

# Limiting exposure to PAGA litigation through compliance with CA Labor Code: Common pitfalls, remediation strategies, and best practices

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# INTRODUCTIONS

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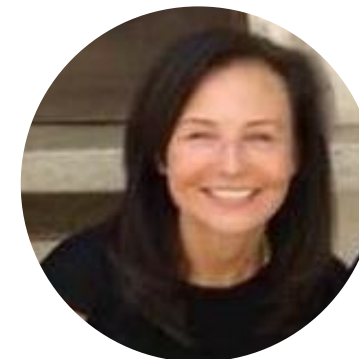


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# TODAY'S PROGRAM

- No Attorney-Client Privilege
- Agenda
  - Overview of PAGA
  - Legal requirements and best practices for avoiding PAGA liability
  - Overview of other noteworthy California laws





# WHAT IS PAGA?

# Private Attorney General Act

- Added to California Labor Code in 2004
- Allows representative action by an “aggrieved” person
  - 
  - Current or former employee
- On behalf of all allegedly “aggrieved” employees
  - No opportunity for such employees to opt out
- Claimant must notify the State and the employer of the intention to sue and wait 65 days before filing
- Statute of limitations is 1 year from most recent violation



# PAGA Penalties



- \$100 per employee per pay period for first violations and twice that for further violations in some cases
- \$250 per violation in other cases
- PAGA penalties are in addition to statutory penalties (e.g., meal and rest penalties)
  - 75% to the state, 25% to the PAGA members
- Attorneys' fees are awarded
- Usually filed as both PAGA and class action claims



# ONBOARDING



# WAGE THEFT PREVENTION NOTICE

- Template from the Labor Commissioner
- Precise name and address of the Employer
- Workers' Compensation Insurance Carrier
- How Sick Leave is provided by the Employer
- Whether there is a state or federal emergency or disaster declaration applicable to the county or counties where the employee works





# CLASSIFICATION

# Independent Contractor v. Employee

- ABC Test
  - A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?
  - B: Does the worker perform work that is outside the usual course of the hiring entity's business
  - C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?
- The Borello Test
  - Precursor to ABC test
  - Used in circumstances when ABC test does not apply

# Exempt v. Non-Exempt



- Duties Test
  - Executive Exemption
  - Administrative Exemption
  - Other Exemptions
- Salary Test
- California is stricter than federal law (the FLSA)
  - “Stopwatch” vs. “primary duty”
- Check the Applicable Wage Order!



# MEAL PERIODS AND REST BREAKS

# Meal Periods

- Minimum Requirements
  - 30 minutes – no rounding!
  - Within first six hours of work
  - Uninterrupted, untethered, unencumbered
- Usually unpaid – but same rules apply even if paid
- Precise time records are key
- Second meal period if employee works more than 12 hours in the day
  - Unless 12 hours completes the day and the employee actually took the first meal period
- Automatic penalty: 1 additional hour's pay at the regular rate



# Rest Breaks

- Minimum Requirements:
  - 10 minutes for every work period of 4 hours “or a major fraction thereof” unless the entire workday is 3.5 hours or less.
    - 3.5-6 hours: 1 break
    - 6.1-10 hours: 2 breaks
    - 10.1-12 hours: 3 breaks
  - Uninterrupted, untethered, unencumbered
- Paid (so no clocking out and in)
- Automatic penalty: 1 additional hour’s pay at the regular rate
- Proper break facilities must be provided (not just the bathroom)



# WORKTIME AND OVERTIME



# Work Time



- Any time the employee is “under the control” of the employer
  - Time spent in line to clock out or clock in
  - Time spent going through security
  - Time spent responding to work-related texts and emails
  - Time spent traveling to a different work location (less commute time)
- Travel time is different in California than under the FLSA
  - Can exclude sleeping time and time entirely on personal pursuits – but not “travel time”
- No “de minimis” in California

# Overtime



California is stricter than the FLSA

1½ x Regular Hourly Rate

- 8-12 **hours worked** in a **workday**
- 1<sup>st</sup> 8 hours on the 7<sup>th</sup> consecutive **workday** in a **workweek**

2 x Regular Hourly Rate

- Hours worked over 12 in a **workday**
- Hours worked over 8 on the 7<sup>th</sup> consecutive workday in a workweek

Alternative Work Schedules require a secret ballot vote and recording with the state



# TIMEKEEPING

# Accuracy is Key

Employee must accurately record each shift

- Time at the beginning and end of the day
- Time starting and returning from the meal period
- Mechanism for capturing worktime during off hours

Rounding is risky

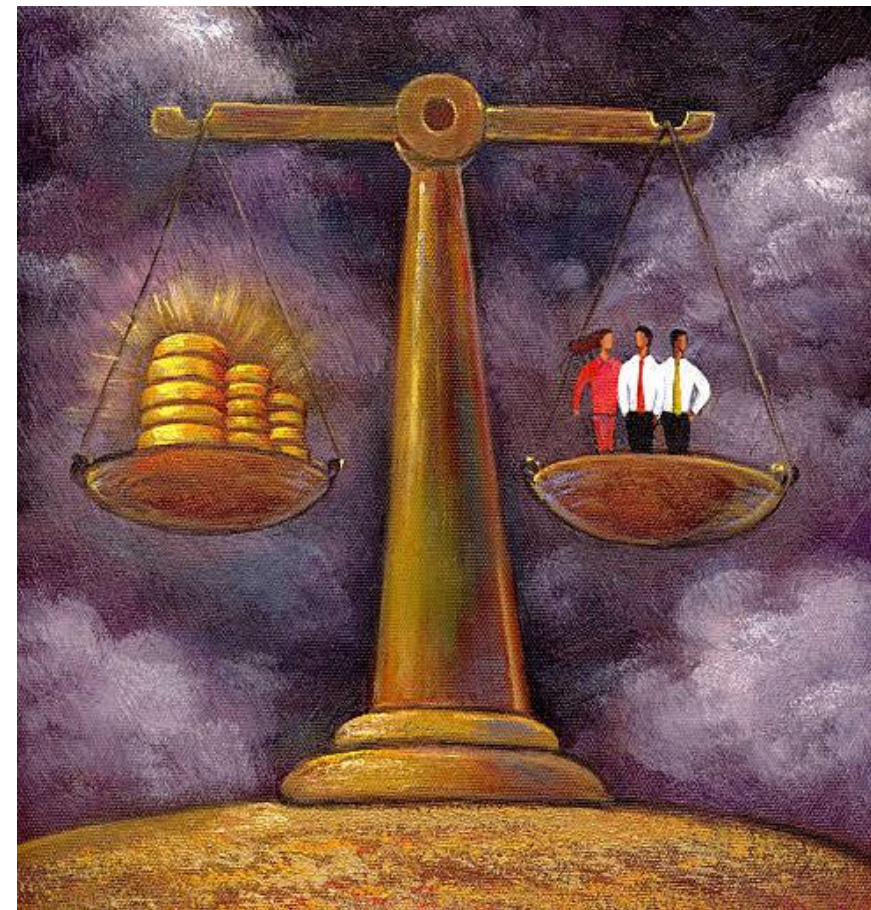
Keep records for 3 years



# COMPENSATION

# Exempt Employees: Salaried

- Fixed weekly amount that does not vary with hours worked
  - Minimum salary: state minimum wage x 2 x 40 (even if part-time)
    - In 2024 = \$64,480 (Eff. 4/1/2024 – for fast food restaurant workers -- \$83,200)
  - Can deduct from a paid leave bank for PTO, but cannot deduct from salary



# Non-Exempt: Hourly Rate



- California minimum wage in 2024 = \$16.00/hour
  - Fast-Food Workers = \$20/hour effective 4/1/2024
  - San Francisco = \$18.07 (effective 7/1/2024 = \$18.67)
  - Los Angeles = \$16.78 (effective 7/1/2024 = \$17.28)
  - Etc.
- Can have different rates for different jobs/tasks



# “Regular Rate”

- Base hourly rate + any extra earned compensation (calculated over the period in which earned)
  - Shift differential
  - Production bonus
  - Attendance bonus
  - Pay in lieu of health insurance
- Must be used for:
  - Overtime
  - Sick Leave
  - Meal and Rest Period Penalties
  - Reporting Time Pay





# Piece Rate



Compensation based on production



Must make at least minimum wage (including overtime)



Must be paid for rest breaks and other “non-productive time”

# Payroll Timing and Other Considerations



- At least twice/month
- Lag time cannot exceed 10 days when semi-monthly pay
- Weekly pay cannot lag more than 7 days
- Cannot require direct deposit or alternate forms of payment
- Reporting Time Pay: Employee required to report: minimum of 2 hours' pay or half the usual of scheduled day's work
- Split Shift Pay: Work interrupted by unpaid period of 1 hour or more



# **“PAY STUBS” / WAGE STATEMENTS**

# Nine Specific Items



Precise name and address of the Employer and information to personally identify employee (SSN or employee ID no.)



All pay rates



Pay period dates



Gross and net pay



Total hours worked



Statement of accrued sick leave “available for use”

On wage statement or separate accompanying document



# TERMINATION

# Final Pay and Documents

- On the last day if involuntary termination or if resignation with 72 hours' notice
- All earned compensation, including --
  - Bonuses/commissions (if capable of calculation)
  - Accrued, unused vacation (or PTO)
- “Waiting Time Penalties” of up to 6 weeks' wages if any portion is late
- Information about Unemployment Insurance





# EXPENSE REIMBURSEMENT

# Strict Requirement in California



- Any expenditure an employee necessarily incurs in order to perform their job
  - Cell phone/internet usage
  - Remote work vs. hybrid work
- Must reimburse regardless of receipts, approvals, or late submission.
- Need not be included in final paycheck – but must be paid within a reasonable time





# VACATION

# Strict No-Forfeiture Rule in California

- Vacation is earned as the employee works
  - Cannot have a “lump sum” award in arrears
  - Once earned, can never be forfeited
  - Can cap accrual at no lower than 1.5 times employee’s accrual rate
- PTO is all vacation (or all sick leave)
- Floating holiday = vacation (unless designated day)
  - No forfeiture, but can cap annual award



# SICK LEAVE

# California Sick Leave revised 1/1/2024



Accrue 1 hour of sick leave for every 30 hours worked

Exempt employee presumed to work 40 hours unless an established shorter schedule



Accrual can be capped at 80 hours or 10 workdays, whichever is longer



Use can be capped at 40 hours or 5 workdays, whichever is longer

Except in cities that prohibit a use cap (e.g., SF, Oakland, Santa Monica) or have a higher use cap (e.g. LA (48 hours))



Can front load available sick leave – but minimums must be satisfied (and it's harder)



Remember: paid at the regular rate!

# Sick Leave Usage

- Sickness or preventive care of employee
- Sickness or preventive care of family member:
  - Spouse or domestic partner
  - Parent or parent-in-law
  - Child (of any age)
  - Grandparent
  - Grandchild
  - Sibling
  - “Designated Person”
- Victim of domestic violence, sexual assault, or stalking





# LEAVES OF ABSENCE

# California Family Rights Act

- Applies to Employers with 5 or more employees (anywhere in the country)
  - Applies to all employees working in California (regardless of where company is based)
- Employees who have worked for 1 year and 1250 hours in 12 months preceding the leave
- 12 weeks of leave within a 12-month period
  - Unpaid, but employee can receive either SDI or PFL through the EDD
  - Health insurance premium must be paid
- Serious health condition of employee or employee's family member (broader than FMLA)



# California Pregnancy Disability Leave



- Applies to Employers with 5 or more employees (anywhere in the country)
  - Applies to all employees working in California (regardless of where company is based)
- All employees are eligible
- 4 months of leave per pregnancy
  - Unpaid, but employee can receive either SDI through the EDD
  - Health insurance premium must be paid
  - Can't require but must permit use of sick leave and vacation
- Accommodation of pregnant employee may be required



# Disability Accommodation

- Applies to employers with 5 or more employees (anywhere in the country)
  - Applies to employees working in California
- Applicants and employees with physical or mental impairment that interferes with a major life function (including working, sleeping, etc.)
- Any accommodation that will enable the employee to perform the essential functions of the job, and that the employer can make without “undue hardship.”
  - May be a leave of absence
- “Interactive process” is required
- Accommodation of pregnant employee may be required



# Miscellaneous Leaves

- Reproductive loss event
- Bereavement
- Bone marrow and organ donation (partially paid)
- Volunteer firefighter and EMT training
- Attendance at child's school events
- Etc.



# Questions?





**THANK YOU!**