

## Question & Answer Summary

April 16, 2009 Webinar

### Wage and Hour Update: How to Avoid Problems from Recruitment through Termination

Confusing and complex wage and hour laws represent one of the toughest compliance areas for employers. And, unfortunately, wage and hour litigation is one of the most lucrative areas for the plaintiffs' bar. On April 16, 2009, Miller Law Group presented an in-depth webinar, "Wage and Hour Update: How to Avoid Problems from Recruitment through Termination," designed to inform employers about the latest legal developments impacting wage and hour compliance. The following are answers to questions asked by webinar attendees.

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**Miller Law Group is the leading women-owned employment law firm in California, specializing in representing management in all facets of employment litigation and strategic advice.** If you have questions about your workplace obligations, please contact Michele Ballard Miller ([mbm@millerlawgroup.com](mailto:mbm@millerlawgroup.com)) or Carolyn Rashby ([cr@millerlawgroup.com](mailto:cr@millerlawgroup.com)), or call 415-464-4300.

## EXEMPT STATUS

### Q. WHAT IS THE EFFECT ON EXEMPT STATUS IF THE EMPLOYER HAS UNPAID HOLIDAYS ON WHICH THE OFFICE IS SHUT DOWN?

A. Under California and federal law, an exempt employee who performs any work in a week must be paid that full week's salary, except in specific circumstances (such as for personal days off). Thus, exempt status is destroyed if, during a work week, the employer deducts from the employee's salary for a day off – including a company holiday -- when the employee is ready and willing to work.

### Q. IF AN EMPLOYER DOES NOT PROVIDE PAID VACATION, OR AN EMPLOYEE HAS USED UP HIS OR HER VACATION, CAN THE EMPLOYER DOCK AN EXEMPT EMPLOYEE'S SALARY IF THE EMPLOYEE TAKES A FULL OR PARTIAL DAY OFF?

A. California and federal law permit an employer to deduct from an exempt employee's salary for personal absences of a full day or more, including when the employer does not provide

vacation or other accrued paid time off (PTO) or the employee has used up all of his or her accrued vacation or PTO. However, salary deductions for partial days off (unless the time off is under the state/federal family and medical leave laws) will destroy exempt status.

**Q. CAN YOU REDUCE AN EXEMPT EMPLOYEE'S SALARY AND HOURS IF THE REDUCTIONS ARE IN CONNECTION WITH THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT'S WORK SHARE PROGRAM?**

A. The California Division of Labor Standards Enforcement (DLSE) addressed this situation in a recent opinion letter, concluding that a reduction in salary and hours for an exempt employee -- even when in connection with the California Employment Development Department's Work Share Program -- strips the employee of the exempt status. In particular, the DLSE found that if an employer puts exempt employees on a work share program, whereby they are paid out of government funds for a percentage of what they would have made but for the reduction in hours imposed by the employer, those employees are no longer paid on a "salary basis" and no longer qualify for exemption. The opinion letter is online at <http://www.dir.ca.gov/dlse/opinions/2002-03-12.pdf>.

**MEAL AND REST BREAKS**

**Q. IS IT PERMISSIBLE TO HAVE AN AUTOMATIC 30-MINUTE DEDUCTION FOR MEAL BREAKS?**

A. While there is no rule prohibiting employers from making an automatic deduction for meal breaks, the practice is risky for several reasons. First, if an employee regularly is leaving for lunch a few minutes late or returning a few minutes early, an automatic deduction might short the employee on pay for the extra time worked. Second, employers are required to keep records of the beginning and ending times of meal breaks, and an automatic deduction practice would not relieve the employer of this obligation. An employer that chooses to use an automatic deduction method should be certain to regularly check actual time records for meal breaks to ensure that the deduction is appropriate.

**Q. DOES AN EMPLOYER HAVE ANY LIABILITY WITH RESPECT TO A NONEXEMPT EMPLOYEE WHO WORKS 6.25 HOUR SHIFTS AND HAS SIGNED A MEAL PERIOD WAIVER?**

A. California Labor Code § 512 specifies that 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 break, except that an employee who will work *no more than* six hours in a day may waive the meal

period. An employee who works 6.25 hours is entitled to a meal period, even if the employee has signed a waiver. Therefore, the employer would be liable for an extra hour of pay as a premium for each missed meal period, as required by Labor Code § 226.7.

**Q. REGARDING THE LABOR CODE § 226.7 PREMIUM PAY FOR A MISSED MEAL BREAK, DOES THIS APPLY ONLY IF THE EMPLOYEE WAS PREVENTED FROM TAKING A LUNCH BREAK, AS OPPOSED TO THE EMPLOYEE CHOOSING TO WORK THROUGH THE LUNCH?**

A. The premium pay for a missed break applies when the employer has failed to “provide” the employee with a meal or rest break. Currently, there is uncertainty in California as to what “provide” means -- must the employer *ensure* employees take a break, or does the employer satisfy the law by making the lunch break available even if the employee chooses not to take the break? Until the law is sorted out, the safest practice is to require nonexempt employees to take meal breaks. Otherwise, it could come down to the employer’s word against the employee’s as to the real reason the employee did not take a lunch break. For example, the employee could argue that a supervisor asked him or her to work through lunch or made it impossible for employees to take their breaks by failing to provide adequate work coverage.

**Q. IF A NONEXEMPT EMPLOYEE’S MEAL BREAK IS INTERRUPTED FOR A FEW MINUTES BY A SUPERVISOR, DOES THE EMPLOYER HAVE TO PAY FOR THAT TIME?**

A. The California DLSE requires that meal periods be an *uninterrupted* 30 minutes. Thus, if a supervisor requires an employee to perform any work during a meal break, the DLSE would likely find that a meal break was not provided and that the employer must pay not only for the time worked but also the extra hour of premium pay for the missed break.

**Q. IS THERE A LEGAL REQUIREMENT TO RECORD REST BREAKS?**

A. California does not require employers to record the start and end times of rest breaks. However, many employers do require employees to record their break times so that the employer has documentation to support that rest breaks were taken. Without such documentation, it is an employee’s word against the employer’s word, and administrative agencies and juries are generally more likely to side with employees.

## **FINAL PAYCHECKS**

### **Q. CAN AN EMPLOYER MAIL A FINAL PAYCHECK WHEN TERMINATING AN EMPLOYEE, INCLUDING A TELECOMMUTER, BY PHONE?**

A. California law requires that the final paycheck be made available at the time and place of discharge. Thus, the employer must cut the check and have it ready for the employee to pick up. Mailing the check to the employee, if the employee requests it, is permissible. However, the employer should document that the paycheck was made available to the employee at the time of discharge. What about an employee who works in California for an out-of-area employer, such that it is impossible for the employee to pick up the paycheck? Unfortunately, this situation is not specifically addressed in the law. The safest practice is to obtain the employee's written authorization to deliver the final paycheck overnight, such as by FedEx, and pay the employee through the date that he or she will receive the final paycheck. Alternatively, the employer could FedEx the final paycheck the night before the termination so that it is received on the date of termination.

### **Q. IN CALIFORNIA, CAN A FINAL PAYCHECK BE DIRECT DEPOSITED ON THE DAY OF DISCHARGE?**

A. California Labor Code § 213(d) permits an employer to pay final wages by direct deposit provided the employee has authorized direct deposit. In addition, the statute makes clear that the employer still must comply with the timing requirements for final paychecks.

### **Q. DOES PAY FOR AN UNUSED FLOATING HOLIDAY HAVE TO BE INCLUDED IN A FINAL PAYCHECK?**

A. The California DLSE takes the position that a floating holiday that can be used for any purpose is akin to an extra vacation day. Therefore, an unused floating holiday, like unused vacation, must be paid out when the employment terminates.

### **Q. CAN THE COST OF AN UNRETURNED UNIFORM BE DEDUCTED FROM AN EMPLOYEE'S FINAL PAYCHECK?**

A. The California Industrial Welfare Commission (IWC) Wage Orders permit an employer to deduct from an employee's final paycheck the cost of unreturned tools, equipment and uniforms, provided the employee has given prior written authorization for the deduction. No deduction is permitted for normal wear and tear.

## **MISCELLANEOUS**

### **Q. DO THE CAUTIONS AGAINST PERMITTING NONEXEMPT EMPLOYEES TO USE BLACKBERRIES AFTER HOURS ALSO APPLY TO CELL PHONES (THAT IS, ANSWERING OR MAKING WORK-RELATED CALLS AFTER HOURS)?**

A. When nonexempt employees use PDAs, laptops, cell phones or similar devices after hours to check work email or voicemail, make calls or send text messages, the time is compensable. To avoid liability, including for overtime, the best practice is not to issue such devices to nonexempt employees. On the other hand, if the employer does issue these devices to nonexempt employees, a policy should be in place prohibiting them from working after hours and imposing disciplinary consequences for violations of the policy. The employer also should have policies requiring nonexempt employees to record *all* time worked.

### **Q. MUST COMMISSIONS BE INCLUDED IN DETERMINING THE REGULAR RATE FOR PURPOSES OF OVERTIME COMPENSATION?**

A. An employee's regular rate of pay includes his or her base pay, as well as commissions and most bonuses. For each overtime hour worked, nonexempt employees must be paid 1.5 times (or 2 times, in some cases) the regular rate of pay.

### **Q. ARE EMPLOYERS REQUIRED TO PROVIDE LABOR LAW WORKPLACE POSTERS FOR A TELECOMMUTER'S HOME OFFICE?**

A. Most California and federal provisions requiring workplace postings specify that the notices must be posted where they can easily be seen by employees. While there are no specific mandates requiring separate postings at a telecommuter's place of work, the safest practice is to provide telecommuters who do not frequent the main office with a set of required workplace postings, and to document that the postings were provided.

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