

# California Wage/Hour Update



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## Announcing Our New California Wage/Hour Newsletter

Fisher & Phillips is excited to launch a new newsletter aimed at assisting employers in dealing with wage-hour issues in California. We will be distributing *California Wage/Hour Update* on a quarterly basis to all our California clients, and to others doing business in California. As with all our other newsletters, *California Wage/Hour Update* will be free of charge.

Although California has always been at the cutting edge for advocates of employee rights, the situation as to wage-hour compliance became more perilous for employers in the year 2000 when the new legislation signed by Governor Gray Davis went into effect. This legislation restored daily overtime, amended numerous sections of the California Labor Code, and added many conditions and requirements for wage-hour compliance.

A different piece of legislation, AB2509, passed later that year, that further amended the Labor Code giving employees the right to receive a premium, penalizing employers for not “providing” a meal and rest period. Recent developments continue to place wage-hour issues at the center of human-resource and personnel management challenges in California.

In our inaugural issue, we will discuss an employer’s obligation to provide certain tools and equipment to its employees, and conditions related to this obligation. Among the variety of topics to be explored in future editions of this newsletter, are the following:

- *Exempt versus Non-Exempt Classifications*
- *Timekeeping Issues*
- *Meal and Rest Period Issues*
- *Overtime Compensation Issues*
- *Drafting Employee Pay Plans*
- *Bonus and Incentive Compensation*
- *Expense Reimbursement*
- *Minimum-Wage Compliance*
- *Final Pay Checks*

This is merely a summary of topics we will be exploring in *California Wage/Hour Update*, not an exhaustive list. Our goal is to provide employers with important information on these subjects to support them in their efforts to achieve compliance with, and defend against, the onslaught of wage-hour litigation that is so prevalent in California.

We appreciate your interest in our publications, and look forward to any comments or feedback you may want to share with us.

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## Understanding The “Tool Rate”



By Lonnie Giamela (Irvine)

California employers are increasingly being challenged on whether they properly compensate and reimburse employees for usage of the

employee’s money or property in the course and scope of the employee’s employment. Courts continuously acknowledge the California Legislature’s intent that employers should not pass the cost of doing business onto employees such that the employees bear losses or incur expenses in conjunction with their employment.

### Reimbursement Must Be “Reasonably Sufficient”

These court decisions have traditionally been adverse to employers’ interests, but a recent California appellate court decision provided employers some relief from the cumbersome laws regarding reimbursement and compensation. The case involved the issue of whether California *Labor Code* section 2802 permits an employer to pay increased wages or commissions as opposed to indemnifying actual expenses necessarily incurred in the discharge of an employee’s duties. *Gattuso v. Harte Hanks Shoppers*.

The *Gattuso* court held that Section 2802 allows an employer to compensate an employee for automobile expenses by paying increased compensation – provided that the increased wages are reasonably sufficient to indemnify the employee for the expenses incurred in the discharge of work-related duties.

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## Understanding The “Tool Rate”

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### Applying The Law To Tools

Employers face the travel-expense and mileage reimbursement issue, discussed in Gattuso, on a regular basis. But one of the less recognized reimbursement issues is how you must reimburse your employees who utilize their own tools as a condition of employment. The issue of the “tool wage” is particularly relevant because of the recent increase in the minimum wage to \$8.00 per hour.

The California Industrial Welfare Commission’s wage orders state that “when hand tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.”

The *California Wage/Hour Update* is a quarterly publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

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The California Division of Labor Standards Enforcement (DLSE) has interpreted the term “hand tools and equipment” in its literal meaning. Specifically, the DLSE holds that such hand held tools and hand held equipment do not include power driven tools or equipment. In its Statement As To The Basis for the recently adopted wage orders, the Industrial Welfare Commission states that the term “hand tools and equipment” is to be read narrowly and is limited to “hand (as opposed to power) tools and personal equipment, such as tool belts or tool boxes, that are needed by the employee to secure those hand tools. Moreover, such hand tools and equipment must be customarily required in a recognized trade or craft.” The word equipment is meant to encompass hand held measuring instruments or like devices.

### The Problem Of Penalties

Although there is little to no case law interpreting the tool reimbursement provisions of the Wage Order, the DLSE does provide some insight as to what remedies are afforded to employees who provide their own tools but are not paid twice the minimum wage. The remedy imposed by the DLSE for the failure of an employer to pay two times the minimum wage while still obligating employees to purchase tools is liability for the cost of the tools or equipment.

Therefore, under this view, it is important that a company not contractually obligate itself to pay \$16.00 per hour unconditionally (when the minimum wage rises to \$8.00 per hour in January 2008) because the Department’s remedy may be less than back wages. Specifically, if the tool wage is not provided, the DLSE implies that the proper remedy would be reimbursement for the tools – not the difference between the tool wage and actual wages paid.

Such a payment policy is particularly relevant for employees who provide their own tools and are paid on a piece-rate or commission basis (such as a service technician in the automobile industry, for example). In such circumstances, you may want to review whether to include language in a pay plan that states, “you will be paid X dollars per piece rate hour (plus overtime) or \$16.00 per hour (plus overtime), whichever is greater.”

In sum, as of January 1, 2008, an employer has the option of providing tools to employees, or alternatively, requiring employees to provide their own tools, in which case the employee must be guaranteed \$16.00 per hour plus overtime where applicable.

### Refusing To Return Tools

A secondary aspect of the tool wage is the situation where an employer provides the tools, thereby eliminating the employee’s eligibility for the tool wage, but the employee fails to return the tools at the conclusion of his or her employment. Except for a limited number of industries, you may deduct the reasonable cost of the unreturned tool from the employee’s paycheck, provided that a written authorization exists. The burden is on the employer to establish the reasonable cost, which ideally should be specified in the written deduction authorization.

Employee expense reimbursement is frequently ignored by employers, but can result in significant liability should you fail to comply with the relevant rules and requirements. We recommend that employers review expense reimbursement, mileage reimbursement, uniform and tool and equipment policies and procedures to ensure conformance with the rules set forth in the California *Labor Code* and *Wage Orders*.

At a minimum, requiring employees to provide their own hand tools and equipment means that you must pay at least \$16.00 per hour as of January 1, 2008.

*For more information contact the author at [lgiamela@laborlawyers.com](mailto:lgiamela@laborlawyers.com) or 949.851.2424.*

*Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters*

We’re interested in your opinion. If you have any suggestions about how we can improve the *California Wage/Hour Update*, let us know by contacting your Fisher & Phillips attorney or email the editor at [mmitchell@laborlawyers.com](mailto:mmitchell@laborlawyers.com).

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