

Question & Answer Summary

January 21, 2010 Webinar

Wage and Hour Update, Part 1: Avoiding Headaches and Legal Claims, from Hire through Termination

On January 21, 2010, Miller Law Group presented part one of our two-part Wage and Hour Update webinar series. We examined legal requirements and recent developments that impact a range of wage and hour issues including bonus and overtime calculations, “hours worked” problems, vacation and PTO policy traps, managing furloughs and partial day absences for exempt employees, and more. The following are answers to frequently asked questions by webinar attendees.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

Q. CAN AN EMPLOYER ALLOW EMPLOYEES TO USE ACCRUED VACATION TIME ONLY DURING CERTAIN TIMES OF THE YEAR?

A. Generally, yes. Employers have a right to control when vacation can be taken and the amount of vacation that may be taken at any particular time, provided such restrictions are spelled out in the employer’s vacation policy. Importantly, however, California employers cannot force employees to use vacation or forfeit it. “Use it or lose it” policies are not permissible in California.

Q. CAN AN EMPLOYER LIMIT HOW MUCH VACATION EMPLOYEES CAN CARRY OVER FROM YEAR TO YEAR?

A. Although use it or lose it policies are illegal, the California Division of Labor Standards Enforcement (DLSE) does permit employers to place a cap on the amount of vacation employees may accrue. According to current DLSE guidance, a vacation accrual cap is acceptable so long as the time period involved for taking vacation is “reasonable.” Some years ago, the DLSE issued an Opinion Letter taking the position that “reasonable” meant a worker had to have at least *nine months* (or .75 of a year) after the accrual of vacation within which to take the vacation before a cap is effective; thus, a cap had to be set at no less than 1.75 times the employee’s annual vacation accrual. The Opinion Letter was subsequently withdrawn, but it does shed some light as to how the DLSE might evaluate the reasonableness of a vacation accrual cap.

Q. MUST A VACATION ACCRUAL CAP INCREASE ALONG WITH AN EMPLOYEE'S INCREASED ENTITLEMENT TO VACATION?

A. Yes. For example, assume that an employer has a policy that allows employees to accrue 10 vacation days in the first four years of employment and 20 days starting at five years of employment. Also assume that the employer has an accrual cap of 1.75 times the annual accrual. The maximum vacation accrual for employees during their first four years of employment would be 17.5 days of vacation (1.75 x 10 days); after five years of employment, when the employee becomes eligible for 20 days of vacation, the maximum accrual increases to 35 days (1.75 x 20 days).

Q. CAN AN EMPLOYER CONTINUE TO IMPOSE A VACATION ACCRUAL CAP EVEN WHEN AN EMPLOYEE IS NEARING THE LIMIT OF THE CAP AND REQUESTS VACATION THAT MANAGEMENT CANNOT APPROVE DUE TO STAFFING LEVELS?

A. Yes. Even if the employee's vacation accrual has reached the cap, and the employee's request to schedule vacation is denied for appropriate reasons and consistent with the employer's policies (staffing levels, business needs, etc.), the accrual cap need not be modified. Keep in mind, however, that it is important to make clear in the vacation policy the factors the company considers when granting and denying vacation requests.

Q. CAN AN EMPLOYER REQUIRE EMPLOYEES TO USE VACATION TIME IF THEY HAVE EXHAUSTED SICK HOURS?

A. Generally, yes. An employer can deduct vacation time from an employee's vacation accrual to cover absences due to illness after the employee has used all available sick hours, provided that the employer has proper policies in place notifying employees (whether exempt or nonexempt) of this procedure. Note, however, that there are some types of absences for which an employer cannot require employees to use vacation time, such as for California pregnancy disability leave.

Q. IN CALIFORNIA, CAN AN EMPLOYER MAKE A DEDUCTION FROM AN EMPLOYEE'S FINAL PAYCHECK TO RECOVER ADVANCED VACATION TIME?

A. The practice of advancing vacation is risky because if an employee quits or is discharged before the advanced vacation is earned back, the DLSE takes the position that the advanced amount is like any other debt and the employer cannot use self help to recoup it by simply

deducting the amount from the employee's final paycheck. In this situation, the employer could ask the employee to repay the amount, or the employer might have to use other legal channels to recover the debt.

Q. DO WE NEED TO PAY OUT AN UNUSED "PERSONAL DAY" OR "BIRTHDAY" HOLIDAY UPON AN EMPLOYEE'S SEPARATION, EVEN IF WE HAVE A SEPARATE VACATION POLICY?

A. Generally, yes. In California, a "personal holiday" or "floating holiday" policy that allows employees to take paid days off for whatever purpose they wish must be treated the same as vacation, and accrued unused days must be paid out upon termination. Employers can also impose a cap on the number of personal or floating holidays that can accrue, in the same manner as it can establish such a cap on vacation accruals. Similarly, if the "birthday" holiday allows employees to take any day off (like vacation), then it too will be treated like a vacation day. Conversely, if, a "birthday" holiday policy requires employees to use the birthday holiday *on the employee's birthday* (or by the following pay period), the DLSE does not consider it the same as vacation, and it need not be paid out at separation.

Q. DO MEAL PERIOD REQUIREMENTS APPLY TO EXEMPT EMPLOYEES?

A. The DLSE does not enforce meal and rest period requirements with respect to employees who are properly classified as exempt from overtime.

Q. ARE EMPLOYERS REQUIRED TO ALLOW EMPLOYEES TO LEAVE THE WORKPLACE DURING MEAL PERIODS?

A. In California, an employer can require employees to remain on its premises during meal periods. However, if this occurs, the meal period must be paid because employees are denied time for their own purposes and in effect remain under the employer's control (even if employees are relieved of all work duties during the meal break). Thus, in California, such time is considered "hours worked" and must be paid. Note that if employees are required to eat on the employer's premises, a suitable place for that purpose must be designated. For most employers, "suitable" means a sheltered place with facilities available for securing, heating and consuming food and drink.

Q. IF NON-EXEMPT EMPLOYEES ARE REQUIRED TO ATTEND A LUNCH MEETING, ARE THEY ENTITLED TO A MEAL BREAK FOLLOWING THE MEETING?

A. Yes. Non-exempt employees must be relieved of all work duties during their meal break. If they are required to attend a lunch meeting, even if food is provided, they are not considered to have been relieved of all duties. The employer must pay for the time spent in the meeting and must provide a meal break either before or after the meeting. If no meal break is provided, the employer must also pay a premium for the missed break, equal to one-hour's pay at the employee's regular rate of pay.

Q. WHAT DOES CALIFORNIA LAW REQUIRE FOR REST BREAKS FOR NON-EXEMPT EMPLOYEES?

A. Generally, employees covered by the rest period provisions in California must be provided with a net 10-minute paid rest period for every four hours worked or major fraction thereof. To the extent practicable, the rest period should be in the middle of the work period. For each day on which a rest break is missed, the employer must pay the employee a premium for the missed break, equal to one hour of pay.

Q. IF AN EMPLOYER DEDUCTS PERSONAL LEAVE TIME FOR AN EXEMPT EMPLOYEE DUE TO A PARTIAL DAY ABSENCE, MUST THE EMPLOYER PAY ADDITIONAL SALARY FOR ANY ADDITIONAL HOURS WORKED ANOTHER DAY BY THAT EXEMPT EMPLOYEE?

A. Generally, an exempt employee must receive his or her full salary for any week in which the employee performs any work, without regard to the number of days or hours worked. Thus, employers need not, and should not, pay an exempt employee additional wages solely because the exempt employee worked longer hours than usual on any particular day.

Q. IF A COMPANY HAS A POLICY OF A \$10 MAXIMUM FOR BUSINESS MEAL REIMBURSEMENT, BUT AN EMPLOYEE SPENT \$12 FOR A MEAL, IS THE COMPANY REQUIRED TO REIMBURSE THE FULL \$12?

A. Yes. California Labor Code section 2802 requires employers to reimburse employees for all expenses incurred in performing duties or in direct consequence of those duties. Thus, if an employee spends \$12 during a business lunch, the employer must reimburse the employee the full amount. The employer, however, may take necessary disciplinary action against the

employee for violating the business meal policy, provided that the policy is clear that spending more than the maximum amount may result in disciplinary action.

Q. IN CALIFORNIA, CAN EMPLOYERS REQUIRE THEIR EMPLOYEES TO PAY FOR UNIFORM CLEANING AND MAINTENANCE COSTS?

A. Generally, when a California employer requires its employees to wear uniforms, the employer must provide and maintain the uniform. Employees may be required to maintain employer-furnished uniforms only when the uniforms require minimal time for care (such as uniforms made of material requiring only washing and tumble or drip drying). If the uniform requires more care - such as dry cleaning, special laundering for heavy soil, or repairs - the employer must do it or must provide employees with a maintenance allowance or reimbursement for maintenance costs.

For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call 415-464-4300.

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