

## Wage and Hour Laws Redux

by D. Gregory Valenza

One thing is clear about California wage and hour laws: The rules governing law firms (and all businesses) in California are too numerous to be summarized in just one column. The first installment on this topic ran on July 27, 2007 and is available online at [www.dailyjournal.com](http://www.dailyjournal.com). In that piece, I discussed potential pitfalls, such as mis-classification of employees as independent contractors or "exempt" employees, minimum wage and overtime laws, independent contractor status, exemptions from overtime, payroll practices and deductions from paychecks. If those topics are not complex and confusing enough, there are many others applicable to California employees.

### Sickness, Breaks and Rental Cars

Employers must provide non-exempt employees with adequate meal periods and rest breaks as prescribed by statute and in the applicable Wage Order. If an employee must work through a meal period, cut it short or take the meal period late (after the end of the fifth hour of work), an extra hour of pay is due. The law requires a second meal period after 10 hours of work, which can be waived under limited circumstances. Paid 10-minute rest periods have to be "authorized and permitted." Preventing an employee from taking a rest period within the middle of every four-hour work period also costs an extra hour's pay. Employers must provide adequate facilities for employees to take their rest breaks and meal periods.

Employers do not have to pay vacation, but once given, such benefits may not be

forfeited and unused amounts must be paid out at the time of termination (for any reason) at the final rate of pay. Paid time off, floating holidays and personal days are treated like vacation in California. Other issues that arise with vacation pay include caps on earnings, as well as accrual that does not begin until the employee completes a period of service (such as 90 days or a year). These variations may or may not be legal, depending on how they are drafted. Paid days off that require a condition to occur, such as sick pay or holiday pay, need not be paid out at the time of termination. In San Francisco, eligible employees must earn sick pay at the rate of one hour for every 30 hours worked, although the sick pay benefit need not be paid out at the time of termination.

Under Labor Code Section 2802, employers must reimburse employees for all expenses necessarily incurred. According to the Division of Labor Standards Enforcement Act, the employer need not pay for an attorney's bar dues or MCLE (or even dry cleaning), which are considered personal to the employee. But if the law firm requires associates to use a laptop or cell phone, then the firm must pay for them. Employees who travel must be reimbursed for reasonable expenses, including for the use of a personal automobile. Although not a legal requirement, the IRS reimbursement rate has been deemed by the DLSE to be a reasonable approximation. The firm, of course, may set guidelines regarding acceptable expenses so that employees do not ask for reimbursement for lavish hotel stays or garish meals.

Non-exempt employees must complete accurate time sheets that specify starting and ending times, as well as the time taken for mandated meal periods. Rest periods are paid and need not be recorded. Employers must keep payroll records for at least three years. Employees are entitled to receive a copy of those records within 21 days of the request. The employee is also entitled to a copy of the "instruments" of employment (typically interpreted as whatever the employee signs regarding their employment). Employees may inspect their personnel files as defined in Labor Code Section 1198.5 at reasonable times. Although not in the statute, DLSE says the Section 1198.5 provision applies to former employees as well.

### Notice Thicket

Many of the issues presented in these articles are addressed in an Industrial Welfare Commission Wage Order. One or more of the 17 wage orders applies to every business in California. The wage orders are available online from the Division of Labor Standards Enforcement at [www.dir.ca.gov/iwc](http://www.dir.ca.gov/iwc) and must be displayed with the other required workplace posters discussed below. Wage Order 4 will apply to most every law firm. The Wage Order contains many of the compensation and recordkeeping requirements applicable to the business. However, there are additional germane provisions in the Labor Code, as well as practices detailed in the DLSE's Enforcement and Interpretations Manual, which can be downloaded at [www.dir.ca.gov/dlse](http://www.dir.ca.gov/dlse).

In addition to the Wage Order, employers must post myriad notices where employees can see them. The ones relevant to wage and hour law include federal and state minimum wage posters, the payday notice and the San Francisco minimum wage and sick pay posters, if applicable. There are others unrelated to wage and hour law (ranging from information about workers' compensation to the Polygraph Protection Act to the whistleblower statute, to prohibitions against discrimination and harassment, family leave, pregnancy, disability leave, etc.). There is even a notice regarding voting time that must be posted prior to a statewide election. You should note that the federal minimum wage poster was updated as of July 24, 2007. If your office has not yet replaced the old poster, you can download it from the U.S. Department of Labor's Web site at [www.dol.gov](http://www.dol.gov). The employer must also hand out a number of pamphlets and notices. These include pamphlets from the Employment Development Department regarding unemployment, state disability insurance and paid family leave benefits available from the state. The employer must also give the employee a "notice of change in relationship" form at the time of termination, and in some other circumstances.

Speaking of termination, final pay, including unused vacation/personal/paid time off pay, is due on the date of termination,

except if the employee quits without giving at least 72 hours notice. Failure to pay on time results in a penalty of one day's pay for each day that the check is late, up to a maximum of 30 days. These penalties may apply if employees are not paid the extra hour's pay for non-compliant meal periods and rest breaks, or if bonuses, commissions and vacation pay are not timely paid. The final check must include the deductions statement required by Labor Code Section 226(a). Some unpaid bonuses may be due a terminated employee, depending on how the plan is written and the particular eligibility and earning criteria. The Labor Code and Wage Order contain costly and numerous penalties for violations of these and other provisions. Many of these accrue per pay period, and penalties may be aggregated.

Finally, the Labor Code provides aggrieved employees with a streamlined way to bring claims against employers for wage and hour violations. Employees may file a simple complaint with the Division of Labor Standards Enforcement. The DLSE assigns a Deputy Labor Commissioner to conduct an informal hearing. Employees frequently are not represented by counsel. Deputies often adhere to the guidelines and opinion letters contained in the DLSE's Enforcement and Interpretations Manual, which is available online. These resources are not binding, however, and

deputies sometimes depart from them and dispense their own brand of wage and hour justice. An employer on the wrong end of the Labor Commissioner's decision may appeal "de novo" to the Superior Court, which is essentially a mini-trial before a judge. The claimant may add claims not litigated before the DLSE. To access the court, the employer-appellant must post a surety bond. The DLSE's trial attorneys may represent employees who prevailed at the administrative agency. And if the employer loses in court, the employee is entitled to attorneys' fees, even if the DLSE represents the worker.

This two-article series covers only a fraction of the wage and hour issues that may arise in law firms. The potential liabilities can add up quickly in this area of employment law, and violations are not always obvious. To ensure legal compliance and protect the firm's bottom line, managing partners must ensure their offices' practices are in keeping with the many applicable laws and rules.

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