

Top 10 Ways to Get Sued



Presented by: Erica L. Rosasco

MCKAGUE | ROSASCO LLP

#1 Meal/Rest Periods



Hours of Work Meal Periods & Rest Breaks Owed

Work Hours	Rest Breaks	Meal Periods
Less than 3.5	None	None
3.5- less than 5	10-minute paid	None
5- less than 6	10-minute paid	30-minute unpaid (unless mutually waived)
6- less than 10	Two 10-minute paid	30-minute unpaid
10- less than 11	Three 10-minute paid	Two 30-minute unpaid (unless mutually waived AND first meal period was taken)
11- less than 14	Three 10-minute paid	Two 30-minute unpaid
14- less than 15	Four 10-minute paid	Two 30-minute unpaid
15- less than 18	Four 10-minute paid	Three 30-minute unpaid

Duty Free Meal and Rest Breaks

- Must be relieved of all duty for BOTH now.
- No closing gates.
- No telling workers they can't leave even if it would not be possible.
- Tardiness is a discipline issue.



Meal & Rest Period Premiums

If an employer fails to provide an employee a compliant timely duty free uninterrupted meal or rest period, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period or rest is not provided.

Max per day: 1 meal period premium + 1 rest period premium.

On Duty Meal Period



- Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an — on duty meal period and counted as time worked.
- An on duty meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
- Do these really exist anymore?
- What about the other penalties available?

I pay my employees during their 30 minute meal period, so I'm good right?

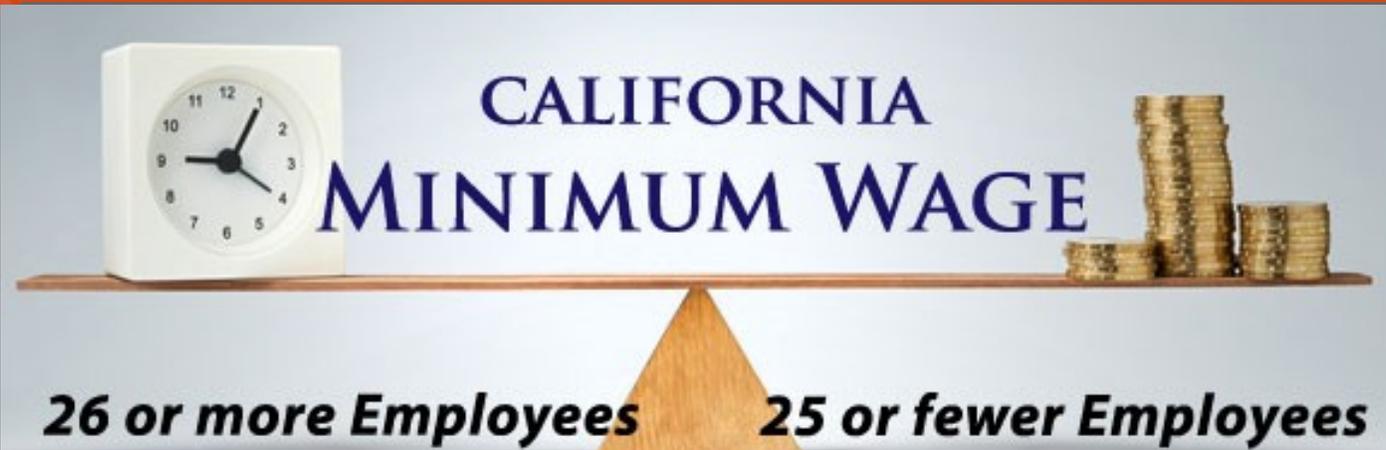
No good deed goes unpunished...

- Still owe 1 hour meal period penalty if compliant duty free uninterrupted meal period is not provided before 5.0 hours of work and 10.0 hours of work.
- What about the PAGA penalty?

#2 The Failure to Pay Minimum Wage



Minimum Wage Increases – Watch out for City and County Minimum Wage



**CALIFORNIA
MINIMUM WAGE**

<i>26 or more Employees</i>	<i>25 or fewer Employees</i>
Jan 1, 2017: \$10.50 / hour	Jan 1, 2018: \$10.50 / hour
Jan 1, 2018: \$11.00 / hour	Jan 1, 2019: \$11.00 / hour
Jan 1, 2019: \$12.00 / hour	Jan 1, 2020: \$12.00 / hour
Jan 1, 2020: \$13.00 / hour	Jan 1, 2021: \$13.00 / hour
Jan 1, 2021: \$14.00 / hour	Jan 1, 2022: \$14.00 / hour
Jan 1, 2022: \$15.00 / hour	Jan 1, 2023: \$15.00 / hour

My employees choose to get to work 15 minutes early. They pick up their tools and put on their safety vest. This is fine because it's their choice, right?



Hours Worked



If an employee is “suffered and permitted” to work even though not instructed or requested to do so, it is compensable time or hours worked.



If the employer knows or has reason to know the time is compensable.



Enforce with discipline, not lack of payment.

De Minimis Doctrine Does Not Apply in CA

Under federal law, courts will forgive employers for not paying employees for small amounts of otherwise compensable time upon a showing that the bits of time are administratively difficult to record.

Examples of de minimis time include but are not limited to: clocking in or out, turning lights and other systems on or off, and unlocking or locking the facilities.

In *Troester v. Starbucks Corporation*, the California Supreme Court held that the **de minimis exception does not apply in California**. As a result, employers must be sure to compensate employees for any and all time that employees work, regardless of how minor or trivial the amount of time and money may seem.



Compensable Time and Donning and Doffing



THE DEFINITION OF WORKING TIME IS VERY BROAD AND INCLUDES ALL TIME WHEN AN EMPLOYEE IS SUBJECT TO THE CONTROL OF AN EMPLOYER AND INCLUDES ALL THE TIME IN WHICH THE EMPLOYEE IS "SUFFERED OR PERMITTED TO WORK," WHETHER OR NOT REQUIRED TO DO SO.



UNDER THIS BROAD DEFINITION, AN EMPLOYER MUST COMPENSATE EMPLOYEES FOR PERIODS OF TIME IN WHICH NO DUTIES ARE PERFORMED, AS LONG AS THE EMPLOYEE IS SUBJECT TO THE CONTROL OF THE EMPLOYER.

- California donning and doffing - when employees are required to wear specialty gear—including uniforms, safety gear, or other tools and equipment—or undertake other work-related activities before they are allowed to begin their official work duties.
- Must be compensated for this time.

The Penalties for Failing to Pay Worker One Cent

Waiting Time Penalties

$\$15.00 \times 8 \text{ hours} \times 30 \text{ days} =$
 $\$3,600 \text{ per worker}$

Three Years

20 Workers = \$72,000

#3 Rounding Time



Rounding of Time

As long as the rounding policy averages out and is neutral, it does not violate California wage and hour law.

- Ensure rounding comes out in employee's favor.
- California law requires employees to be paid at least minimum wage for all hours worked.



DONAHUE V. AMN SERVICES, INC. (CAL. SUPREME COURT)

(NO ROUNDING OF MEAL PERIOD TIME)

Takeaways:

- Rounding at the beginning and end of a shift remains legal, for now.
- BUT rounding at beginning of day to meal period could result in a late meal period claim. (Not getting a meal period by the fifth hour.)
- Start meal periods well before the fifth hour of work.
- Consider extending meal periods to longer than 30 minutes.
- Use an attestation and drop-down menu for non-compliant meal punches if software allows it.
- If an employee is entitled to a meal period premium for a short, late or missed meal period, pay it!



I have an expensive biometric time keeping system. I don't have to worry about this right?

Start	Stop	Hours	Company	Ranch	Lot No.	Acres	Crop	Task
Empeza	Parar	Horas	Compañia	Rancho	No. de Lote	Acres	Producto	Trabajo
:	:							
:	:							
:	:							
:	:							
:	:							
:	:							

Para uso de la oficina

FOREMAN: _____
 CREW: _____
 TOTAL: _____

HOURS: _____
 PEOPLE: _____

Cuadrilla & Mayordomo

BREAK #1 _____ TO (A) _____
 LUNCH #1 _____ TO (A) _____
 BREAK #2 _____ TO (A) _____
 LUNCH #2 _____ TO (A) _____
 BREAK #3 _____ TO (A) _____
 LUNCH #3 _____ TO (A) _____
 BREAK #4 _____ TO (A) _____
 BREAK #5 _____ TO (A) _____

Start Empezo: _____
 Stop Paro: _____

CREW #

Non-Productive Time

Exercise/Ejercicio: _____ / _____
 Meeting/Junta: _____ / _____
 Machine Breakdown/Maquinaria Descompuesta: _____ / _____
 Audits/Auditoria: _____ / _____
 Crew Relocation/Reubicacion de Cuadria: _____ / _____
 Person Protective Equipment/Equip Protectivo: _____ / _____
 Replenish Material/Esperando Material: _____ / _____

The Time Card...

Pay Check Stubs – LC 226

EARNINGS STATEMENT						
EMPLOYER NAME		SSN	EMPLOYEE ID	CHECK NO.	PAY PERIOD	PAY DATE
Sample Company LLC 200 State St. Ste. 1000 San Francisco, CA 94102		888 888 888	12345	78910	01/01/15 - 01/15/15	01/15/15
INCOME	RATE	HOURS	EARNINGS	DEDUCTIONS	CURRENT TOTAL	YEAR-TO-DATE
GROSS WAGES	20.00	40.00	800.00	FICA MED TAX FICA SS TAX FED TAX	14.00 86.14 117.86	28.12 100.28 228.96
YTD EARNINGS	YTD DEDUCTIONS	YTD NET PAYS	CURRENT TOTAL	CURRENT DEDUCTIONS	NET PAY	
1,000.00	200.00	1,000.00	800.00	197.86	778.12	

Itemized wage statement must include the following information:

All deductions, Federal and State, Health Care, Child Support, Etc.

Inclusive dates of the pay period

Employee name and SSN (only last 4 digits of the SSN)

Employer full legal name, Address, and EIN

Entity securing services (full legal entity name and address – January 1, 2012)

Hours worked and ALL applicable rates of pay

Applicable piece rate and number of pieces produced under each applicable piece rate (Daily)

Gross wages

Net wages

Effective July 1, 2015: Paid Sick Leave hours. Available and Used.

AB 1513: Piece-rate work: Rest & Recovery Periods, and Other Non-Productive Time

Paycheck Deductions

Under California law, an employer may lawfully deduct the following from an employee's wages:

- Deductions that are required of the employer by federal or state law, such as income taxes or garnishments.
- Deductions expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues or other deductions not amounting to a rebate or deduction from the wage paid to the employee.
- Deductions authorized by a collective bargaining or wage agreement, specifically to cover health and welfare or pension payments.

EARNINGS STATEMENT

EMP. NO.	EMPLOYEE ID	CHECK NO.	PAY PERIOD	PAY DATE
6789	101	123	8/28/20-9/11/20	9/11/20
RS	CURRENT TOTAL	DEDUCTIONS	CURRENT TOTAL	YEAR TO DATE
	200.00	FEDERAL TAX	8.62	93.51
		FICA SS TAX	0.00	125.40
		FICA MEDICARE	2.90	31.00
		STATE TAX	0.74	9.21
		TOTAL	12.27	187.73
	YTD NET INCOME			
	2320.98			

Are your paycheck stubs up to date?

Paycheck stubs or a document with the paycheck stub needs to show how much sick time accrued (if using the accrual method) and how much time is available for use.

Employers also must keep records showing how many paid sick days employees earned and used for three years.



**I use a big, expensive
paycheck company for
all my pay checks, so I
don't have to worry,
right?**



#5 Weighted Average Overtime & The Regular Rate of Pay



Overtime – Most Wage Orders

Employees are entitled to one and one-half times their regular rate of pay for hours worked beyond eight in a day.

Employees are entitled to one and one-half times their regular rate of pay for all hours worked beyond 40 in a single workweek.

Twice the regular rate of pay must be paid for all hours worked in excess of twelve hours in a day.

One and one-half times the regular rate of pay must be paid for the first eight hours of the seventh consecutive day of work in a single workweek.

Twice the regular rate must be paid for all hours beyond eight on that **seventh day**.



Defining the “Workweek” and the “Workday”

The “**workday**” is not the portion of the day when employees are working, it is a consecutive 24-hour period starting at the same time each calendar day. If not otherwise defined by the employer, the workday runs from 12:01 a.m. to midnight.

The “**workweek**” is any seven consecutive 24-hour periods starting on the same calendar day each week.

The Labor Commissioner will presume a Sunday through Saturday workweek unless otherwise defined by the employer. If the workweek runs from Sunday through Saturday, they will be entitled to seventh day overtime for Saturday.

Suggested to define your workweek as running from 12:01 a.m. Monday through midnight on Sunday.

“Regular Rate of Pay”

- Regular rate of pay is not the agreed rate of pay for the employee’s straight time hours.
- Regular rate of pay is the actual hourly rate paid for the employee’s work including the agreed rate plus all other forms of compensation.
- The regular rate includes commissions, nondiscretionary bonuses, piecework earnings, and the value of meals and lodging (in some circumstances).
- **Weighted Average**: If an employee, in a single workweek, performs two or more different types of work for which different non-overtime hourly rates of pay have been established, the employee’s regular rate for that week ordinarily is the weighted average of those rates. The employee’s total includable earnings are computed to include his or her compensation during the workweek from all applicable rates, and then divided by the total number of hours worked at all jobs.

Not Included in Regular Rate of Pay

- Gifts (i.e., for holidays or birthdays, as a reward for service, but only those where the timing and amount are not based on any objective factors and are left entirely to the employer's discretion)
- Hours paid but not worked (i.e., vacation, holidays, sick leave, reporting time pay or split shift premiums)
- Expense reimbursement
- Overtime pay
- Discretionary bonuses
 - *Note:* For a bonus to be “discretionary,” the employer must retain discretion over whether to give a bonus, when to give a bonus, and what amount the bonus will be. When an employer ties a bonus to the occurrence of a particular condition, the bonus will most often be treated as wages, and must be paid if the condition occurs. Further, the bonus must be counted when calculating the regular rate of pay for overtime purposes.
- Profit-sharing plans (as long as the contributions are to a bona fide plan without regard to hours worked, production levels, or efficiency)
- ERISA plan payments (i.e., health benefit plans, many retirement plans, and similar benefits)



Flat Sum Bonuses/ Bonus Pay

Calculation of Flat Sum Bonuses and Overtime



Alvarado v. Dart Container Corporation of California
– Cal. Sup. Ct. (2018)

- When calculating overtime in pay periods in which an employee earns a flat sum bonus, employers must divide the total compensation earned in a pay period by only the non-overtime hours worked by an employee.
- In order to encourage attendance on unpopular work days, Dart paid employees an “attendance bonus” of \$15 per day for employees who worked on a Saturday or Sunday and completed their full work shift.
- Guided by two longstanding principles:
 1. There is a state policy favoring an eight-hour work day and six-day 40-hour workweek; and
 2. The state’s labor laws are to be liberally construed in favor of worker protection.

What is a Flat Sum Bonus?

Yes:

- End of Season
- Transportation (careful here)
- Work on Saturday
- Work on Holiday
- Bring a friend to work (careful here)

No:

- Piece rate pay
- Production Bonus



How to Calculate Flat Sum Bonuses

DLSE Manual states:

“If the bonus is a flat sum, such as \$300 for continuing to the end of the season, or \$5.00 for each day worked, the regular bonus rate is determined by dividing the bonus by the maximum legal regular hours worked during the period to which the bonus applies.”

- Relying on Labor Code section 510, the Court stated that a flat sum bonus must be treated “as if it were earned on a per-hour basis throughout the relevant pay period.”
- Applies retroactively (OUCH!)





#6 Business Expenses Labor Code 2802

Nice Pruning Shears...

You provided your employees with pruning shears. The employees complain because the shears are uncomfortable and break. Employees have been buying their own shears. Only one or two use the company shears. You do not want to buy shears because the employees are always losing them and they don't return them when they leave.

Any issues?



Business Expenses – Labor Code § 2802

- An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties,
- Attorney's Fees



- Tools
- Tool sharpeners
- Gloves
- Protective Gear
- Specialized Boots

Tools & Equipment



Employers **cannot require employees to purchase tools, goods or services.**



Employers (and supervisors) should not sell anything to employees.

Employees may claim that they were forced to make the purchases due to the supervisor or employer's control over their job, which can result in liability to the employer.



Employers cannot charge employees who lose or break the employer's tools or equipment without facing the possibility of an illegal payroll deduction.



Uniforms must be supplied by the employer **if required.**

Cell Phones and Internet Charges

Employers must reimburse employees for expenses incurred within course and scope of employment (LC 2802).

If use of the employee's own device for work results in an increase in employee's data or phone charges, must reimburse.

Policy can require employees to submit actual expenses.

Or, policy may be to reasonably approximate expenses that will be incurred by the typical employee and set a reasonable allowance for such expenses (e.g. \$50/mo).

Allowance must be reasonably related to approximate cost borne by the employee.

Mileage Reimbursement aka Driving for Dollars

As of January 1, 2022, the new mileage IRS mileage rates are:

- 58.5 cents per mile for business miles driven
- Not Taxed!!
- Or pay actual expenses

A hand holding a blue pen is writing on a document. The background is blurred, showing a person's face. The text is overlaid on the image.

#7 Turning Over Payroll & Personnel Records

HELLO
I AM...

SUING YOU

I got a letter requesting my
employee's payroll and personnel
records.





LAWYERS FOR EMPLOYEE AND CONSUMER RIGHTS
4100 West Alameda Avenue, Third Floor
Burbank, California 91505
(323) 375-5101 telephone (general)
(323) 306-5571 facsimile
www.LawyersForEmployeeAndConsumerRights.com

JAMIE BELIN
(323) 306-5785 telephone (direct)
jbelin@lfecr.com

Confidential Settlement Communication
(Cal. Evid. Code § 1152)

November 27, 2019

 FIRST CLASS MAIL



3580 Wilshire Boulevard, Suite 1260
Los Angeles, California 90010

t | 213.493.6300
f | 213.336.3704

wza@abramsonlabor.com
www.AbramsonLaborGroup.com

June 16, 2021

Via Certified Mail and E-Mail:

[REDACTED]
Attention: Human Resources Director
[REDACTED]
[REDACTED]
[REDACTED]

Re: [REDACTED]

This correspondence is protected by California Evidence Code § 1154 regarding settlement discussions.

Abramson Labor Group has been retained to represent [REDACTED] (“Plaintiff”) in his claims against [REDACTED] (“Defendant”) for (1) Discrimination in Violation of FEHA; (2) Retaliation in

8 Not Having Arbitration Agreement



Arbitration agreements



FLC Elkhorn Packing H-2A employee Martinez-Gonzalez signed arbitration agreements each season as part of Elkhorn's new hire process.

Martinez-Gonzalez filed suit alleging violation of state labor and wage laws. Elkhorn moved to compel the case to arbitration.

After a two day trial, a federal district court held that the arbitration agreements were unenforceable due to economic duress and undue influence.

Arbitration agreements cont.

The Ninth Circuit reversed.

Martinez-Gonzalez alleged economic duress because he was dependent on Elkhorn for housing and had already started work harvesting lettuce when presented with the arbitration agreements.

This conduct though 'not ideal', does not constitute a "wrongful act".



Lessons learned



1. Elkhorn demonstrated business necessity for having the orientation in the U.S.

2. There were reasonable alternatives available to Martinez-Gonzalez. He had ten days after signing to revoke the agreement.

3. Elkhorn never told him he had to sign to keep working for the company.

4. Nothing in the agreement stated that refusal to sign was cause for termination.

***Najarro v.
Horizon
Personnel
Services, Inc.,
(Oct. 2021)***

- Arbitration agreements should not contain language that waives the employee's right to bring a representative action under the California Labor Code Private Attorney General Act of 2004 (PAGA).
 - Could be unconscionable even if plaintiff didn't have paga case
- Arbitration agreements must be signed by both parties – employer and employee – to be valid.
- Must identify the employer's name, not just 'company' or 'employer'

Najarro arbitration rules cont.

- Employees asked to sign arbitration agreements that incorporate specific arbitration rules such as JAMS or the American Arbitration Association should be provided with a copy of those rules at the time they are asked to sign the agreement.
 - the employer's failure to provide such rules "established at least some degree of procedural unconscionability."
- Employees should be given an opportunity to review and understand what they are being asked to sign.

Actions that could be fraud:

- refusing to explain what the employee is being asked to sign,
- statements made to pressure an employee into signing,
- misrepresenting the agreement as an "unimportant" document,
- failing to encourage employees with limited education to seek outside review of the agreement before signing.

**Whether PAGA can
be included in
arbitration
agreements will be
taken up by the
Supreme Court in
2022.**

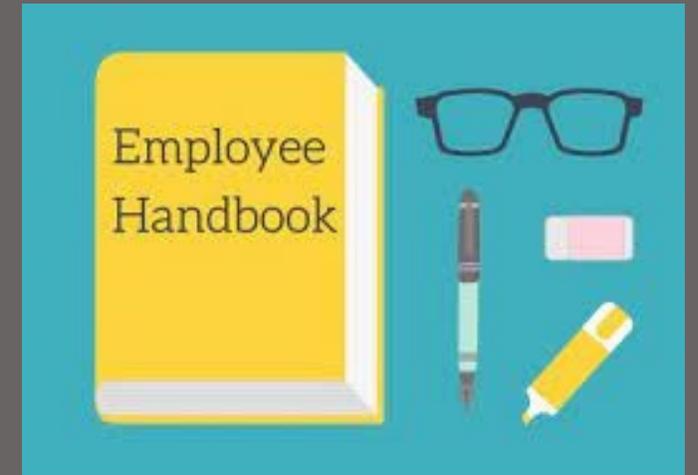
Stay tuned!





#9 Outdated Handbooks

I got my handbook
from my friend. This is
fine, right?





**#10 Payment of All Wages Due
at Termination or Seasonal
Layoff**

Final Wages Due



Worker Layoffs/Terminations: All due wages must be paid that same work day.

-Even when working on piece rate

Worker Voluntary Quit: All due wages paid within 3 days/72 Hours.

Employer responsible for getting final checks to workers, even if they don't show to pick them up.

Don't know where to find your employee? Turn it over to the labor commissioner unpaid wage fund.



Waiting Time Penalties if Not Paid On Time

Final Wages Due

- My employee gave me two weeks notice. Today is her last day.
- When are the final wages due?



QUESTIONS?

Presented by: Erica L. Rosasco,
Esq.

1217 Pleasant Grove Blvd., Ste. 120

Roseville, CA 95678

916.672.6552

Erica@McKagueRosasco.com

www.McKagueRosasco.com

MCKAGUE | ROSASCO LLP



LEGAL disclaimer: Seminar materials and this presentation are not intended as legal advise and are not legal advise. These materials cannot substitute for legal advise. You should consult an experienced employment attorney if you have questions about your business, policies or your particular circumstances.