



Lingering Labor Code Landmines

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Labor and Employment Practice Group

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Plaintiffs' Attorneys See Business Opportunity

- When jobs are plentiful, unhappy employees tend to move.

"95% of our wage and hour cases are a result of someone coming to us complaining about something else. I can't tell you how many people walk into our office with employment disputes that are meritless, but walk out with a wage and hour case."

Wage and Hour Litigation is a Billion Dollar Business

- Reasonable estimates for the last few years indicate that companies have collectively paid out more than \$1 billion annually to resolve these claims. That's

\$1,000,000,000.00
per year



#1: Classify All Employees as Exempt, Whether They Are or Not

Misclassification

- “It is easier to pay everyone a salary, rather than dealing with meal and rest breaks, overtime, time records, and such.” – CEO #1
- “My employees like the fact that they always make the same amount of money each pay period, and it won’t be a problem.” – CEO #2
- **Reality check:**
 - With few exceptions, to be exempt an employee must:
 - (a) be paid at least \$37,440 per year (for now), and
 - (b) be paid on a salary basis, and also
 - (c) perform exempt job duties.
 - Most employees must meet all of these "tests" to be exempt.

Salary Basis Test

- Salary Basis Test
 - Guaranteed minimum amount of money employee can count on receiving for any work week s/he performs any work.
 - In most cases, employees must earn at least twice the minimum wage to qualify for an exemption from overtime.
 - Until December 31, 2015: at least \$37,440 per year (based on \$9.00/hr minimum wage).
 - Beginning January 1, 2016: at least \$41,600 per year (based on \$10.00/hr minimum wage)
 - Salary basis is not affected by whether pay is expressed in hourly or salaried terms

The Duties Tests

- Exemptions are limited to employees who perform relatively high-level work.
 - Job titles or position descriptions are of limited usefulness in the determination
 - Actual job tasks must be evaluated along with how the particular job tasks “fit” into the employer’s overall operations.
- Three typical categories of exempt job duties:
 - Executive
 - Professional
 - Administrative

The Executive Exemption

- Job duties are exempt executive job duties if the employee
 - Has duties and responsibilities involving the management of the enterprise
 - Regularly supervises two or more other employees,
 - Primarily engaged in...
 - Interviewing and training employees
 - Setting rates of pay and hours of work
 - Maintaining production or sales records (beyond clerical)
 - Appraising productivity
 - Handling employee grievances
 - Disciplining employees
 - Determining work techniques
 - Planning budgets for work
 - Apportioning work among employees
 - Has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).

The Professional Exemption

- “Learned Professionals”
- Predominantly intellectual work that requires specialized education and involves the exercise of discretion and judgment
 - Must have education beyond high school, and usually beyond college, in fields that are distinguished from (more "academic" than) the mechanical arts or skilled trades
- “Creative Professionals”
 - Work requires invention, imagination, originality or talent; work contributes a unique interpretation or analysis

The Administrative Exemption

- Administrative job duties are:
 - office or nonmanual work, which is
 - directly related to management or general business operations of the employer or the employer's customers, and
 - a primary component of which involves the exercise of independent judgment and discretion about
 - matters of significance
- Designed for relatively high-level employees whose main job is to "keep the business running"
- Work must be office or nonmanual, and must be for matters of significance
- Typically involves the exercise of discretion and judgment, with the authority to make independent decisions on matters which affect the business as a whole or a significant part of it

Other Exemptions

- Computer Professional making not less than \$41.00 per hour
- Outside Sales
- Commissioned Inside Sales Employee

Independent Contractors

- The factors that the Supreme Court has considered significant, although no single one is regarded as controlling are:
 - the extent to which the worker's services are an integral part of the employer's business
 - the permanency of the relationship
 - the amount of the worker's investment in facilities and equipment
 - the nature and degree of control by the principal
 - the worker's opportunities for profit and loss; and
 - the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise

Consequences to Misclassification

- Liability for employment taxes and penalties
- Liability to employee who was misclassified
- Administrative agencies and the IRS closely scrutinized independent contractor relationships
 - Challenges can arise in many forms, including:
 - Filings for unemployment benefits
 - Claims for unpaid wages
 - Claims for workers' compensation
 - Charges of employment discrimination
 - Investigations by the IRS and Employment Development Department (EDD) to audit wage payments, workers' compensation coverage and Unemployment Insurance Fund contributions



#2: Use Interns As Free Labor

Should I Pay My Interns?

You May Not Need To Pay If:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.



#3: Let Employees Take Lunch Whenever They Want To

Meal Periods

- California law requires employers to provide an uninterrupted, 30-minute duty-free meal period for all employees who work 5 or more hours in a day.
 - No duty to ensure employees do no work
 - But if they do any work, they are entitled to straight time
 - First meal period must start before the completion of the fifth hour of work
 - Second meal period if the employee works more than 10 hours
 - No rolling 5-hour rule – i.e., so long as the employee works fewer than 10 hours, no second meal is required, even if the employee works more than 5 hours after the first meal period ends

- Meal Period Waivers

Meal Periods

- Do:

- Do provide duty-free meal breaks
- Do require non-exempt employees to accurately record their meal breaks on their timecards
- Do allow employees to leave the work premises

- Do Not:

- Do not allow your employees to take their meal breaks at their work station
- Do not require employees to attend unpaid “lunch meetings”
- Do not have an automatic meal break deduction unless there is a clear way that employees can inform management that they did not take a meal break so that they can be paid appropriately



#4: Automatically Terminate Employees Who Stay Out Beyond Protected Leave

When Can I Fire The Employee Out On Leave?

- **Examples of When Employees Can't Be Fired:**

- They are on FMLA/CFRA leave (whether they can do the essential functions of their job or not under the ADA), OR
- They are able to do the essential functions of the job with reasonable accommodations, but the employer hasn't provided accommodations (whether the employee is on FMLA/CFRA leave or not).

- **Examples of When Employees *Can* Be Legally Fired:**

- They don't return from leave after taking their 12 annual weeks of FMLA/CFRA, OR
- They didn't declare they were taking FMLA/CFRA leave and they violated their sick leave policy or used up their sick time.

- **AND**

- They are not able to do the essential functions of the job, even with reasonable accommodations, OR
- They are able to do the essential functions of the job with accommodations, but they don't return to work after the employer has provided the appropriate accommodations.



#5: Forego Required Harassment and Discrimination Training for Managers and Supervisors

Harassment/Discrimination Avoidance Training



“To all the women that I've offended, I had no intention to be offensive, to violate any physical or emotional space. I was trying to establish personal relationships, but the combination of awkwardness and hubris led to behavior that I think many found offensive.”

- Training is required under California law.
 - Employers with 50 or more employees must provide at least two hours of education regarding sexual harassment to all supervisory employees within six months of assuming a supervisory position.
 - Employers must also provide sexual harassment training and education to supervisors once every two years.



#6: Withhold Final Pay If Employees Fail To Return Company Property

Final Pay

- “Be Big In Small Things”
- Generally, deductions are not allowed for cash shortage, breakage, or equipment loss unless caused by the employee’s gross negligence, or dishonest or willful act.



#7: Allow Employees To Take “Comp Time” Instead of Paying For Overtime Work

Compensatory Time Off

- Compensatory time, commonly referred to as "comp time," is generally paid time off granted instead of overtime wages.
- Not allowed under the FLSA for non-exempt employees in the private sector.
 - Comp time can even be problematic when offered to exempt employees:
 - If comp time is offered regularly, employees may come to expect it every time they work overtime.
 - It can lead to wage and hour claims and disputes over whether employees are truly exempt or non-exempt.
 - Some employees may take advantage of the offering – for example, working overtime unnecessarily so they can get a day off in the future.
 - If an employee has saved up a lot of comp time and then quits, do you need to pay for those banked hours?
- If you do offer comp time to exempt employees, make sure you cover the rules with a strict and stringent company policy. Also make sure comp time is used as an occasional reward, not an hour-for-hour overtime exchange.

California Makeup Time - Alternative To Comp Time

- If you choose to allow makeup time, you must comply with the following rules:
 - While you can inform an employee of the makeup time option, you cannot encourage or otherwise solicit an employee to request the employer's approval for makeup time.
 - An employee can work no more than 11 hours on another workday, and not more than 40 hours in a workweek, to make up the time off.
 - The time must be made up within the same workweek.
 - The employee must provide you with a signed, written request for each occasion that s/he desires makeup time.



#8: Use Social Media To Screen Job Applicants

Using Social Media To Screen Applicants

- **Legal challenges:** FCRA, Discrimination, Invasion of Privacy and Stored Communications Act violations
 - **DO:**
 - Establish procedures for making social media based employment decisions
 - Redact all information that cannot be considered in the hiring process
 - Require all job applicants authorize you to perform a social media background check as part of the hiring process and throughout his/her employment
 - **DON'T:**
 - Have the hiring team perform the social media search
 - Assume your managers are not using social media to screen applicants or employees
 - Make employment decisions based on an employee's off-duty, lawful conduct
 - Forget to keep consistent records of data reviewed and make uniform hiring decisions based on social media research



#9: Fail To Hang The Required Federal And State Posters

Posters and Notice Requirements

- State and federal laws require employers to conspicuously display a variety of posters in all workplaces where they can be easily read by employees and job applicants.
- Must also distribute notices or pamphlets to employees when hired or in connection with certain events.
- Failure to comply can be punishable by a fine, imprisonment or both.

- Posters can be purchased or downloaded online
 - Federal - <http://www.dol.gov/whd/resources/posters.htm>
 - State – <http://www.dir.ca.gov/wpnodb.html>



#10: Fail to Provide Employees With Paid Sick Leave

Healthy Workplaces, Healthy Families Act of 2014

- As of July 1, 2015, employers are required to offer 3 days or 24 hours of paid sick leave per year to employees who have worked in CA for 30 days
- Must accrue at the rate of one hour per 30 hours worked, or on a regular basis such that the employee will have 24 hours of accrued sick leave by the 120th calendar day of employment of each calendar year, or in each 12 month period
- Record dates and amounts used, but not the reason
- Rate of Pay
 - Nonexempt Employees: Either (1) the employee's regular rate of pay in the week sick time is used (not including OT) or (2) divide the employee's non-OT wages by the hours worked in the pay periods of the prior 90 days
 - Exempt Employees: Calculated the way the employer calculates other PTO



Proactive Steps That Employers Can Take

Proactive Steps To Reduce The Risk of Litigation

- Regularly provide management and supervisory trainings on employment laws and harassment/discrimination avoidance
- Review your handbooks to make sure you are in compliance with the law
- Audit the exempt classifications of your workforce periodically to ensure that employees are properly classified
- Audit payroll practices periodically to ensure that you are tracking time and paying correctly
- Ensure that record-keeping policies are intact so that you maintain the appropriate documents, either on paper or electronically, to substantiate classification and pay practices
- Make sure the required posters and notices are prominently placed and/or distributed
- Consult employment counsel before making wide-scale changes to any overtime classification, payroll practice, or employment policy

Thank You!



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