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all we do is work

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**“911” – Wage & Hour  
Compliance**

# Lawyer's Disclaimer

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# DLSE Bureau of Field Enforcement

Industry	Inspections	# of Violations	Penalties Assessed	Penalties Collected
Agriculture	80	51	\$990,859.52	\$147,684.16

Source: 2016-2017 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement

# DLSE Bureau of Field Enforcement

<b>BUREAU of Field Enforcement</b>			
<b>FY 2016-2017, Results by Violation Category</b>			
<i>Citation Category</i>	<i># of Citations</i>	<i>Penalties Assessed</i>	<i>Penalties Collected</i>
Workers' Compensation	1,434	\$36,440,626.41	\$3,144,447.63
Child Labor	106	\$126,500.00	\$52,914.83
Itemized Statement	507	\$6,768,250.00	\$1,480,653.04
Minimum Wage	430	\$939,300.00	\$59,322.76
Overtime	173	\$831,044.72	\$73,178.66
Rest and Meal Period	136	\$1,173,550.00	\$93,161.37
Misclassification	0	\$0.00	\$0.00
Unlicensed Farm Labor Contractor	5	\$40,300.00	\$24,500.00
Lactation Accommodation Violation	1	\$4,900.00	\$50.00

# Are You Ready? Let's See what You Got!



# What Concerns You?

Sara Givemeabreak is driving to visit a Company packing facility in California. As she drives by one of the Company's fields, she see employees sitting and standing around waiting when they usually would have started work. She notices her supervisor is looking at a piece of equipment with some other folks trying to get it working. Idle workers – not good during picking season she thinks to herself. Sara arrives at the facility and parks in the employee parking lot and walks to the employee entrance. It is a long walk. She then walks into the building to the break room but the walk is taking longer than she is used to since you enter the building and then walk from the employee entrance down a long hallway. She finally arrives at the employee entrance and waits to clear security. There is a metal detector and also a guard with a screening wand if you set off the detector.

Sara clears security and then walks by the locker rooms set up for employees to change into their light blue uniforms. The employees have to wear boots, pants and shirts but the light blue color makes everyone look super spiffy. She was told employees cannot take uniforms home.

Sara then walks by a line of employees trying to clock in at the time clocks outside the changing room but seems there is a back up at the time clock. Sara notices there are employees trying to clock in but also employees trying to clock out for their lunch period and then walking back to the break room which is on the other side of the building. Any issues?

# OTC – Off The Clock Work

- Traveling between work locations
- Attending meetings (e.g. safety meetings) – informal meetings
- Attending job trainings
- Doing warm-up calisthenics
- Donning and doffing personal protective equipment or protective clothing
- Waiting for the arrival of bins, boxes, or other containers in which crops are placed
- Waiting for the repair or replacement of equipment necessary to harvest or work
- Waiting for your foreman or manager to arrive
- Waiting for weather or other environmental conditions to change so that production work can start or resume
- Company vans – optional transportation but supervisor talks about work as drive
- Time keeping systems – placement of clocks/boot up time/walk time

# Troester v. Starbucks (2018) 5 Cal. 4<sup>th</sup> 829

- In *Troester*, the manager of a Starbucks spent 4-10 minutes every day engaged in closing procedures after he logged out. This included locking the front gate and walking with employees to their cars.
- Manager filed a complaint in federal court and the Ninth Circuit asked the California Supreme Court to opine on whether California had adopted the federal *de minimis* exception.
- Federal *de minimis* doctrine – “[I]nsubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*.”
- Under federal law, daily periods of up to 10 minutes can be considered *de minimis* even though otherwise compensable. However, there is no bright line rule – it is highly fact specific.

# Troester v. Starbucks (2018) 5 Cal. 4<sup>th</sup> 829 (cont.)



- The California Supreme Court held that while the *de minimis* doctrine exists in California – it does not apply to hours worked. “The Labor Code ... contemplates that employees will be paid for all work performed.”
- However... “[w]e decline to decide whether a *de minimis* principle may ever apply to wage and hour claims given the wide range of scenarios in which this issue arises.” There is an open question whether activities that are so “irregular” or “brief in duration” may be excluded.
- As a practical matter, very few tasks performed by non-exempt employees could fall under California’s *de minimis* exception
- **Be proactive – find and eliminate any time off the clock!!**

# Review of Records Workshop

- As HR Director, you have to visit locations in Central and Southern California from time to time. You show up early at a location and decide to review some records while you are waiting for the staff to arrive. You pull a time card for a non-exempt employee and see the following for each day hand written:

Time in: 9:00 a.m.

Time out: 5:00 p.m.

- On the one day the employee wrote down “5:06,” you also notice that the foreman manually changed the time to “5:00.” The employee did not sign the change
- What are the issues? Concerns?

# Review of Records Workshop

- Non-exempt employees must record the start and end of their day and meal period (Section 7 of the Wage Orders);
  - What about rest periods? Not required but should an employer record rest periods?
- Potential “off the clock” claims since few, if any, employees start and end their day exactly at 9:00/5:00. An employer needs accurate records; and,
- Manager changing time without employee consent can cause numerous issues

# Which Wage Order?

Which Wage Order?

Does it matter?

YES!!

Wage order	
	Minimum wage order Effective January 1, 2017
	Wage order #1 Manufacturing Industry
	Wage order #2 Personal Services Industry
	Wage order #3 Canning, Freezing, and Preserving Industry
	Wage order #4 Professional, Technical, Clerical, Mechanical and Similar Occupations
	Wage order #5 Public Housekeeping Industry
	Wage order #6 Laundry, Linen Supply, Dry Cleaning and Dyeing Industry
	Wage order #7 Mercantile Industry
	Wage order #8 Industries Handling Products After Harvest
	Wage order #9 Transportation Industry
	Wage order #10 Amusement and Recreation Industry
	Wage order #11 Broadcasting Industry
	Wage order #12 Motion Picture Industry
	Wage order #13 Industries Preparing Agricultural Products for Market, on the Farm
	Wage order #14 Agricultural Occupations
	Wage order #15 Household Occupation
	Wage order #16 Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries
	Wage order #17 Miscellaneous Employees

# California State Minimum Wage Increases

- ◆ Please remember that California minimum wage increases per the following schedule:

Starting on	26 Employees or More	25 Employees or Less
January 1, 2018	\$11.00	\$10.50
<b><u>January 1, 2019</u></b>	<b><u>\$12.00</u></b>	<b><u>\$11.00</u></b>
January 1, 2020	\$13.00	\$12.00
January 1, 2021	\$14.00	\$13.00
January 1, 2022	\$15.00	\$14.00
January 1, 2023	\$15.00	\$15.00
January 1, 2024	Indexed to CPI	Indexed to CPI

- ◆ **Certain wage and hour requirements and sick leave have a collective bargaining exemption which requires union employees to **make 30% above the state minimum wage**, this means the minimum wage rate must be \$15.60 in 2019**

# When the CA Minimum Wage Increases So Does the CA White Collar Overtime Exemption

- ◆ When the California state minimum wage increases so does the white collar overtime exemption salary test since the test is always two times the state minimum wage (2080 X minimum wage X 2)

Starting on	26 Employees or More	CA State White Collar Salary Test
January 1, 2018	\$11.00	\$45,760
<b><u>January 1, 2019</u></b>	<b><u>\$12.00</u></b>	<b><u>\$49,920</u></b>
January 1, 2020	\$13.00	\$54,080
January 1, 2021	\$14.00	\$58,240
January 1, 2022	\$15.00	\$62,400

# But There is More! City Minimum Wage Increases

- ◆ Please remember that there are a large number of City minimum wage increases. Here are some:

CITY	DATE	RATE	CITY	DATE	RATE
Belmont, CA	January 1, 2019	\$13.50	Oakland, CA	January 1, 2018	\$13.23
Berkeley, CA	October 1, 2018	\$15.00	Palo Alto, CA (see municipal code also)	January 1, 2018	\$13.50
Cupertino, CA	January 1, 2019	\$15.00	Pasadena, CA (see municipal code also)	July 1, 2018	\$12.00
El Cerrito, CA	January 1, 2019	\$15.00	Redwood City, CA (see ordinance)	January 1, 2019	\$13.50
Emeryville, CA	July 1, 2018	≤55 \$15.00 56+ \$15.69	Richmond, CA	January 1, 2019	\$15.00
Flagstaff, AZ	January 1, 2019	\$12.00	San Diego, CA	January 1, 2019	\$12.00
Los Altos, CA	January 1, 2018	\$13.50	San Francisco, CA	July 1, 2018	\$15.00
Los Angeles, CA	July 1, 2019	≤25 \$13.25 26+ \$14.25	San Jose, CA	January 1, 2019	\$15.00
Los Angeles County, CA	July 1, 2019	≤25 \$13.25 26+ \$14.25	San Leandro, CA	July 1, 2019	\$14.00
Malibu, CA (see municipal code also)	July 1, 2019	\$14.25	San Mateo, CA	January 1, 2019	\$15.00
Milpitas, CA	July 1, 2019	\$15.00	Santa Clara, CA	January 1, 2019	\$15.00
Mountain View, CA	January 1, 2019	\$15.65	Santa Monica, CA	July 1, 2019	≤25 \$13.25 26+ \$14.25
			Sunnyvale, CA	January 1, 2019	\$15.65

# Living Wage Ordinances - Don't Forget!!!!

Albany – [Link to Chapter 2, Article V of the City Code](#)

Anaheim – see also: [Measure L on “City Measures – November 6, 2018” webpage.](#)

Berkeley

Davis

Emeryville

Fairfax – [Link to Title 8, Chapter 8.56](#)

Hayward

Long Beach (hotel workers and concessionaire workers)

Los Angeles

Los Angeles Airport Hospitality Enhancement Zone – [Link to Chapter X, Article 4 of the Municipal Code](#)

Los Angeles County

Marin County

Oakland

Oakland – [Link to Title 2, Chapter 2.28](#)

Oxnard – See pages 5-6

Pasadena

Petaluma

Port Hueneme – [Link to Article II, Chapter 6, Part F, Section 2561.2](#)

Port of Los Angeles PDF –[Port of Oakland](#)

Richmond

Sacramento – [Link to Title 3, Chapter 3.58](#)

San Diego PDF – (see also [Rules Implementing Living Wage](#)

[Ordinance PDF](#))

San Francisco

San Jose

San Leandro – [Link to Title 1, Chapter 1-6, Article 6](#)

San Mateo County

Santa Barbara

Santa Clara County PDF

Santa Cruz – [Link to Title 5, Chapter 5.10](#)

Santa Cruz County – [Link to Chapter 2.122](#)

Santa Monica

Santa Monica Hotel Worker Living Wage

Sebastopol

Sonoma – [Link to Title 2, Chapter 2.70](#)

Sonoma County

Ventura

Ventura County

Vernon

Watsonville – [Link to Title 2, Chapter 5](#)

West Hollywood – [Link to Title 3, Chapter 3.20](#)

# Itemized Statement – Labor Code 226

- Accurate itemized wage statements must have:
  - (1) gross wages earned,
  - (2) **total hours worked** by the employee
  - (3) **the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,**
  - (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
  - (5) net wages earned,
  - (6) the inclusive dates of the period for which the employee is paid,

# Itemized Statement – Labor Code 226

- Accurate itemized wage statement must have:
  - (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number,
  - (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and
  - (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee

# Itemized Statement – Labor Code 226

- Accurate itemized wage statement must have:

(10) if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment.

Note: The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. For purposes of this subdivision, “copy” includes a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information required by this subdivision.

# Itemized Statement – Other Issues

- An employer shall provide an employee with written notice that sets forth the **amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee’s itemized wage statement described in Section 226 or in a separate writing** provided on the designated pay date with the employee’s payment of wages.
- If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer may satisfy this section by indicating on the notice or the employee’s itemized wage statement “unlimited.”

# Regular Rate

- Key issue for employers continues to be the “regular rate of pay.”
- This is very important because overtime (and meal and rest break premium pay) must be paid at the regular rate. If the regular rate isn’t calculated properly, you are underpaying your employees.
- Regular rate must include all compensation earned. This includes bonuses, shift differentials, piece rates, etc.
- Certain exclusions are allowed under the Fair Labor Standards Act and California law.

# How Bonuses, Commissions, Premium Pay And Incentive Pay Impact Overtime Pay Rates

- Bonuses: if discretionary it is NOT included in the regular rate of pay.
- A bonus is “**discretionary**” if both the fact that the bonus was paid and the amount of the payment were determined at the sole discretion of the employer at or near the end of the bonus period and not made pursuant to any prior contract, agreement or promise which would cause the employee to expect the bonus on a regular basis.
- Very rare

# Non-Discretionary Bonus Paid To Non-exempt Employees

- When an employer pays a non-discretionary bonus to non-exempt employees based on performance, attendance, safety etc. that is pre-announced, the employer must calculate the amount of overtime on a bonus paid, if overtime is worked in the measuring period. If no overtime worked, no calculation is required.
- The bonus rate for non-discretionary bonuses when paid to hourly employees is found by dividing the bonus amount by the total hours worked during the period to which the bonus applies, multiplying that amount by .5 and then multiplying the total by the number of overtime hours worked in the measuring period.

## Alvarado v. Dart Container – CA Did What?????

- On March 5, 2018, the Cal Supreme Court unanimously ruled that when calculating overtime in pay periods in which an employee earns a flat rate bonus, employers must divide the total compensation earned in a pay period by the non-overtime hours worked by an employee.
- FLSA formula for non-Dart Bonuses: This decision formally breaks from practice under federal FLSA law of calculating overtime by dividing total compensation by total hours worked times .5 times overtime hours worked in the measuring period.
- Under *Dart*, when a flat-sum bonus is paid in a week, a different formula is used to calculate overtime on the bonus now.
- **The *Dart* case will impact bonus plans where there is no chance for increase in the bonus depending on the employee's performance by the hour.**

# Impact of Alvarado v. Dart Container

- A performance bonus which rewards productivity if the employee reaches certain thresholds earned during any hour worked, including overtime hours, is NOT covered by *Dart*.
- An attendance bonus for \$250 if an employee doesn't miss work for a week or a flat sum payment of \$100 for working weekend shifts is covered by *Dart*.
- **Dart Formula:** The overtime owed on the bonus is found by dividing the bonus by the number of non-overtime hours the employee worked in the measuring period, multiplying that number by 1.5 and then multiplying the total by the number of overtime hours worked in the measuring period.
- **The decision will apply retroactively, potentially subjecting employers to penalties and liability based on past practices.**

# Piece Rate – Do You Really Know?

- **Commission:** This must be a sale situation – if an employer cannot show it is a sale – it likely is not a commission. Compensation paid to any person for services rendered in the sale of property or services and based proportionately upon the amount. If the compensation is based on a percentage of a sale, the compensation plan is likely a commission. A commission could now also be paid on a flat amount but it must increase or decrease of the amount sold.
- **Bonus Plans:** A bonus is paid to reward extra ordinary effort or work. It is money promised to an employee in addition to the monthly salary, hourly wage, commission or piece rate. For example, employees are paid an hourly rate at least minimum wage and then an employer offers to pay \$50 to anyone who gives more than 15 tours a month and not pay anything for people who give less, likely could be a bonus. It is rewarding extra ordinary effort.
- **Piece Rate:** Piece rate is based on being paid for completing a particular task or making a particular piece of good. A payment for a specific task, e.g. \$5.00 per bunch picked, is a piece rate.

# Piece-Rate

- Requires separate payment for **rest and recovery periods** at the greater of the applicable minimum wage OR the employee's average hourly wage for all time worked (exclusive of break time) during the work week.
- **Non Productive Time:** Employees must be separately compensated for "other nonproductive time." "Other nonproductive time" is defined as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis."
- "Other nonproductive time" must be compensated at an hourly rate no less than the applicable minimum wage.
- Special Itemized wage statement rules

# Commission Based Employees and Rest Breaks

- Commission-based compensation agreements are still valid in California.
- BUT.
  - Non-exempt employees paid by commissions should also be separately compensated for rest breaks and other non-productive time

# Commission Plans – Labor Code § 2751

- All commission contracts must be in writing;
- All contracts must set forth the method by which the commissions shall be computed and paid;
- All employers must give a signed copy of the contract to every employee who is a party to the contract; and
- All employers must obtain a signed receipt for the contract from each employee.

# Paying Commissions

- Must be paid when earned
- Reconcile earned commissions every pay period
- Advances may only be recovered from earned commissions, not salary or hourly wages
- No reserve commission banks in CA
- Forfeitures disfavored - “He or she who shakes the tree should bear the fruit”
  - Focus on the duties to earn the commission
  - Who did the work vs. When the individual was discharged

# Tools

Employer must provide tools. However, employees whose wages are at least two (2) times the state minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.

Limited to hand tools only.

# Improper Deductions From Wages

- Any deductions for items that are for the convenience of the employer
- Financial losses due to the clients or customers not paying bills
- Damages to the employer's property by the employee or any other individual
- Theft of the employer's property by the employee or other individuals

# Improper Deductions From Wages

- Medical or Physical Examinations.
- An employer may not withhold or deduct from the wages of any employee or require any prospective employee or applicant for employment to pay for any pre-employment medical or physical examination taken as a condition of employment, nor may an employer withhold or deduct from the wages of any employee, or require any employee to pay for any medical or physical examination required by any federal or state law or regulation, or local ordinance. Labor Code Section 222.5

# Improper Deductions From Wages

- Overpayments and debts in California
- Don't make the classic mistakes!
- An employer needs voluntary, contemporaneous consent in writing to deduct. Employee may not fall below minimum wage for any pay period
- Employee selects amount to deduct. End of employment – no balloon deductions
- Double Direct Deposit
- Reverse Direct Deposit
- If employee refuses to repay, what can you do?

# Determining Proper And Improper Deductions From Wages

- Don't deduct advanced vacation from final check!
- Employee Loans
  - California regulates deductions
  - Must be in writing
  - Employee may not fall below minimum wage for any pay period
  - Final check may only deduct installment payment authorized by employee

# Improper Deductions From Wages

Exempt employees who work any part of a work week that is interrupted by jury duty, witness duty or military leave must be paid their weekly salary for that week

# Determining Proper And Improper Deductions From Wages

- An employer can make a full day deduction from pay for an exempt employee who missed an entire work day for a personal reason, other than accident or illness, and performs no work at all on that day
- An employer cannot make a partial day deduction from wages of an exempt employee when absent for less than a day unless FMLA/CFRA intermittent leave
- An employer may make a partial deduction from paid leave accounts, i.e. vacation, PTO, etc. when an employee is absent from work for a partial or full day for personal reasons.

# Determining Proper And Improper Deductions From Wages

- An employer can make a full day deduction from pay for an exempt employee for a sickness or illness who missed an entire work day and performed no work if the employee has exhausted their sick days under a bona fide sick leave plan (at least 5 days per federal DOL opinion).
- An employer may not make a partial day deduction from an exempt employees pay if an employee misses part of the day due to illness and the employee has exhausted their sick days under a bona fide sick leave plan.
- An employer may make a partial deduction from paid sick leave when an employee is absent from work for a partial or full day for illness or accident.

# Determining Proper And Improper Deductions From Wages

- An exempt employee's salary can be reduced for the following reasons:
  - full-day absences for personal reasons;
  - full-day absences for sickness or disability, if the available paid sick leave has been exhausted under a bona fide sick leave policy;
  - intermittent absences, including partial-day absences, covered by the federal Family and Medical Leave Act or California Family Rights Act leave, if other available paid leave has been exhausted;
  - to offset amounts received as payment for jury and witness fees or military pay;
  - during the first or last week of employment in the event an employee works less than a full week; and
  - any work week in which an employee performs no work for the Company.

# Determining Proper And Improper Deductions From Wages

- An exempt employee's salary will not be reduced for any of the following reasons:
  - partial-day absences for personal reasons, sickness or disability;
  - absence on a holiday when the facility is closed or because the facility is otherwise closed on a scheduled workday;
  - absences for jury duty, attendance as a witness or military leave in any week in which an employee has performed any work

# Waiting Time Penalties

**An employer that willfully fails to pay any wages at end of employment within the statutory time may be assessed waiting time penalties equal to the employee's daily wages for each day the wages were not paid, up to 30 days.**

# Qualifying for Exemptions



## The “White Collar” Exemptions

**BOTH** of two tests must be met:

**1**

**Compensation test**

**California:** “No less than two times the state minimum wage for full time employment”

**2**

**Duties test**

Can be defined as...

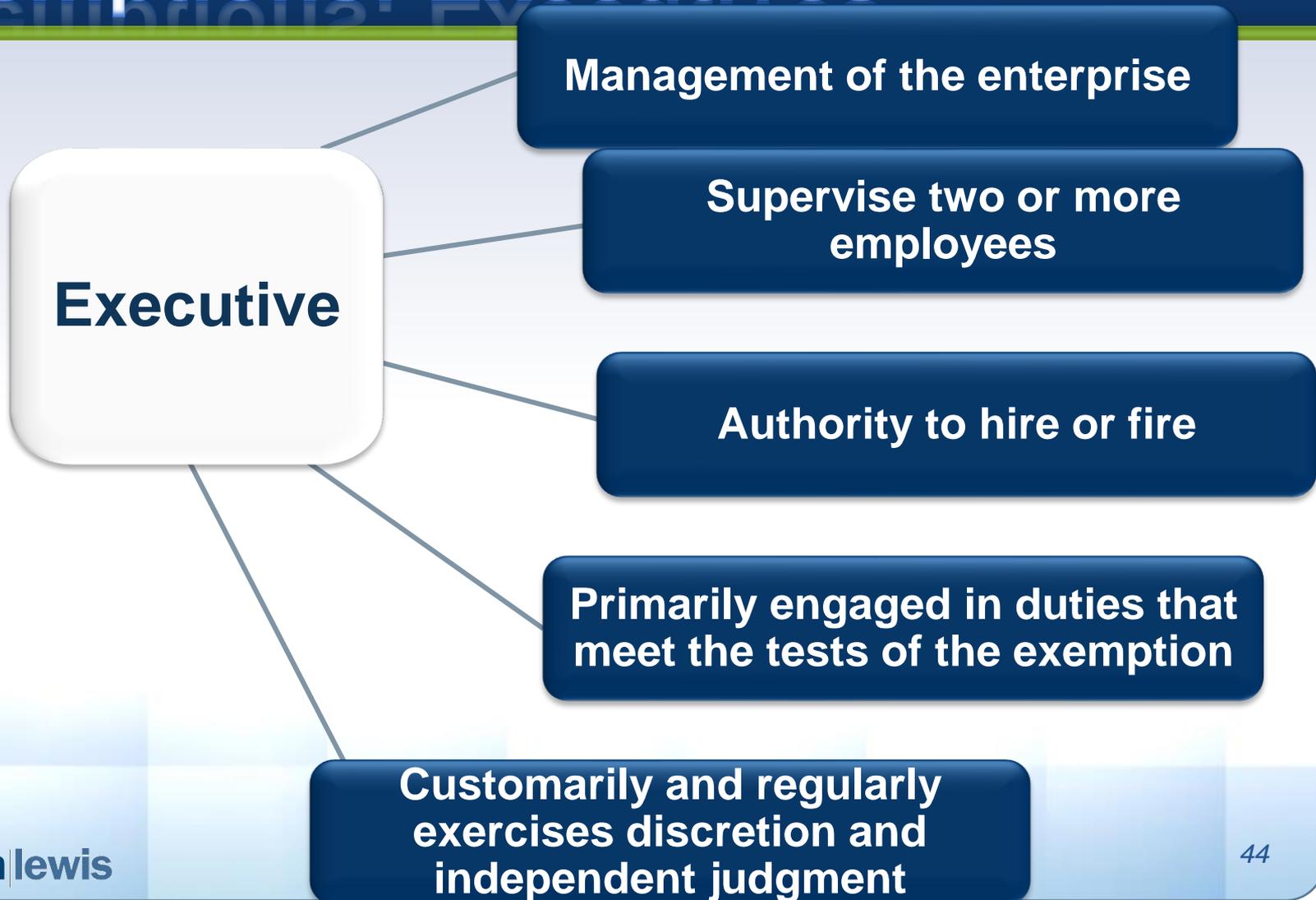
- **Executive**
- **Administrative**
- **Professional**

# Wage Order 14 – Overtime Exemptions

- No provision of this order shall apply to **any employee who is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and**
- for which the remuneration is **not less than two (2) times the monthly state minimum wage** for full-time employment.

**“Primarily”** means more than one-half the employee’s work time.

# Non Wage Order 14 - Overtime Exemptions: Executives



# Non Wage Order 14 - Administrative

## Administrative Personnel

Office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers

Customarily and regularly exercises discretion and independent judgment

Regularly and directly assists a proprietor, or an exempt executive or administrator

AND

Performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge.

or

Who executes under only general supervision special assignments and tasks

Primarily engaged in duties that meet the tests of the exemption

# Non Wage Order 14 : Professionals

## Professionals

**Licensed or certified** by the State of California and primarily engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting;

or

Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession.

# Non Wage Order 14: Computer Professionals

**Effective January 1, 2019:**

**Computer Software Professionals**

**Must earn \$45.41 per hour  
or \$94,603.25 per year**

**Must be engaged in intellectual/creative work and exercises discretion and independent judgment and primarily engaged in one of the following:**

- **Systems analysis type work**
- **Systems design work**
- **Systems Documents**
- **Specialized Systems Engineering**



# Overtime Exemptions: Sales

## Sales Exemptions

**FLSA 7 (i)  
And  
Wage Order 4 and 7  
commission exemption**

**Outside sales  
representatives**

Special compensation rules apply

# Wage Order 14 – Overtime Phase

The number of hours worked per day or per week before overtime pay is required at a rate of one and one-half times the agricultural employee's regular rate of pay will phase-in according to the following schedule:

## Overtime pay schedule for agricultural workers at large employers (26 or more employees)

Date	Hours in a day	Hours in a workweek
January 1, 2019	9.5	55
January 1, 2020	9	50
January 1, 2021	8.5	45
January 1, 2022**	8	40

\*\*Double time after 12 hours

# Wage Order 14 – Overtime Phase

The number of hours worked per day or per week before overtime pay is required at a rate of one and one-half times the agricultural employee's regular rate of pay will phase-in according to the following schedule:

## Overtime pay schedule for agricultural workers at large employers (25 or less employees)

Date	Hours in a day	Hours in a workweek
January 1, 2022	9.5	55
January 1, 2023	9	50
January 1, 2024	8.5	45
January 1, 2025**	8	40

\*\*Double time after 12 hours

# Non-Wage Order 14 - California Overtime



**1½ time** regular hourly rate of pay for hours worked in excess of 8 in a day and/or 40 in a week and during the first 8 hours on the 7th consecutive day of the workweek.

**2 times** regular hourly rate of pay for hours worked in excess of 12 in a day and/or for hours worked in excess of 8 hours on the 7th consecutive day of the workweek.

# Travel Time

- Normal commute is non-compensable to a REGULAR, DESIGNATED LOCATION
- Travel time during working hours is compensable, e.g., after arriving at work, driving between locations, customers, or work sites
- Overnight travel during working hours is compensable

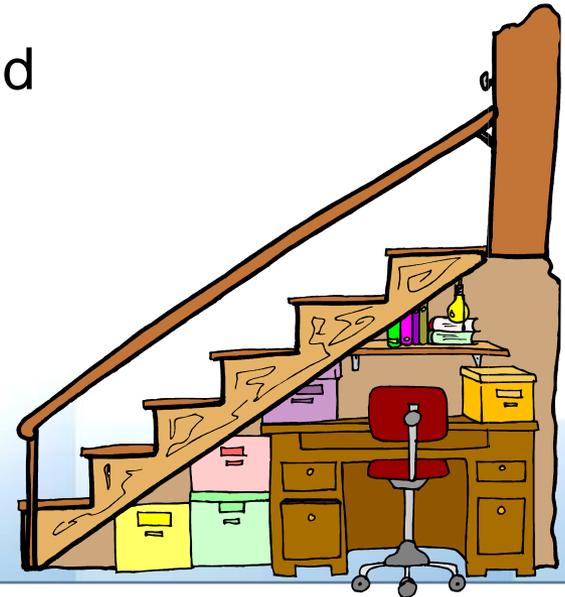


# Travel Time

- Travel time outside employee's normal working hours is compensable in California, which is different from the FLSA.
- Out of town travel likely compensable from door to door until employee reaches a place where they are free of all duty (less the employee's normal commute time to their designated work location).
- There are unique rules for employees who do not have a regularly designated work location.

# Rules for Work at Home

- Non-exempt employees must be paid for all hours worked
  - Must provide meal and rest periods
  - Hours must be recorded
  - All reasonable business expenses reimbursed by employer
  - Telecommuting agreement recommended
    - Define the relationship
- *Employer must closely monitor to avoid abuse and wage-hour violations*



# Payment for Business Expenses

- Employees must be paid for all expenses they necessarily incur on behalf of the employer
- The employer may implement a policy regarding the submission of requests for reimbursement
- If an employee fails to comply with the policy, the employee must still be paid, but may be disciplined



# Payment for Business Expenses

- If an employee uses their personal vehicle for business use, an employer must reimburse employees for the cost of the operation of their vehicle.
- Employers may do this in several different ways, e.g. mileage reimbursement, monthly allowance and increased compensation by written agreement.



# Payment for Business Expenses

- While the DLSE only requires a “reasonable rate” for mileage reimbursement, the DLSE has opined that the IRS rate is an example of a reasonable rate.
- Whatever your system, it must result in covering the business expenses and you need to be able to defend your system.
- Requiring increased levels of car insurance on an employee’s personal vehicle beyond the California legal minimum was found to be a reimbursable business expense by the DLSE.
- Cell Phone – even if employee has unlimited plan – employer must reimburse for reasonable business use!!

# What About Uniforms?

- When uniforms are required by the employer, they usually must be provided by the employer
- “Uniform” includes apparel and accessories of *“distinctive design or color”*
- Examples of possible uniforms:
  - Requiring employees to wear blue or yellow pants;
  - Requiring clothes made of only 100% cotton because of production issues with static electricity

# What About Uniforms?

- An employer must maintain a uniform if the employer requires anything beyond “wash and wear” care.
- ***Can the employee take it out of the dryer and wear it to work?***
- An employer will likely have to pay for the maintenance of the uniform if an employer requires any of the following :
  - Pressing
  - Ironing
  - Dry cleaning . . . CHECK YOUR HANDBOOK LANGUAGE !!!



# California Rules Regarding Paid Time Off

- Vacation vests on a daily basis and becomes vested wages
- No use-it-or-lose-it policy allowed (reasonable cap or cash-out is acceptable)
- Cannot deduct from final paycheck for “borrowed” vacation
- Personal and floating holidays and “PTO” treated like vacation – any paid day which can be used for any reason
- A vacation policy may provide a “reasonable” cap or maximum amount of vacation that may be accrued. Reasonable cap is in dispute – we recommend 1.75 but arguments to go lower.
- **EXCEPTION TO RULE:** sick days based on illness or eligible basis under CA paid sick leave law and City laws like San Francisco, Emeryville, Oakland, Berkeley, Santa Monica, Los Angeles, or San Diego Sick day Ordinance and there are more

# Meal & Rest Break

## ● Rest Breaks

- Interpretation of Wage Order – same rest break language in most Wage Orders
- Employers must “**authorize and permit**” rest breaks of:
- 10 minutes for each four hours worked “or major fraction thereof”
- “Major fraction” means a fraction greater than one half, that is, any amount of time in excess of two hours
- No rest break is owed for work days less than three and one-half hours in length

# Meal & Rest Break –

## ● Rest Break (continued)

- One 10 minute rest period for work days of three and one-half up to six hours in length
- Two 10 minute rest periods for work days more than six hours up to 10 hours in length
- Three 10 minute rest periods for work days of more than 10 hours up to 14 hours, and so on
- Rest breaks are **PAID TIME**.

3.5-6

Work Hours

10 Rest  
Minutes

6-10

Work Hours

10 Rest  
Minutes

10 Rest  
Minutes

10-14

Work Hours

10 Rest  
Minutes

10 Rest  
Minutes

10 Rest  
Minutes

# Meal & Rest Break



## ● Rest Breaks (continued)

- Employers must also permit employees reasonable time to use bathroom facilities during the work day.
  - DLSE Manual, § 45.3.4.
  - This time is in addition to the 10 minutes required for each rest break.
- So merely allowing employees time for bathroom breaks does not meet the rest break requirement.
- Employers may still put reasonable limits on employee time spent away from work.

# Meal & Rest Break

## ● Meal Periods

- Brinker provides a definitive interpretation of the Wage Order meal period requirements:
- Employer **must provide** but not police unpaid 30-minute duty free meal periods.
  - The 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."
- Employers must not impede or discourage employees from using an uninterrupted 30 minutes for the employees' own purposes.
- An employee choosing to work after being truly relieved of duty must receive pay for the time worked, but is not entitled to the one hour of premium pay.



# Meal & Rest Break

## ● Meal Periods (continued)

- The first meal period must start by the end of the fifth hour worked, unless a condition for waiver applies.
- If an employee is eligible for a second meal period, it must start by the end of the tenth hour worked, again unless one of the conditions for waiver applies
- The Brinker ruling comports with the Labor Commissioner's interpretation on when meal periods must be made available.
- Each meal period must be provided as a 30 minute block of uninterrupted time.



Five Work Hours

One 30-Minute  
Meal Break

Ten Work Hours

First 30-Minute  
Meal Break

Second 30-  
Minute Meal  
Break

# Meal & Rest Break

## ● Meal Periods (continued)

- An employee may agree to waive the first meal period where a work day is 6 hours or less.
  - The employee and employer must mutually agree that the employee will waive the first meal period.
  - The agreement does not need to be in writing, but it is safer to make a written agreement for every waived meal break so it is documented in writing.
- An employee may agree to waive the second meal period where the work day is 12 hours or less and the first meal period was not waived.
  - Employer and employee must agree to waive the meal period.

# Recovery Periods for Outside Employees And Heat Illness

- Labor Code 226.7 provides that an employee should receive one hour of pay as a penalty for not receiving rest or meal periods in accordance with California law.
- California expanded the one hour of pay penalty to missed “recovery periods.”
- The law applies to any meal, rest or recovery period mandated by applicable statute, regulation, standard, or order of the California IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

# Recovery Periods For Outside Employees And Heat Illness

- “Recovery Period” is “a cool down period afforded an employee to prevent heat illness.”
- For example, when the outdoor temperature exceeds 80 degrees Fahrenheit, CA OSHA mandates an employee eligible for a recovery period of not less than 5 minutes for employees who work outside to take a cool-down rest, in the shade, to protect themselves from overheating.

# Federal DOL & CA DLSE Audits Seem to be Increasing since LC 226.8 as Passed

- California Labor Code 226.8 penalties are severe for willful misclassification of independent contractors (ICs):
  - If DLSE or a court finds an employer has engaged in willful misclassification of ICs, the employer shall be subject to a civil penalty of not less than five thousand dollars (\$5,000) and not more than fifteen thousand dollars (\$15,000) for each violation.
  - If a “pattern or practice” of these violations are found, the person or employer shall be subject to a civil penalty of not less than ten thousand dollars (\$10,000) and not more than twenty-five thousand dollars (\$25,000) for each violation, in addition to any other penalties or fines permitted by law.
- Who are your ICs? Run a report of people being paid by Form 1099

# Record Keeping

- Most recordkeeping laws are satisfied if you keep employment records for the duration of employment + 4 Years ... except:
  - Pension and Welfare Records = 6 years
  - First Aid Records of Job Injuries = 5 years
  - Safety and Toxic Chemical Exposure (MSDS) = 30 years

**Thank You**  
**QUESTIONS?**

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