis Test

- But, you can make deductions for:
  - Absence of one or more full days for personal reasons (not illness or disability) where no vacation time available to cover the absence
  - Can deduct from accrued vacation bank for partial days' absence, but you cannot deduct wages for partial day absences once vacation leave is exhausted (or not provided)
  - Absence of one or more full day when employee is absent for illness or disability and deduction is made pursuant to a bona fide sick leave policy

# Duties Test

- FLSA uses “primary duty” test, so concurrent performance of exempt and non-exempt does not disqualify employee from exempt status
- BUT, California requires more than 50% of an employee’s time to be spent performing exempt work



# Executive

- Duties and responsibilities involve the *management* of the business or of a *customarily recognized department or subdivision* of the business; **and**
- Customarily and regularly directs two or more full-time employees (or part-time equivalents); **and**
- Can hire, fire or recommendations to do so are given particular weight; **and**
- Customarily and regularly exercises *discretion and independent judgment*

•

•

# Administrative

- Office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; **and**
- Customarily and regularly exercises discretion and independent judgment; **and**
- Regularly and directly assists a proprietor, or an employee in a bona fide executive or administrative capacity; **or**
- Who performs under only general supervision work along specialized or technical lines requiring specialized training, experience or knowledge; **or**
- Who executes under only general supervision special assignments and tasks



# Examples of Administrative

- Executive or administrative assistant to a business owner or executive if such employee has been delegated authority regarding matters of significance (i.e., not just data entry, transcribing dictation, etc.);
- Human resources managers who formulate, interpret or implement employment policies;
- Purchasing agents with authority to bind the company on significant purchases

•

•

# Professional

- Licensed or certified by the state and primarily engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting; **or**
- Primarily engaged in an occupation commonly recognized as a learned or artistic profession (knowledge of an advanced type in science or learning customarily acquired by a prolonged course of specialized instruction and study); **and**
- Customarily and regularly exercises discretion and independent judgment

•

•

# Outside Sales Exemption

- Outside sales
  - Employees over 18 who spend more than ½ of working time away from employer's place of business "selling" or obtaining orders or contracts for products, services or use of facilities. *No minimum salary requirement.*

# Inside Sales Exemption

- Inside Sales
  - Employees covered by Wage Orders 4 (professional) or 7 (retail)
  - Earnings must exceed 1 ½ times the minimum wage for all hours worked
  - More than half of the employee's compensation must represent commissions
  - Employers must still keep time records



# Inside Sales (cont'd)

- Cannot attribute commission wages paid in one pay period to other pay periods in order to meet the wage requirements
- *Peabody v. Time Warner*
- Plaintiff was paid biweekly, fixed hourly wages at \$9.61/hour based on a 40 hour workweek (min. wage was \$9).
- Once a month she was paid commissions.
- In the 10 months she worked for TW, she was paid \$75,000 in wages.

•

•

- Peabody sued TW saying she worked 45 hours/week and was never paid overtime.
- TW argued Peabody fell under the “inside sales” exemption.
- Although she was paid \$75,000 total, her paychecks included only hourly wages and equated to less than 1.5 times the minimum wage.
- TW argued commissions should be attributed not to the pay period in which they were paid but the weeks in the month when commissions were earned.

- Court rejected the argument; the minimum wages prong is based on the wages actually paid in the pay period.
- Whether 50% of earnings comes from commissions is not each pay period but a representative period, e.g., quarterly or every 6 months.
- To avoid liability, pay 1.5 times hourly rate for all hours worked exclusive of commissions;
- Or commission plan should state that commissions are earned and paid each pay period but this will require close monitoring of employee's total earnings each work week.



# Correcting Isolated, Inadvertent and Impermissible Deductions

- Employer will lose exemption for making improper deductions if and only if the employer has an actual practice of improper deductions
- No “actual practice” if:
  - Employer has a clearly communicated policy that prohibits improper deductions
  - Reimburses employees for improper deductions and
  - Makes a good faith commitment to comply in the future

# Penalties for Misclassification

- Payment of unpaid overtime/double time
- Liquidated damages under FLSA
- Inaccurate wage statements
- Meal and rest break penalties
- Waiting time penalties if employee is no longer employed



# Allegation 4: Failure to Reimburse for Necessary Work-Related Expenses



# Reimbursement

- Labor Code section 2802 requires an employer to indemnify its employees for all expenses and losses necessarily incurred in the discharge of their duties.
- A component of the “necessary” requirements is that expenses must be “reasonable”
- Mileage, tools/equipment, personal devices, uniforms



# Penalties

**Waiting Time Penalties** (Labor Code 203: provides that if any wages are due and not paid when an employee quits or is discharged, the employer will be subject to penalties.

Measured by the employee's daily rate of pay, up to 30 (calendar) days.

Defense if there is a good faith dispute based on law or facts that no wages are owed.





# Penalties

- **PAGA** (Private Attorney General Act)
- Assesses penalties for Labor Code violations
- 75% of recovery goes to the State; 25% to “aggrieved employees”
- Less stringent requirements than a class action
- Penalties are permitted to “stack”
- Court has discretion to reduce penalty if confiscatory, oppressive, or otherwise unjust



# Penalties

- **Labor Code 226 Penalties** (Wage Statement Violations)
- If employee deemed to have suffered an injury due to incorrect wage statements, penalty is \$250 per employee per violation in an initial citation, \$1,000 per employee for each violation in a subsequent citation (not to exceed \$4,000)
- “Injury” is a low standard.
- Problem – when you have incorrect OT/DT calculations or missed meal periods, you have inaccurate wage statements, triggering a violation of 226.



15. For such other and further relief as may be warranted to the procedures detailed in Labor Code § 2698 et seq.
16. For all provisions of the Labor code violated as described above except those for which a civil penalty is specifically provided, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392,

# Questions?



Thank you!

