EMPLOYMENT LABOR & WORKERS' COMPENSATION

ADVICE
SOLUTIONS
LITIGATION

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LANDEGGER, BARON, LAVENANT & INGBER

Presents

"California Employers Under Attack In Wage And Hour Litigation."

Learn How to Defend Yourself through a Comprehensive Wage and Hour Audit

Employment Law Workshop

By

Alfred J. Landegger, Esq.

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California Employers Under Attack In Wage and Hour Litigation

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Division of Labor Standards Enforcement (DLSE)
DLSE - Glossary
A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

executive exemption

A person employed in an executive capacity means any employee:

1. Whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and
2. Who customarily and regularly directs the work of two or more other employees therein; and
3. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
4. Who customarily and regularly exercises discretion and independent judgment; and
5. Who is primarily engaged in duties, which meet the test of the exemption.
6. An executive employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c).

With respect to the requirement that management duties must be exercised over the entire enterprise or a customarily recognized department or subdivision thereof, it is important to note that the phrase "customarily recognized department or subdivision thereof" has a particular meaning. The phrase is intended to distinguish between " a mere collection of employees assigned from time to time to a specific job or series of jobs" and " a unit with permanent status and function." Thus, in order to meet the criteria of a managerial employee, one must be more than merely a supervisor of two or more employees. The managerial exempt employee must be in charge of the unit, not simply participate in the management of the unit.

The IWC Orders require as a basic condition for the executive exemption that the manager must supervise two or more employees. This may be one full-time and two half-time employees. It has been the experience of the DLSE that a managerial employee supervising as few as two employees rarely spends as much as 50% of his or her time primarily engaged in managerial duties.

Regarding the requirement for the exemption to apply that the employee "customarily and regularly exercises discretion and independent judgment," this phrase means the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. With respect to the executive exemption, the most frequent cause of

misapplication of the phrase "discretion and independent judgment" is the failure to distinguish discretion and independent judgment from the use of independent managerial skills. An employee who merely applies his or her memory in following prescribed procedures or determining which required procedure out of the company manual to follow, is not exercising discretion and independent judgment.

exempt
Exempt status deprives an employee of certain protections of the Industrial Welfare Commission Orders.

The exemption has far-reaching ramifications since exempt status deprives the employee not only of the right to overtime compensation, but also to many of the other protections afforded to nonexempt employees by such orders. Some of the protections that do not apply to exempt employees are:

Section 3, overtime premium;

Section 4, minimum wage;

Section 5, reporting time pay;

Section 7, requirement of records under the IWC Orders (but not records required by the Labor Code);

Section 9, requirement that employer furnish uniforms and equipment (except, of course, that any expenditure by an employee is recoverable under Labor Code Section 2802).

Section 10, requirement that meals and lodging amounts be limited;

Section 11, meal period requirement; and

Section 12, rest period requirement.

Division of Labor Standards Enforcement (DLSE)
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administrative exemption

A person employed in an administrative capacity means any employee:

1. Whose duties and responsibilities involve either:

a. The performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer's customers, or

b. The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

1. Who customarily and regularly exercised discretion and independent judgment; and
2. Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity, or
3. Who performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge, or
4. Who executes, under only general supervision, special assignments and tasks, and
5. Who is primarily engaged in duties which meet the test for the exemption.
6. An administrative employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c).

Following are examples of employees who might qualify for the exemption if, and only if, they meet the criteria set forth above:

1. Employees who regularly and directly assist a proprietor or exempt executive or administrator. Included in this category are those executive assistants and administrative assistants to whom executives or high-level administrators have delegated part of their discretionary powers. Generally, such assistants are found in large establishments where the official assisted has duties of such scope and which require so much attention that the work of personal scrutiny, correspondence and interviews must be delegated.

2. Employees who perform, only under general supervision, work along specialized or technical lines requiring special training, experience or knowledge. Such employees are often described as "staff employees," or functional, rather than department heads. They include employees who act as advisory specialists to management, or to the employer's customers. Typical examples are tax experts, insurance experts, sales research experts, wage rate analysts, foreign exchange consultants, and statisticians. Such experts may or may not be exempt, depending on the extent to which they exercise discretionary powers. Also included in this category would be persons in charge of a functional department, which may even be a one-person department, such as credit managers, purchasing agents, buyers, personnel directors, safety directors, and labor relations directors.
3. Employees who perform special assignments under only general supervision. Often, such employees perform their work away from the employer's place of business. Typical titles of such persons are buyers, field representatives, and location managers for motion picture companies. This category also includes employees whose special assignments are performed entirely or mostly on the employer's premises, such as customers' brokers in stock exchange firms and so-called "account executives" in advertising firms.

Regarding the requirement for the exemption to apply that the employee "customarily and regularly exercises discretion and independent judgment," this phrase means the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. With respect to the administrative exemption, this phrase has been most frequently misunderstood and misapplied by employers and employees alike in cases involving the following:

1. Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards.
2. Misapplication o the phrase to employees making decisions relating to matters of little consequence.
3. Perhaps the most common misapplication is the application of the exemption to employees engaged in production aspects of the employer's business as opposed to administrative functions.

Caveat. As with any of the exemptions, job titles reflecting administrative classifications alone may not reflect actual job duties and therefore, are of no assistance in determining exempt or nonexempt status. The fact that an employee may have one of the job titles listed above is, in and of itself, of no consequence. The actual determination of exempt or nonexempt status must be based on the nature of the actual work performed by the individual employee.

adverse action

An act or action taken by an employer against an employee that works to the employee's detriment in some aspect of his or her employment, including a poor evaluation, surveillance, an unfavorable recommendation for a promotion, less desirable duties, a transfer, demotion, a cut in pay, or a discharge.

affinity

Used in the context of "victim of domestic violence" signifies the connection existing in consequence of marriage between each of the married persons and the blood relatives of the other. Family Code Section 6205

alternative workweek schedule

Any regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period.

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professional exemption

A person employed in a professional capacity means any employee who meets all of the following requirements:

1. Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting, or
2. Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. "Learned or artistic profession" means an employee who is primarily engaged in the performance of:
3.

a. Work requiring knowledge of an advance type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or
b. Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and
c. Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

4. Who customarily and regularly exercised discretion an independent judgment in the performance of duties set forth above.
5. Who earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c).

Regarding the requirement for the exemption to apply that the employee "customarily and regularly exercises discretion and independent judgment," this phrase means the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

For the learned professions, an advanced academic degree (above the bachelor level) is a standard prerequisite.

For the artistic professions, work in a "recognized field of artistic endeavor" includes such fields as music, writing, the theater, and the plastic and graphic arts.

protected activity

The engaging in or exercising of a right that is protected by law. Some examples of "protected activity" under the Labor Code include:

1. Filing or threatening to file a claim or complaint with the Labor Commissioner.
2. Taking time off from work to serve on a jury or appear as a witness in court.
3. Disclosing or discussing your wages.
4. Using or attempting to use sick leave to attend to the illness of a child, parent, spouse, domestic partner, or child of the domestic partner of the employee.
5. Engaging in political activity of your choice.
6. For complaining about safety or health conditions or practices.

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: _____

DLSE-NTE (rev 4/2012)

WORKERS' COMPENSATION

Insurance Carrier's Name: _____

Address: _____

Telephone Number: _____

Policy No.: _____

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

ACKNOWLEDGMENT 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 acknowledgment 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.

SEMI-MONTHLY TIME SHEET FOR:

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

Full Name: _____
Address: _____
_____
Phone 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.

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

SAMPLE MEAL AND REST PERIOD POLICY AFTER BRINKER

Employees that are scheduled to work more than five (5) hours must take a thirty (30) minute uninterrupted meal period, off the clock, no later than the end of the fifth hour of work. Employees are entitled to be relieved of all their duties and free to take care of personal matters during that time. Employees that have a six (6) hour shift may voluntarily waive the meal period if they execute a Six Hour Shift Waiver Form. Please see the Human Resource Department.

The Company provides a paid ten (10) minute rest period for every four (4) hours of work or major fraction thereof. An employee who works between three and a half (3 1/2) to six (6) hours is entitled to one (1) ten minute break, an employee who works over six (6) hours is entitled to a second ten minute break. An employee that works less than three and a half (3 ½) hours is not entitled to receive a paid ten (10) minute rest period. Please check with your supervisor for the appropriate time to take meal and rest breaks.

Meal periods and rest periods may not be waived to leave early nor may they be consolidated for a longer break or meal period.

It is against Company policy for any employee to perform work during meal or rest periods. It is against Company policy to return to work before the end of a 30 minute meal period or ten minute rest break. It is also against Company policy for employees to work "off the clock," that is, perform work without recording it as time worked on their timesheets.

Employees working more than ten (10) hours are entitled to a second meal period before end of the tenth hour of work, unless the employee voluntarily executes a Twelve Hour Shift Waiver Agreement and has taken the first meal period.

The undersigned acknowledges that he or she has read and understands the foregoing Meal and Rest Period Policy.

_____ _____

Employee Signature Date

Rest Periods/Lactation Accommodation

Revised 3/04/11

In California, the Industrial Welfare Commission Wage Orders require that employers must authorize and permit nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle of each work period. The rest period is based on the total hours worked daily and must be at the minimum rate of a net ten consecutive minutes for each four hour work period, or major fraction thereof. The Division of Labor Standards Enforcement (DLSE) considers anything more than two hours to be a "major fraction" of four." A rest period is not required for employees whose total daily work time is less than three and one-half hours. The rest period is counted as time worked and therefore, the employer must pay for such periods. Since employees are paid for their rest periods, they can be required to remain on the employer's premises during such periods. With respect to the taking of rest periods, an exception exists under IWC Order 5-2001, Section 12(C) for certain employees of 24-hour residential care facilities who may have their rest period limited under certain circumstances. Another exception to the general rest period requirement is for swimmers, dancers, skaters, and other performers engaged in strenuous physical activities who shall have additional interim rest periods during periods of actual rehearsal or shooting. IWC Order 12-2001, Section 12 (C).

For employees in certain on-site occupations in the construction, drilling, logging and mining industries, the employer may stagger the rest periods to avoid interruption in the flow of work and to maintain continuous operations, or schedule rest periods to coincide with breaks in the flow of work that occur in the course of the workday. IWC Order 16-2001, Section 11(A) Additionally, for these employees rest periods need not be authorized in limited circumstances when the disruption of continuous operations would jeopardize the product or process of the work. However, under such circumstances, the employer must make-up the missed rest period within the same workday or compensate the employee for the missed ten minutes of rest time at his or her regular rate of pay within the same pay period. IWC Order 16-2001, Section 11(B) Under Order 16-2001, rest periods must take place at employer designated areas which may include or be limited to the employees immediate work area. See Question No. 9, below, for information on how to file a claim to require your employer to provide time and a place to express milk.

Under IWC Order 10-2001, Section12(C), a crew member employed on a commercial passenger fishing boat who is on an overnight trip shall receive no less than eight hours off-duty time during each 24-hour period. This eight-hour period is in addition to the meal and rest periods required under the Wage Order.

Pursuant to Labor Code Section 1030 every employer, including the state and any political subdivision, must provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child. The break time shall, if possible, run concurrently with any break time already provided to the employee. Break time for an employee that does not run concurrently with the rest time authorized for the employee by the applicable wage order of the Industrial Welfare Commission need not be paid. The employer shall make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private. The room or location may include the place where the employee normally works if it otherwise meets the requirements of this section. An employer is not required to provide an employee break time for purposes of lactating if to do so would seriously disrupt the operations of the employer. Lactation Accommodation-Labor Code translation-Spanish

If an employer fails to provide an employee a rest period in accordance with an applicable IWC Order, the employer shall pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the rest period is not provided. Labor Code Section 226.7 Thus, if an employer does not provide all of the rest periods required in a workday, the employee is entitled to one additional hour of pay for that workday, not one additional hour of pay for each rest period that was not provided during that workday.

The rest period is defined as a "net" ten minutes, which means that the rest period begins when the employee reaches an area away from the work area that is appropriate for rest. Employers are required to provide suitable resting facilities that shall be available for employees during working hours in an area separate from the toilet rooms.

1. **Q. What are the basic requirements for rest periods under California law?**

   A. Employers of California employees covered by the rest period provisions of the Industrial Welfare Commission Wage Orders must authorize and permit a net 10-minute paid rest period for every four hours worked or major fraction thereof. Insofar as is practicable, the rest period should be in the middle of the work period. If an employer does not authorize or permit a rest period, the employer shall pay the employee one hour of pay at the employee's regular rate of pay for each workday that the rest period is not provided.

2. **Q. Must the rest periods always be in the middle of each four-hour work period?**

   A. Rest breaks must be given as close to the middle of the four-hour work period as is practicable. If the nature or circumstances of the work prevent the employer from giving the break at the preferred time, the employee must still receive the required break, but may take it at another point in the work period.

3. **Q. My employer is not allowing me to take a rest period. Is there anything I can do about this situation?**

   A. Yes, there is something you can do if you are an employee covered by the rest period

requirements of theIndustrial Welfare Commission Wage Orders. If your employer fails to authorize and permit the required rest period(s), you are to be paid one hour of pay at your regular rate of compensation for each workday that the rest period is not authorized or permitted. If your employer fails to pay the additional one-hour's pay, you mayfile a wage claim with the Division of Labor Standards Enforcement.

4. **Q. Is it permissible if I choose to work through both of my rest periods so that I can leave my job 20 minutes early?**

A. No, working through your rest period does not entitle you to leave work early or arrive late.

5. **Q. Can my employer require that I stay on the work premises during my rest period?**

A. Yes, your employer can require that you stay on the premises during your rest break. Since you are being compensated for the time during your rest period, your employer can require that you remain on its premises. And under most situations, the employer is required to provide suitable resting facilities that shall be available for employees during working hours in an area separate from the toilet rooms.

6. **Q. Can I have additional rest breaks if I am a smoker?**

A. No, under California law rest period time is based on the total hours worked daily, and only one ten-minute rest period need be authorized for every four hours of work or major fraction thereof.

7. **Q. When I need to use the toilet facilities during my work period does that count as my ten minute rest break?**

A. No, the 10-minute rest period is not designed to be exclusively for use of toilet facilities as evidenced by the fact that the Industrial Welfare Commission requires suitable resting facilities be in an area "separate from toilet rooms." The intent of the Industrial Welfare Commission regarding rest periods is clear: the rest period is not to be confused with or limited to breaks taken by employees to use toilet facilities. This conclusion is required by a reading of the provisions of IWC Orders, Section 12, Rest Periods, in conjunction with the provisions of Section 13(B), Change Rooms And Resting Facilities, which requires that "Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours."

Allowing employees to use toilet facilities during working hours does not meet the employer's obligation to provide rest periods as required by the IWC Orders. This is not to say, of course, that employers do not have the right to reasonably limit the amount of time an employee may be absent from his or her work station; and, it does not indicate that an employee who chooses to use the toilet facilities while on an authorized break may extend the break time by doing so. DLSE policy simply prohibits an employer from requiring that employees count any separate use of toilet facilities as a rest period.

8. **Q. I am regularly scheduled to work an eight-hour shift. What can I do if my employer doesn't allow me to take a rest break?**

A. You can either file a wage claim (the Labor Commissioner's Office), or you can file a lawsuit in court against your employer to recover the the premium of one additional hour of pay at your regular rate of compensation for each workday that the rest period is not provided.

9. **Q. What happens if my employer does not provide me with the opportunity to take a**

break for lactation purposes?

If you feel your employer is not providing you with adequate break time and/or a place to express milk as provided for in Labor Code section 1030, you may file a report/claim with the DLSE Bureau of Field Enforcement (BOFE) at the BOFE office nearest your place of
employment. Seehttp://www.dir.ca.gov/dlse/HowToReportViolationtoBOFE.htm.
The DLSE may, after an inspection, issue to an employer who violates any provision of this chapter, a civil citation ($100.00 for each violation) that may be contested in accordance with the procedure outlined inLabor Code Section 1197.1 (Labor Code Section 1033).
In addition, any employee who is a victim of retaliation for either asserting a right to lactation accommodation or for complaining to the DLSE about the failure of an employer to provide this accommodation may file a retaliation claim with DLSE
A. pursuant to Labor Code Section 98.7 .

10. Q. What is the applicable statute of limitations on filing a rest period claim?

In the case of Murphy v. Cole, the California Supreme Court held that the remedy for meal and rest period violations of "one additional hour of pay" under Labor Code section 226.7 is a wage subject to a three-year statute of limitations. Accordingly, a claim must be filed within three (3) years of the alleged rest period violation. See attached
A. Division memoranda regarding the Court's decision.

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

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
A. the wage claim procedure.

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

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
A. 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.

13. Q. **What can I do if my employer retaliates against me because I objected to the fact that he doesn't provide employees with rest breaks?**

A. If your employer discriminates or retaliates against you in any manner whatsoever, for example, he discharges you because you object to the fact that he's not providing employees with rest breaks, 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.

Meal periods

Revised 7/11/2012

In California, an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than thirty minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. A second meal period of not less than thirty minutes is required if an employee works more than ten hours per day, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and employee only if the first meal period was not waived. Labor Code Section 512. There is an exception for employees in the motion picture industry, however, as they may work no longer than six hours without a meal period of not less than 30 minutes, nor more than one hour. And a subsequent meal period must be called not later than six hours after the termination of the preceding meal period.IWC Order 12-2001, Section 11(A)

Unless the employee is relieved of all duty during his or her thirty minute meal period, the meal period shall be considered an "on duty" meal period that is counted as hours worked which must be compensated at the employee's regular rate of pay. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the employer and employee an on-the-job paid meal period is agreed to. The written agreement must state that the employee may, in writing, revoke the agreement at any time. IWC Orders 1 -15, Section 11, Order 16, Section 10. The test of whether the nature of the work prevents an employee from being relieved of all duty is an objective one. An employer and employee may not agree to an on-duty meal period unless, based on objective criteria, any employee would be prevented from being relieved of all duty based on the necessary job duties. Some examples of jobs that fit this category are a sole worker in a coffee kiosk, a sole worker in an all-night convenience store, and a security guard stationed alone at a remote site.

If the employer requires the employee to remain at the work site or facility during the meal period, the meal period must be paid. This is true even where the employee is relieved of all work duties during the meal period. *Bono Enterprises, In. v. Bradshaw* (1995) 32 Cal.App.4th 968.

If an employer fails to provide an employee a meal period in accordance with an applicable IWC Order, the employer must pay one additional hour of pay at the employee's regular rate of pay for each workday that the meal period is not provided. IWC Orders and Labor Code Section 226.7 This additional hour is not counted as hours worked for purposes of overtime calculations.

In all places where employees are required to eat on the premises, a suitable place for that purpose must be designated. This requirement does not, however, apply to employees covered by IWC Order 16-2001, on-site occupations in the construction, drilling, logging and mining industries.. For

employees covered by IWC Order 16-2001, the employer must provide an adequate supply of potable water, soap, or other suitable cleansing agent and single use towels for hand washing.

Under all of the IWC Orders except Orders 12, 14, 15, and 16-2001, if a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities must be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place must be provided in which to consume such food or drink. Under IWC Order 12-2001 for employees in the motion picture industry, hot meals and hot drinks must be provided for employees who are required to work after 12 o'clock midnight, except off-production employees regularly scheduled to work after midnight.

What are the basic requirements for meal periods under California law?

1. **Q.**

Under California law (IWC Orders and Labor Code Section 512), employees must be provided with no less than a thirty-minute meal period when the work period is more than five hours (more than six hours for employees in the motion picture industry covered by IWC Order 12-2001).Unless the employee is relieved of all duty during the entire thirty-minute meal period and is free to leave the employer's premises, the meal period shall be considered "on duty," counted as hours worked, and paid for at the employee's regular rate of pay. An "on duty" meal period will be permitted only when the nature of the work prevents the employee from being relieved of all duty and when by written agreement between the employer and employee an on-the-job meal period is agreed to. The test of whether the nature of the work prevents an employee from being relieved of all duty is an objective one. An employer and employee may not agree to an on-duty meal period unless, based on objective criteria, any employee would be prevented from being relieved of all duty based on the necessary job duties. Some examples of jobs that fit this category are a sole worker in a coffee kiosk, a sole worker in an all-night convenience store, and a security guard stationed alone at a remote site.

A.

How does an employer satisfy its obligation to provide a meal period according to the law?

2. **Q.**

An employer is not required to ensure that no work is performed. However, an employer must do more than simply make a meal period "available." In general, to satisfy its obligation to provide a meal period, an employer must actually relieve employees of all duty, relinquish control over their activities, permit them a reasonable opportunity to take an uninterrupted 30-minute break (in which they are free to come and go as they please), and must not impede or discourage employees from taking their meal period. (For employees in the health care industry covered by IWC Orders 4 or 5, however, minor exceptions exist as to the employee's right to leave the employment premises during an off-duty meal period.) Employers may not undermine a formal policy of providing meal periods by pressuring employees to perform their duties in ways that omit breaks (e.g., through a scheduling policy that makes taking breaks extremely difficult). As the California Supreme Court has noted, "The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks." Which particular facts in any given

A. case will satisfy the employer's obligation to provide bona relief from all duty may vary from

industry to industry. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

What are the timing requirements for when any required first or second meal period must be provided during the workday?

3. Q.

In general, when an employee works for a work period of more than five hours, a meal period must be provided no later than the end of the employee's fifth hour of work (in other words, no later than the start of the employee's sixth hour of work). When an employee works for a period of more than 10 hours, a second meal period must be provided no later than the end of the employee's tenth hour of work (in other words, no later than the start of the employee's eleventh hour of work). The foregoing rules are subject to certain waivers by mutual consent (as explained above), and different rules apply to employees in the motion picture industry. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

A.

My employer is not allowing me to take a meal period. Is there anything I can do about this situation?

4. Q.

Yes, there is something you can do if you are covered by the meal period requirements of the law. If your employer fails to provide the required meal period, you are to be paid one hour of pay at your regular rate of compensation (this is referred to as meal period premium pay) for each workday that the meal period is not provided. If your employer fails to pay the additional one-hour's pay, you mayfile a wage claim with the Division of Labor Standards Enforcement.

A.

If there is bona fide relief from all duty during a meal period and the employer relinquishes all control over the employee's activities, but the employee then freely chooses to continue working, is the employer liable for meal period premium pay?

5. Q.

No, the employer would not be liable for meal period premium pay where there is bona fide relief from duty and relinquishment of employer control (and no discouragement or coercion from the employer against taking the meal period). However, in this circumstance, an employer that knows or has reason to know an employee is performing work during the meal period owes compensation to the employee for the time worked (including any overtime hours that have accrued as a result of working through the meal period). *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

A.

Is it permissible if I choose to work through my meal period so that I can leave my job 30 minutes early?

6. Q.

No, working through your meal period does not entitle you to leave work early prior to your scheduled quitting time. In order for an "on duty" meal period to be permitted under the Industrial Welfare Commission Wage Orders, the nature of the work must actually prevent the employee from being relieved of all duty, and there must be a written agreement that an on-the-job paid meal period is agreed to. Additionally, the written agreement must also state that the employee may, in writing, revoke the agreement at any time.

A.

Can my employer require that I stay on its premises during my meal period?

7. **Q.**

Yes, your employer can require that you remain on its premises during your meal period, even if you are relieved of all work duties. However if that occurs, you are being denied your time for your own purposes and in effect remain under the employer's control and thus, the meal period must be paid. Minor exceptions to this general rule exist under IWC Order 5-2001 regarding healthcare workers. Pursuant to the Industrial Welfare Commission Wage Orders, if you are required to eat on the premises, a suitable place for that purpose must be designated. "Suitable" means a sheltered place with facilities available for securing hot food and drink or for heating food or drink, and for consuming such food and drink.

A.

I regularly work an eight-hour shift. What can I do if my employer doesn't provide me with a meal period?

8. **Q.**

You can either file a wage claim with the Division of Labor Standards Enforcement (the Labor Commissioner's Office), or you can file a lawsuit in court against your employer to recover the premium of one additional hour of pay at your regular rate of compensation for each workday that the meal period is not provided.

A.

What is the applicable statute of limitations on filing a meal period claim?

9. **Q.**

In the case of Murphy v. Cole, the California Supreme Court held that the remedy for meal and rest period violations of "one additional hour of pay" under Labor Code section 226.7 is a wage subject to a three-year statute of limitations. Accordingly, a claim must be filed within three (3) years of the alleged meal period violation. See attached Division memoranda regarding the Court's decision.

A.

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

10. **Q.**

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.

A. 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.

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

11. **Q.**

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.

A.

What can I do if my employer retaliates against me because I asked him why we don't get a meal period?

12. **Q.**

If your employer discriminates or retaliates against you in any manner whatsoever, for example, he discharges you because you ask about not getting a meal period, object to what you believe to be an illegal practice, 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

A. employer.

MEAL PERIOD WAIVER (6 HOUR SHIFT)

I recognize that in California, an employer may not employ an employee for a work period of more than five hours per day without providing the employee with an unpaid meal period of not less than thirty minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. I,_____, do hereby agree to waive the required meal period when my workday is no more than six (6) hours. I understand that I will receive my normal hourly wage rate throughout the workday. I also understand that this agreement is not applicable to situations where I work more than six (6) hours in a workday. I acknowledge that I may revoke this agreement at any time, in writing.

Dated:_____

_____
Employee

_____
Employer

MEAL PERIOD WAIVER (10/12 Hour Shift)

I recognize that in California, an employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second unpaid meal period of not less than thirty minutes, except that if the total hours worked is no more than twelve (12) hours, the second meal period may be waived by mutual consent of both the employer and employee but only if the first meal period was not waived.

I,_____, do hereby agree to waive the second required meal period when my workday is no more than twelve (12) hours. I understand that this agreement is not applicable to situations where I work more than twelve (12) hours in a workday. I acknowledge that I may revoke this agreement at any time, in writing.

Dated:_____

_____
Employee

_____
Employer

ON DUTY MEAL AGREEMENT

I, _____, do hereby agree that the nature of the work prevents me from being relieved of all duty during my shift to take a thirty (30) minute unpaid meal period. I agree to waive the required meal period and agree to work during the meal period. I understand that I will receive my normal hourly wage rate during the meal period. I understand that I may revoke this agreement at any time, in writing.

Dated:_____

_____
Employee

_____
Employer

§ 785.48 Use of Time Clocks.

(a) *Differences between clock records and actual hours worked.* Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

(b) *"Rounding" practices.* It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

47 CALCULATING HOURS WORKED.

47.1 **Rounding.** The Division utilizes the practice of the U.S. Department of Labor of "rounding" employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions. (29 CFR § 785.48(b))

47.2 **"Rounding" Practices.** As mentioned above, the federal regulations allow rounding of hours to five minute segments. There has been practice in industry for many years to follow this practice, recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted by DLSE, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. (See also, 29 CFR § 785.48(b))

47.2.1 **Recording Insignificant Time Periods.** In recording working time, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*. (*Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Lindow v. United States* 738 F.2d 1057 (9th Cir.1984)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.

47.2.1.1 An employer may not rely on this policy to arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F. 2d 981, 987 (C.A. 8, 1952), *cert. denied*, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not *de minimis*; see also *Addison v. Huron Stevedoring Corp.*, 204 F. 2d 88, 95 (C.A. 2, 1953), *cert. denied* 346 U.S. 877, holding that "[T]o disregard workweeks for which less than a dollar is due will produce capricious and unfair results;" and *Hawkins v. E. I. du Pont de Nemours & Co.*, 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not *de minimis*.

47.2.2 **Differences Between Clock Records And Actual Hours Worked.** Time clocks are not required but in those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work.

47.2.2.1 Actual facts must be investigated, of course, however, unless the employee is either performing work during the period or has been directed by the employer to be on the premises, the early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but

major discrepancies should be investigated since they raise a doubt as to the accuracy of the records of the hours actually worked.

47.2.2.2 **DLSE Enforcement Policy.** When auditing payroll records, Division personnel will ascertain the facts regarding the time keeping requirements (*i.e.,* the true work patterns of the workers and whether these patterns are accurately reflected by the time records). When, based on these facts, the above description results in an averaging out for both the employer and the employee, it is, in the long run, much more reasonable than an attempt at absolute accuracy by "counting minutes". This method also simplifies payroll computation and the average employer appreciates being permitted to use it.

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.

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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.

When is an individual an employee?

An individual is an employee *when hired by an employer to perform services and either (1) the law defines the worker as an employee (statutory employee) or (2) the employer has the right to control the manner and means by which the worker performs his/her services (common law employee).*

For more information, refer to the Information Sheet *Employment* (DE 231) which is available on the Employment Development Department's (EDD) Web site at **www.edd.ca.gov/Payroll_Taxes/Forms_and_Publications.htm**

COMMON MISCONCEPTIONS

1

If I issue an Internal Revenue Service (IRS) Form 1099-MISC, then the worker is an independent contractor.

NOT TRUE. An IRS Form 1099-MISC is simply a method the government uses to track and report certain types of nonemployment income. When you provide an IRS Form 1099-MISC to a worker for payment of services, it does not automatically make the worker an independent contractor.

2

If I pay a worker less than $600 in a year, then the worker is not subject to California payroll taxes.

NOT TRUE. The amount paid to a worker is not, by itself, a factor in determining whether a worker is an employee or independent contractor. The amount paid to a worker may determine if you should issue an IRS Form 1099-MISC. For information on the federal requirements, access the IRS Web site at www.irs.gov or contact the IRS at (800) 829-1040.

3

The part-time, temporary, probationary, and substitute workers I employ are day laborers or casual laborers, not employees.

NOT TRUE. An employee may perform services on a less than full-time permanent basis. The law does not exclude services from employment that are commonly referred to as day labor, part-time help, casual labor, temporary help, probationary, or outside labor.

For more information, refer to the Information Sheet: *Casual Labor* (DE 231K).

4

If a family member works for me, he/she is not an employee.

NOT TRUE. Family members working for your business are employees and subject to California payroll taxes unless certain conditions are met.

For more information, refer to the Information Sheet: *Family Employment* (DE 231FAM).

5

My worker and I have signed a written contract that makes my worker an independent contractor.

NOT TRUE. A written contract or agreement does not necessarily depict the actual relationship. The actual practices of the parties in a relationship are more important than the wording of an agreement in determining whether a worker is an employee or independent contractor.

For more information, refer to the Information Sheet: *Employment* (DE 231).

6

My competitors treat their workers as independent contractors; therefore, it is okay for me to treat my workers as independent contractors.

NOT TRUE. The law defines employment relationships, not you or the actions of your competitors. If you misclassify your workers as independent contractors, EDD may assess you for the unpaid payroll taxes for any unreported employees.

7

My worker performs similar work for other businesses, so the worker is an independent contractor.

NOT TRUE. Performing similar work for other businesses is not, by itself, a determining factor. The relationship the worker may have with the other businesses is not a controlling factor when determining the worker's status as an employee or independent contractor with your business. The working relationship with each business is looked at separately.

8

My worker has a city business license and business card, so the worker is an independent contractor.

NOT TRUE. A city business license and business card, by themselves, do not make a worker an independent contractor. All of the common law factors need to be reviewed and weighed with respect to the specific circumstances of the services provided by each worker.

9

I pay my workers solely by commission; therefore, they are independent contractors.

NOT TRUE. The method of payment is not, by itself, a determining factor. All of the common law factors need to be considered and weighed to determine whether a worker is an employee. If the worker is an employee, then all remuneration for services (salary, hourly pay, piece rate, commissions, bonuses, stock options, vehicle, etc.) is wages.

For more information, refer to the Information Sheet: *Wages* (DE 231A).

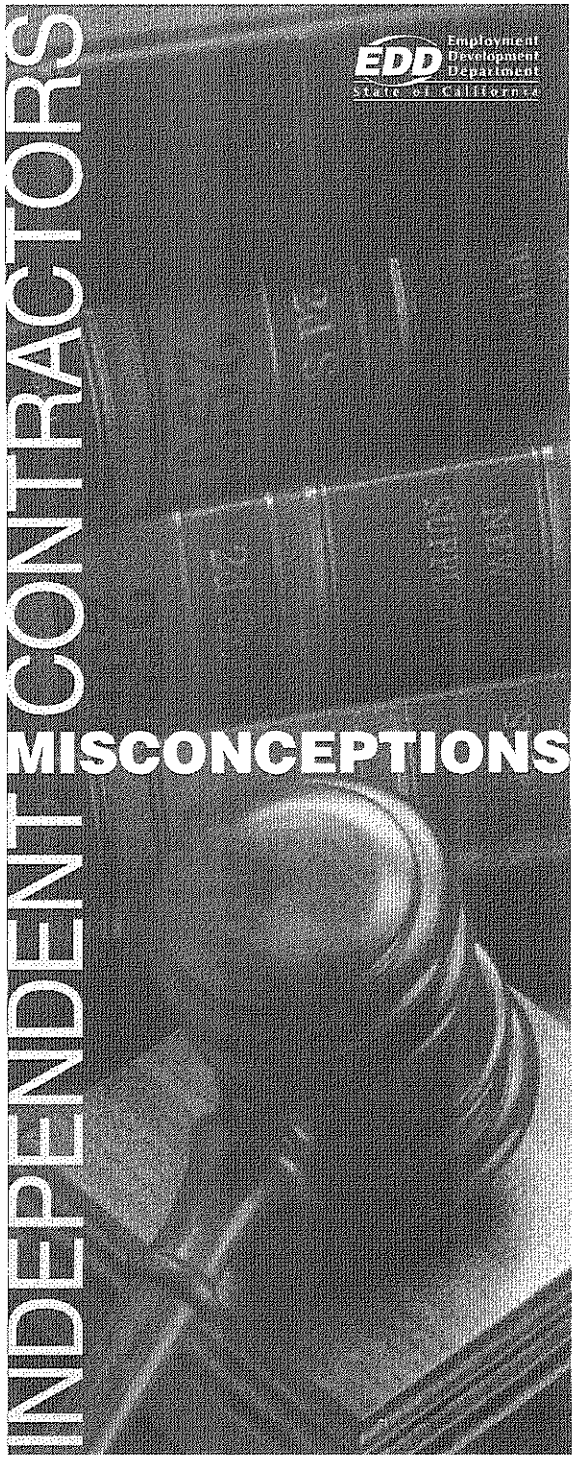
To help employers correctly classify workers and report payroll taxes, EDD offers no-fee State payroll tax seminars, either classroom-style or online courses. The classroom seminars are offered in various locations throughout California. To access an online course or locate a classroom seminar near you, visit EDD's Web site at **www.edd.ca.gov/Payroll_Tax_Seminars/**. For further assistance, please contact the Taxpayer Assistance Center at (888) 745-3886.

STATE OF CALIFORNIA

LABOR AND WORKFORCE DEVELOPMENT AGENCY

EMPLOYMENT DEVELOPMENT DEPARTMENT

INDEPENDENT CONTRACTORS MISCONCEPTIONS



Employment Development Department
State of California

EMPLOYMENT DETERMINATION GUIDE

Purpose:

This worksheet is to be used by the proprietor of a business to determine whether a worker is most likely an employee or an independent contractor.

General Information:

Generally speaking, whether a worker is an employee or an independent contractor depends on the application of the factors contained in the California common law of employment and statutory provisions of the California Unemployment Insurance Code.

If a worker is an employee under the common law of employment, the business by which the worker is employed must report the worker's earnings to the Employment Development Department (EDD) and must pay employment taxes on those wages. If the business pays $600 or more in payments to an independent contractor, the business must file a Form 1099-Misc with the Internal Revenue Service (IRS) and must file a *Report of Independent Contractor(s)* (DE 542) with EDD within 20 days of either making payments totaling $600 or more, or entering into a contract for $600 or more with an independent contractor in any calendar year. For more detailed information regarding your independent contractor reporting requirements, obtain the latest revision of the *California Employer's Guide* (DE 44).

The basic test for determining whether a worker is an independent contractor or an employee is whether the principal has the right to direct and control the manner and means by which the work is performed. When the principal has the "right of control," the worker will be an employee even if the principal never actually exercises the control. If the principal does not have the right of direction and control, the worker will generally be an independent contractor.

If it is not clear from the face of the relationship whether the worker or the principal has the "right of control," reference is made to a list of secondary factors that are evidence of the existence or nonexistence of the right of control.

If use of the attached worksheet clearly demonstrates that a worker is an employee, you should contact EDD and arrange to report the worker and pay the relevant taxes. You may also want to contact the IRS and your workers' compensation insurance carrier to ensure that you are in compliance with federal tax laws and with state workers' compensation statutes.

If after completing the worksheet you are not sure whether the worker is an independent contractor or employee, you may also contact the Taxpayer Assistance Center for advice by calling (888) 745-3886 or request a written ruling by completing a *Determination of Employment Work Status* (DE 1870). The DE 1870 is designed to analyze a working relationship in detail and serves as the basis for a written determination from EDD on employment status.

WORKSHEET ON EMPLOYMENT STATUS

Questions 1 – 3 are significant questions. If the answer to any of them is "Yes," it is a strong indication that the worker is an employee, and you have a high probability of risk if you classify the worker as an independent contractor.

1. Do you instruct or supervise the person while he or she is working? Yes _____ No _____

   Independent contractors are free to do jobs in their own way, using specific methods they choose. A person or firm engages an independent contractor for the job's end result. When a worker is required to follow company procedure manuals and/or is given specific instructions on how to perform the work, the worker is normally an employee.

2. Can the worker quit or be discharged (fired) at any time? Yes _____ No _____

   If you have the right to fire the worker without notice, it indicates that you have the right to control the worker.

   Independent contractors are engaged to do specific jobs and cannot be fired before the job is complete unless they violate the terms of the contract. They are not free to quit and walk away until the job is complete. For example, if a shoe store owner hires an attorney to review his or her lease, the attorney would get paid only after satisfactory completion of the job.

3. Is the work being performed part of your regular business? Yes _____ No _____

   Work which is a necessary part of the regular trade or business is normally done by employees. For example, a sales clerk is selling shoes in a shoe store. A shoe store owner could not operate without sales clerks to sell shoes. On the other hand, a plumber engaged to fix the pipes in the bathroom of the store is performing a service on a one-time or occasional basis that is not an essential part of the purpose of the business enterprise. A certified public accountant engaged to prepare tax returns and financial statements for the business would also be an example of an independent contractor.

A "No" answer to questions 4 – 6 indicates that the individual is not in a business for himself or herself and would therefore normally be an employee.

4. Does the worker have a separately established business? Yes _____ No _____

   When individuals hold themselves out to the general public as available to perform services similar to those performed for you, it is evidence that the individuals are operating separately established businesses and would normally be independent contractors. Independent contractors are free to hire employees and assign the work to others in any way they choose. Independent contractors have the authority to fire their employees without your knowledge or consent. Independent contractors can normally advertise their services in newspapers and/or publications, yellow page listings, and/or seek new customers through the use of business cards.

5. Is the worker free to make business decisions which affect his or her ability to profit from the work? Yes _____ No _____

   An individual is normally an independent contractor when he or she is free to make business decisions which impact his or her ability to profit or suffer a loss. This involves real economic risk, not just the risk of not getting paid. These decisions would normally involve the acquisition, use, and/or disposition of equipment, facilities, and stock in trade which are under his or her control. Further examples of the ability to make economic business decisions include the amount and type of advertising for the business, the priority in which assignments are worked, and selection of the types and amounts of insurance coverage for the business.

6. Does the individual have a substantial investment which would subject him or her to a financial risk of loss? Yes _____ No _____

   Independent contractors furnish the tools, equipment, and supplies needed to perform the work. Independent contractors normally have an investment in the items needed to complete their tasks. To the extent necessary for the specific type of business, independent contractors provide their own business facility.

Questions 7 – 13 are additional factors that should be considered. A "Yes" answer to any of the questions is an indication the worker may be an employee, but no one factor by itself is deciding. All factors must be considered and weighed together to determine which type of relationship exists. However, the greater the number of "Yes" answers to questions 7 – 13 the greater the likelihood the worker is performing services as an employee.

7. Do you have employees who do the same type of work? Yes _____ No _____

   If the work being done is basically the same as work that is normally done by your employees, it indicates that the worker is an employee. This applies even if the work is being done on a one-time basis. For instance, to handle an extra workload or replace an employee who is on vacation, a worker is hired to fill in on a temporary basis. This worker is a temporary employee, not an independent contractor.

   (Note: If you contract with a temporary agency to provide you with a worker, the worker is normally an employee but may be an employee of the temporary agency. You may wish to request EDD's Information Sheet: *Temporary Services and Employee Leasing Industries* (DE 231F) on the subject of temporary service and leasing employers.)

8. Do you furnish the tools, equipment, or supplies used to perform the work? Yes _____ No _____

   Independent business people furnish the tools, equipment, and supplies needed to perform the work. Independent contractors normally have an investment in the items needed to complete their tasks.

9. Is the work considered unskilled or semi-skilled labor? Yes _____ No _____

   The courts and the California Unemployment Insurance Appeals Board have held that workers who are considered unskilled or semi-skilled are the type of workers the law is meant to protect and are generally employees.

10. Do you provide training for the worker? Yes _____ No _____

In skilled or semi-skilled work, independent contractors usually do not need training. If training is required to do the task, it is an indication that the worker is an employee.

11. Is the worker paid a fixed salary, an hourly wage, or based on a piece rate basis? Yes _____ No _____

Independent contractors agree to do a job and bill for the service performed. Payments to independent contractors for labor or services are made upon the completion of the project or completion of the performance of specific portions of the project.

12. Did the worker previously perform the same or similar services for you as an employee? Yes _____ No _____

If the worker previously performed the same or similar services for you as an employee, it is an indication that the individual is still an employee.

13. Does the worker believe that he or she is an employee? Yes _____ No _____

Although belief of the parties is not controlling, intent of the parties is a factor to consider when making an employment or independent contractor determination. When both the worker and principal believe the worker is an independent contractor, an argument exists to support an independent contractor relationship between the parties.

Interpretations of Answers

Depending on the services being performed and the type of occupation, this questionnaire may produce a variety of results. There may be some factors which lean toward employment and some which lean toward independence. The answers to questions 1 – 6 provide a strong indication of the presence or absence of direction and control. The answers to questions 7 – 13 when joined with other evidence may carry greater weight when indicating the presence or absence of direction and control.

1. If all of the answers to questions 1 – 3 are "No" and all of the answers to questions 4 – 6 are "Yes," there is an indication of independence. When this is the case, there are likely to be a number of "No" answers to questions 7 – 13 which add to the support of the determination.

2. If all of the answers to questions 1 – 3 are "Yes" and all of the answers to questions 4 – 6 are "No," it is very strong indication that the worker in question is an employee. When this is the case, there are likely to be a number of "Yes" answers to questions 7 – 13 which add to the support of the determination.

3. If the answer to question 1 or 2 is "Yes" or the answer to any one of questions 4 – 6 is "No," there is a likelihood of employment. At the very least, this pattern of answers makes the determination more difficult since the responses to questions 7 – 13 will probably be mixed. In such situations, the business owner would be well advised to complete a DE 1870, giving all of the facts of the working relationship and requesting a ruling from EDD.

4. If the answer to question 3 is "Yes" and the answer to question 4 is "No," there is a likelihood of employment. Given this pattern of answers, it is probable that the answers to questions 5 and 6 will also be "No." When this happens you may also see more "Yes" answers to the last group of questions (7 – 13). This scenario would support an employment determination.

These four scenarios illustrate only a few combinations of answers that could result from the use of this Employment Determination Guide, depending on the working relationship a principal may have with a worker and the type of occupation. The more the pattern of answers vary from the above four situations, the more difficult it is to interpret them. In situations 1 and 2, there is a greater chance that the interpretation will be accurate, and they present the least risk to the business owner of misclassifying the worker. With other combinations of answers, EDD recommends that business owners complete a DE 1870, giving a complete description of the working relationship and requesting a ruling from the Department.

NOTE: Some agent or commission drivers, traveling or city salespeople, homeworkers, artists, authors, and workers in the construction industry are employees by law even if they would otherwise be considered independent contractors under common law. If you are dealing with workers in any of these fields, request Information Sheet: *Statutory Employees* (DE 231SE) from the Taxpayer Assistance Center at (888) 745-3886 or access EDD's Web site at www.edd.ca.gov/Payroll_Taxes/.

SOME EXAMPLES OF INDEPENDENT CONTRACTORS AND COMMON LAW EMPLOYEES

Independent Contractors	Employees
An attorney or accountant who has his or her own office, advertises in the yellow pages of the phone book under "Attorneys" or "Accountants," bills clients by the hour, is engaged by the job or paid an annual retainer, and can hire a substitute to do the work is an example of an independent contractor.	An attorney or accountant who is employed by a firm to handle their legal affairs or financial records, works in an office at the firm's place of business, attends meetings as needed, and the firm bills the clients and pays the attorney or accountant on a regular basis is an example of an employee.
An auto mechanic who has a station license, a resale license, buys the parts necessary for the repairs, sets his or her own prices, collects from the customer, sets his or her own hours and days of work, and owns or rents the shop from a third party is an example of an independent contractor.	An auto mechanic working in someone's shop who is paid a percentage of the work billed to the customer, where the owner of the shop sets the prices, hours, and days the shop is open, schedules the work, and collects from the customers is an example of an employee.
Dance instructors who select their own dance routines to teach, locate and rent their own facilities, provide their own sound systems, music and clothing, collect fees from customers, and are free to hire assistants are examples of independent contractors.	Dance instructors working in a health club where the club sets hours of work, the routines to be taught and pays the instructors from fees collected from the customers are examples of employees.
A repairperson who owns or rents a shop, advertises the services to the public, furnishes all of the tools, equipment, and supplies necessary to make repairs, sets the price for services, and collects from the customers is an example of an independent contractor.	A repairperson working in a shop where the owner sets the prices, the hours and days the shop is open, and the repairperson is paid a percentage of the work done is an example of an employee.

NOTE: Payroll tax audits conducted by EDD have disclosed misclassified workers in virtually every type and size of business. However, certain industries seem more prone to have a higher number of misclassified workers than others. Historically, industries at higher risk of having misclassified workers include businesses that use:

- Construction workers
- Seasonal workers
- Short-term or "casual" workers
- Outside salespersons