



Littler

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A Stitch In Time Saves Nine....FIGURES: How Managing Minutes Can Save Your Business Millions



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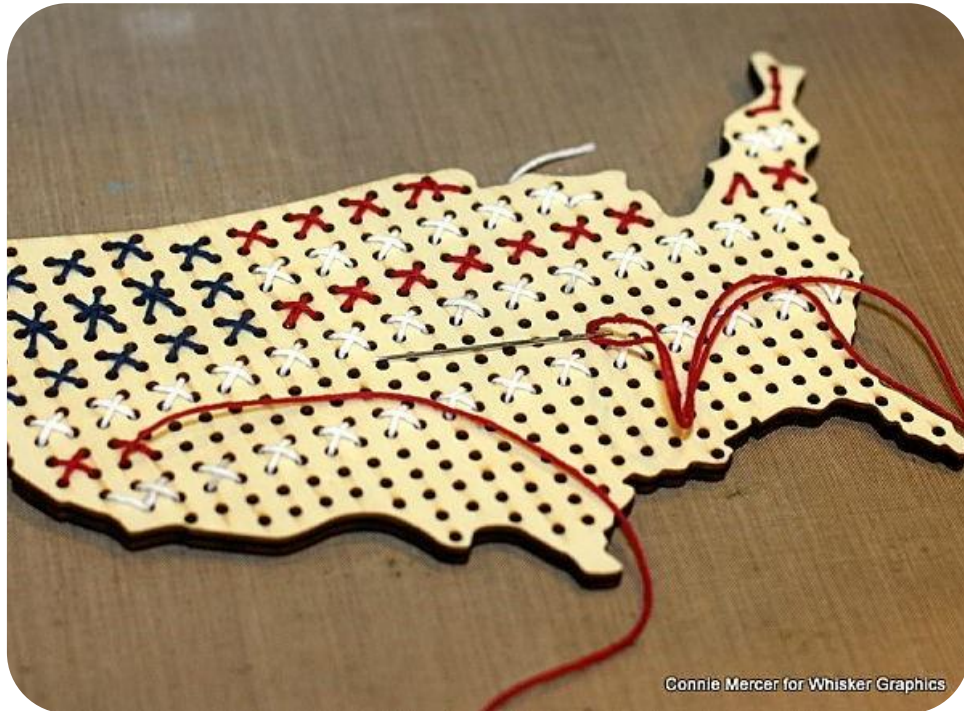
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What does “a stitch in time saves nine” mean?



Connie Mercer for Whisker Graphics

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It is generally understood as a proverb meaning “if you sort out a problem immediately it may save a lot of extra work later.”

This history of this phrase is credited to the English astronomer Francis Baily, written in 1797. However, this could have been written by any modern-day class action or PAGA litigator.

Wage & Hour Litigation - Why Is It So Popular?

- Plaintiffs' attorneys love it
- Results in costly judgments and settlements against major employers for overtime and technical violations
- Statute of limitations and potential back pay: 3-4 years
- Can cover all employees that worked during that period of time.
- Potential Liquidated Damages: **DOUBLE** back pay
- Automatic attorney's fees



The Focus Must be on Avoiding Litigation!

- Once the lawsuit has been filed, you have already lost something:
 - Time dedicated to the litigation (discovery, depositions, court hearings, etc.)
 - Money on the cost of defense.
 - Attention to your business, potentially reducing revenue and/or hindering new business opportunities.
- **HR plays a vital role in implementing measures to prevent litigation from starting!**
- Some cases may be filed and will be litigated, but you can reduce the likelihood of litigation and/or better position yourself in litigation.



What is an Arbitration Agreement



Arbitration agreements require that people who signed them, resolve any disputes by binding arbitration, rather than in court before a judge and/or jury.



Resolving a case through arbitration is usually far less costly than proceeding through litigation because the process is quicker and generally less complicated than a court proceeding.



How else can arbitration agreement insulate you from liability?

Class Action Waiver in Arbitration Agreement

- In *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 344 (2011), the U.S. Supreme Court ruled that class action waivers in arbitration agreements are enforceable.
- So long as a defendant can show a valid agreement to arbitrate and a valid class action waiver, then a putative class action plaintiff will be unable to proceed on a class basis.
- This can insulate you from potentially millions of dollars in liability?
- What about PAGA?



PAGA - Wage & Hour Update

- PAGA bill in Oregon killed in 2021. Likely back after they see what happens in California.
- Viking Cruises, U.S. Supreme Court (June 2022)
- Adolph v. Uber Technologies, Inc., California Supreme Court
- What's next after *Adolph*? Gregg v. Uber Technologies, Petition to the U.S. Supreme Court.

Now What?

- PAGA representative claims should be stayed pending arbitration of the individual PAGA claim
- Defeating a plaintiff's individual PAGA claim in arbitration may *defeat* the representative PAGA claim as well if the individual Plaintiff suffered no injury.





Mandatory Employment Arbitration

- In October 2019, CA legislature passed AB 51 in an attempt to ban mandatory employment arbitration, which prevented employers from requiring employees or job applicants “as a condition of employment, continued employment, or the receipt of any employment-related benefit” to “waive any right, forum, or procedure” for discrimination and labor claims, including “the right to file and pursue a civil action or complaint.”
- On Feb 15, 2023, the Ninth Circuit Court of Appeals **blocked** a 2020 CA law, which held that the Federal Arbitration Act (FAA) preempts AB 51 because the law discriminates against arbitration by discouraging or prohibiting the formation of an arbitration agreement.
- Mandatory arbitration agreements entered into, modified, or extended on or after January 1, 2020 preempted by FAA.
- **Impact – Mandatory Employment Arbitration Agreements are still permissible in California if governed by the FAA.**

SB 365 - No Automatic Stay

- Eliminates automatic stay of trial court proceedings when grant/denial of petition to compel arbitration is appealed.
- More shades of AB 51...
- Make sure your arbitration agreement is enforceable and compliant with the law.



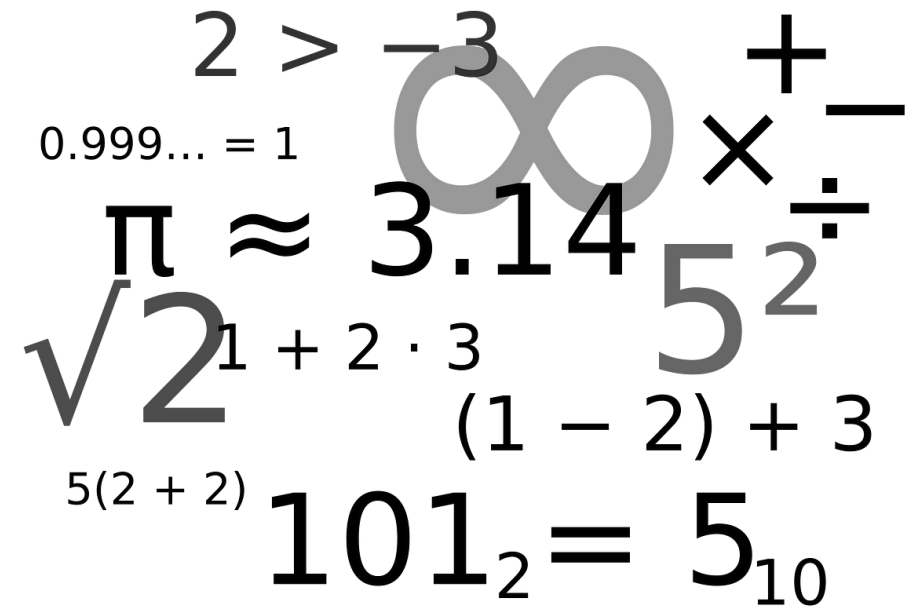


How to Handle the Reluctant Employee

- Start with “Roll Out Communications” to reduce the number of reluctant employees.
 - Cover letter to employees explaining the benefits and the process.
 - Talking points for frontline managers/HR to empower them to answer questions.
 - Meet with employees individually to address any potential concerns.
- **Reminder: If you roll out arbitration agreement while representative action is pending, you must notify employees of pending litigation.**

The PAGA MATH, according to Plaintiffs attorneys.

- How many employees do you have per year?
- Do you pay weekly, biweekly?
- Who is your Plaintiff's attorney?
- *Faced with this, what issues should employers focus on?*



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Issue #1: What About Breaks?

California - Meal & Rest Periods

Meal periods must be:

- Within the first 5 hours
- At least 30 minutes in duration
- Uninterrupted
- Second meal period (more than 10 hours)
- Off duty (unless valid on duty agreement)
“Off duty” generally means relieved of all duty and free to leave premises.



Meal & Rest Periods



- To provide a meal period does not require that the employer ensures it is taken
- **DO** implement a meal period policy
- **DO NOT** impede taking of a meal period
- **DO** have employees clock in and out for meal periods (30+ mins.)
- **DO** use preventative measures such as discipline
- **DO** use waivers for shifts up to 6 hours

Meal & Rest Periods

Rest Periods:

All employees not covered by an exemption must be authorized and permitted to take ten (10) minutes of “net” or actual rest for every four hours (or major fraction thereof) of work, which should be taken so far as practicable in the middle of each **work period**.



Meal & Rest Periods



- Rest Periods:
 - “Authorized and permitted”
 - Must be paid time
 - No waiver allowed
 - Employees cannot be pressured to waive rest periods (*e.g., tight schedules*).
 - Must be fully “off duty” and able to leave the workplace

Meal & Rest Periods

Common Issues:

- Lines at the time clock.
- *Rounding of meal periods.*
- *Managers disciplining people for not being at their station exactly at the 30-minute mark.*
- Employees having to keep their phones with them on break in case they are needed.





Issue #2: OVERTIME

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- ***Don't*** just assume that overtime is straightforward.
- **Additional state requirements:**
 - Daily overtime
 - Double time
- Salaries, **bonuses** and commissions
- all have special overtime considerations.
- *Your company is fair game for a lawsuit if you violate these rules!*



Overtime

- **DO** pay time and one-half of regular rate for:
 - Over 8 hours up to 12 hours per day
 - The first 8 hours of the 7th consecutive day of work
 - Over 40 hours per week



Overtime

- **DO** pay Double Time for :
 - Over 12 hours per day
 - Over 8 hours on the 7th consecutive day of work
 - *Pay two times the regular rate of pay*





Issue #3: Off the Clock Claims

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Employer Liability for Off-the-Clock Work

General Rule: If the employer knows or should know that work was performed, regardless of whether it was done on-site or off-site, then that work is compensable

Please shut up. I'm off the clock and refuse to listen to you for free.



your  cards
someecards.com

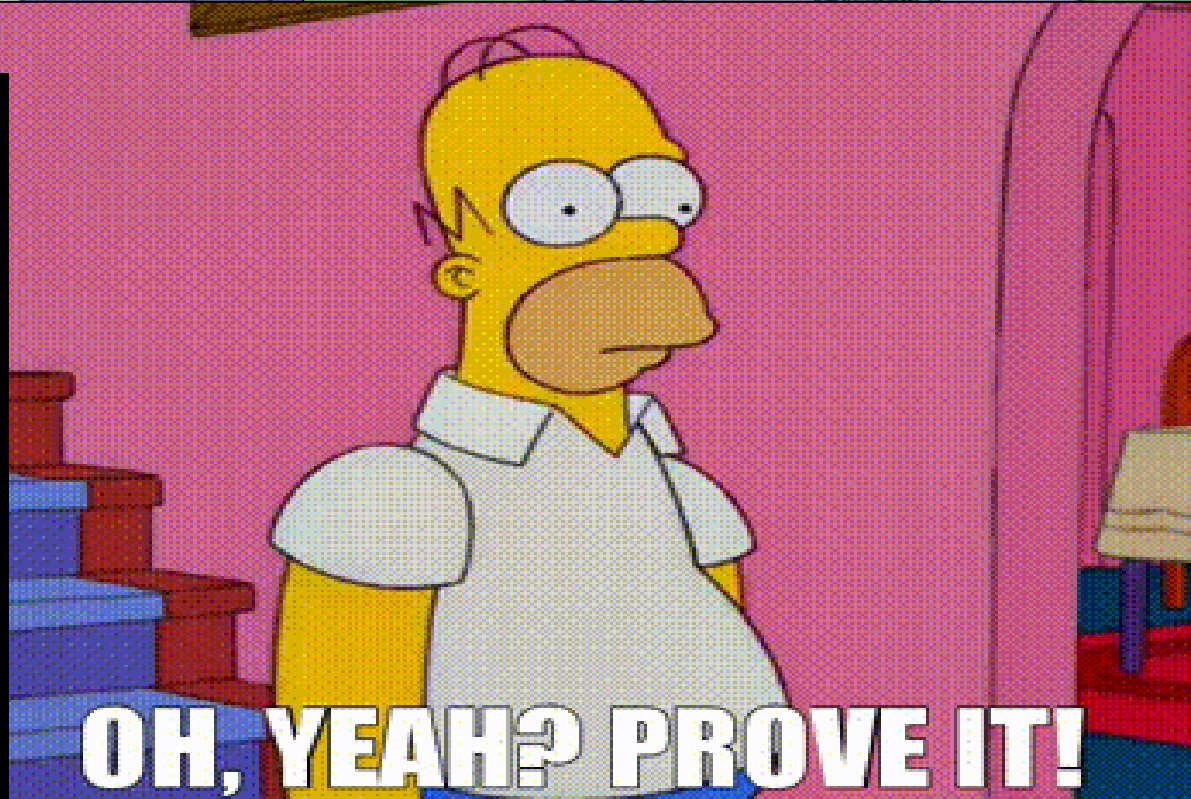
Issue #3 (Cont): Avoiding Off the Clock Claims



- Maintain a policy strictly prohibiting off-the-clock work.
 - Message: Work begins with your first activity of the day, such as your phone or computer log on. All time worked is compensable.
- Be aware of pre-shift and post-shift activities.
- A meal break of less than 30 minutes and a “working lunch” must be paid.
- Even if not authorized, extra time worked must be paid
- ***Carefully review time records.***



You can't possibly have worked 1,000 hours last week!



OH, YEAH? PROVE IT!

Issue #3 (Cont): Common Off the Clock Issues

- Boot up time on the computer.
- Pre or post shift activities (thank you Starbucks).
- Lines at the time clocks.
- *All of these lead to derivative OT and Meal Period Claims*





Issue #4: Expense Reimbursement & Wage Statements

Expense Reimbursement

- California has an expense reimbursement laws with the stated purpose of prevent employers from passing some or all of their operating expenses on to employees. (Labor Code Section 2802)
 - California, for example, requires employers to reimburse
 - all “necessary” and “reasonable” expenses incurred by employees in direct consequence of discharging their duties
 - or at the direction or request of their employer.
 - Whether an expense is “necessary” turns on the reasonableness of the employee’s choice under the circumstances – expenses incurred voluntarily need not be reimbursed.



Wage Statements

- California has wage statement requirements requiring the following information:
 - Employer's name and address
 - Employee's name and last four digits of social security number
 - Inclusive dates for which the employee is being paid
 - Gross wages earned
 - Applicable hourly rate
 - Total hours worked
 - All deductions
 - Net wages earned
 - For piece rate: piece rate and number of pieces earned





Wage Statements

- **Q:** How much will it cost you if you fail to comply?
- **A:** More than you think.
- Remedy for inaccurate pay stubs:
 - Knowing and intentional violations: greater of all actual damages or \$50 for the initial pay period in which the violation occurs and \$100 per employee for each violation in a subsequent pay period
 - Not to exceed aggregate penalty of \$4,000
- Civil Penalties
 - Can be assessed even for inadvertent violations
- Attorney's Fees

Thank You

The logo for Littler, featuring the word "Littler" in a green, sans-serif font with a small blue dot above the first 'i'.The logo for Fisher Phillips, featuring the words "Fisher" and "Phillips" stacked vertically in white, sans-serif font, set against a red, 3D-style rectangular background.

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