

American Payroll Association

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2009 Payroll Law Update and Issues in a Depressed Economy

Presented by:

Jeanine DeBacker, Esq.
JDebacker@wendel.com

David Goldman, Esq.
DGoldman@wendel.com

Wendel, Rosen, Black & Dean LLP
1111 Broadway, 24th Floor
Oakland, California
(510) 834-6600
www.wendel.com



Agenda

- Payroll Issues
- Wage and Hour Issues
- Meal and Rest Breaks
- Lay-offs
- Expense Reimbursement
- Travel Time
- New Laws and Regulations

Payroll Issues

Payroll Requirements

Any payroll order, check, draft or other acknowledgment of indebtedness must:

1. Be negotiable and payable in cash,
2. On demand, without discount,
3. At an established place of business in California, whose name and address must appear on the instrument, and
4. Must be sufficient funds or credit for payment of the funds from the date of issuance and at least 30 days thereafter.

Payroll Requirements

- If payroll funds are to be drawn from a bank, the bank's address need not appear on the instrument so long as the Employee can cash it at any of the bank's branches.

Direct Deposits

- As an alternative to the requirements of the Labor Code §212, payroll can be made through direct deposit.
 1. Must be a bank, savings and loan, or credit union of the Employee's choice,
 2. With a place of business "located in the state,"
 3. Employee must voluntarily authorize direct deposit, and
 4. Final paycheck may be direct deposited, if previously authorized by Employee.
Labor Code §213(d).

Use of Payroll Cards

- Can Payroll Companies use “payroll cards” to pay Employees?
 - **Payroll Card** – Stored value or prepaid card which contains an amount of preloaded value.
 - **“Payroll Card Account”** is an account that is established through an Employer to which EFT of the consumer’s wages, salary or commissions is made on a recurring basis.

Payroll Card Regulation

- Electronic Fund Transfer Act (EFTA) establishes rights and obligations of participants and consumers involved in electronic fund transfers.
- EFTA is administered by the Federal Reserve Board, through Regulation E.
- Effective July 1, 2007, “Payroll Cards” were made subject to the EFTA.

Payroll Card Programs

- Payroll Card programs utilize **both** a direct deposit of wages **and** a means of access to those wages using an electronic card.

Labor Commissioner Approves Payroll Cards

- In July 2008, the Labor Commissioner determined that Payroll Cards comply with California law, if properly constructed.
 - Must be voluntary. Employee must opt-in to a Payroll Card program, in which Employer direct deposits payroll into an Employee's account at the Program bank.
 - Employee must have option to have their pay direct deposited at their own bank, savings and loan or credit union.

Labor Commissioner Approves Payroll Cards

- The deposit need not be made in California; the financial institution simply has to have a place of business in California.
- Access to cash through a VISA member financial institution and ATMs throughout California is a sufficient presence in California.

Labor Commissioner Approves Payroll Cards

- Immediate access to wages must exist on the scheduled payday, without charge.
- Employers must still distribute itemized wage statements (Paystubs).

Is This Legal?

Payrolls-R-Us would like to start a payroll distribution service where Employers deposit their payroll into a pooled account at a federal savings and loan. Employees receive a supply of blank checks issued by the S&L.

- ❑ On payday, Employee calls Payrolls-R-Us at a toll-free number to obtain an authorization code. The code is placed on the face of the check by the Employee and the check is written to him or herself.
- ❑ Check could be cashed, without charge, at a designated check cashing location, or a Walmart location, in California, either location would be designated on the check.
- ❑ Employees would not be required to use Payrolls-R-Us.
- ❑ Is this legal?

Money Network Checks

- In July 2008, Labor Commissioner said it is legal.
- Program is voluntary.
- Check allows Employee to draw full wages, in cash, on demand, without discount.
 - Check is payable at an established place of business in the state, with the name and address on the check (at a Check Cashing location or any Walmart location in California).
 - Funds are immediately transferred from pooled account to a bank owned clearing account. Funds are fully available on payday and for at least 30 days thereafter.
- Labor Code §213 is not the **sole** method of payroll distribution involving bank deposits, but program must comply with Section 212.

Wage Statements (Labor Code Section 226)

- Name of Employee
- Last 4 numbers of Social Security only, or other Employee identification
- Gross and net wages earned
- All deductions
- Dates of payroll period
- Name and address of Employer
- Total hours worked
- All applicable hourly rates, and hours worked at each rate
- Number of piece-rate units earned and applicable rate

Recordkeeping Requirements

- Wage statements must be kept 3 years
 - Place of employment, or
 - Central location within California
- Current and former Employees have right to inspect itemized wage statements.
 - Must comply “as soon as practicable” and no later than 21 days after request to inspect
 - Employers may designate a person to whom such inspection requests must be made
- Employer may charge for actual cost of copies made.

Wage Statement Penalties

- Failure to keep proper itemizations
 - Knowing and intentional failure required
 - Greater of
 - Actual damages, or
 - \$50 for initial pay period and \$100 for each subsequent pay period **per Employee** up to \$4,000
- Failure to allow inspection or copying
— \$750 penalty

Paper Required?

- Labor Code §226(a) requires Employers, semi-monthly or at the time of payment of wages, to issue as “a detachable part of the check, draft or a voucher,” an accurate itemized statement in writing of wages paid and deductions taken.
- The deductions shall be “recorded in ink or other indelible form.”
- Electronic wage statements are allowed. Labor Commissioner Opinion Letter July 6, 2006.

Requirements Of Electronic Wage Statements

1. Employee must be able to elect to receive paper wage statements at any time.
2. Must contain all information required by Section 226(a) and be available on a secure website by pay day.
3. Access to website must be controlled by unique Employee identification numbers and PINs.
 - Website must be protected by firewall and available at all times (except for down time caused by system errors or maintenance requirements).

Requirements Of Electronic Wage Statements

4. Employees must be able to access their records through their own PC or Company computers.
5. Employees must be able to print copies of their electronic wage statements at work on printers close to them. No charge to print electronic wage statements.
6. Employees must also be able to access their records over the Internet and print on their own printers.

Requirements Of Electronic Wage Statements

7. Wage statements must be maintained electronically for at least 3 years and be available to active Employees.
 - Former Employees must be provided paper copies at no charge upon request.
8. Compliance with these “guidelines” do not establish a “safe harbor” from private actions brought by Employees or others.

Electronic Timesheets

We-R-Fine Company uses a bi-weekly pay period and routinely pays its Employees for 80 hours of work just prior to the end of the two week pay period. After wages are paid, Employees submit electronic timesheets reporting the actual hours they worked. If Employee took unpaid time during the pay period, overpayment of wages is reconciled in the Employee's next paycheck.

Since the Employee submitted an electronic timesheet stating that unpaid time was taken, can WRF deduct for the overpayment in the next payroll check?

Overpayment of Wages

- To encourage WRF to pay a full two weeks wages timely, Employees signed a written authorization allowing WRF to deduct overpayments in the next payroll cycle?

Would such deductions be legal?

- What if the Employee took unpaid time off in the pay period and quit after receiving his final paycheck. How could WRF recover the overpayment of wages?

Overpayment of Wages

- Labor Code §221 makes it illegal for an Employer to collect any part of previously paid wages. Section 224 allows withholdings for:
 - ❑ State or Federally required or authorized deductions, such as taxes;
 - ❑ Deductions for insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage that are authorized in writing by the Employee, and
 - ❑ Deductions to cover health and welfare, or pension plan contributions.

Overpayment of Wages

- Employers cannot set-off debts owing from an Employee against wages due on the Employee's final paycheck. *Barnhill v. Saunders*, California Court of Appeal.
 - Deductions made by Employer against final paychecks would create liability under Labor Code §203 for up to 30 days of wages.

Overpayment of Wages

- Periodic deductions from wages, authorized in writing by an Employee, to recoup predictable, expected overpayments that occur as a consequence of an Employer's payroll practice are legal.

Labor Commissioner Letter Opinion,
November 25, 2008.

- The Key is Employee written authorization.
- Section 224 permits a deduction “not amounting to a rebate or deduction from the standard wage. . . that is authorized in writing by the Employee.”

Overpayment of Wages

- Cannot set-off below the minimum wage.
- Does not reduce the “standard wage.”
Employee receives full expected wages for time worked, less a deduction permitted by Section 224.

Recoupment of Unearned Commissions

- In *Steinhebel v. Los Angeles Times Communication*, the Court of Appeal held that an Employee “charge back” of commissions advanced for the sale of newspaper subscriptions that were cancelled within 28 days was not illegal because Employee signed agreement authorizing the “charge back.”
- Considered an “advance,” not payment of wages, based on commissions yet to be fully earned.

Wage & Hour Issues

Meal and Rest Periods

“To Ensure or Provide” – That is the Question!

Rest Periods

IWC Wage Orders, Section 12:

- Every employer shall **authorize and permit** employees to take rest periods which, *insofar as practicable*, shall be in the middle of each work period.
- The authorized rest period shall be based on the total hours worked daily at the rate of 10 minutes net rest time per 4 hours, or major fraction thereof.
- A rest period need not be authorized for employees whose total daily work time is less than 3½ hours.

Meal Periods

- Labor Code Section 512(a):
 - An employer shall not employ an employee for a work period more than 5 hours per day **without providing** an employee with a meal period of not less than 30 minutes.
- IWC Wage Order, Section 11 provides similar language:
 - No employer shall employ any person for a work period of more than 5 hours without a meal period of not less than 30 minutes.

Meal/Rest Periods

Labor Code Section 226.7

- No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the IWC.
- If an employer fails **to provide** an employee a meal period or rest period, the employer shall pay the employee **one additional hour of pay** at the employee's regular rate for each work day the meal or rest period is not provided.

Meal Periods – What does “Provide” mean?

- “Employers have an affirmative obligation to **ensure** that workers are actually relieved of all duty” during a meal and rest period. ***Cicairos v. Summit Logistics, Inc.***, 2005 Court of Appeal decision.
- No employee shall work for a period of more than 5 hours without a meal period, which shall not be less than 30 minutes.
- If the employee took the first meal period in the 6th hour, or if the meal was less than 30 minutes, the employer would owe the employee one hour of premium pay.

Labor Commissioner Enforcement Manual, 45.2.9.

Meal Periods

Brinker Restaurant Corp. v. Superior Court - July 2008

- Restaurant workers were required to take their meal period within the first hour of work shift and rarely took a rest period in the middle of each 4 hour work period.
- Contended employers must **ensure** employees take their meal periods and entitled to a meal period for every 5 hours worked (i.e., a “rolling 5 hour period of time”).
- Alleged a lunch period should not precede the first rest period (“early lunching”) and rest periods should have been in the middle of each 4 hour work period.
- Alleged violations of Labor Code 226.7 and 512, as well as Sections 11 and 12 of Wage Order.

Meal Periods – Brinker Court

- The Trial Court agreed with the employees . . . But Brinker court of appeal reversed.
- No obligation to provide a meal period for every 5 hours of work.
 - Labor Code §512(a) only requires a first meal period for every “work period more than 5 hours **per day**.”
 - No “rolling 5 hour work period.”
- No need to ensure
 - Employers need only provide, not ensure, meal periods.
 - Cannot impede or discourage employees from taking meal periods.

Supreme Court Accepts Brinker Case

- Review of the *Brinker* decision was granted by Supreme Court on October 22, 2008.
- Can no longer be relied upon or cited as legal precedent.

Things To Do

- Make sure Handbooks reinforce right to take meal and rest periods.
- Instruct supervisors to schedule and post meal and rest periods for employees.
- Make record of meal periods taken.
- Discuss meal and rest periods with employees during periodic evaluations.

Meal Periods

- An Employer has a required training program during the lunch hour and pays for catered food to be provided to its Employees. Employees just have to listen and can eat lunch. Must the Employer pay Employees during lunch?
- **Answer:** Meal periods must be “duty free.” Must pay the Employees for their time at the training. Considered part of time worked for overtime purposes. Employer is required to pay the Employee one (1) hour of **additional** pay.

Overtime Owed?

Security Company pays its Employees 1½ times the Employee's regular rate of pay for each hour worked over 8 hours a day and 40 hours a week. Company pays Employees 1½ times premium pay when they work on holidays.

Missy worked 12 hours on Monday, Labor Day, and 12 hours on both Tuesday and Wednesday, and 8 hours each on Thursday, Friday and Saturday for a total of 60 hours. Missy received overtime pay for 4 hours on Tuesday and 4 hours on Wednesday, and for 12 hours on Labor Day. But Missy contends her "regular rate" of pay *for holidays*, was time and half, and therefore she should be paid 1½ times her holiday pay rate for the hours she worked on Labor Day.

Is Missy right? How much is the Company obligated to pay?

Advanced-Tech Security Services v. Superior Court (June 3, 2008)

- Security guard filed a class action for violation of overtime regulations
- No violation of Labor Code Section 510(a).
- Company paid Employee no less than 1½ times the Employee's regular rate of pay. Nothing in section 510(a) prohibits an Employer from crediting "premium" pay for a holiday against "overtime" pay.
- Premium holiday pay is not considered a "regular rate" of pay. Under the FLSA, "regular rate" of pay means all remuneration for employment **excluding** "extra compensation paid for work by Employees on Saturdays, Sundays or holidays."

What Hours are Considered Hours Worked?

Married couple manages apartment complex for the elderly and is required to live on premises. They work a regular day, but must also be on-call during evening hours to respond to emergencies.

“Hour worked” means the time during which an Employee is “subject to the control of an Employer.”

They are allowed to stay in their apartment and sleep, eat or do whatever they wanted when on-call. But, they cannot walk around the apartment complex or otherwise be outside of the range of their telephone or alarm.

If the Employees cannot leave their own apartment and are required to be on-call for the elderly residents, should they be paid while they are “on-call”?

On-Call - Hours Worked?

What if you are told that the elderly residents regularly call the property managers about an “emergency” once or twice an evening?

On-Call – Hours Worked?

Last year, California court of appeal held:

“Employees who are required to reside where they work are entitled to be compensated for time spent performing their assigned duties; they are not entitled to be compensated for time simply being available to perform those duties.”

Lay-offs

Reducing Pay In Hours For Exempt Employees

The economy has hurt XYZ Auto Supply Company. It decides to have its exempt managers work a 4-day week and be paid 20% less in order to avoid layoffs. The great majority of the managers think this is a fair way to avoid anyone losing their jobs.

Can the Company impose this change?

Will it affect the Employees exempt status?

Requirements For Exempt Status

Executive, administrative and professional exempt Employees must satisfy both the “**salary test**” and the “**job duties test.**”

Employees must receive two times the minimum wage, or \$2,774 per month (rounded up) or \$33,280 per year. Exempt Employees are guaranteed full salary if they work any part of the workweek.

Deductions can be taken from salaries if Employees do not work full days for personal reasons.

An exempt Employee will no longer meet the salary test if deductions are made for absences caused by the Employer. If the Employee is ready, willing and able to work, deductions cannot be made when work is not available.

An Employer has the option of reclassifying an exempt Employee to nonexempt status on a monthly basis.

Options for Reduction of Pay for Exempt Employees

- Unilaterally reduce salary only.
- Convert salaried management Employees to hourly. An Employer has the option of reclassifying an exempt Employee to non-exempt status on a monthly basis.

Work Sharing and Unemployment Insurance

- Offered by the Employment Development Department (“EDD”).
- Employees will receive the percentage of their weekly Unemployment Insurance benefits that equals the percentage of the reduction of normal hours and wages caused by Work Sharing.
- Plan must involve at least two Employees and at least 10% of the work force or work units.
- Must be at least a 10% reduction in both hours worked and wages earned for each participating Employee.
- Work Sharing benefits are charged to an Employer’s reserve account in the same as any other Unemployment Insurance benefit.

Expense Reimbursement

Expense Reimbursement

Fantasy Payroll Co.'s expense reimbursement policy requires Employees to get advance approval of expenses exceeding \$500 and expense reports on a Company form must be submitted within 30 days after the end of each month.

The policy provides that if reasonable documentation for work-related expenses is not submitted within 30 days of the end of the month, Fantasy can deny expense reimbursement requests.

Expense Reimbursement

Johnny Hotshot is a sometimes successful sales person for Fantasy. Hotshot is a nonconformist and does not always follow Company rules, including timely submitting expense reports. Fantasy's bookkeeper regularly asks Hotshot for his expense reports, but rarely receives them.

Hotshot calls his boss and states he is quitting and going to work with Fantasy's direct competitor.

Expense Reimbursement

Four months later, Hotshot sends a copy of his weekly calendar and some receipts seeking thousands of dollars of travel and other expenses. Hotshot claims these expenses were related to his sales efforts while working at Fantasy.

- Must Fantasy pay Hotshot for these expenses?
- Must he submit them within the time limits set by Fantasy's written policy?

Expense Reimbursement

- What if Hotshot resubmits his expense reimbursement request on Company forms?
- What if Hotshot does not submit the expense reimbursement for two years after he quits?
Too little, too late?

Expense Reimbursement

- Employer **must** indemnify an Employee for all “necessary expenditures” incurred by an Employee in direct consequence of the discharge of his or her duties. Labor Code §2802.
- Necessary expenditures includes all “reasonable costs.” Section 2802 does not specify what is “necessary” or “reasonable.”
- Most common examples are mileage, travel and dining expenses. Using the IRS mileage reimbursement rate will be considered reasonable in the absence of contrary evidence.

Travel Time

Travel Time To Alternate Worksites

Jane works at Wonder Company at alternate sites. For 5 days she works in Oakland, where she lives. The following week she works 5 days at the Sacramento office. It takes her 1½ hours each way to drive from Oakland to Sacramento. When she works in Sacramento, Jane drives directly from her home to the Sacramento office.

Jane is provided a Wonder Company car to use for work. She is a nonexempt Employee entitled to receive overtime pay.

Travel Time To Alternate Worksites

Is Jane entitled to be paid when commuting from her home to the Sacramento office?

What if Jane was a carpenter not assigned to a specific work place and routinely is required to travel reasonable distances to different job sites?

Is the carpenter entitled to be paid time traveling from her home to different worksites?

What's An Ordinary Commute?

- Employees normally are not paid for time when they commute from their home to work.
- Must distinguish travel that the Employer specifically compels and controls with an “ordinary commute” that Employees take on their own.

What's An Ordinary Commute?

- If an Employee with a fixed and assigned workplace is required, on a short term basis, to travel anything more than a *de minimis* distance to report to work, other than the Employee's usual workplace, the Employee is entitled to be compensated for additional time.
- This calculation is to be expressed in "time" and not distance.

What's An Ordinary Commute?

- What if an Employee is assigned to a job site for the duration of a project, and thereafter is transferred or assigned to another job site.
- Is that Employee entitled to travel time to the various job sites?

What's An Ordinary Commute?

- If the assignment is for **more than a month**, each of the job sites would be considered “assigned workplaces” for that Employee and are not subject to travel time pay.
- Employees not assigned to a specific workplace and have a **reasonable expectation** they will routinely be required to travel reasonable distances to job sites, are not entitled to be paid for travel time to their worksites.

New Laws and Regulations

COBRA Premium Assistance

- ❑ American Recovery and Reinvestment Act of 2009
- ❑ Premium reductions
- ❑ Additional election opportunities
- ❑ Interaction with CalCOBRA

FMLA Regs. – Intermittent Leave

- Employers must account for FMLA leave in an increment no greater than the shortest period of time used for other forms of leave (and no greater than one hour).
- Employers are not required to account for leave in 6 or 15 minute intervals – even if payroll system is capable of doing it.

Minimum Pay for Exempt Computer Professionals

- Labor Code 515.5 was amended to allow payment to computer professionals on a monthly or annual salary basis. Previously, computer professionals had to earn a minimum hourly rate set by the California Division of Labor Statistics and Research annually and usually adjusted every October.
- For 2009, the minimum salary requirements are \$6,587.50/mo. and \$79,050/yr.
- Exemption is only for overtime, not required meal and rest breaks.

Exemption for Physicians Paid on Hourly Basis

- A licensed physician or surgeon is exempt from overtime while performing such medical duties, if he or she is paid a minimum hourly rate. Effective January 1, 2009, the minimum hourly rate is \$69.13.
- Exemption does not apply to medical interns and residents and physician Employees covered by collective bargaining agreements.

Temporary Employees

Labor Code 201.3

- Wage for Employees of temporary services
Employers shall be paid weekly, or daily if an Employee is assigned to a client on a day-to-day basis or to a client engaged in a trade dispute.
 - Does not apply if an Employee is assigned to a client for over 90 consecutive calendar days, unless the Employer pays Employees weekly anyway.
- Violations can result in civil and criminal penalties.

San Francisco Commuter Benefits

- Employers with 20 or more Employees must provide commuter opportunities to those Employees who work at least 10 hours per workweek within San Francisco by offering:
 - A pretax election up to \$110 per month;
 - An employer-provided transportation pass equal in value to \$45 per month, or reimbursement for one; **or**
 - Employer provided transportation at no cost.
- Twenty Employees, whether full-time, part-time or temporary.
 - Do not all have to work in San Francisco.
 - If any of them works at least 10 hours a week in San Francisco, benefits must be offered to those that do.

San Francisco Health Care Security Ordinance

- In 2006, San Francisco enacted the Health Care Security Ordinance, which requires all private Employers with more than 20 Employees pay an assigned amount toward Employee health care, or pay SF a fee based on the number of Employees and hours worked.
- On September 30, 2008, the U.S. Ninth Circuit of Appeals ruled that the Ordinance was not preempted by ERISA under federal law.
- The legal challenges continue. . .

Wendel, Rosen, Black & Dean LLP

1111 Broadway, 24th Floor

Oakland, CA 94607

Jeanine DeBacker, Esq.

jdebacker@wendel.com

(510) 622-7601

David Goldman, Esq.

dgoldman@wendel.com

(510) 622-7663

