

# APMA FORUM

## CA Wage-Hour 101 - Essential Knowledge for HR Professionals

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# Hot Litigation Trends

PAGA Claims and/or Class Actions involving wage and hour issues:

- Meal and rest break compliance and period premiums
- Non-productive time
- Regular rate for overtime, meal/ rest break premiums, sick pay – what goes into regular rate?
- Rounding
- Non-discretionary bonuses - which formula for regular rate?
- Labor Code 2802 - Business Expense Reimbursement
- Wage statements
- Off-the-Clock work – not paying minimum wage

**What is the plan to avoid class actions?**

**How can you minimize PAGA claims?**

# Meal Periods & Rest Breaks

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# Rest Breaks

- Must “authorize and permits” 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 workdays less than three and one-half hours in length.
- For example, if a nonexempt employee works more than six (6) hours, but no more than ten (10) hours in a workday, the employee is authorized and permitted to take two (2) 10 minute rest breaks: one during the first half of the shift and a second rest break during the second half of the shift.
- Employee must be completely relieved from all duties.
- Rest breaks are paid time.

# Meal Periods

- Must provide 30-minute duty free meal periods to employees who work at least a 5-hour shift.
- Meal periods should be started before the end of the 5th hour of work.
- For example, an employee who begins work at 8 a.m. must their meal period no later than 12:59 p.m.
- If an employee works more than 10 hours, the employee is entitled to a second 30 minutes break.

# Meal Periods

- Cannot impede or discourage employees from taking meal periods.
- Employees must be completely relieved from all duties while taking their meal periods.
- Meal periods are to be UNPAID, and employees should clock out.
- Employees should immediately notify Human Resources and/or their supervisor if they believe that they are prevented by the nature of their work from taking a timely and/or complete meal period.

# Meal and Rest Period Timing

Hours of Work	Meal Periods and Rest Breaks
0 to 3 hours, 29 minutes	No paid rest break and no meal period
3 hours and 30 minutes and up to 4 hours 59 minutes	One 10-minute paid rest break
More than 4 hours 59 minutes and up to 6.0 hours	One 10-minute paid rest break and one 30-minute unpaid meal period (unless first meal period is mutually waived pursuant to the policy)
More than 6.0 hours and, up to 9.0 hours and 59 minutes	Two 10-minute paid rest breaks and one 30-minute unpaid meal period
More than 9.0 hours and 59 minutes and up to 12.0 hours	Three 10-minute paid rest breaks and two 30-minute unpaid meal periods (unless second meal period is mutually waived pursuant to the policy)
More than 12.0 hours and up to 14.0 hours	Three 10-minute paid rest breaks and two 30-minute unpaid meal periods

# Meal Periods and Rest Breaks

- Completely relieved of all duties.
- May leave the premises for either their rest breaks or meal periods.
- Not expected to remain “on call,” or available to respond to messages, telephones, email or other devices during meal periods and rest breaks.
- Required to notify Human Resources immediately if they believe they are being pressured or coerced by any manager, supervisor, or other employee to forego any portion of a rest break or meal period.



# Meal Period Waivers

- An employee may voluntarily agree to waive their meal period if workday is 6 hours or less.
- An employee also may voluntarily agree to waive the second meal period if the workday is 12 hours or less and employee received the first meal period.

# Missed and Untimely Rest Breaks

- **What if an employee is unable to take their rest break(s)?**
  - Employee should be paid an additional 1 hour of pay.
- **What if an employee is not able to take a rest break at the mid -point of the work period?**
  - The rest period should be provided as soon as possible.

# Missed and Untimely Meal Periods

## **What if an employee is unable to take their meal period?**

- Employees should be paid an additional 1 hour of pay for the missed meal period.

## **What if an employee takes a meal period but had to take it late because of business needs?**

- Employees should be paid an additional 1 hour of pay for each meal period that was not taken at the appropriate time, regardless of whether or not one was taken.
- For example, if the employee started their shift at 8:00 a.m., they should have started their meal period by 12:59 p.m., or it is late.

# Missed and Untimely Meal Periods

**What if an employee voluntarily asks to take a late meal period?**

- Do not permit the request.

**What if the employee only received a less than 30 -minute lunch?**

- Employees should be paid an additional 1 hour of work because employee was not provided a full 30 -minute meal period

# Meal Period and Rest Break Violations

Maximum number of hours of compensation for meal and rest violations is two (2) per day

- Only one hour of compensation may be imposed for each day there was a failure to provide a compliant rest break regardless of the number of rest breaks which were non-compliant on a particular day
- Only one hour of compensation may be imposed for each day there was a failure to provide a compliant meal period

# Meal Period and Rest Break Violators

- Employees may be disciplined for violation of meal and rest break policy.
- Examples of violations warranting discipline:
  - Takes more than the allotted time.
  - Falsifies time records.
  - Refuses to take rest break or meal period with no valid excuse.
  - Pressuring or coercing another employee to miss or forgo their meal periods or rest breaks.

## Recovery Periods for Outside Employees And Heat Illness

- California expanded the one hour of pay penalty to missed “recovery periods.” “Recovery Period” is “a cool down period afforded an employee to prevent heat illness.”
- 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.

# Cool-Down Rest Periods

## High Heat Procedures for Agriculture:

When are preventative cool-down rest periods required in agriculture?

When temperatures reach or exceed 95 F, employers must provide one ~~ten~~ minute "preventative cool-down rest period" every 2 hours.

During the first 8 hours of a shift, the ~~cool~~down periods may be provided at the same time as the rest periods already required by Industrial Welfare Commission Order No. 14 (8 CCR ~~§~~11140). Such rest periods must be counted as hours worked.

If employees work longer than 8 hours, the employer must provide an additional ~~1~~ 10 minute cool-down rest period every 2 hours. For example, if the shift extends beyond 8 hours, an additional rest period is required at the end of the eighth hour of work. If the shift extends beyond 10 hours, another is required at the end of the ~~ten~~ hour.



# Timekeeping

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# “Off-the-Clock” Work

- Starting work before clocking in
- Clocking out but continuing to work
- Work during meal periods
- Do Not Allow Off-the-Clock work

What about unauthorized overtime offthe-clock?

- Employees can be disciplined for working unauthorized overtime but must be paid for the overtime that they worked.

# Rounding – Beginning and End of Shift

Rounding may be permitted if:

- Rounds to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked
- Does not result over a period of time in a failure to compensate employees properly for all time worked.
- Neutral, both facially and as applied.
- **Employers must verify static impact of rounding**
- **Is Rounding coming to an end?**
  - *Camp v. Home Depot U.S.A., Inc.*
- **What is the lesson here?**



# Best Practices for Avoiding Off-the-Clock Work

- Ensure that all employees are aware of proper way to request or obtain approval for OT hours.
- Ensure the subject employee signs off on any timecard adjustments.
- Always pay an employee for hours worked regardless of whether those hours were approved or not.
- Ensure that all employees are aware that any work-related activity is considered “work” and that an employee must be CLOCKED IN to work.
- Keep an eye out for any work being done outside of shift hours to avoid any off the-clock work.

## Do Not!

- Unilaterally change employee time records.
- Deny meal periods or rest breaks.
- Fail to pay overtime because it was not preauthorized.
- Require employees who are off duty or on leaves answer cell phones or respond to email/text messages.



# Hours Worked



Under California law, hours worked include all time the employee is “subject to the control” of the employer even if not suffered or permitted to work.



## on-call time



Employers may discipline employees who perform off-the-clock work or unauthorized OT but still must pay them for the time.

# No De Minimus Work Time – Off The Clock Work

Donning and doffing personal protective equipment or protective clothing

Attending meetings (e.g. safety meetings) – informal meetings

Attending job trainings

Doing warm-up calisthenics

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

Time keeping systems – placement of clocks/ boot up time/ walk time

# Overtime

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# California Overtime Rules for Non-Exempt Employees

One and one-half times the “regular rate of pay”

- Over 8 hours in a day
- Over 40 hours in a week
- First 8 hours of seventh consecutive day worked in the same workweek.

Twice the “regular rate of pay”

- Over 12 hours in a day
- Over 8 hours on seventh consecutive day worked in the same workweek

**Hourly Rate? Regular Rate?  
What's the Difference?**

# The Headache - Regular Rate

Key issue for employers continues to be the “regular rate of pay.”

Key issues that **must be paid at the regular rate** . If the regular rate isn't calculated properly, you may be underpaying your employees:

- **Overtime,**
- **Meal and rest break premium pay,**
- **CA paid sick leave (unless use alternate formula),**
- **2022 Supplemental sick leave**
- **Reporting time pay**

Regular rate must include all compensation earned. This includes non-discretionary bonuses, shift differentials, piece rates, etc.

Review your **payroll codes** to see what is being included in the regular rate and what is not being included in the regular rate

- **Certain exclusions are allowed under the FLSA and California law.**

# Non-Discretionary Bonus Paid To Non-exempt Employees

FLSA/CA Non-Discretionary Bonuses: When an employer pays a non-discretionary bonus to non-exempt employees based on performance, attendance, safety, efficiency **during all hours worked** that is pre-announced, the employer must calculate the regular rate.

FLSA/CA Traditional Bonuses Bonus formula:

Total compensation divided by total hours worked X .5 (if any double time then this would be “1”) X overtime hours worked in the measuring period.

# Getting Your Bonus Calculations Right and Much More!!

Dart Container v. Alvarado case Flat sum bonus and it **is not** measuring production, efficient, or safety during all hours worked employers must divide the total compensation earned in a pay period by only the non-overtime hours worked.

Dart Bonuses Bonus divided by straight time hours X 1.5 (if any double time then this would be “2”) X the number of overtime hours worked in the year.

Example: An attendance bonus for \$250 if an employee doesn't miss work for a quarter or a flat sum payment of \$100 for working weekends or flat sum referral bonus that requires employees to be employed for a period of time, etc.

You get the correct formula to calculate the regular rate on the bonus but **now you must go back and properly calculate** any meal and rest periods premiums and CA paid sick pay paid in the measuring period of the bonus.

# Paystubs

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## Check the Pay Stub:

### 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, and
- (6) the inclusive dates of the period for which the employee is paid,

## Check the Pay Stub:

### 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



## Check the Pay Stub:

### Itemized Statement – Labor Code 226

#### Accurate itemized wage statement must have:

(10) if the employer is a temporary services employer as defined in Section 2013, 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."

# Paid Sick Leave

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# Covered Reasons for Use of Paid Sick Leave

- Employee's own illness.
- To seek medical diagnosis, treatment, or preventative care.
- To care for a family member who is ill or needs medical diagnosis, treatment, or preventative care.
- To obtain or attempt to obtain any relief, including but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or their child.
- Employee's family member is a victim of domestic violence, sexual assault, stalking and other crimes, as defined, and employee is assisting the family member to obtain relief as specified.

# Family Members Defined

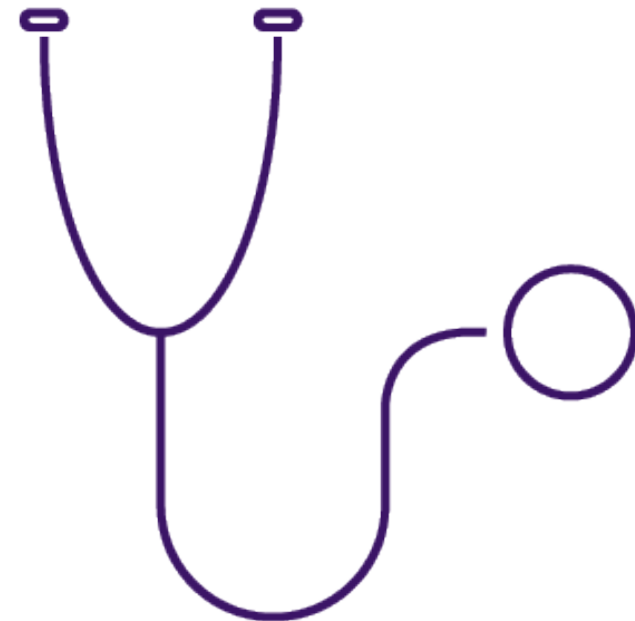
- Parents
- Child
- Spouse
- Registered domestic partner
- Grandparent
- Sibling
- **Designated person:** a person identified by the employee at the time the employee requests paid sick days. An employer may limit an employee to one designated person per 12-month period for paid sick days.

# Anti-Retaliation and Discrimination

- Must allow eligible employees to use accrued paid sick leave upon reasonable request.
- May not retaliate or discriminate against an employee who requests or uses paid sick days.
- Must allow employees to request leave orally or in writing.
- Cannot require employees to find a replacement as a condition of using leave.
- Talk to HR before denying an employee's paid sick leave request.

# Doctor's Notes, Medical Certifications

- Generally cannot require a doctor's note or medical certification for paid sick leave.
- Before denying paid sick leave, check with HR first!



# Penalties

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# 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.**

Questions?

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