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# LANDEGGER BARON LAW GROUP, ALC

Exclusively Representing Employers

## "When a Payroll Cough Becomes an Employment Law Flu"

## Best Payroll Practices to Avoid Employment Law Issues

**March, 2018**

***Presented By:***

| *San Fernando Valley Location:* | *Ventura County Location:* |
|---|---|
| Roxana E. Verano, Esq. | Marie D. Davis, Esq. |

***This program has been approved for 1.50 hours (California) recertification credit hours toward PHR, SPHR & GPHR through the HR Certification Institute (HRCI) and SHRM-CP and SHRM-SCP.***

***"The use of these seals is not an endorsement by HRCI and SHRM of the quality of the program. It means that this program has met HRCI and SHRM's criteria to be pre-approved for recertification credit."***

The attached material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies to avoid potential liability

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# Table of Contents

Amends General Minimum Wage Order and IWC Industry and Occupation Orders

**PLEASE POST NEXT TO YOUR IWC OR INDUSTRY OCCUPATION ORDER**

# OFFICIAL NOTICE

# California Minimum Wage

**MW-2017**

**Minimum Wage — Every employer shall pay to each employee hourly wages not less than the following.**

| EFFECTIVE DATE | Employers with 26 or More Employees* | Employers with 25 or Fewer Employees* |
|---|---|---|
| January 1, 2017 | $10.50 | $10.00 |
| January 1, 2018 | $11.00 | $10.50 |

* Employees treated as employed by a single qualified taxpayer pursuant to Revenue and Taxation Code section 23626 are treated as employees of that single taxpayer.

To employers and representatives of persons working in industries and occupations in the State of California:

## SUMMARY OF ACTIONS

TAKE NOTICE that on April 4, 2016, the Governor of California signed legislation passed by the California Legislature, raising the minimum wage for all industries. (SB 3, Stats of 2016, amending section 1182.12 of the California Labor Code.) Pursuant to its authority under Labor Code section 1182.13, the Department of Industrial Relations amends and republishes Sections 2, 3, and 5 of the General Minimum Wage Order, MW-2014. Section 1, Applicability, and Section 4, Separability, have not been changed. Consistent with this enactment, amendments are made to the minimum wage, and the meals and lodging credits sections of all of the IWC's industry and occupation orders.

This summary must be made available to employees in accordance with the IWC's wage orders. Copies of the full text of the amended wage orders may be obtained by ordering on-line at www.dir.ca.gov/WP.asp, or by contacting your local Division of Labor Standards Enforcement office.

## 1. APPLICABILITY

The provisions of this Order shall not apply to outside salespersons and individuals who are the parent, spouse, or children of the employer previously contained in this Order and the IWC's industry and occupation orders. Exceptions and modifications provided by statute or in Section 1, Applicability, and in other sections of the IWC's industry and occupation orders may be used where any such provisions are enforceable and applicable to the employer.

## 2. MINIMUM WAGES

Every employer shall pay to each employee wages not less than those stated in the above table on each effective date.

## 3. MEALS AND LODGING CREDITS - TABLE

When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited pursuant to a voluntary written agreement may not be more than the following:

| For an employer who employs: | EFFECTIVE JANUARY 1, 2017 | | EFFECTIVE JANUARY 1, 2018 | |
|---|---|---|---|---|
| | 26 or More Employees | 25 or Fewer Employees | 26 or More Employees | 25 or Fewer Employees |
| **LODGING** | | | | |
| Room occupied | $49.38/week | $47.03/week | $51.73/week | $49.38/week |
| Room shared | $40.76/week | $38.82/week | $42.70/week | $40.76/week |
| Apartment — two thirds (2/3) of the ordinary rental value, and in no event more than | $593.05/month | $564.81/month | $621.29/month | $593.05/month |
| Where a couple are both employed by the employer, two thirds (2/3) of the ordinary rental value, and in no event more than | $877.27/month | $835.49/month | $919.04/month | $877.26/month |
| **MEALS** | | | | |
| Breakfast | $3.80 | $3.62 | $3.98 | $3.80 |
| Lunch | $5.22 | $4.97 | $5.47 | $5.22 |
| Dinner | $7.09 | $6.68 | $7.35 | $7.01 |

Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the amounts stated in the table above.

## 4. SEPARABILITY

If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word or portion of this Order should be held invalid, unconstitutional, unauthorized, or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

## 5. AMENDED PROVISIONS

This Order amends the minimum wage and meals and lodging credits in MW-2014, as well as in the IWC's industry and occupation orders. (See Orders 1-15, Secs. 4 and 10; and Order 16, Secs. 4 and 9.) This Order makes no other changes to the IWC's industry and occupation orders.

**These Amendments to the Wage Orders shall be in effect as of January 1, 2017.**

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Questions about enforcement should be directed to the Labor Commissioner's Office. For the address and telephone number of the office nearest you, information can be found on the internet at http://www.dir.ca.gov/DLSE/dlse.html or under a search for "California Labor Commissioner's Office" on the internet or any other directory. The Labor Commissioner has offices in the following cities: Bakersfield, El Centro, Fresno, Long Beach, Los Angeles, Oakland, Redding, Sacramento, Salinas, San Bernardino, San Diego, San Francisco, San Jose, Santa Ana, Santa Barbara, Santa Rosa, Stockton, and Van Nuys.

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## MINIMUM WAGE INCREASES FOR CALIFORNIA LOS ANGELES CITY AND COUNTY

| YEAR | FEDERAL | CALIFORNIA (effective January 1) | | LOS ANGELES CITY (effective July 1) | | LOS ANGELES COUNTY & UNINCORPORATED AREAS OF LOS ANGELES COUNTY (effective July 1) | |
|---|---|---|---|---|---|---|---|
| 2016 | $7.25 | $10.00 | | 26 or more $10.50 | 25 or fewer $10.00 | 26 or more $10.50 | 25 or fewer |
| 2017 | | 26 or more $10.50 | 25 or fewer $10.00 | $12.00 | $10.50 | $12.00 | $10.50 |
| 2018 | | $11.00 | $10.50 | $13.25 | $12.00 | $13.25 | $12.00 |
| 2019 | | $12.00 | $11.00 | $14.25 | $13.25 | $14.25 | $13.25 |
| 2020 | | $13.00 | $12.00 | $15.00 | $14.25 | $15.00 | $14.25 |
| 2021 | | $14.00 | $13.00 | | $15.00 | | $15.00 |
| 2022 | | $15.00 | $14.00 | | | | |

06-22-16

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# NOTICE TO EMPLOYEE

***Labor Code section 2810.5***

## EMPLOYEE

Employee Name: _____

Start Date: _____

## EMPLOYER

Legal Name of Hiring Employer: _____

Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? □ Yes □ No

Other Names Hiring Employer is "doing business as" (if applicable):

_____

Physical Address of Hiring Employer's Main Office:

_____

Hiring Employer's Mailing Address (if different than above):

_____

Hiring Employer's Telephone Number: _____

If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work:

Name: _____

Physical Address of Main Office: _____

Mailing Address: _____

Telephone Number: _____

## WAGE INFORMATION

Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____

Rate by (check box): □ Hour □ Shift □ Day □ Week □ Salary □ Piece rate □ Commission

□ Other (provide specifics): _____

Does a written agreement exist providing the rate(s) of pay? (check box) □ Yes □ No

If yes, are all rate(s) of pay and bases thereof contained in that written agreement? □ Yes □ No

Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):

_____

(If the employee has signed the acknowledgment of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)

Regular Payday: _____

## WORKER'S COMPENSATION

Insurance Carrier's Name: _____

Address: _____

Telephone Number: _____

Policy No.: _____

□ Self-Insured (Labor Code 3700) and Certificate Number for Consent to Self-Insure: _____

## PAID SICK LEAVE

Unless exempt, the employee identified on this notice is entitled to minimum requirements for paid sick leave under state law which provides that an employee:

a. May accrue paid sick leave and may request and use up to 3 days or 24 hours of accrued paid sick leave per year;
b. May not be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and
c. Has the right to file a complaint against an employer who retaliates or discriminates against an employee for
   1. requesting or using accrued sick days;
   2. attempting to exercise the right to use accrued paid sick days;
   3. filing a complaint or alleging a violation of Article 1.5 section 245 et seq. of the California Labor Code;
   4. cooperating in an investigation or prosecution of an alleged violation of this Article or opposing any policy or practice or act that is prohibited by Article 1.5 section 245 et seq. of the California Labor Code.

The following applies to the employee identified on this notice: (Check one box)

□ 1. Accrues paid sick leave only pursuant to the minimum requirements stated in Labor Code §245 et seq. with no other employer policy providing additional or different terms for accrual and use of paid sick leave.

□ 2. Accrues paid sick leave pursuant to the employer's policy which satisfies or exceeds the accrual, carryover, and use requirements of Labor Code §246.

□ 3. Employer provides no less than 24 hours (or 3 days) of paid sick leave at the beginning of each 12-month period.

□ 4. The employee is exempt from paid sick leave protection by Labor Code §245.5. (State exemption and specific subsection for exemption):_____

## ACKNOWLEDGEMENT OF RECEIPT
(Optional)

_____ _____
(PRINT NAME of Employer representative) (PRINT NAME of Employee)

_____ _____
(SIGNATURE of Employer Representative) (SIGNATURE of Employee)

_____ _____
(Date) (Date)

The employee's signature on this notice merely constitutes acknowledgement of receipt.

Labor Code section 2810.5(b) requires that the employer notify you in writing of any changes to the information set forth in this Notice within seven calendar days after the time of the changes, unless one of the following applies: (a) All changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226; (b) Notice of all changes is provided in another writing required by law within seven days of the changes.

**State of California**

**LABOR CODE**

**Section 226**

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226. (a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (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, (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 and, beginning July 1, 2013, 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. 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.

(b) An employer that is required by this code or any regulation adopted pursuant to this code to keep the information required by subdivision (a) shall afford current and former employees the right to inspect or copy records pertaining to their employment, upon reasonable request to the employer. The employer may take reasonable steps to ensure the identity of a current or former employee. If the employer provides copies of the records, the actual cost of reproduction may be charged to the current or former employee.

(c) An employer who receives a written or oral request to inspect or copy records pursuant to subdivision (b) pertaining to a current or former employee shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request. A violation of this subdivision is an infraction. Impossibility of

performance, not caused by or a result of a violation of law, shall be an affirmative defense for an employer in any action alleging a violation of this subdivision. An employer may designate the person to whom a request under this subdivision will be made.

(d) This section does not apply to any employer of any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees.

(2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of 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 during the pay period.

(iv) 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.

(C) For purposes of this paragraph, "promptly and easily determine" means a reasonable person would be able to readily ascertain the information without reference to other documents or information.

(3) For purposes of this subdivision, a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In reviewing for compliance with this section, the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section.

(f) A failure by an employer to permit a current or former employee to inspect or copy records within the time set forth in subdivision (c) entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar ($750) penalty from the employer.

(g) The listing by an employer of the name and address of the legal entity that secured the services of the employer in the itemized statement required by subdivision (a) shall not create any liability on the part of that legal entity.

(h) An employee may also bring an action for injunctive relief to ensure compliance with this section, and is entitled to an award of costs and reasonable attorney's fees.

(i) This section does not apply to the state, to any city, county, city and county, district, or to any other governmental entity, except that if the state or a city, county, city and county, district, or other governmental entity furnishes its employees with a check, draft, or voucher paying the employee's wages, the state or a city, county, city and county, district, or other governmental entity shall use no more than the last four digits of the employee's social security number or shall use an employee identification number other than the social security number on the itemized statement provided with the check, draft, or voucher.

(j) An itemized wage statement furnished by an employer pursuant to subdivision (a) shall not be required to show total hours worked by the employee if any of the following apply:

(1) The employee's compensation is solely based on salary and the employee is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission.

(2) The employee is exempt from the payment of minimum wage and overtime under any of the following:

(A) The exemption for persons employed in an executive, administrative, or professional capacity provided in any applicable order of the Industrial Welfare Commission.

(B) The exemption for outside salespersons provided in any applicable order of the Industrial Welfare Commission.

(C) The overtime exemption for computer software professionals paid on a salaried basis provided in Section 515.5.

(D) The exemption for individuals who are the parent, spouse, child, or legally adopted child of the employer provided in any applicable order of the Industrial Welfare Commission.

(E) The exemption for participants, director, and staff of a live-in alternative to incarceration rehabilitation program with special focus on substance abusers provided in Section 8002 of the Penal Code.

(F) The exemption for any crew member employed on a commercial passenger fishing boat licensed pursuant to Article 5 (commencing with Section 7920) of Chapter 1 of Part 3 of Division 6 of the Fish and Game Code provided in any applicable order of the Industrial Welfare Commission.

(G) The exemption for any individual participating in a national service program provided in any applicable order of the Industrial Welfare Commission.

(Amended by Stats. 2016, Ch. 77, Sec. 1. (AB 2535) Effective January 1, 2017.)

DEPARTMENT OF INDUSTRIAL RELATIONS

# Labor Commissioner's Office

# Deductions

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An employer can lawfully withhold amounts from an employee's wages only: (1) when required or empowered to do so by state or federal law, or (2) when a deduction is expressly authorized in writing by the employee to cover insurance premiums, benefit plan contributions or other deductions not amounting to a rebate on the employee's wages, or (3) when a deduction to cover health, welfare, or pension contributions is expressly authorized by a wage or collective bargaining agreement. Labor Code Sections 221 and 224. Although a wage garnishment is a lawful deduction from wages under Labor Code section 224, an employer cannot discharge an employee because a garnishment of wages has been threatened or if the employee's wages have been subjected to a garnishment for the payment of one judgment. Labor Code Section 2929(a) (See How to file a discrimination complaint)

The ability of an employer to deduct amounts from an employee's wages due to a cash shortage, breakage, or loss of equipment is specifically regulated by the Industrial Welfare Commission Orders and limited by court decisions. (*Kerr's Catering v. Department of Industrial Relations* (1962) 57 Cal.2d 319). In addition, there have been several court decisions that significantly restrict an employer's ability to take an offset against an employee's wages. *Barnhill v. Sanders* (1981) 125 Cal.App.3d 1, (Balloon payment on separation of employment to repay employee's debt to employer is an unlawful deduction even where the employee authorized such payment in writing); *CSEA v. State of California* (1988) 198 Cal.App.3d 374 (Unlawful to deduct from current payroll for past salary advances that were in error); *Hudgins v. Nieman Marcus* (1995) 34 Cal.App.4th 1109 (Deductions for unidentified returns from commission sales unlawful.)

Some common payroll deductions often made by employers that are unlawful include:

a. Gratuities. An employer cannot collect, take, or receive any gratuity or part thereof given or left for an employee, or deduct any amount from wages due an employee on account of a gratuity given or left for an employee. Labor Code Section 351 However, a restaurant may have a policy allowing for tip pooling/sharing among employees who provide direct table service to customers.

b. Photographs. If an employer requires a photograph of an applicant or employee, the employer must pay the cost of the photograph. Labor Code Section 401

c. Bond. If an employer requires a bond of an applicant or employee, the employer must pay the cost of the bond. Labor Code Section 401

d. Uniforms. If an employer requires that an employee wear a uniform, the employer must pay the cost of the uniform. Labor Code Section 2802, Industrial Welfare Commission Orders, Section 9. The term "uniform" includes wearing apparel and accessories of distinctive design and color.

e. Business Expenses. An employee is entitled to be reimbursed by his or her employer for all expenses or losses incurred in the direct consequence of the discharge of the employee's work duties. Labor Code Section 2802

f. 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

1. Q. What can my employer lawfully deduct from my wages?
   A. Under California law, an employer may lawfully deduct the following from an employee's wages:

   - Deductions that are required of the employer by federal or state law, such as income taxes or garnishments.
   - Deductions expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues or other deductions not amounting to a rebate or deduction from the wage paid to the employee.
   - Deductions authorized by a collective bargaining or wage agreement, specifically to cover health and welfare or pension payments.

2. Q. If I break or damage company property or lose company money while performing my job, can my employer deduct the cost/loss from my wages?
   A. No, your employer cannot legally make such a deduction from your wages if, by reason of mistake or accident a cash shortage, breakage, or loss of company property/equipment occurs. The California courts have held that losses occurring without any fault on the part of the employee or that are merely the result of simple negligenceare inevitable in almost any business operation and thus, the employer must bear such losses as a cost of doing business. For example, if you accidentally drop a tray of dishes, take a bad check, or have a customer walkout without paying a check, your employer cannot deduct the loss from your paycheck.

   There is an exception to the foregoing contained in the Industrial Welfare Commission Wage Orders that purports to provide the employer the right to deduct from an employee's wages for any cash shortage, breakage or loss of equipment if the employer can show that the shortage, breakage or loss is caused by a dishonest or willful act, or by the employee's gross negligence. What this means is that a deduction may be legal if the employer proves that the loss resulted from the employee's dishonesty, willfulness, or grossly negligent act. Under this regulation, a simple accusation does not give the employer the right to make the deduction. The DLSE has cautioned that use of this deduction contained in the IWC regulations may, in fact, not comply with the provisions of the California Labor Code and various California Court decisions. Furthermore, DLSE does not automatically assume that an employee was dishonest, acted willfully or was grossly negligent when an employer asserts such as a justification for making a deduction from an employee's wages to cover a shortage, breakage, or loss to property or equipment.

   Labor Code Section 224 clearly prohibits any deduction from an employee's wages which is not either authorized by the employee in writing or permitted by law, and any employer who resorts to self-help does so at its own risk as an objective test is applied to determine whether the loss was due to dishonesty, willfulness, or a grossly negligent act. If your employer makes such a deduction and it is later determined that you were not guilty of a dishonest or willful act, or grossly negligent, you would be entitled to recover the amount of the wages withheld. Additionally, if you no longer work for the employer who made the deduction and it's decided that the deduction was wrongful, you may also be able to recover the waiting time penalty pursuant to Labor Code Section 203.

3. Q. What, if anything, can my employer do if I experience shortages in my cash drawer?
   A. Your employer may subject you to disciplinary action, up to and including termination of employment. Additionally, your employer can bring an action in court to try to recover any damages and/or losses it has suffered.

4. Q. My employer loaned me $500.00, and per our written agreement was taking $50.00 from each paycheck as an installment payment on the loan. When I quit last week my employer deducted the outstanding loan balance of $250.00 from my final paycheck. Is this legal?
   A. No. Although a California court has held that deductions for the periodic installment payments on a loan made to an employee by the employer are permissible when authorized in writing by the employee, the court also concluded that the balloon (lump sum) payment of the outstanding balance to

be made at the time the employment relationship ends is not allowed notwithstanding the fact the employee has given his or her written consent to such a payment. When the employment relationship ends, your employer can only deduct the amount of one installment payment from your final paycheck.

5.Q. Can my employer deduct anything from my paycheck if I come to work late?

A. Yes, your employer can deduct money from your paycheck for coming to work late. The deduction shall not, however, exceed the proportionate wage that would have been earned during the time actually lost, but for a loss of time less than 30 minutes, a half hour's wage may be deducted. Labor Code Section 2928. For example, if you earn $12.00 per hour and come to work 40 minutes late, your employer can deduct $8.00 from your paycheck. And if you come to work five minutes late, your employer can deduct $6.00.

6.Q. What can I do if my employer makes an illegal deduction from my paycheck?

A. You can either file a wage claim with the Division of Labor Standards Enforcement (the Labor Commissioner's Office), or file a lawsuit in court against your employer to recover the lost wages. Additionally, if you no longer work for this employer, you can make a claim for the waiting time penalty pursuant to Labor Code Section 203.

7.Q. What is the procedure that is followed after I file a wage claim?

A. After your claim is completed and filed with a local office of the Division of Labor Standards Enforcement (DLSE), it will be assigned to a Deputy Labor Commissioner who will determine, based upon the circumstances of the claim and information presented, how best to proceed. Initial action taken regarding the claim can be referral to a conference or hearing, or dismissal of the claim.

If the decision is to hold a conference, the parties will be notified by mail of the date, time and place of the conference. The purpose of the conference is to determine the validity of the claim, and to see if the claim can be resolved without a hearing. If the claim is not resolved at the conference, the next step usually is to refer the matter to a hearing or dismiss it for lack of evidence.

At the hearing the parties and witnesses testify under oath, and the proceeding is recorded. After the hearing, an Order, Decision, or Award (ODA) of the Labor Commissioner will be served on the parties.

Either party may appeal the ODA to a civil court of competent jurisdiction. The court will set the matter for trial, with each party having the opportunity to present evidence and witnesses. The evidence and testimony presented at the Labor Commissioner's hearing will not be the basis for the court's decision. In the case of an appeal by the employer, DLSE may represent an employee who is financially unable to afford counsel in the court proceeding.

See the Policies and Procedures of Wage Claim Processing pamphlet for more detail on the wage claim procedure.

8.Q. What can I do if I prevail at the hearing and the employer doesn't pay or appeal the Order, Decision, or Award?

A. When the Order, Decision, or Award (ODA) is in the employee's favor and there is no appeal, and the employer does not pay the ODA, the Division of Labor Standards Enforcement (DLSE) will have the court enter the ODA as a judgment against the employer. This judgment has the same force and effect as any other money judgment entered by the court. Consequently, you may either try to collect the judgment yourself or you can assign it to DLSE.

9.Q. What can I do if my employer retaliates against me because I objected to a deduction from my wages?

A. If your employer discriminates or retaliates against you in any manner whatsoever, for example, he discharges you because you object to what you believe to be an illegal deduction, or because you file a claim or threaten to file a claim with the Labor Commissioner, you can file a discrimination/retaliation complaint with the Labor Commissioner's Office. In the alternative, you can file a lawsuit in court against your employer.

# Department of Industrial Relations

Labor Commissioner's Office

# Exemptions from the overtime laws

Printer friendly version

| IWC Order | Affected Employees | Exemption |
|---|---|---|
| All Orders, Section 1 | Executive, Administrative and Professional employees | Sections 3 through 12 of the Orders (3 through 11 for Order 16-2001) do not apply. |
| All Orders, Section 1, except Orders 14 and 16 | Employees in the computer software field who are paid on an hourly basis and meet all of the other requirements set forth in the Orders | Exempt from Orders (under "Professional" employee classification.) |
| All Orders, Section 1, except Orders 14 and 15 | Employees directly employed by the **State or any political subdivision thereof**, including any city, county or special district. | Exempt from Orders, except Sections 1, 2, 4, 10 and 20 |
| All Orders by operation of law (see Labor Code Section 1171) | Outside Salespersons | Exempt from Orders |
| All Orders, Section 1 | Any individual who is the parent, spouse, child, or legally adopted child of the employer | Exempt from Orders |
| All Orders | Any individual participating in a **national service program**, such as AmeriCorps. | Exempt from Orders |
| All Orders, except Orders 11, 12, 14, 15, and16 | **Drivers** whose hours are regulated by the U.S Department of Transportation Code of Federal Regulation, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers | Exempt from overtime provisions |
| All Orders, except Orders 11, 12, 14, 15, and 16 | **Drivers** whose hours are regulated by Title 13 of the California Code of Regulations, subchapter 6.5, section 1200 et seq. | Exempt from overtime provisions |

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| All Orders, except 14 and15 | Employees covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30% more than the state minimum wage. | Exempt from overtime provisions. |
| Orders 4 and 7 | Employees (except minors) whose earnings exceed one and one-half times the minimum wage and more than half their compensation represents **commissions** | Exempt from overtime provisions |
| Order 5 | **Student nurses** in a school accredited by the California Board of Registered Nursing or by the Board of Vocational Nurse and Psychiatric Technician Examiners | Exempt from Order 5, except Sections 1, 2, 4, 10, and 20 |
| Order 9 | Employees who have entered into a collective bargaining agreementunder the Railway Labor Act | Exempt from Order 9, except Sections 4, 10, 11, 12, 20, and 22 |
| Order 9 | **Taxicab drivers** | Exempt from overtime provisions |
| Order 9 | **Airline employees** who work over 40 but not more than 60 hours during the workweek due to a temporary modification in their normal work schedule not required by the employer and arranged at the request of the employee | Exempt from overtime provisions |
| Order 10 | Full-time **carnival ride operators** employed by a traveling carnival | Exempt from Order 10, except Sections 1, 2, 4, 10, and 20 |
| Order 10 | **Crew members employed on a commercial fishing boat** Fish and Game Code Section7920 et seq. | Exempt from overtime provisions |
| Orders 10, 11, and 12 | **Professional Actors** | Exempt from Orders, except Sections 1, 2, 4, 10, and 20 |
| Order 10 | Employees whose duties are exclusively those of a **motion picture projectionist** | Exempt from overtime provisions |
| Order 11 | An **announcer, news editor, or chief engineer** employed by a radio or television station in a city or town with a population of 25,000 or less | Exempt from overtime provisions |
| Order 14 | Any employee who is engaged in **work that 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 times the monthly State minimum wage for full time employment | Exempt from Order |

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| Order 14 | Sheepherders | Exempt from overtime provisions |
| Order 14 | **Irrigators** | Exempt from overtime provision during any week in which more than half of such employee's working time is devoted to performing the duties of an irrigator. |
| Order 14 | Employees covered by a collective bargaining agreement if the agreement provides premium wage rates for overtime work and a cash wage rate of at least $1.00 per hour more than the state minimum wage. | Exempt from overtime provisions |
| Order 15 | Personal attendants not covered under the Domestic Worker Bill of Rights | Exempt from Order, except Sections 1, 2, 4, 10, and 15 |
| Order 15 | Any person under the age of 18 who is employed as a **babysitter** for a minor child of the employer in the employer's home. | Exempt from Order |

# ANNUAL SALARY REQUIREMENTS FOR EXEMPT CALIFORNIA EMPLOYEES

| | 2017 | | 2018 (January 1st) | | 2019 (January 1st) | | 2020 (January 1st) | | 2021 (January 1st) | | 2022 (January 1st) | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Annual Salary | 25 or Less | 26 or More | 25 or Less | 26 or More | 25 or Less | 26 or More | 25 or Less | 26 or More | 25 or Less | 26 or More | 25 or Less | 26 or More |
| | $41,600 | $43,680 | $43,680 | $45,760 | $45,760 | $49,920 | $49,920 | $54,080 | $54,080 | $58,240 | $58,240 | $62,400 |
| Weekly Salary | $800 | $840 | $840 | $880 | $880 | $960 | $960 | $1,040 | $1,040 | $1,120 | $1,120 | $1,200 |

*Unless the Dept. of Labor increases the minimum salary to a level higher than the California State minimum.

**State of California**

**LABOR CODE**

**Section 2802**

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2802. (a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

(b) All awards made by a court or by the Division of Labor Standards Enforcement for reimbursement of necessary expenditures under this section shall carry interest at the same rate as judgments in civil actions. Interest shall accrue from the date on which the employee incurred the necessary expenditure or loss.

(c) For purposes of this section, the term "necessary expenditures or losses" shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section.

(d) In addition to recovery of penalties under this section in a court action or proceedings pursuant to Section 98, the commissioner may issue a citation against an employer or other person acting on behalf of the employer who violates reimbursement obligations for an amount determined to be due to an employee under this section. The procedures for issuing, contesting, and enforcing judgments for citations or civil penalties issued by the commissioner shall be the same as those set forth in Section 1197.1. Amounts recovered pursuant to this section shall be paid to the affected employee.

(Amended by Stats. 2015, Ch. 783, Sec. 4. (AB 970) Effective January 1, 2016.)

# Department of Industrial Relations

## Labor Commissioner's Office

# Independent contractor versus employee

Not all workers are employees as they may be volunteers or independent contractors. Employers oftentimes improperly classify their employees as independent contractors so that they, the employer, do not have to pay payroll taxes, the minimum wage or overtime, comply with other wage and hour law requirements such as providing meal periods and rest breaks, or reimburse their workers for business expenses incurred in performing their jobs. Additionally, employers do not have to cover independent contractors under workers' compensation insurance, and are not liable for payments under unemployment insurance, disability insurance, or social security.

The state agencies most involved with the determination of independent contractor status are the Employment Development Department (EDD), which is concerned with employment-related taxes, and the Division of Labor Standards Enforcement (DLSE), which is concerned with whether the wage, hour and workers' compensation insurance laws apply. There are other agencies, such as the Franchise Tax Board (FTB), Division of Workers' Compensation (DWC), and the Contractors State Licensing Board (CSLB), that also have regulations or requirements concerning independent contractors. Since different laws may be involved in a particular situation such as a termination of employment, it is possible that the same individual may be considered an employee for purposes of one law and an independent contractor under another law. Because the potential liabilities and penalties are significant if an individual is treated as an independent contractor and later found to be an employee, each working relationship should be thoroughly researched and analyzed before it is established.

There is a rebuttable presumption that where a worker performs services that require a license pursuant to Business and Professions Code Section 7000, *et seq.*, or performs services for a person who is required to obtain such a license, the worker is an employee and not an independent contractor. Labor Code Section 2750.5

1. **Q.How do I know if I am an employee or an independent contractor?**

   **A.** There is no set definition of the term "independent contractor" and as such, one must look to the interpretations of the courts and enforcement agencies to decide if in a particular situation a worker is an employee or independent contractor. In handling a matter where employment status is an issue, that is, employee or independent contractor, DLSE starts with the presumption that the worker is an employee. Labor Code Section 3357. This is a rebuttable presumption however, and the actual determination of whether a worker is an employee or independent contractor depends upon a number of factors, all of which must be considered, and none of which is controlling by itself. Consequently, it is necessary to closely examine the facts of each service relationship and then apply the law to those facts. For most matters before the Division of Labor Standards Enforcement (DLSE), depending on the remedial nature of the legislation at issue, this means applying the "multi-factor" or the "economic realities" test adopted by the California Supreme Court in the case of *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (1989) 48 Cal.3d 341. In applying the economic realities test, the most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed. Additional factors that may be considered depending on the issue involved are:

- 1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
- 2. Whether or not the work is a part of the regular business of the principal or alleged employer;
- 3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;
- 4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
- 5. Whether the service rendered requires a special skill;
- 6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- 7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;
- 8. The length of time for which the services are to be performed;
- 9. The degree of permanence of the working relationship;
- 10. The method of payment, whether by time or by the job; and
- 11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

Even where there is an absence of control over work details, an employer-employee relationship will be found if (1) the principal retains pervasive control over the operation as a whole, (2) the worker's duties are an integral part of the operation, and (3) the nature of the work makes detailed control unnecessary. *(Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288)

Other points to remember in determining whether a worker is an employee or independent contractor are that the existence of a written agreement purporting to establish an independent contractor relationship is not determinative *(Borello, Id.*at 349), and the fact that a worker is issued a 1099 form rather than a W-2 form is also not determinative with respect to independent contractor status. *(Toyota Motor Sales v. Superior Court*(1990) 220 Cal.App.3d 864, 877)

**2. Q.The person I work for tells me that I am an independent contractor and not an employee. He does not make any payroll deductions or withholdings for taxes, social security, etc., when he pays me, and at the end of the year he provides me with an IRS form 1099 rather than a W-2. By paying me in this manner does it mean I am automatically an independent contractor?**

**A.** No. The fact that a person who provides services is paid as an independent contractor, that is, without payroll deductions and with income reported by an IRS form 1099 rather than a W-2, is of no significance whatsoever in determining employment status. Your employer cannot change your status from that of an employee to one of an independent contractor by illegally requiring you to assume a burden that the law imposes directly on the employer, that being, withholding payroll taxes and reporting such withholdings to the taxing authorities.

**3. Q.Does it make any difference if I am an employee rather than an independent contractor?**

**A.** Yes, it does make a difference if you are an employee rather than an independent contractor. California's wage and hour laws (e.g., minimum wage, overtime, meal periods and rest breaks, etc.), and anti-discrimination and retaliation laws protect employees, but not independent contractors. Additionally, employees can go to state agencies such as DLSE to seek enforcement of the law, whereas independent contractors must go to court to settle their disputes or enforce other rights under their contracts.

4. **Q.When I started my current job my employer had me sign an agreement stating that I am an independent contractor and not an employee. Does this mean I am an independent contractor?**

   **A.** No. The existence of a written agreement purporting to establish an independent contractor relationship is not determinative. The Labor Commissioner and courts will look behind any such agreement in order to examine the facts that characterize the parties' actual relationship and make their determination as to employment status based upon their analysis of such facts and application of the appropriate law.

5. **Q.How can it be that the Labor Commissioner determined I was an employee with respect to a wage claim I filed and won, and the Employment Development Department (EDD) determined I was an independent contractor, and denied my claim for unemployment insurance benefits?**

   **A.** There is no set definition of the term "independent contractor" for all purposes, and the issue of whether a worker is an employee or independent contractor depends upon the particular area of law to be applied. For example, in a wage claim where employment status is an issue, DLSE will often use the five-prong economic realities test to decide the issue. However, in a separate matter before a different state agency with the same parties and same facts, and employment status again being an issue, that agency may be required to use a different test, for example, the "control test," which may result in a different determination. Thus, it is possible that the same individual will be considered an employee for purposes of one law and an independent contractor under another.

6. **Q.As an employer, what obligations do I have to purchase Workers' Compensation Insurance or comply with other labor laws for persons classified as independent contractors?**

   **A.** Employers often improperly classify their employees as independent contractors to avoid paying payroll taxes, minimum wage or overtime, or complying with other wage and hour requirements such as providing meal periods and rest breaks, etc. Additionally, employers do not have to cover independent contractors under Workers' Compensation Insurance. However, because potential liabilities and penalties are significant it is important that each working relationship be thoroughly researched and analyzed before classifying an individual as an independent contractor and not an employee. You should understand that the DLSE presumes that the worker is an employee (Labor Code Section 3357). However, the actual determination of whether a worker is an employee or independent contractor depends upon a number of factors which must be considered. Consequently, it is necessary to closely examine the facts of each relationship and then apply the law to those facts. The most significant factor to be considered is whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker, the work to be done and the manner and means in which it is performed.

7. **Q.What can I do if I believe my employer has misclassified me as an independent contractor and as a result am not being paid any overtime?**

   **A.** You can either file a wage claim with the Division of Labor Standards Enforcement (the Labor Commissioner's Office), or you can file an action in court to recover the lost overtime premiums. In both situations, it will first be necessary to determine your employment status, that is, employee or independent contractor, before the issue of overtime can be addressed and decided. Additionally, if it is determined that you are an employee and you no longer work for this employer, you can make a claim for the waiting time penalty pursuant to Labor Code Section 203. Eligibility for this penalty is dependent upon your employment status, as independent contractors are ineligible for the waiting time penalty.

8. **Q.What is the procedure that is followed after I file a wage claim?**

   **A.** After your claim is completed and filed with a local office of the Division of Labor Standards Enforcement (DLSE), it will be assigned to a Deputy Labor Commissioner who will determine, based upon the circumstances of the claim and information presented, how best to proceed. Initial action taken regarding the claim can be referral to a conference or hearing, or dismissal of the claim.

If the decision is to hold a conference, the parties will be notified by mail of the date, time and place of the conference. The purpose of the conference is to determine the validity of the claim, and to see if the matter can be resolved without a hearing. If the claim is not resolved at the conference, the next step usually is to refer the matter to a hearing or dismiss it for lack of evidence.

At the hearing the parties and witnesses testify under oath, and the proceeding is recorded. After the hearing, an Order, Decision, or Award (ODA) of the Labor Commissioner will be served on the parties.

Either party may appeal the ODA to a civil court of competent jurisdiction. The court will set the matter for trial, with each party having the opportunity to present evidence and witnesses. The evidence and testimony presented at the Labor Commissioner's hearing will not be the basis for the court's decision. In the case of an appeal by the employer, DLSE may represent an employee who is financially unable to afford counsel in the court proceeding.

See the Policies and Procedures of Wage Claim Processing pamphlet for more detail on the wage claim process procedure.

**9. Q. What can I do if I prevail at the hearing and the employer doesn't pay or appeal the Order, Decision, or Award?**

**A.** When the Order, Decision, or Award (ODA) is in the employee's favor and there is no appeal, and the employer does not pay the ODA, the Division of Labor Standards Enforcement (DLSE) will have the court enter the ODA as a judgment against the employer. This judgment has the same force and effect as any other money judgment entered by the court. Consequently, you may either try to collect the judgment yourself or you can assign it to DLSE.

**10. Q. What can I do if my employer retaliates against me because I thought I was misclassified as an independent contractor and objected to not being paid overtime?**

**A.** If you are an employee and your employer discriminates or retaliates against you in any manner whatsoever, for example, he discharges you because you question him about your employment status, or about not being paid overtime, or because you file a claim or threaten to file a claim with the Labor Commissioner, you can file a discrimination/retaliation complaint with the Labor Commissioner's Office. In the alternative, you can file an action in court against your employer. If, on the other hand it is determined that you are in fact an independent contractor, DLSE cannot assist you as it does not have jurisdiction over independent contractors, and you would have to go to court to enforce your rights.

**SEMI-MONTHLY TIME SHEET FOR:**

Full Name: _____
Address: _____
_____
Phone No.: _____

**Pay Period _____, 20____ through _____, 20____**
Soc. Sec. No.: _____

| **REGULAR TIME** (FILL IN TIME IN & OUT) | | | | | **OVERTIME** (FILL IN TIME IN & OUT) | | **TOTAL HOURS** | |
|---|---|---|---|---|---|---|---|---|
| **Date** | **In** | **Out** | **In** | **Out** | **In** | **Out** | **Regular** | **O.T.** |
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| **OT Approval:** | | | | | | | | |

| **TOTALS** | | | |
|---|---|---|---|
| **I certify that I have provided complete and accurate information in completing this time sheet. I understand that it is against company policy to provide false or incomplete information on time sheets. I further certify that I have had the opportunity to take my required rest period(s) according to company policy and have taken the required meal period(s) according to company policy.** | **Regular/OT Hours** | | |
| | **Vacation Hours** | | |
| | **Holiday Hours** | | |
| | **Sick Pay Hours** | | |
| | **TOTAL** | | |

_____ _____
Signature Date