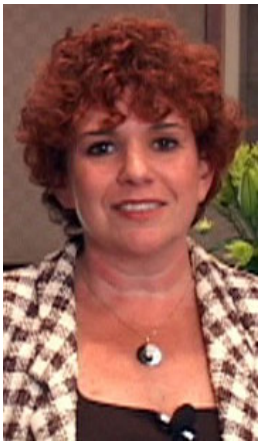
Top Ten Mistakes Good and Honest Employers Make

By Helene Wasserman, Esq



I have devoted my entire career to helping employers deal with their employees. Over all of these years, dealing with all sizes of employers in all sorts of industries, I have formed one universal belief – most employers are genuinely good and want to help their employees develop and grow. Most employers recognize that by treating their employees well, the employees will serve them well, will be productive, and will enhance the business.

Unfortunately, even the most well-intentioned employer sometimes unwittingly makes mistakes. What is also unfortunate is that those unwitting mistakes can have serious, even disastrous, ramifications for an employer.

So, in an effort to either help those who read this piece to avoid making these mistakes or, alternatively, to make those who have made these mistakes realize that they are not alone, I have created a "Top 10" list of questions, statements, and scenarios that many good, caring and well-intentioned employers have raised that reflect common misconceptions that employers have.

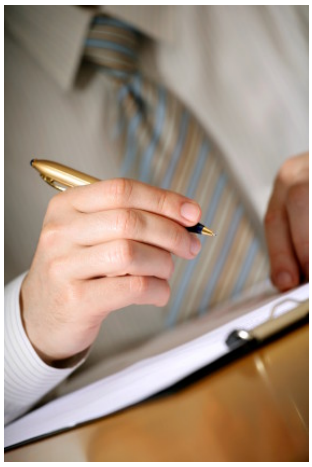
1) "I pay my employee such a large salary, why do they think they should also be paid overtime?"

One of the biggest misconceptions held by many employers is that, just because an employee is paid a significant salary, that should "take into account" overtime. Employers want to be good to their employees and pay them good wages. So, if the employer pays a good wage, it expects the employee to do the job and take whatever time it takes to complete the job. Makes sense, right?

Unfortunately, California wage and hour law is very specific as to which employees are, and are not, entitled to receive overtime compensation. That decision has more to do with the actual tasks the employee performs than it has to do with the amount of compensation the employee receives. Generally, only executives, professionals, some true administrative staff, and certain highly-compensated computer professionals qualify as being "exempt" from overtime laws. All other employees, regardless of how well-compensated they are, must be paid overtime.

A complete analysis of the classifications of employees who are exempt from overtime is contained in my Podcast, "Exempt or Not Exempt: That is the Question."

2) "What do you mean, 'if it isn't written down, it didn't happen?' Of course it did!"



As I mentioned above, I truly believe that most employers are good and honest. And, while I always do my due diligence in working with employers, I generally trust what I am being told by my clients. Unfortunately, not all attorneys are like me. Many attorneys, especially those who are on the opposite side of employers in lawsuits, tend not to be as trusting and believing in employers as I am. So, when an employer's deposition is being taken, for example, and the question is asked "did you take notes during your investigation of the employee's complaint," or "did you make a record of the employee's work performance deficiencies," the attorney asking the question is going to expect the answer to be "yes." If the answer is "no," then the attorney deposing the employer proceeds to cast doubt on whether the employer did, in fact, conduct the investigation or whether the employer actually told the employee that his or her work performance was somehow deficient. From the other attorney's perspective, "if it isn't written down, it didn't happen."

Now, we all know that it did happen. The investigation did happen, right? The employee was told numerous times about his or her performance deficiencies, of course. But, the documentation is what "proves" it. Not that the employer's word is not enough. But memories fade, depositions often happen one or more years after the investigation or the disciplinary action, and the documentation, created contemporaneously with the action, is the best way to remind the employer of what exactly happened. It is also the best way to avoid the doubt an opposing counsel will attempt to cast.

For hints and suggestions about proper documentation, check out my podcast "Effective employee evaluations and documentation."

3) "Of course we offer 'light duty.' Anyone coming back to work from a workers' compensation leave of absence can get a 'light duty' position."

Many, many employers have policies or practices like this. The term "light duty" had its origins in the workers' compensation system. Frequently, an employee who was injured on the job goes to the workplace clinic or a personal physician who has been designated by the employee for workers' compensation purposes. Either after some time off, or just after a few office visits, oftentimes the doctor will release the employee to "light duty." That can be defined numerous different ways, typically tailored to the job the employee was performing. Maybe the employee can't lift for a period of time, or can only lift a certain number of pounds, for example. That is how the term "light duty" was created.

However, policies or practices of limiting the offer of "light duty" to employees returning to work from workers' compensation leaves of absence can run afoul of the California Fair Employment and Housing Act and the American's with Disabilities Act. What if, for example, an employee develops a disability while working for you? Let's assume the disability was not caused by a work-related injury. Now what? Well, many well-meaning employers (or maybe untrained supervisors or managers), recite to the employee their policy: "we only offer light duty to people returning from workers' compensation leaves of absence."

However, employees with disabilities are entitled, by law, to workplace accommodations that do not pose an "undue hardship" or "undue burden" on the employer. If the employer would be able to accommodate an employee returning from a workers' compensation leave of absence with "light duty" or some other form of accommodation, it would not be an "undue hardship" or "undue burden" to provide the same accommodation to an employee who has a non-industrial disability. Not every disability can be accommodated, and just because someone is disabled means that every employer needs to accommodate every disability.

My suggestion is that, before "reciting the policy," consider the entire situation and recognize that an effort to at least attempt to accommodate the disability, and "engage in the interactive process," to quote the legal lingo on this topic, must be made to avoid having to defend against a potentially very expensive lawsuit. Contacting counsel experienced in this area is very important to protect yourself against these types of claims.

4) "She was joking, too."

An employee complains that she has been sexually harassed. Maybe the alleged harassment consists of jokes, maybe some physical horseplay. And, of course, you conduct a thorough investigation. During the course of the investigation, you find out that no one intended the victim to feel harassed, but that everyone was just "joking around." Then, you hear that the victim was "joking" right along with everyone else. So how was everyone to know she was offended? In more than 50% of the sexual harassment cases I have handled, there is some element of participation by the complaining party. So, what do you do?

Well, you DON'T stop the investigation. Yes, one element that any alleged victim of sexual harassment must establish is that the conduct was unwelcome. While participation in the conduct can be a sign that the conduct was welcome (or, at least, not unwelcome,) it also can be a sign of "going along with the group" so as not to be ostracized of shunned. Continue the investigation, ask the complaining person about her participation, and take everything into account when deciding the appropriate level of discipline for the offending parties. In fact, depending on what is revealed during the investigation, maybe some sort of non-disciplinary counseling regarding appropriate work conduct is appropriate for the complaining party, if it is established that she participated in the conduct. But DON'T discipline the complaining person, as that could be viewed as retaliation for making the complaint.

I recorded two podcasts related to sexual harassment that employers may find useful. One of them "Sexual Harassment," discusses the law of sexual harassment, what is (and what can be) considered to be sexual harassment. The other one, "California's New Sexual Harassment Training Regulations" discusses the regulations related to the new California law that requires all employers with 50 or more employees conduct mandatory sexual harassment training for all of their supervisors.

5) "He told me not to do anything."

So, your employee complains to you that his supervisor made some racist remarks to him, about him. You have an "open door" policy, and your employee opens the door. He spills his heart out about how upset and offended he is. Then, after he vented, he tells you how much better he feels and tells you not to do anything with the information he just provided to you. He just wanted someone to listen to him. So, what do you do?

Well, what you DON'T do is you DON'T "do nothing." Even though the employee told you not to do anything, you have an obligation to provide your employees with a harassment-free workplace. If the employee who reported the harassment heard the remarks, likely there are other employees who have not come forward. What about the people who haven't been harassed or offended, yet. If the employee who engages in the inappropriate conduct isn't told that the conduct is inappropriate and must stop, the conduct will just continue, with the employee thinking nothing is wrong. You cannot ignore the complaint.

Also, think about the future. As a litigator and trial attorney, I have learned the importance that past actions play in defending these types of cases, and the devastating effects improper handling can have. If a future harassment victim files suit, and it comes out that you knew the harasser had previously harassed people and you did nothing, even if you did nothing because the victim asked you to do nothing, it won't matter. You will be found liable and likely for punitive damages due to your ignoring a prior complaint (that you were told to ignore by the complaining employee.)

6) "He wanted to work through lunch."

Once upon a time, adult employees were allowed to be treated as adults. If they wanted to work through lunch to leave early, that was ok. If they wanted to take an early lunch or a late lunch, that was ok. Enter California wage and hour law, and suddenly, the state of California determines when employees are hungry and when they should take their lunch break.

California law requires that all employees take a 30 minute, unpaid, uninterrupted meal break for every 5 hours they work. If they don't take their meal break, then the employer is violating the law, and owes the employee 1 hour of wages for every time the meal break is missed. The violation of law occurs regardless of who wants the meal period to be missed. So, if your employee asks if he could work through lunch and leave early, regardless of the reason why, you cannot allow that to happen. Or, if you choose to let it happen, make sure you pay the employee an extra hour for the day. That is an extra hour – not just for the time the employee worked through his lunch, but an ad-

ditional hour as a penalty for letting your employee do what he wanted to do.

7) "While my employee was out on medical leave, we hired a temp. The temp did such a great job; can we keep the temp and fire the employee?"

How many times has this happened? You have an employee who is doing a decent job. Hasn't been counseled or disciplined for performance-related reasons. In fact, the employee may have received positive performance ratings. Then, the employee takes some form of a protected medical leave of absence, and you, reluctantly, hire a temporary employee to fill in. Lo and behold, the temporary employee is doing an excellent job. You never knew the job could be done so well. You never thought there was a problem with how your regular employee did the job, until you saw someone do the job better.

Unfortunately, there is little you can do about this one. If the employee is on a leave of absence where his or her job is protected during the leave (i.e. pregnancy disability leave, leave protected by the Family and Medical Leave Act or California Family Rights Act, etc.), then the employee must be returned to their job, or an equivalent job, upon their leave ending. If the employee does not return from the leave, hire the temporary employee!

8) "We taught her everything she knows about the business. She can't leave us and go work for our competitor, can she?"

One area of law that is very different in California than in other states is the area of non-competition agreements. While in most states an employer can have employees execute non-compete agreements containing reasonable geographic and time restrictions and expect them to be enforced, such agreements are typically unenforceable in California.

However, if an employee works with and is exposed to confidential, "trade secret" type of information, which is information that has economic value by virtue of the fact that it is not known to the public and which is protected from public disclosure in various ways, then that employee can be precluded from using that information to compete with his or her employer post-termination. Employers who expose employees to such confidential information should have all employees execute confidentiality and trade secret protection documents. If you would like to see what the document should look like, let me know, and I will provide you a sample.

9) "It's no wonder she attracted attention. You should see how she dresses for work!"

Dress codes are the bane of most employers' existences. And most employers see absolutely no need to create a dress code policy UNTIL someone appears for work inappropriately dressed. People have been dressing themselves for years, and should be able to decide what is appropriate for work, right? There is a difference between what someone wears to work and what they wear to clean their garage on the weekend or wear to go clubbing, right?

At a prior place of employment, I had the unenviable task of trying to create the dress code policy in our small, one-office, law firm. You wouldn't think that would be too difficult, would you? I am embarrassed to acknowledge how long it

took for everyone to agree on what should and should not be allowed in the policy. And in that policy, the primary focus of our discussions was what does the term "Casual Friday" mean. Jeans or no jeans? Black jeans or blue jeans? Open-toed shoes or flip-flops? What about sweats? The list of questions that employers ask about dress codes goes on and on.

Obviously, dress codes are industry specific, and company or firm specific. What is appropriate attire at a modeling studio specializing in high fashion is not appropriate in a professional office or manufacturing plant. If an employer sees a need to put into place a dress code policy, extreme care should be given to the wording contained in the policy. I saw a policy written that specifically said that no "wife beaters" were allowed. While everyone knew what the term meant, someone was offended by the term. Understandably so. Policies should be as specific and tailored as possible.

Along with dress code policies goes enforcement of dress code policies. I had a male client once who wanted to bring to a female employee's attention how inappropriate her attire was. As soon as the client began describing to me in excruciating detail how tight and low cut her sweater was, and how short her skirt was, I knew that he was the WRONG person to counsel this person about how inappropriate her attire was. The person needed counseling – her attire was inappropriate and, in fact, a distraction. Yet, I was concerned that a claim for sexual harassment would ensue if this male client counseled her. Get my drift? I suggested that a female supervisor meet with her to suggest that her attire was inappropriate. Then we drafted a dress code policy.

If you would like to see some of the language that appears in dress code policies, please contact me and I would be happy to provide you with a sample policy.

10)"No good deed goes unpunished."

This is a term I have heard my entire career and have used my entire career. Employers do the right thing. Employers want to do the right thing. Employers go above and beyond what is necessary to do the right thing. And if they make one mistake, even a minor mistake, employees will sometimes take advantage of the situation. An employer will provide an employee with a longer leave of absence than is required by law. Then, when the employer needs to, and ultimately does, fill the position left by the employee, the employee sues, claiming that the employer should have kept the position open longer. Or, the employer keeps an employee on a leave of absence on the employer-funded health insurance policy as long as the employer is able (and in accordance with the law), and the employee is upset and sues when the insurance is ultimately cancelled. I have seen many situations where employers have "bent over backwards" to help and accommodate employees, only to find themselves on the wrong end of a lawsuit. Maybe there was a minor violation of policy or of law, but had the employee brought it to the attention of the employer, it would have been addressed. The employee didn't necessarily need to get a lawyer involved to get the matter resolved.

And despite the fact that "no good deed goes unpunished," most employers still take care of their employees, knowing that they may, someday, fall victim themselves to this adage. And that is the right answer. Because just as employers are basically good, employees are basically good. Most employees don't take advantage of their employers. Most employees go to work, want to do a good job, want to earn their wage, and want to be a productive part of their employer's operations. As it should be.

Over the years, I can't count how many times I have heard these statements or comments. Each time, there are new facts and new situations. Each situation is different, and by no means have I intended this article to be the "be all and end all" on how to respond to these situations. My intent was solely to provide some useful hints and information, as well as some solace to those who have read this and seen themselves in any of these examples. You DEFINITELY are not alone.

If you would like any more information about any of these examples, or any other area of employment law, please feel free to contact me at hwasserman@fordharrison.com or (213) 237-2403.

I hope you have enjoyed this article.