

What's Eating You?

Meal and Rest Breaks, Overtime, and Other Wage and Hour Issues That Keep You Up at Night

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DAILY COURT FILINGS

John Aquino v. Sedgwick Claims Management Services, Inc 9/26/2012 BC492743 Highberger	Class action for Labor Code violations, including failure to provide rest and meal periods
Daniel Robert Salazar v. International Services Agency 9/26/2012 BC492744 Wiley	Class action for Labor Code violations, including failure to pay minimum hourly wages and to pay earned wages
Laura E. Duarte v. Mother's Nutritional Center, Inc.; Richard Flores 9/25/2012 BC492647 Mohr	Class action for Labor Code violations including failure to pay overtime or provide meal and rest periods.
Jose Moreno v. Liu & Sun Enterprises, Inc dba Yummy Cafe Chinese Cuisine; Sue Wong; Shu Oh Wong 9/25/2012 BC492674 Recana	Failure to pay overtime and minimum wages

EXEMPT OR NON-EXEMPT?

- Not to be confused with “salaried” vs. “hourly”
- Exempt = exempt from wage and hour laws requiring, among other things, the payment of overtime
- Non-exempt = subject to wage and hour laws requiring payment of overtime

EXEMPT EMPLOYEES MUST MEET TWO SEPARATE TESTS:

1. Salary test

- Exempt employees cannot be paid on an hourly basis
- Exempt employees must receive a monthly salary that is at least twice the minimum wage for full-time employment, currently \$2773.33 per month

2. Duties test - three most common duties exemptions:

- Executive Exemption
- Administrative Exemption
- Professional Exemption

EXECUTIVE EXEMPTION

- Applies to managers and supervisors
- Must be primarily engaged in managing at least one recognized department or subdivision of a business
- Must customarily and regularly supervise the work of at least two full-time employees in the department he or she manages
- Must customarily and regularly exercise independent judgment, including authority to make significant personnel decisions

ADMINISTRATIVE EXEMPTION

- Employees who are primarily engaged in office or non-manual work directly related to management policies or general business operations of the company
- Must customarily and regularly exercise independent judgment
- Must regularly and directly assist a proprietor or bona fide executive or perform technical work or special assignments under only general supervision

PROFESSIONAL EXEMPTION

- Must be licensed or certified by the state of California and primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting
- Learned and artistic exemption
 - Knowledge of an advanced type in a field, or
 - Original/creative and dependent on invention, imagination, or talent, or
 - Work is predominantly intellectual/varied in character, and
 - Exercise of discretion and independent judgment

OTHER COMMON EXEMPTIONS

- Computer professionals
 - Exempt if high level work and
 - Salary of at least \$38.89 per hour or \$81,026.25 per year
- Licensed physicians and surgeons can be paid a flat hourly rate of at least \$70.86 without losing exemption
- Outside salespeople
 - Exempt if they spend more than half their working time away from their employer's place of business
- Inside salespeople
 - May be exempt from overtime requirements (but not other wage and hour laws) if they earn at least one and one-half times the minimum wage and earn more than half of their compensation through commissions, and are governed by Wage Orders 4 or 7

STEPS TO ENSURE CLASSIFICATION COMPLIANCE

- Carefully review job descriptions for accuracy on a periodic basis
- Compare each job description with exact requirements for exempt status – titles are irrelevant
- Educate Human Resources staff on the law concerning exempt / non-exempt classifications
- Conduct annual audit of salary levels of exempt employees
- Don't assume exempt status is OK based on industry custom & practice
- Be alert to positions where work performed is routine
- Be conservative and err on the side of caution

OVERTIME REQUIREMENTS

- Daily and weekly overtime rules apply
- Time and one-half (i.e., one and one-half times an employee's regular rate of pay) for:
 - all hours worked beyond eight hours, up to and including 12 hours, in any work day
 - the first eight hours worked on an employee's seventh consecutive day of work in a workweek
- Double time (twice an employee's regular rate of pay) for:
 - all hours worked beyond 12 in a workday; and
 - all hours worked beyond eight hours on the employee's seventh consecutive day in a workweek
- Weekly overtime for all straight time hours worked beyond 40 in a workweek
- Establish your workday and workweek
- Properly calculate the regular rate of pay
- Don't overpay by "pyramiding" overtime

CALCULATION EXAMPLES

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
9-3	9-3	9-3	9-3	9-3	9-3	9-3

- 6 hours each day
- 6 hours on the 7th consecutive day of work
- 42 hours/work week

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
X	9am - 7pm (10)	7pm - Midnight (5)	12:01am – 7am (7)	9am – 11pm (14)	X	X

- 6 hours > 8 < 12 in a day
- 2 hours > 12/day

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
X	8	8	8	8	8	8

- 8 over 40 in a week that are straight-time hours

OVERTIME EXCEPTIONS

- “Make-up” time
- Employees covered by collective bargaining agreements
- Alternative workweek schedules
- Employees receiving tips or gratuities

RECORDKEEPING OBLIGATIONS

- Must have a system that keeps track of the hours worked, meal breaks taken, and days not worked for all non-exempt employees

PAYROLL DEDUCTIONS

- General rule: Do not make deductions from employees' paychecks (other than required withholdings)
- Can only deduct for cash shortage, breakage or loss if caused by employee's gross negligence or willful conduct
- Take extra precautions with final paychecks to avoid the assessment of waiting time penalties

SPECIAL COMPENSATION RULES

- Reporting Time Pay
- Split Shifts
 - *See Aleman v. AirTouch Cellular* - Sept. 20, 2012
- On-Call Pay

PAY STUB REQUIREMENTS

- All employees must receive a pay stub with their paycheck that includes **nine** specific pieces of information on it (Labor Code Section 226)
- If an employee suffers injury as a result of his or her employer's knowing and intentional violation of the pay stub obligations, the employee is entitled to penalties

PAY STUB HOURLY EMPLOYEE

Pay stub for an employee paid an hourly wage

The name and address of the legal entity that is the employer

Last 4 digits of the employee's social security number or an employee ID number

All applicable hourly rates

Name of the employee

The inclusive dates of the period for which the employee is paid

Total hours worked

Gross wages earned

All deductions

Net wages earned

SMITH AND COMPANY, INC. 123 West Street Smalltown, CA 98765		SOCIAL SECURITY NO. XXX-XX-6789	PAY RATE 18.00 regular 27.00 overtime	PAY PERIOD 2/11/02 to 2/17/02
EMPLOYEE Johnson, Bob				
EARNINGS		HOURS	AMOUNT	DEDUCTIONS
Regular	40.00	720.00	Federal W/H	60.45
Overtime	2.00	54.00	FICA	49.67
			Medicare	12.36
			CA State W/H	10.04
			CA State DI	7.12
			401k	77.40
GROSS EARNINGS:		774.00		
TOTAL DEDUCTED:		217.04		
NET EARNINGS:		556.96		

This pay stub is not applicable to an employee whose compensation is solely based on a salary and who is exempt from payment of overtime under Labor Code section 515(a) or any applicable IWC order.

PAY STUB PIECE RATE EMPLOYEE

Pay stub for an employee paid on a piece rate basis

The name and address of the legal entity that is the employer

Last 4 digits of the employee's social security number or an employee ID number

Inclusive dates of the period for which the employee is paid

Name of the employee

Number of units earned

Piece rate

Total hours worked

Gross wages earned

Net wages earned

All applicable hourly rates

Piece rate earnings

All deductions

SMITH AND COMPANY, INC. 123 West Street Smalltown, CA 98765			PAY PERIOD 2/11/02 to 2/17/02	
EMPLOYEE Johnson, Bob		SOCIAL SECURITY NO. XXX-XX-6789		PAY RATE
PIECE RATE	NO. OF PIECES	AMOUNT	DEDUCTIONS	
\$0.50	720	\$360.00	Federal W/H	60.45
\$0.25	864	\$216.00	FICA	49.67
\$0.10	1,440	\$144.00	Medicare	12.36
			CA State W/H	10.04
			CA State DI	7.12
			401k	77.40
EARNINGS		HOURS		
Regular		40.00		
GROSS EARNINGS:		720.00		
TOTAL DEDUCTIONS:		217.04		
NET EARNINGS:		502.96		

- Providing vacation time is discretionary under the law
- But, if provided, California law regulates vacation time very stringently
- Common mistake: “Use It or Lose It” policies
- Can have cap only if cap is “reasonable”
- Once vacation time drops below cap, it must start accruing again

- Paid holidays are discretionary
- Common misconception: payment of double time if employees work on a company holiday
- Floating Holidays

MEAL PERIODS AND REST BREAKS

- Meal periods
 - Non-exempt employees who work five or more consecutive hours must be provided with an uninterrupted meal period of at least 30 minutes.
- Rest breaks
 - Employers must authorize and permit non-exempt employees to take a paid ten minute rest break for each four hours worked or “major fraction thereof”

Key issues

- What does it mean to “provide” a meal period?
- Frequency of meal periods
- Is early lunching illegal?
- Frequency of rest periods
- Timing of rest periods
- “Off-the-clock” claims

What Does “Provide” Mean?

Court’s ruling:

“We conclude **an employer’s obligation is to relieve its employee of all duty**, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, **but the employer need not ensure that no work is done.**”

What Happens If Nonexempt Employee Works Through Meal Break?

“An employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks.”

If employer **knows or reasonably should know** that an employee works through their meal period, the employer must pay the employee for that time worked but not for the extra hour of premium pay required if employer prevents the meal break.

Court found:

- Employees are entitled to half-hour meal period no later than the end of an employee's 5th hour of work
- Where applicable, second meal period no later than 10th hour of work
- During an eight-hour shift, one rest break should generally fall on either side of the meal break, but some variations may be legal

Employees are entitled to:

- 10 minutes of rest for shifts from 3 ½ to 6 hours
- 20 minutes of rest for shifts of 6 to 10 hours
- 30 minutes of rest for shifts of 10 to 14 hours
- No rest breaks required for employees who work less than 3 ½ hours in a day

Can employees create class-wide claims that they were forced to work “off the clock” when clocked out for meal periods?

Court rejected employee’s attempt to certify a class on such a claim where Brinker’s formal written policy prohibited such work.

- Employees would have to show they were coerced to work off the clock on a case-by-case basis

Take-Home Lessons from *Brinker*

- Employers must make meal periods available (not prevent or discourage them) and relieve employees of all duties
- Where “practicable” in an 8-hour shift, employees should receive a rest period, a meal period, then another rest period
- Company policies contrary to these laws can create certified class actions
- When Company policies comply with the law, individuals who claim they were treated against policy will not likely be able to proceed via class action

Take-Home Lessons from *Brinker*

Recommended Steps:

- Distribute (and enforce) written meal and rest period policies
- Provide a mechanism for employees to lodge complaints about violations
- Post-Brinker cases make clear that courts look to employers' enforcement practices in deciding whether class certification is appropriate
- Train all supervisors so that nobody discourages or prevents employees from taking their breaks
- Beware of compensation or promotion activity that rewards those who skip meals and rest breaks
- Beware of understaffing
- Require all hourly nonexempt employees to clock in and out for meal periods
- Regularly obtain signatures from employees on their time records, acknowledging that they have been authorized to take their meal and rest breaks
- Regularly audit time records

More Good News on Meal/Rest Periods

- When an employee sues **only** for violation of meal or rest periods, neither side may recover attorneys' fees
- This, along with *Brinker*, can provide good leverage in settling meal and rest claims

New Risks to Employers who Misclassify Their Employees as Independent Contractors

- California considers all workers to be employees, not independent contractors; the burden is always on alleged employers to disprove employee status
- Administrative agencies are charged with collecting more revenue and are becoming increasingly more aggressive in challenging and assessing employers for misclassification

Common Law Tests for Independent Contractors

Top Three:

- Does principal have right to control the manner and means by which worker accomplished the task?
- Is the worker doing work which is integral to the principal's business or that is often done by the principal's employees?
- May the worker be terminated without cause or notice by the principal?

Other Factors Considered

- Is the worker engaged in a distinct occupation or business?
- Is the particular skill required one that the business doesn't already have?
- Does the worker supply his or her own instrumentalities, tools and place of work?
- Is the worker paid by the job or by the time?
- Does the worker have a set schedule or can he or she set his or her own hours?

Other Factors Considered

- Is the worker restricted from working for other principals?
- Is the intent of the parties to create an independent contractor relationship?

Risks that have always existed:

- Risk of paying employer and employee taxes, penalties and interest for failure to withhold
- Risk of paying unpaid wages and overtime plus interest
- Civil penalties for failure to pay minimum wage
- Attorney's fees for the misclassified employee who prosecutes a claim
- Penalties of up to 30 days' wages

Risks that have always existed (cont.):

- Countless other penalties for Labor Code payroll violations
- Liability for failing to secure workers' compensation which includes criminal penalties
- Possible claims of lost benefits by the misclassified employee

Effective January 1, 2012:

- Willful misclassifications of independent contractors are subject to a civil penalty of \$5,000 to \$15,000 per violation; increases to from \$10,000 to \$25,000 if a pattern exists
- Any person who for money or something of value knowingly advises an employer to treat an individual as an independent contractor to avoid employee status is jointly and severally liable with the employer (attorneys and employees who provide advice to their employers are excluded)

Effective January 1, 2012 (cont.):

- Offending employers must also post on their website that they have committed a “serious violation of the law by engaging in willful misclassification of employees.”

Recent Case Law Re Misclassification

- Class certification
 - Denied where individual issues predominate – *Sotelo v. Medianews Inc.*, July 2, 2012
 - Granted where type of work involved is common to the class members -- *Ayala v. Antelope Valley Newspapers, Inc.*, Sept. 19, 2012

It is lawful to have interns who are unpaid or paid less than minimum wage only for:

- **Exploratory Work Experience Education Program**
 - Intern is pursuing a professional course of study
 - Intern does no productive work
 - Intern observes and samples a variety of work conditions
 - Intern is unpaid and receives school credit
 - Work is related to a course at an accredited college and performed during school hours

It is lawful to have interns who are unpaid or paid less than minimum wage only for:

- **Training Program**

- Must be similar to that given in a vocational school;
- For benefit of trainees or students;
- Trainees or students must not displace regular employees but must work under their close observation;
- Employer providing training must derive no advantage from activities of the trainees or students, and its operations should be impeded;
- Trainees or students must not necessarily be entitled to a job at the conclusion of the training period; and
- Employer and trainees or students must understand that trainees or students are not entitled to wages for time spent in training.

If any of the above are not met, “trainees” will be considered employees entitled to minimum wage

