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Protections for Transgender Employees: What California Employers Need to Know

Steven M. Zadravec & Victoria E. Cho

Over the past few years, legal protections of transgender rights have grown increasingly prevalent across the country and, particularly, in California. On a national level, the Equal Employment Opportunity Commission (EEOC) and a few federal circuit courts have determined that transgender employees are protected under Title VII of the Civil Rights Act of 1964.¹ Nonetheless, there are presently no federal laws that explicitly protect employees from workplace discrimination or harassment based on "gender identity." In contrast, California has long advocated for the rights of transgender employees and applicants. Recently, the California Fair Employment and Housing Council (FEHC) responded to the demands for increased protections for transgender individuals, implementing new regulations under the California Fair Employment and

¹ 42 U.S.C. 2000e et seq. *See e.g.* Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (Apr. 12, 2012) (discrimination based on transgender status is sex discrimination in violation of Title VII); Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (Mar. 27, 2015) (denying an employee equal access to a common bathroom corresponding to the employee's gender identity constitutes discrimination on the basis of sex); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (government termination of a transgender person for his or her gender nonconformity is unconstitutional sex discrimination); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (Title VII prohibits discrimination against transgender individuals based on gender stereotyping); Schwenck v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (commenting that the initial approach taken in earlier federal appellate Title VII cases rejecting claims by transgender plaintiffs has been overruled by the language and logic of the *Price Waterhouse* decision).

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The Requirements of California Wage and Hour Law: A Primer

Dale A. Hudson & Irene Scholl-Tatevosyan

Introduction

California employers are unquestionably subject to the most comprehensive and detailed set of wage and hour rules in the country. In addition to federal law, California employers must comply with myriad state-specific wage and hour laws, which has resulted in an epidemic of class-action lawsuits alleging violations of these laws by California employers. Many employers are not even aware of all of the regulatory mandates, creating low-hanging fruit for plaintiffs' attorneys. This article provides an overview of the general California wage and hour rules that apply to companies with employees in California.

The Wage Orders

California wage and hour rules are set forth in the California Labor Code, in 18 "Wage Orders" issued by the California Industrial Welfare Commission (IWC),¹ and in court decisions interpreting these statutes and regulations. California has twelve industry-wide wage orders, five "occupation" wage orders, and a general minimum wage order. Employers are required to post the appropriate wage order(s) where they can be seen by employees, so it is important that the correct wage order be identified and posted. Employers should first determine if an industry wage applies to their business. Generally speaking, if an employer is covered by an industry wage order, such order will apply to all classifications of its employees in the industry, regardless of the work they perform. If no industry order applies, then the employer should determine which occupation order(s) govern their employees. However, there are exceptions to these rules and, in some circumstances, a company's employees may be governed by more than one wage order. The IWC has published a brochure entitled, *Which Wage Order?*, that provides employers with guidance as to which wage order(s) applies to specific businesses.²

The following discussion is limited to the *general* rules as reflected in *most* of the IWC Wage Orders. However, because there are significant variations among the various wage orders, it is important to examine the specific wage order(s) applicable to any specific employer.

Minimum Wage

Employers must pay each non-exempt employee³ not less than the applicable minimum wage for *each hour of work*.⁴ Under California law, an employer may not "average" an employee's compensation over a workday⁵ or workweek⁶ for the purpose of determining minimum wage compliance.⁷ Thus, where employees are paid on a piece-rate or commission basis, they must also receive hourly pay at the minimum wage rate during so-called "non-productive time," i.e., when they are not engaged in activities that enable them to earn piece-rate or commission compensation.⁸ In addition, piece-rate and commission employees must be

³ The tests for exempt and non-exempt employees are set forth in the wage orders and other applicable laws, and are beyond the scope of this article.

⁴ See CAL. LAB. CODE § 1182.12; General Minimum Wage Order; Wage Orders 1–15, secs. 4 and 10; Wage Order 16, secs. 4 and 9; *Armenta v. Osmose, Inc.* 135 Cal. App. 4th 314, 323 (2005).

⁵ A "workday" is a consecutive 24-hour period established by the employer for the purpose of calculating daily overtime. The workday can begin at any time of the day, but it must begin at the same time each calendar day. CAL. LAB. CODE § 500 (a); section 2.T. of most wage orders; Dep't of Lab. Standards Enforcement, DLSE Enforcement Policies and Interpretations Manual ("DLSE Enforce. Pol. & Interp. Man.") § 48.1.2.

⁶ A "workweek" is a fixed and recurring period of seven consecutive 24-hour periods established by the employer for wage calculation purposes. The workweek may begin at any hour on any day, so long as it is fixed and regularly recurring. CAL. LAB. CODE § 500 (b); section 2.T. of most wage orders; DLSE Enforce. Pol. & Interp. Man., *supra* note 5, at § 48.1.3.

⁷ *Armenta*, 135 Cal. App. 4th at 323.

⁸ CAL. LAB. CODE §§ 221–223, 226.2; *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013).

¹ General Minimum Wage Order and Industry and Occupation Wage Orders 1–17. Cal. Code Regs. tit. 8 §§ 11000–11170. These wage orders are available at the IWC website at <http://www.dir.ca.gov/Iwc/WageOrderIndustries.htm>.

² See <http://www.dir.ca.gov/dlse/WhichIWCOOrderClassifications.pdf>.

paid separate hourly compensation during rest periods.⁹ Thus, under California law, a minimum wage violation may occur even if the employee's total compensation for the workweek or weekday, when divided by his or her total hours, equals or exceeds the minimum wage.

For California employers with 26 or more employees, the minimum wage increased from \$10.00 per hour to \$10.50 per hour effective January 1, 2017.¹⁰ This increase will be delayed one year for employers with 25 or fewer employees. Annual adjustments going up to \$15.00 per hour are scheduled thereafter through January 2022 for employers with over 25 employees and January 2023 for employers with fewer than 25 employees.¹¹ Some cities and counties in California impose a higher minimum wage.

Overtime Premiums

Most non-exempt employees¹² are entitled to overtime premiums in the following circumstances:

Time and a half pay for:

- Hours worked in excess of eight hours in one workday;
- The first eight hours worked on the seventh consecutive day of work in any one workweek; and
- Hours worked in excess of 40 straight-time hours in any one workweek.¹³

Double pay for:

- Hours worked in excess of 12 hours in one day; and
- Hours worked in excess of eight hours on the seventh consecutive day of a workweek.¹⁴

In calculating overtime premiums, employers calculate both daily overtime and weekly overtime, and pay the greater of the two.¹⁵

Several exceptions exist which are beyond the scope of this summary. For example, there is an exemption for employees who are governed by a collective bargaining agreement that provides premium wage rates for all overtime hours worked and a regular hourly rate of pay of not less than thirty percent more than the state minimum wage.¹⁶ In addition, employers can avoid paying daily overtime for shifts not exceeding ten hours by adopting an "alternative workweek" for all or some of its employees.¹⁷ The law mandates specific procedures which must be followed in adopting such a workweek, including a secret ballot election.¹⁸

Meal Periods

As a general rule, all non-exempt employees must be provided with a 30-minute, uninterrupted off-duty meal period (which may be unpaid) for each work period of more than five hours. If the employee works six or fewer

⁹ CAL. LAB. CODE § 226.2; *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013). (See section on "Rest Periods," *infra*, for specific requirements.)

¹⁰ CAL. LAB. CODE § 1182.12; General Minimum Wage Order. The federal minimum wage is \$7.25 effective July 24, 2009, subject to certain exceptions. 29 U.S.C. § 206(a)(1). Compliance with the federal minimum wage is determined by dividing the employee's compensation for a workweek by the total number of hours worked; this method is not permitted under California law. See *Armenta*, 135 Cal. App. 4th at 323.

¹¹ CAL. LAB. CODE § 1182.12.

¹² Employees governed by Wage Order 15, applicable to agricultural employees, are subject to different rules. Beginning January 1, 2019, a new California law will phase-in more stringent overtime rules for agricultural workers over a four year period. Assem. B. No. 1066, 2015–2016 Reg. Sess. (Cal. 2016).

¹³ Federal law also requires time and one-half pay for hours worked in excess of 40 hours in a workweek, but prescribes no daily overtime rules. 29 U.S.C. § 207(a)(1). This requirement normally has no practical impact on California employers, who are required to comply with the stricter California state rules. However, violation of federal minimum wage law can give rise to additional penalties. 29 U.S.C. § 260.

¹⁴ CAL. LAB. CODE § 510; see sec. 3 of most wage orders.

¹⁵ 29 U.S.C. § 218(a); 29 C.F.R. § 778.5; *Aguilar v. Ass'n for Retarded Citizens*, 234 Cal. App. 3d 21, 34–35 (1991); *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1426–27 (9th Cir. 1990). For purposes of calculating overtime, the employer must pay 1.5 times or double the employee's "regular rate of pay," which encompasses compensation beyond just an employee's hourly rate. CAL. LAB. CODE § 510. The regular rate includes most "remuneration for employment" paid to an employee, such as piece-rate pay, commissions, and non-discretionary bonuses. See *Huntington Mem'l Hosp. v. Super. Ct.*, 131 Cal. App. 4th 893 (2005); *Marin v. Costco Wholesale Corp.*, 169 Cal. App. 4th 804 (2008). However, items such as discretionary tips, bonuses, holiday gifts, and stock options need not be included in the regular rate. The *DLSE Enforcement Policies and Interpretations Manual* specifies which forms of compensation should be included, and excluded, in calculating the regular rate. DLSE Enforce. Pol. & Interp. Man., *supra* note 5, at §§ 49-1–49-3.

¹⁶ CAL. LAB. CODE § 514; see sec. 3 of most wage orders.

¹⁷ CAL. LAB. CODE § 511.

¹⁸ DLSE Regulations provide detailed guidance for implementing an alternative workweek. See sec. 3(B) of most wage orders.

hours total in the work period, the meal period may be “waived by mutual consent of the employer and the employee.”¹⁹

If an employee works more than 10 hours in a work period, the employee is entitled to two uninterrupted, off-duty meal periods of at least 30 minutes each.²⁰ If the work period is 12 or fewer hours, an employee may waive the second meal period, but only if the first meal period was taken.²¹ In measuring the length of the “work period,” unpaid meal periods are not counted.

An employer satisfies its obligation to provide employees with a meal period if it: (1) relieves employees of all duties; (2) relinquishes control over their activities; (3) permits the employees a reasonable opportunity to take an uninterrupted thirty-minute period; and (4) does not impede or discourage employees from doing so.²² An employer is not required to ensure that employees actually take their meal periods.²³

The timing of meal periods is critical. A first meal period must begin within five hours of when the employee begins his or her shift, and a second meal period must begin within 10 hours of when the employee begins his or her shift.²⁴ If the meal period is not provided by the prescribed time, the employee’s meal break will not satisfy the legal test for a “meal period,” and a violation will occur.²⁵ However, an employee may be provided with his or her meal period early in the five hour work period.

The wage orders provide that an employer may provide an employee with a paid, “on-duty” meal period when

the nature of the work prevents an employee from being relieved of all duties and other conditions are met.²⁶ However, on-duty meal periods are permitted under narrowly prescribed circumstances and only if certain procedures are followed.²⁷ Among other things, the employee must voluntarily sign a written agreement that provides for an on-duty meal period and further provides that the employee is free to revoke the agreement at any time.²⁸ Employers should consult with experienced employment law counsel prior to implementing on-duty meal periods.

Note that even where employees are provided with meal periods, the employer may still be found liable for meal period violations if:

- (1) The meal periods are provided but not within the prescribed time;
- (2) The meal periods are less than 30 minutes long;
- (3) The employees are not free to leave the premises; or
- (4) The employees perform some work during the meal period.

The actual times when employees begin and end meal periods must be recorded on time records, unless all operations cease during the meal period.²⁹

Rest Periods

Employers must “authorize and permit” non-exempt employees to take paid rest periods of at least 10 minutes duration for each four hours worked “or major fraction thereof.”³⁰ (A “major fraction” of four hours means a period of more than two hours.) The rest periods “insofar as practicable shall be in the middle of each work period.”³¹ For this purpose, a “work period” is the period before and after each meal period.³² Departures from the preferred schedule (i.e. the

¹⁹ CAL. LAB. CODE § 512(a); *see* sec. 11 of most wage orders. There are limited exceptions to meal period rules applicable to employees in the health care industry, and employees in certain industries or occupations covered by a collective bargaining agreement that meets specified requirements. *See* CAL. LAB. CODE §§ 512(c)-(e), 516(b); Wage Orders 1, 5, 9 and 16. In addition, employees in the motion picture industry may work no longer than six hours without a meal period of not less than 30 minutes nor more than one hour. Sec. 11 of Wage Order 12.

²⁰ CAL. LAB. CODE § 512(a).

²¹ CAL. LAB. CODE § 512(a).

²² *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1040 (2012).

²³ 53 Cal. 4th at 1040.

²⁴ CAL. LAB. CODE § 512(a); *see also* sec. 11 of most wage orders.

²⁵ *Brinker*, 53 Cal. 4th at 1041–42.

²⁶ Sec. 11(C) of most wage orders.

²⁷ *See e.g.* DLSE Opinion Letter No. 2002.09.04 (Sept. 4, 2002).

²⁸ Sec. 11(C) of most wage orders.

²⁹ *See* sec. 7(A)(3) of most wage orders.

³⁰ Some wage orders contain exemptions for employees covered by a valid collective bargaining agreement if the agreement provides “equivalent protection.” *See* Wage Orders 9 and 16.

³¹ *See* sec. 12 of most wage orders.

³² *Rodriguez v. E.M.E., Inc.*, 246 Cal. App. 4th 1027, 1044 (2016).

middle of each work period) are permitted when such departures “(1) will not unduly affect employee welfare, and (2) [are] tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule.”³³

Employers must “authorize and permit” employees to take rest periods, but are not required to ensure that the employees actually take rest periods.³⁴ Although an employee may lawfully choose to skip a rest period, proving that employees were not pressured into skipping rest periods can be challenging.

Rest periods are not required for employees “whose total daily work time is less than three and one-half (3½) hours.”³⁵ This means that for a total work period of 3½ to 6 hours, an employee is entitled to one 10-minute rest period; for over six and up to 10 hours, the employee is entitled to two rest periods; for shifts over 10 hours and up to 14 hours, the employee is entitled to three rest periods. Employees who work over 14 hours are entitled to four rest periods.

The following table illustrates the number of meal and rest periods authorized for shifts of a specific length.

California Meal and Rest Period Mandates

Hours Worked	Meal Period Entitlement	Rest Period Entitlement
0 – 3:29	0	0
3:30 – 5:00	0	1
5:01 – 6:00	1 (can be waived)	1
6:01 – 10:00	1 (cannot be waived)	2
10:01 – 12:00	2 (1 can be waived)	3
12:01 – 14:00	2 (cannot be waived)	3
14:01 – 15:00	2 (cannot be waived)	4

The California Supreme Court recently held in *Augustus v. ABM Security Services, Inc.*³⁶ that on-call rest periods are not permitted because an on-call requirement would not allow an employee to be relieved of all work duties during the break.³⁷ Rest periods need not be recorded for hourly employees, but they constitute part of hours worked and must be paid.³⁸

Employees paid on a piece-rate basis must be compensated for rest periods at a regular hourly rate that is no less than the *higher* of:

- An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods, and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods; or
- The applicable minimum wage, being the higher of the applicable federal, state or local minimum wage.³⁹

Employees paid by commission should be paid separate compensation for rest periods at a rate that is not less than the minimum wage, so that the rest time is not considered “unpaid.”⁴⁰

Additional Pay for Failing to Provide Employees with Meal or Rest Periods

All employers are obligated to pay their employees *one additional hour of pay* at the employee’s “regular rate of compensation”⁴¹ for each day an employee is not provided with a meal period as required. Employers are also obligated to pay employees *one additional hour of pay* at the employee’s regular rate for each day an employee is not permitted to take a prescribed rest period.⁴² This one hour of pay is considered a “premium wage,” which is owed automatically for any violation of the employee’s rights to take a meal period or rest period.⁴³ Of course, the employee must also be paid for all hours worked, including any time an employee works during a scheduled meal period.

³⁹ CAL. LAB. CODE § 226.2(a)(3)(A).

⁴⁰ See e.g. *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal. App. 5th 98, 110–13 (2017).

⁴¹ In *Bradescu v. Hillstone Rest. Group, Inc.*, No. SACV 13-1289-GW(RZx), 2014 U.S. Dist. LEXIS 150978, at *1 (C.D. Cal. Sept. 18, 2014), the court interpreted the phrase “regular rate of compensation” to mean the employee’s hourly rate of pay. The court distinguished this from the phrase “regular rate of pay,” which is used to calculate overtime pay, and includes items such as commissions and non-discretionary bonuses. However, no California state courts have passed on this issue.

⁴² See CAL. LAB. CODE § 226.7; secs. 11 and 12(B) of most wage orders.

⁴³ *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1302–03 (2009), *as modified* (Mar. 18, 2009).

³³ 246 Cal. App. 4th at 1040.

³⁴ *Brinker*, 53 Cal. 4th at 1033.

³⁵ See sec. 12 of most wage orders.

³⁶ 2 Cal. 5th 257 (2016).

³⁷ 2 Cal. 5th at 269–73.

³⁸ See secs. 7(A)(3) and 12 of most wage orders.

Employers should set up procedures to pay this “premium wage” when employees are not provided with meal periods or are not permitted to take rest periods. Generally an employee is entitled to: (1) one hour of premium pay for each day on which one or more meal periods was denied; *and* (2) one hour of premium pay for each day on which one or more rest periods were denied.⁴⁴

Maximum Hours and Days of Work

California law provides that an employer may not “cause” its employees to work more than six days in seven.⁴⁵ The law similarly provides that each employee is entitled to one day’s rest in seven.⁴⁶ In *Mendoza v. Nordstrom, Inc.*,⁴⁷ the California Supreme Court recently held that an employee’s entitlement to one day of rest is determined by reference to each work-week; the court rejected the argument that compliance should be determined by reference to a seven-day rolling period. The court further held that an employer causes an employee to forego a day of rest if it encourages the employee to work a seventh day or conceals the entitlement to rest. However, an employer may allow an employee, fully apprised of the entitlement to rest, to choose to work a seventh day.

These rules do not apply to any cases of emergency, nor to work performed in the protection of life or property from loss or destruction.⁴⁸ In addition, when the nature of the work reasonably requires that the employee work seven or more consecutive days, the days of rest may be accumulated, provided that in each calendar month the employee receives days of rest equivalent to one day’s rest in seven.⁴⁹

Wage Order 4 provides that a non-exempt employee may not be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency.⁵⁰ Some of the other wages orders, including Wage Orders 5, 8 and 13, contain maximum hours requirements.⁵¹ Employers should consult the applicable wage order to determine if any maximum hours rules apply to their business.

⁴⁴ See *United Parcel Serv., Inc. v. Super. Ct.*, 196 Cal. App. 4th 57, 69 (2011).

⁴⁵ CAL. LAB. CODE § 552.

⁴⁶ CAL. LAB. CODE § 551.

⁴⁷ 2 Cal. 5th 1074 (May 8, 2017).

⁴⁸ CAL. LAB. CODE § 554.

⁴⁹ CAL. LAB. CODE § 554.

⁵⁰ Sec. 3(L), Wage Order 4.

⁵¹ See *e.g.*, sec. 3 of Wage Orders 5, 8, and 13.

Reporting Time Pay

Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half of said employee’s usual or scheduled day’s work, the employee shall be paid for half the usual or scheduled day’s work, but in no event for less than two hours or more than four hours, at the employee’s regular rate. If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee’s regular rate (commonly referred to as “call back pay.”)

Reporting-time pay is not owed where:

- (1) Operations cannot commence or continue due to threats to employees or property, or when recommended by civil authorities;
- (2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system; or
- (3) The interruption of work is caused by an Act of God or other cause not within the employer’s control.⁵²

Split-Shift Premiums

When an employee works a split shift at the employer’s request, the employee must be paid one hour’s additional pay *at the minimum wage*, except where the employee resides at the place of employment.⁵³ However, if the employee’s total pay for a workday exceeds the minimum wage for that day, including one additional hour for the split-shift premium, then no additional split-shift premium is required. Otherwise, the minimum wage pay must include the split-shift premium. In other words, if the employee’s total pay for the day exceeds the minimum wage, the excess over the minimum wage is applied towards the split-shift premium.⁵⁴

Final Pay

Where an employee is terminated by the employer, the employee must be paid all accrued wages immediately upon termination.⁵⁵

If an employee quits, his or her wages must be paid within 72 hours, unless the employee has given 72 hours

⁵² See sec. 5 of most wage orders.

⁵³ See sec. 4(C) of most wage orders.

⁵⁴ *Aleman v. AirTouch Cellular*, 209 Cal. App. 4th 556 (2012).

⁵⁵ CAL. LAB. CODE § 201(a).

previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.⁵⁶

The employer must pay all earned wages, including accrued vacation benefits and any commissions that can be calculated.⁵⁷ If commissions cannot be calculated on the date of termination, they must be paid “as soon as the amount is ascertainable.”⁵⁸ Once the commission is calculable, the employer may not defer payment until the next regular pay day.

Waiting Time Penalties

Labor Code section 203 requires an employer to pay “waiting time penalties” of up to an extra 30 days of pay at the employee’s daily wage rate for failure to pay any wages to an employee who has quit or been terminated. The penalties continue to run until the employee is paid, up to a maximum of 30 *work days*. Unpaid wages that may trigger Labor Code section 203 include, but are not limited to: commissions, premium pay for missed meal or rest periods, overtime, and accrued vacation or paid time off (PTO) benefits.⁵⁹ A failure to pay is considered willful unless there is a good faith dispute as to whether the monies are owed.⁶⁰ Ignorance of the law is not a defense to Labor Code section 203 penalties. Nor is ignorance of the exact amount of wages due, if the employer reasonably should have known that some uncompensated work was done.

Business Expenses

An employer must reimburse an employee for costs necessarily incurred by the employee as a direct consequence of the discharge of his or her duties.⁶¹ Thus, employees are generally entitled to reimbursement for travel expenses, mileage for use of personal vehicles, personal cell phone charges, and other expenses incurred for the benefit of the employer. Employers are not permitted to pass operating expenses of the business to employees.⁶² Even where, for example, an

employee has an unlimited plan on his or her personal cellphone, the employer must reimburse the employee for “some reasonable percentage of the employee’s cell phone bill” if the employee uses his or her personal phone to make work-related calls.⁶³

Notice to Employees Regarding Pay Information

California Labor Code section 2810.5 requires that employers provide most newly hired employees a written notice containing the following information:

- The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable;
- Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances;
- The regular payday designated by the employer in accordance with the requirements of the Labor Code;
- The name of the employer, including any “doing business as” names used by the employer;
- The physical address of the employer’s main office or principal place of business, and a mailing address, if different;
- The telephone number of the employer;
- The name, address, and telephone number of the employer’s workers’ compensation insurance carrier;
- That an employee may accrue and use sick leave, and has a right to request and use accrued paid sick leave;
- Whether paid sick leave is provided pursuant to an “accrual” or “lump sum” formula; and
- That an employee may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and has the right to file a complaint against an employer who does retaliate.

California’s Division of Labor Standards Enforcement (DLSE) has issued a template notice⁶⁴ which may be used, but its use is optional.

Employers must also give employees written notice of any changes to the above information within seven days

⁵⁶ CAL. LAB. CODE § 202(a).

⁵⁷ CAL. LAB. CODE §§ 201–202.

⁵⁸ DLSE Enforce. Pol. & Interp. Man., *supra* note 5, at § 4.6.

⁵⁹ See e.g., DLSE Opinion. Letter No. 2003.01.28 (Jan. 28, 2003).

⁶⁰ *Choate v. Celite Corp.*, 215 Cal. App. 4th 1460, 1468 (2013).

⁶¹ CAL. LAB. CODE § 2802(a).

⁶² *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 562 (2007).

⁶³ *Cochran v. Schwan’s Home Service, Inc.*, 228 Cal. App. 4th 1137, 1144 (2014).

⁶⁴ The DLSE’s template notice is currently available at https://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf.

of such change (unless the change is shown on employee's wage statements).⁶⁵ The notice requirements do not apply to employees who are exempt from California overtime rules.⁶⁶

Time and Payroll Recordkeeping Requirements

California law also requires employers to keep accurate records of time worked, including when each non-exempt employee begins and ends work, and when each non-exempt employee begins and ends each meal period. The recordkeeping requirements are substantially identical across the wage orders that may apply. For example, Wage Order 4 provides, in pertinent part:

- (A) Every employer shall keep accurate information with respect to each employee including the following:
- (1) Full name, home address, occupation and social security number.
 - (2) Birth date, if under 18 years, and designation as a minor.
 - (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
 - (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
 - (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
 - (6) When a piece rate or incentive plan is in operation, the number of piece-rate units earned by each employee, and the applicable piece rates.

Employee Wage Statement Requirements

California Labor Code section 226 requires that each employee paycheck be accompanied by an itemized wage statement which contains specified information.⁶⁷

This requirement generally applies to *both exempt and non-exempt employees*. The California Labor Code requires that the itemized wage statements include the following information:

- (1) Gross wages earned;
- (2) Total hours worked by the employee, except for any employee who is exempt from California minimum wage and overtime requirements;
- (3) All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate, and, if the employer is a temporary services employer, the rate of pay and the total hours worked for each temporary services assignment;
- (4) All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- (5) Net wages earned;
- (6) The amount of paid sick leave (or paid time off, if provided in lieu of paid sick leave) available to the employee;⁶⁸
- (7) The inclusive dates of the period for which the employee is paid;
- (8) The name of the employee and only the last four digits of his or her social security number, or an employee identification number other than a social security number;
- (9) The name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer;
- (10) The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; and
- (11) If the employee is compensated on a piece-rate basis, the following additional information:
 - a) (i) The total hours of compensable rest and recovery periods, (ii) the rate of compensation for those periods, and (iii) the gross wages paid for those periods during the pay period; and

⁶⁵ CAL. LAB. CODE § 2810.5(b).

⁶⁶ CAL. LAB. CODE § 2810.5(c).

⁶⁷ Detailed rules regulating frequency of and deadlines for payment of wages are set forth in Labor Code sections 204–204.2.

⁶⁸ If an employer provides unlimited paid sick leave or unlimited paid time off, the employer may indicate “unlimited” on the itemized wage statement.

- b) (i) The total hours of other nonproductive time, (ii) the rate of compensation for that time, and (iii) the gross wages paid for that time during the pay period.⁶⁹

Employers who violate any of these wage statement requirements may be liable to employees for a penalty of up to the greater of all actual damages, or \$50 per employee for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of \$4,000 per employee.⁷⁰

Conclusion

It is not possible for one article to provide a comprehensive explanation of all wage and hour laws that apply to California employers. However, as this overview demonstrates, California wage and hour laws are replete with traps for unwary employers. Achieving full

compliance with these laws is a challenge for even the largest and most sophisticated employers; the challenge is even greater for smaller employers. However, the potential liability for non-compliance can be massive, so employers need to know these rules.

Dale A. Hudson is of Counsel and Irene Scholl-Tatevosyan is an associate in the Labor & Employment practice group of Nixon Peabody LLP in Los Angeles. Mr. Hudson provides strategic advice to California employers regarding employment law compliance and litigation avoidance. He also defends employers in employment and wage/hour litigation matters. Ms. Scholl-Tatevosyan primarily represents employers in all aspects of labor and employment matters - from wage and hour class and PAGA actions to discrimination, harassment, wrongful termination, and labor disputes. They may be reached at dhudson@nixonpeabody.com and itatevosyan@nixonpeabody.com.

⁶⁹ CAL. LAB. CODE §§ 226, 226.2(a)(2), 246(i).

⁷⁰ See CAL. LAB. CODE § 226(e).