

Alert!

**Labor Commissioner Issues Back-to-Back Pronouncements
Signaling a More “Employer Friendly” Climate in California**

Labor Commissioner Reverses Position on Two Critical Vacation/PTO Issues – Exempt Employee Vacation Use and Employer Notice Requirements.

On May 31, 2005, the new Labor Commissioner issued a Memorandum rejecting the former Labor Commissioner’s position on two vacation/paid time off (PTO) issues that have plagued employers: (1) partial-day use of vacation/PTO by exempt employees and (2) notice required for employer-mandated use of vacation/PTO. The Labor Commissioner called for the immediate removal of Opinion Letter No. 2002.08.30, which addressed both issues.

- **Partial-Day Use of Vacation/PTO Does Not Violate Exempt Status:** The Labor Commissioner has determined that partial-day use of vacation/PTO does not violate the salary basis test for exempt employees. According to the former Labor Commissioner, an employer would violate the salary basis test and destroy an exempt employee’s status by reducing the employee’s vacation/PTO balance for partial-day absences. The new Labor Commissioner’s analysis of California law is consistent with the federal Department of Labor’s interpretation of the federal salary basis requirement. The Labor Commissioner’s interpretation of California law is also consistent with other existing federal and state laws which allow partial-day use of paid leave for all employees (e.g., family/medical leave, leave for criminal victim’s court proceedings, school-related leave and California “kincare” leave). However, it is important to remember that partial-day deductions from salary (as opposed to vacation or PTO accounts) are still not permissible for exempt employees.
- **Shortened Notice Period for Employer-Mandated Vacation/PTO Use:** The Labor Commissioner shortened what the DLSE will consider "reasonable notice" for employer-mandated use of vacation/PTO. In the past, the DLSE took the position that employers must give their employees a minimum of nine-months notice before requiring employees

to use vacation or PTO (such as during a temporary shutdown). The Labor Commissioner reasoned that there was no legal basis for requiring nine months of notice, and that employers must only provide “reasonable notice, which should be as far in advance as possible, but generally no less than one full fiscal quarter or 90 days, whichever is greater.”

Labor Commissioner Decides That Payments for Missed Meal And Rest Periods Are Penalties And Not Wages.

On May 11, 2005, in response to California employers’ persistent confusion surrounding the meal and rest period violations, the Labor Commissioner issued an unusual “Precedent Decision,” *Hartwig v. Orchard Commercial, Inc.*, Case No. 12-56901RB. Section 226.7 of the California Labor Code requires an employer to pay an employee an additional hour of pay for each day that a meal or rest period is not provided. There has been substantial debate over whether this one hour of additional pay is a “wage” or a “penalty.” The *Hartwig* decision tackled this question and opined that the purpose of the fine was to deter employers from violating the imposed rules for meal (and rest) periods, and the payment for missed meal periods is a penalty, not a wage.

This Decision is favorable to employers in two significant respects. First, the statute of limitations for recovering a penalty is one year, compared to the three-year statute of limitations for recovering unpaid wages. Second, employers who do not pay employees an extra hour for missed meal and rest periods will not be automatically liable for waiting time penalties under Labor Code section 203, which applies when employers fail to pay *wages* due upon termination.

This Decision is consistent with DLSE’s proposed regulations introduced in December 2004, governing meal and rest periods, which also clarify that the fine for missed meal or rest periods is a penalty and not wages. Presently, the most recent version of the proposed regulations is open to public comment until July 25, 2005.

Not surprisingly, there has already been an action filed in the Sacramento Superior Court challenging *Hartwig*, so for the time being this issue remains unsettled. While the issue is battled out in court, the administrative law judges who decide claims filed with the Labor Commissioner will be bound to follow *Hartwig*.

Of Note: The *Hartwig* decision also reminds us that employers should remain vigilant about keeping accurate time records reflecting meal periods. Rest periods should also be reflected, or employees should clarify in writing that they have taken all required rest breaks.

On July 12, 2005, Michele Miller, Maki Daijogo and Kristin Pedersen of the Miller Law Group conducted a web seminar hosted by Parachute Associates on these and other recent California employment law developments. If you would like to listen to the one-hour program, a recording is available on the web; just [click here](#). If you are interested in obtaining a copy of the slides used in the program, [click here](#).

Miller Law Group is a Bay Area law firm that specializes in representing management in all facets of employment litigation and counseling. For more information about this Alert, the July 12 web seminar or for general employment advice, please call Michele Ballard Miller, Maki Daijogo or Kristin Pedersen at (415) 464-4300 or e-mail us at mbm@millerlawgroup.com.

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