

California Wage/Hour Update

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Pay Stub Payoffs

Check Yours Now To Make Sure You're In Compliance

By John McLachlan (San Francisco)

There is a California law which costs employers millions of dollars each year, all of which could be avoided with almost no effort on the employer's part – no lengthy training, no notices to post, and no changes to employee handbooks.

The law deals with pay stubs and the information that must appear on them. What could be more mundane or routine? Yet many employers have been astonished to learn that not including the right information – or all that is necessary – can result in some startling liability.

By the Numbers

California Labor Code 226 is not a recent statute, but employees have begun regularly including claims under this statute in many actions filed against employers. This Labor Code section sets out certain items of information which must be included on an employee's pay check stub or statement accompanying each pay check.

Failure to provide *any one* of these items can subject you to fines calculated on each pay period up to a total of \$4,000.00 per employee – plus attorneys' fees and costs. And that's not counting additional amounts that may be recovered by a litigant under California's new private Attorney General laws. This is true low-hanging fruit on the litigation tree.

While it would be reasonable to assume that payroll services would ensure that employees' pay statements include the proper information, from our experience an employer cannot rely on a payroll service to ensure compliance with this statute.

Here are the top items which **must** appear on each employee's pay statement:

- gross wages earned;
- total hours worked by the employee (unless properly exempt from overtime);
- the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
- all deductions (all deductions made on written agreement of the employee may be aggregated and shown as one item);
- net wages earned;
- the inclusive dates of the period for which the employee is paid;
- the name of the employee and the last four digits of the social security number or employee identification number – **not** the entire social security number;
- the name and address of the legal entity that is the employer; and
- all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate.

Compare your current pay statement against the nine items listed above. If your check statement does not have the required information, correct it today. You can see an example of a lawful wage statement contained on the California Labor Commissioner's website at: <http://www.dir.ca.gov/dlse/PayStub.pdf>



You've got mail!

In a 2006 opinion letter the Acting Labor Commissioner confirmed that California employers may provide electronic wage statements instead of a physical pay check stub under certain circumstances. To be valid, your policy must include all of these components:

- the employee can elect to receive paper wage statements at any time;
- the electronic wage statement contains all information required by Labor Code section 226(a) and is available on a secure website no later than pay day;
- access to the website is by unique employee identification number and confidential personal identification numbers (PINS);
- the website is protected by a firewall and is expected to be available at all times with the exception of downtime caused by system errors or maintenance requirements;
- employees can access their records through their own personal computers or by company provided computers. Terminals are available to all employees to access these records at work;
- employees are able to print copies of the electronic wage statements at work on printers in close proximity to the computer terminal. They may also access their records over the internet and save them electronically or print them on their own printer;
- wage statements are maintained electronically for at least three years and are available to employees for that entire time;
- former employees will be provided paper copies at no charge upon request.

Checking out your pay stub information may not be glamorous or exciting, but you should do it. You can bet that your employees – and their lawyers – do.

For more information, email the author at jmclachlan@laborlawyers.com or call 415.490.9000.

The Explosion Of Overtime Claims (Part 1)

By John K. Skousen (Irvine)

Employers in California are still being pummeled with claims by current and former employees seeking compensation for allegedly unpaid overtime. Employers should tackle this problem by conducting self-audits and improving internal procedures for eliminating overtime complaints. The fact is, many overtime claims have identifiable causes and are completely avoidable.

In Part 1 of this article, we'll examine the most important problem area, timekeeping. In Part 2 we'll look at others, and include some specific advice on avoiding trouble.

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Office Locations

Atlanta

1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, GA 30326
phone (404) 231-1400

Charlotte

Suite 2020
227 West Trade Street
Charlotte, NC 28202
phone (704) 334-4565

Chicago

1000 Marquette Building
140 South Dearborn Street
Chicago, IL 60603
phone (312) 346-8061

Columbia

Suite 1400
1901 Main Street
Columbia, SC 29201
phone (803) 255-0000

Dallas

Thanksgiving Tower
Suite 4343
1601 Elm Street
Dallas, TX 75201
phone (214) 220-9100

Denver

1999 Broadway
Suite 3300
Denver, CO 80202
phone (303) 218-3650

Fort Lauderdale

Suite 800
450 East Las Olas Boulevard
Fort Lauderdale, FL 33301
phone (954) 525-4800

Houston

Two Allen Center
Suite 620
1200 Smith Street
Houston, TX 77002
phone (713) 292-0150

Irvine

Suite 400
18400 Von Karman Avenue
Irvine, CA 92612
phone (949) 851-2424

Kansas City

Suite 400
104 West 9th Street
Kansas City, MO 64105
phone (816) 842-8770

Las Vegas

Suite 650
3993 Howard Hughes Parkway
Las Vegas, NV 89169
phone (702) 252-3131

New Jersey

430 Mountain Avenue
Murray Hill, NJ 07974
phone (908) 516-1050

New Orleans

Suite 3710
201 St. Charles Avenue
New Orleans, LA 70170
phone (504) 522-3303

Orlando

1250 Lincoln Plaza
300 South Orange Avenue
Orlando, FL 32801
phone (407) 541-0888

Philadelphia

Radnor Financial Center
Suite 650
201 King of Prussia Road
Radnor, PA 19087
phone (610) 230-2150

Portland

Suite 1250
111 SW Fifth Avenue
Portland, OR 97204
phone (503) 242-4262

San Diego

Suite 950
4225 Executive Square
La Jolla, CA 92037
phone (858) 597-9600

San Francisco

One Embarcadero Center
Suite 2340
San Francisco, CA 94111
phone (415) 490-9000

Tampa

SunTrust Financial Centre
Suite 2525
401 E. Jackson Street
Tampa, FL 33602
phone (813) 769-7500

Timekeeping

One of the most common pitfalls leading to runaway overtime claims is poor timekeeping coupled with an employee's exaggerated estimates of hours worked. California employers are required to maintain time records for hourly or non-exempt employees. With the exception of employers who hold a good faith belief that employees are subject to a white collar salaried exemption (time records not required), it is puzzling why employers would not keep such time records. The reasons for an employer's failure to keep accurate time records may include:

Passing the buck

Although you may delegate the duty to keep time records to your employees, it is the employer, not the employees, who bears the responsibility of maintaining employee time records, and monitoring their accuracy. Exaggerated overtime claims typically result when an employer has not kept accurate time records.

In the absence of time records, courts generally will presume that the employee's estimate of hours worked will be accurate. To overcome this presumption, employers have the burden of specifically refuting an employee's estimate of hours worked where records are not kept. So if your managers don't ensure that accurate time records are kept, it may be difficult to refute an employee's account of overtime hours worked.

Permitting handwritten time records

Handwritten time records are permitted under California law as long as they are accurate and kept in indelible (permanent) ink. But employees often get too busy and complete a handwritten time record at the end of the pay period – and sometimes under pressure from their supervisors who are not expecting a lot of overtime. These employees may later claim that the submitted time records don't reflect actual hours worked. Lacking the expected benefit of contemporaneous time records maintained by a time clock, computer, or other electronic time entry system, handwritten time records can quickly become suspect once problems are detected.

Time-based exemptions

Not all exemptions are created equal. Some by necessity carry time keeping requirements. In such instances, the exemptions from overtime are conditional and depend upon an employee's achieving a certain level of compensation based upon total hours worked each week of the pay period.

Here's an example: computer professionals are exempt from overtime if, among other things, their realized hourly rate of compensation equals or exceeds the minimum hourly rate fixed by the Division of Labor Statistics and Research (a Division of the California Department of Industrial Relations) each year, or as amended by statute.

Similarly, commissioned sales persons in some occupations or industries will be exempt from overtime if, among other things, their realized hourly rate of compensation exceeds one and one-half times the state minimum wage for all hours worked each week of the pay period. In each case, time records must be kept, in part, to establish that the employees have satisfied the exemption's remuneration requirements for the exemption to apply.

For more information email the author at jkskousen@laborlawyers.com or call 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.

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