



## Brushing Up On California Wage & Hour Laws

By George Camerlengo\*

Federal and state laws determine how employee hours are calculated and what their resulting pay should be. Federal laws should be treated as a “baseline” for how employees are compensated by their employers – if the California specific law is more favorable to the employee then an employer must abide by California law as well. For example, currently the **Federal** minimum wage is \$7.25 per hour, but the **California** minimum wage is \$10.00 for employers with 25 or fewer employees; \$10.50 with 26 employees or more per hour. Thus, employers in California must pay their employees the California rates, even though the Federal requirement is less. Some cities (e.g. San Francisco) may also have local minimum wage requirements for certain types of employment, so this should be considered when determining employee wages. Also note that California law (unlike Federal law) does **not** allow tips to be credited against the minimum wage requirement, so an employee must be paid at least minimum wage, not including what they are likely to make in tips.

### Overtime Laws:

Non-exempt employees are entitled to time and one-half for the following:

- Over 8 hours of work in a single workday
- Over 40 hours of work in a workweek
- The first 8 hours of work on the 7<sup>th</sup> consecutive day of work in a work week

Non-exempt employees are entitled to double-time for the following:

- Over 12 hours of work in a workday
- Over 8 hours of work on the 7<sup>th</sup> consecutive day in a work week

### Employee Overtime and Minimum Wage Exemptions:

State and Federal laws provide that employers do not have to pay overtime or minimum wages to certain “exempt” employees. There are a number of exemptions that may apply to employees, including many executive, administrative and professional positions. Usually exempt employees are engaged in jobs in which they exercise discretionary powers, independent judgment, or supervise at least two employees for a majority of the work day. However, it is often difficult to determine whether an exemption may apply. You should consult with an attorney when

*\*The author is greatly indebted to Fred Duscha, formerly a senior attorney for the Labor Commissioner for 25 years, for his invaluable review of the contents of this article.*

determining whether an employee is exempt from overtime, as many individual factors may affect the ultimate determination.

To qualify as an exempt employee, the following must apply:

- An employee's duties must fall into one of the exemption categories (Administrative, Executive, Professional, Computer Related Professional, Outside Salesperson, Commissioned Salesperson, etc.)
- The employee must engage in those specified duties during more than ½ of that employee's work time
- The employee must earn a monthly salary greater than or equal to twice the state minimum wage for full-time employment (defined as 40 hours per week)

### **Pay Periods:**

Most employees must be paid twice during each calendar month, though there are some exceptions. Wages can always be paid before they are due or at more frequent intervals than the law requires.

### **Payment of Wages Upon Termination of Employment:**

Wages earned by employees that have not yet been paid at the time of termination are due and payable immediately. In California, vacation time earned but not used by the employee is also due to be paid to the employee immediately, as well as any unpaid verified expense amounts owed to the employees. Commissions are subject to special rules.

Employees that quit voluntarily, with 72 hours notice, must also be paid on that employee's last work day, however if they do not provide notice to the employer they must be paid within 72 hours of his/her last day of work.

Failure to promptly pay all wages upon termination could subject the employer to up to 6 weeks of wages ("waiting time penalties"), plus attorney fees to an employee who wins in court.

### **Meal and Rest Break Requirements:**

In California employees are required to receive 10-minute rest paid periods for every 4 hours of time worked. These rest periods must be taken in the middle of each 4-hour period, as much as practicable. If an employee's total daily work is less than 3.5 hours, no rest breaks are required to be provided.

Employers are also required to provide a 30-minute duty free meal break for employees that work more than 5 hours per day. The meal breaks can be paid or unpaid, subject to the

employer's choice. However, if the total amount of work during the day is less than 6 hours, the meal period can be waived by the mutual consent of the employee and employer.

If an employee works more than 10 hours per day they must be provided with a second 30-minute meal period. However, if the total hours worked is no more than 12, the second meal period can be waived by mutual consent of employee and employer.

An employer may not require an employee to perform work during his/her rest or meal breaks. Employers must provide "duty free" breaks, and the employee must be permitted to leave the workplace if desired.

Generally, the right to rest breaks or meal breaks cannot be waived by an employee. There are limited exceptions for certain jobs (i.e. dispatchers, on-call employees or other jobs requiring ongoing duties) but these exceptions require a voluntary written waiver.

#### **Travel Time:**

Travel time to and from work is generally not considered to be a part of a day's work and does not need to be compensated by an employer. However, if an employee is required to take certain transportation to work from a drop-off and pick-up point, that time must be compensated (including the time spent waiting for the employer's transportation).

#### **Paid Sick Leave:**

After July 1, 2015, all California employers, regardless of size, must provide paid sick leave to eligible employees. Paid sick leave accrues at the rate of one hour every 30 hours worked, paid at the employee's regular wage rate. An employer may limit the use of paid sick days to 24 hours or 3 days in each year. Accrued but unused paid sick leave must be carried over to the following year and may be capped at 48 hours or 6 days. However, employers can adopt a written policy that provides no carryover is required under specific conditions.

#### **Record Keeping Requirements:**

Employers in California are required to maintain at a central location payroll records for all employees showing the hours worked daily and the wages paid to each employee. Employers are also required to keep a record of all employee names and addresses. These records must be kept for at least three years.

Employers must also provide to the employee semi-monthly (or at the time of each payment) itemized wage statement showing the gross and net wages earned, the hours worked, any deductions, the applicable time periods and hourly rates, and the name and address of the employer. (Note that exceptions and other requirements may apply in specific circumstances).

An employer must keep a record of any deductions made from an employee's wages for at least a three-year period.

### **Determining whether someone is an Employee or an Independent Contractor:**

There is a common misperception that hiring someone as an independent contractor, with or without a written contract, makes them an independent contractor. That is not the case in California. Even if both parties agree at the time the work is to be done that the basis of employment is as an independent contractor, that person could still be later held to be an employee under the law. Many factors have been considered by the courts in determining if someone is an independent contractor or an employee.

Among these factors are:

- Whether the person performing services is engaged in an occupation or business distinct from that of the employer;
- Whether or not the work is a part of the regular business of the employer;
- Whether the employer or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
- The alleged employee's investment in the equipment or materials required by his task;
- The skill required in the particular occupation;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- The alleged employee's opportunity for profit or loss depending on his managerial skill;
- The length of time for which the services are to be performed;
- The degree of permanence of the working relationship;
- The method of payment, whether by time or by the job;
- Whether or not the parties believe they are creating an employer-employee relationship.

Failure to properly classify an employee can be costly. Such a mistake could subject an employer to liability for minimum wage and overtime pay, denied rest and meal periods compensation, expense reimbursement, as well as numerous other wage and hour violations. The employer can also be assessed amounts due for training taxes, disability insurance contributions, unemployment insurance contributions and state income tax withholding. It is advisable to go over the details of the terms and conditions regarding the work to be performed with a labor law attorney prior to treating a worker as an independent contractor.

*George Camerlengo, Partner with Gray•Duffy, has more than 40 years' experience as a civil litigator in the Bay Area. He specializes in employment litigation matters, including wrongful termination, discrimination, retaliation, harassment, and wage and hour claims, representing both employers and employees. He may be contacted at [gcamerlengo@grayduffylaw.com](mailto:gcamerlengo@grayduffylaw.com).*

**The above is a brief overview of wage and hour laws and regulations in California and is not intended to take the place of advice from an attorney regarding specific employment situations.**