



WAGE & HOUR LEGAL UPDATE & BEST PRACTICES FOR CALIFORNIA EMPLOYERS

AUGUST 22, 2023

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Counsel to California Employers®

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 - ❑ We cover the full spectrum of labor and employment law - from guiding employers on policies and training to prevent litigation, to defeating individual lawsuits and class action threats with claims from thousands of plaintiffs
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 - ❑ Sacramento, San Francisco, Los Angeles, Orange County & San Diego

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CA MCLE, HRCI and SHRM Certificates Of Attendance

- Certificates will be emailed to attendees within 48 hours of the conclusion of the webinar.

Presentation Materials

- The presentation materials were emailed yesterday to all attendees.
- If you didn't receive the email or still need the handout, you can download it now via the link provided/shared under the "Chat" button.
- If you cannot locate either, please email Dorothy Rausa at drausa@cdflaborlaw.com.

Time Frame and Q&A

- This webinar is scheduled for 1 hour and 15 minutes. We anticipate being able to take time at the end of the webinar to answer questions. Please submit your questions via the "Q&A" button.

Save the Date! Next CDF Webinar

- **Arbitration of PAGA Claims:**
and Other Issues Stemming from the CA Supreme Court's Decision in *Adolph v. Uber*
- **Date:** September 26, 2023
- **Time:** 10:00 – 11:00 a.m. (Pacific)
- **Presenters:** CDF Partners Corey Cabral and Sander van der Heide

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What We Will Cover Today

- **Recent Changes in Wage & Hour Laws**
- **Overtime Pay**
- **Meal and Rest Break Compliance**
- **Timekeeping Best Practices**
- **Handling Remote Work**
- **Recordkeeping and Documentation**





Recent Changes in California Wage & Hour Laws



Minimum Wage Rate As Of January 1, 2023

- **\$15.50 per hour.**
- **Regardless of size.**
- **All employees are entitled to a minimum wage rate of \$15.50 per hour regardless of how many employees are employed.**
- **Make sure to check local ordinances as many require a higher minimum wage rate. As a reminder, several localities, cities, and counties have higher minimum wages than the state's rate, including, at present:**
 - Alameda, Belmont, Berkeley, Burlingame, Cupertino, Daly City, East Palo Alto, El Cerrito, Emeryville, Foster City, Fremont, Half Moon Bay, Hayward, Long Beach, Los Altos, Los Angeles (city and unincorporated county), Malibu, Menlo Park, Milpitas, Mountain View, Novato, Oakland, Palo Alto, Pasadena, Petaluma, Redwood City, Richmond, San Carlos, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, Santa Rose, Sonoma, South San Francisco, Sunnyvale, and West Hollywood.



Minimum Wage Rate As Of January 1, 2024

- **\$16.00 per hour.**
- This increase affects the minimum salary requirement of exempt employees in California who are required to receive a salary of at least twice the state minimum wage.

➔ **Reminder:** Update your regular rate of pay calculation in payroll system.

➔ **Reminder:** Check the numerous local ordinances.



Disclosure of Pay Scale

- As of **January 1, 2023**, employers of **15 or more** (with at least one in California) are required to publish pay scales for open positions in any job postings, regardless of whether they are posted internally or externally.
- The statute does not specify who qualifies as an employee for purposes of meeting the “15 or more employees” threshold, but the California Labor Commissioner interprets this requirement to mean at least one employee currently located in California.
- Further, the pay scale must be included in the job posting “if the position may ever be filled in California, either in-person or remotely.”



Pay Data Report and Recordkeeping Requirements

- Effective **May 10, 2023**.
- Employers with **100 or more** (with at least one in California) must submit an annual pay data report to the California Civil Rights Department (previously known as the Department of Fair Employment and Housing) that is based on a “snapshot” of W-2 earnings during a single pay period from October through December of the previous calendar year.
- The guidance also directs employers to include remote employees in pay data reports if the employees are assigned to a California establishment, regardless of whether they reside in California, or if the employees reside in California but are assigned to an establishment in another state.



Pay Data Report and Recordkeeping Requirements

- Previously, pay data reports were only required from employers with 100 or more employees who were covered by annual EEO-1 Employer Information Report requirements.
- These employers were permitted to submit their annual EEO-1 report to satisfy California's pay data reporting obligations, if desired.
- The revised California law creates an independent obligation for employers with 100 or more employees to provide a pay data report regardless of their federal EEO-1 reporting status and removes the option to submit an EEO-1 report in lieu of the California pay data report.
- Practically this means that, absent an applicable exception, almost all employers of 100 or more employees with at least one employee in California will be required to create and provide both an annual EEO-1 report and a California pay data report on a yearly basis.



Pay Data Report and Recordkeeping Requirements

- Employers who are required to submit a pay data report must break out the number of employees by **race**, **ethnicity**, and **sex** in a series of job categories, and must report the number of employees by race, ethnicity, and sex whose earnings fall within each of the pay bands prescribed in the Bureau of Labor Statistics' Occupational Employment Statistics survey.



NOTE: For employers who have previously been complying with this reporting requirement, there is a new mandate that employers identify the median and mean hourly pay rate for each combination of race, ethnicity and sex (inter-sectionally) for each job category.

- In addition, employers with multiple establishments must continue to submit a separate report for each establishment.
- Employers will no longer be required to submit a consolidated report that includes all employees across establishments as the existing law required.



Pay Data Report and Recordkeeping Requirements



<https://calcivilrights.ca.gov/paydatareporting/>

California Pay Data Reporting

2022 Pay Data Reports are due 5/10/2023

California law requires private employers of 100 or more employees and/or 100 or more workers hired through labor contractors to annually report pay, demographic, and other workforce data to the Civil Rights Department (CRD). This reporting is required under Government Code section 12999, as amended by Senate Bill 1162.

The buttons below link to the portal through which employers submit their data to CRD (Pay Data Reporting Portal), a guide to using the portal (User Guide), Excel Templates that employers may use to submit their data (Excel Templates), examples of CSV submissions (CSV Examples), and answers to frequently asked questions (FAQs).

Pay Data Reporting
Portal

User Guide

Excel Templates

CSV Templates

FAQs

Pay Data Reporting
Results

Reply to Notice
and/or Submit Pay
Data
Related Questions

Pay Data in the
News

Training Slides



Overtime Pay



Overtime Pay – General Requirements

- **In California, non-exempt employees who are not part of a proper alternative workweek schedule are entitled to overtime wages at one and one-half times the employee’s regular rate of pay for any time worked over:**
 - a) eight (8) hours in a single workday
 - b) forty (40) hours in a single workweek, or
 - c) six (6) days in a single workweek.
- **Overtime is paid out at double an employee’s regular rate of pay for any time worked:**
 - a) in excess of twelve (12) hours in a single workday or
 - b) in excess of eight (8) hours on the seventh day of a workweek.
- **For many employees, the calculation is simple enough using the employee’s base hourly rate multiplied by either 1.5 or 2.0 to determine the Overtime or Double Overtime rate for the corresponding hours in accordance with the above requirements.**
- **However, the regular rate of pay calculation may become increasingly more complicated when other forms of remuneration, such as incentives, are paid out, or when an employee is paid at multiple rates.**



Regular Rate of Pay Considerations

- **Other “remuneration” that employees may receive and whether it impacts the regular rate of pay calculation:**
 - Discretionary v. Non-Discretionary Bonuses: If a bonus is discretionary, it can be excluded from the regular rate of pay calculation, whereas a non-discretionary bonus needs to be factored into the regular rate.
 - Simple enough, right? Not always.
- **Other Bonuses:**
 - Hiring Bonuses
 - Flat Sum Bonuses
 - Percentage Bonuses
- **Certain Statutory Exclusions:**
 - Gifts
 - Reimbursements
 - Benefit Contributions



 **Why is this so important?**



Meal & Rest Break Compliance



General Meal Break Requirements

- **Unless an exception applies, employers must “provide” non-exempt employees who work more than five hours in a day with a meal period at least 30 minutes long, except that if the employee's total work period does not exceed six hours, the employee and employer may mutually agree to waive the meal period.**
 - If a non-exempt employee works more than ten hours per day, employers must provide a second meal period of at least 30 minutes long.
 - However, if a nonexempt employee works no more than 12 hours, the employer and employee may mutually agree to waive the second meal period if the first meal period was not waived.
- **The first meal period must begin after no more than five hours of work, and the second meal period must begin after no more than ten hours of work.**
- **Unpaid, BUT Premium Pay for Violations.**
- **Employer’s Duty to “Provide”**
 - Uninterrupted and Relieved of All Duties.
 - Cannot be Required to Remain on the Premises.



General Rest Break Requirements

- **In general, employers must provide non-exempt employees with a certain number and amount of rest periods, based on the total number of hours worked in a workday.**
 - At least 10 consecutive minutes long for each four-hour work period or "major fraction" of four hours.
- **Therefore, employers must provide non-exempt employees at least:**
 - First rest break for three and one-half hours up to six hours of work.
 - Second rest break for more than six hours up to ten hours of work.
 - Third rest break for more than ten hours up to 14 hours of work.
- **Counts as time worked and is paid; generally not "recorded".**
- **Generally not allowed to require employees to stay on the work premises.**
- **Also subject to Premium Pay for violations.**



Meal & Rest Break Compliance

- **Compliant Policies are a MUST**
- **Application of Compliant Policies is Equally Important**
- **Record Keeping**
 - Rebuttal Presumption
- **Waiver Policy**
 - Each Time or One time?
- **Premium Pay Calculations**
 - Impact on Wage Statements
- **Automatic Triggers**
 - Non-Compliant (Late, Short, Missed)
 - Limitations on Clocking-In





Timekeeping Best Practices



Issues with Rounding

- **Woodworth v. Loma Linda Univ. Med. Ctr., No. E072704, 2023 WL 4701976, at *1 (Cal. Ct. App. July 24, 2023)**
 - An employer cannot apply a rounding policy if it has captured the exact amount of time an employee has worked.
- **Camp v. Home Depot U.S.A., Inc., 84 Cal. App. 5th 638 (2022)**
 - Review Granted February 1, 2023.
 - If an employer can capture and has captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for all the time worked.



Practical Examples

- Can the Employer even “see” this issue?





Handling Remote Work



Timekeeping Policies & Practices For Remote Workers



- **All of the same wage and hour risks exist for remote workers, especially non-exempt workers:**
 - Risks include unpaid overtime, meal and rest period premium pay, **off-the- clock** work, related penalties and attorneys' fees.
- **Develop a timekeeping policy for remote workers – and use timekeeping software – that tracks start and stop time, including meal periods.**
 - Accurate start and stop times essential to overtime and meal break compliance.
 - A variety of apps, software, and programs exist to aid in remote timekeeping.
- **Managing and monitoring productivity and performance:**
 - Restrict or prohibit after hours use of work email/texts/calls.
 - Will vary by industry, *e.g.*, sales numbers, billed hours, results.

Meal & Rest Breaks - Remote Control

- **Remote workers must still be provided with proper meal and rest breaks even when working from home.**
 - Difficult to track, let alone ensure, that breaks are taken remotely.
 - Easy to “interrupt” breaks since employer can’t see when employees are on break.



What to do:

- Essential that time records accurately reflect start and stop of meal breaks (including second meal breaks if employees work more than 10 hours).
- Distribute written meal and rest break policies communicating importance of taking breaks for remote workers and have workers acknowledge or sign the policy.
- Pay break premiums when owed (and note that premiums for noncompliant breaks must be paid at the “regular rate of pay” (*Ferra v. Loews*, Cal. Supreme Court, July 15, 2021) <https://www.callaborlaw.com/entry/ca-supreme-court-interprets-break-premium-pay-requirement-to-give-employees-higher-pay>)



Business Expense Reimbursement for Remote Workers

- **What Must Employers Pay For?**
 - **The Rule:** California Labor Code Section 2802 requires employers to reimburse employees for “all **necessary** business expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.” “[N]ecessary expenditures or losses shall include all **reasonable** costs....”
 - Even with unlimited cell phone plans, courts have held that “the employer must pay some reasonable percentage of the employee’s cell phone bill.” *See, e.g., Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1077–78 (9th Cir. 2020).



Business Expense Reimbursement for Remote Workers

- *Continued*



Examples of Remote Worker Expenses

- Internet service
- Cell phone service
- Office supplies
- Furniture, and equipment
- Travel to and from the office

Evaluating Whether Expenses are Reimbursable

- Cal. Labor Code Section 2802 requires reimbursement if the expense is both **(1) Reasonable** and **(2) Necessary**.
- What about fancy, expensive equipment?

Business Expense Reimbursement for Remote Workers

- *Continued*

Practical Considerations

- Create a business expense reimbursement policy.
- Provide employees with the necessary supplies and equipment needed to perform their job remotely.
- Provide a monthly stipend for incidental expenses like cell phone or internet (*e.g.*, \$30), while allowing employees to request additional reimbursement for reasonably incurred expenses.
- Actual reimbursement via turning in receipts and requests.
- Complexities for reimbursement for “hybrid” employees.
 - Commuting and other expenses may differ
- *Reasonable accommodation and reimbursements.
 - Special equipment



Compensation for Vacation & Other Days Off

- **California law does not require employers to offer vacation or PTO* ... however ... there are certain restrictions placed on employers that choose to do so.**
 - Vacation is considered wages, which must be paid out at termination.
- **Remote Work Can Complicate Vacation and PTO Tracking**
 - Employees now have devices with access to work/work emails.
 - Tracking time spent working while “on vacation” can be tricky.
 - The Blurred Lines of work and vacation creates off the clock risk.
- **Practical Considerations**
 - Again, clear timekeeping policies, vacation, and remote work can manage/prohibit off the clock work.
 - Remember to pay out accrued, unused vacation at termination.



*Note that California law DOES require employers to provide paid sick leave, and some cities and counties have additional paid sick leave requirements. See, e.g., https://www.dir.ca.gov/dlse/paid_sick_leave.htm; <https://www.californiaemploymentlawreport.com/2021/03/five-paid-sick-leave-laws-applicable-to-california-employers/>

Remote Work From Locations Other Than Home

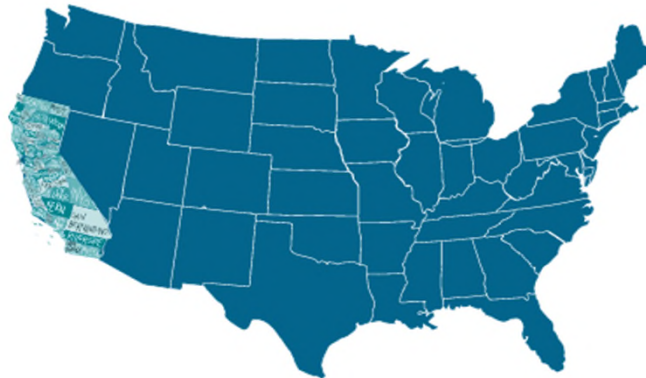
- Employers are required to furnish employment and a place of employment that is safe and healthful for the employees therein. Lab. C. 6400

- Policy and Practice Solutions:
 - Require remote employees to maintain a designated workspace at home. Prohibit work in public places.
 - These environments invite privacy and security problems.
 - Aggravates the risks of being overheard in business conversations and lowers the barriers for third party access to computer screen, internet connection, computer files and send dangerous emails.
 - Increases potential risks of employee injury.
 - Workers' comp typically covers workers if the injury or illness occurs while an employee is completing a work task during work hours, regardless of where the work is carried out.
 - Ergonomic set-ups provided in the office setting or home office setting likely don't exist at a coffee shop, library or park, and chronic or acute injuries from mishaps can occur in these settings.



Employees Working Outside of CA

- ❑ Remote workers located outside of California present the added challenge of complying with the right laws. . . .
 - What are the controlling wage and hour, meal and rest breaks, reimbursement, separation, equal pay obligations, privacy and security laws when your remote employee resides outside of California?
 - The reach of any given California law can vary from one law to the next and “there is no single, all-purpose answer to the question of when California law will apply to an interstate employment relationship or set of transactions.” *Ward v. United Airlines, Inc.*, 9 Cal. 5th 732 (2020); *Oman v. Delta Airlines, Inc.*, 9 Cal. 5th 762 (2020).



Employees Working Outside of CA - *Continued*

- ❑ Although no wholesale test has been established for determining when the provisions of the California Labor Code could apply to work performed outside the state, lower courts have examined factors such as the nature of the work, the amount of work being performed in California, the employee's and employer's residences, whether the conduct occurred in California, and the employer's ties to the jurisdiction. *Shook v. Indian River Transport Co.*, 236 F.Supp.3d 1165, 1170 (E.D. Cal. 2017).

- ❑ Remote employees may also be subject to the laws of the state and city where they are physically located and perform work.
 - Employers may have to develop employment terms around the applicable laws of the state where remote workers reside on a case-by-case basis.



Employees Working Outside of CA - *Continued*

Potential equal pay questions with employees residing outside of California:

- Under the Federal Equal Pay Act, an employer cannot pay lower wages to female employees than it pays to male employees within the same establishment for equal work at jobs that require equal skill, effort and responsibility, and that are performed under similar working conditions.
29 USC § 206(d)(1).
- The California Equal Pay Act states, “An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work.”
Cal. Lab. Code § 1197.5.

Don't assume out of state workers will be excluded from an equal pay analysis.

- Laws of the jurisdiction where the employee resides may be controlling instead.
- Be sure to use objective metrics to support differences in pay.



Employees Working Outside of CA - *Continued*

❑ Remote work outside of California also creates:

- The potential need to reevaluate unemployment insurance, workers' compensation and state level OSHA compliance and coverage requirements.
- There may be tax considerations to evaluate.





New Fights on the Arbitration Front



New Fights on the Arbitration Front

- **Gamboa v. Northeast Cmty. Clinic, 72 Cal. App. 5th 158 (2021)**
 - Declaration by employer's human resources director, stating that employee had signed an arbitration agreement and that the agreement was in effect during employee's term of employment, was not admissible to prove existence of a valid arbitration agreement since human resources director did not explain how she knew that employee had seen, much less signed, the arbitration agreement.
- **Iyere v. Wise Auto Grp., 87 Cal. App. 5th 747(2023), review denied (Apr. 26, 2023)**
 - Former employees offered no admissible evidence creating dispute as to authenticity of their physical signatures on arbitration agreement; evidence showed that employees signed stack of documents and that they did not deny that stack included arbitration agreement, there was no conflict between employees' having signed document on which their handwritten signatures appeared and, two years later, being unable to recall doing so.
- **Menjivar v. Field Fresh Foods Inc., No. B321444, 2023 WL 2660193 (Cal. Ct. App. Mar. 8, 2023)**
 - Unpublished decision agreeing with *Iyere* Court.



New Fights on the Arbitration Front – Cont’d.

- **Coinbase, Inc. v. Bielski, 143 S. Ct. 1915 (2023)**
 - District court was required to stay its proceedings after operator of platform, which allowed users to buy and sell cryptocurrencies and government-issued currencies, filed interlocutory appeal of the denial of its motion to compel arbitration based on operator's user agreement, in putative class action brought by user of platform, alleging that operator failed to replace funds fraudulently taken from users' accounts.
- **Prudential-Bache Sec., Inc. v. Superior Ct., 201 Cal. App. 3d 924, 925 (Ct. App. 1988)**
 - “Here Bache appealed the order denying arbitration. That appeal affects the entire case. Thus, further trial court proceedings are stayed under Code of Civil Procedure section 916.”
- **Varian Med. Sys., Inc. v. Delfino, 35 Cal. 4th 180, 190 (2005)**
 - Finally, a proceeding affects the effectiveness of the appeal if the very purpose of the appeal is to avoid the need for that proceeding ...Thus, an appeal from the denial of a motion to compel arbitration automatically stays all further trial court proceedings on the merits.





Recordkeeping & Documentation



Payroll Records

■ California Labor Code Section 226

- Sets forth the nine specific items of information that employers are required to include on wage statements.
- Employees have a right to inspect and copy records within 21 days of request.
- Failure to comply carries a **\$750** penalty.

■ California Labor Code Section 1175

- Requires employers to maintain payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees.
- Central location in California or locations where employees employed.
- Not less than three years.
- Four years is better.



Personnel Records

- **California Labor Code Section 1198.5**
 - Maintain employee personnel records for not less than three years after termination.
 - Employees have a right to inspect and copy records within 30 days of request.
 - Failure to comply carries a **\$750** penalty.





Recent Wage & Hour Cases



Recent Cases

- **Naranjo v. Spectrum, 88 Cal.App.5th 937 (2023) – Review Granted Again**
 - **ISSUE:** Does an employer's good faith belief that it complied with Labor Code section 226, subdivision (a) preclude a finding that its failure to report wages earned was "knowing and intentional" as is necessary to recover penalties under Labor Code section 226, subdivision (e)(1)?

GRANTED

Recent Cases, Cont'd.

- **Morales-Garcia v. Better Produce Inc., 70 F.4th 532 (2023)**
 - Client of primary employer not liable for wages because they had no control/not part of client's customary work.
- **Alberto v. Cambrian Homecare, 91 Cal. App. 5th 482 (2023)**
 - Employer's agreements were unconscionable because they contained illegal, one-sided terms that prevented wage discussions and representative actions.



Recent Cases Cont'd.

- **Wood v. Kaiser Foundation Hospitals, 88 Cal.App.5th 742 (2023)**
 - The Healthy Workplaces, Healthy Families Act does not bar PAGA penalties for sick pay.
- **Helix Energy Sols. Grp., Inc. v. Hewitt, 143 S. Ct. 677 (2023)**
 - Toolpusher on offshore oil rig was not exempt from FLSA because he was paid based on the number of days worked rather than a predetermined, unchanging “salary.”



Recent Cases Cont'd

- **Imperial Cnty. Sheriff's Assn. v. Cnty. of Imperial, 87 Cal. App. 5th 898 (2023)**
 - Trial court improperly denied class certification of two groups of Imperial County employees since both had a well-defined community of interest and any potential conflict between the two was hypothetical.
- **People ex rel. Garcia-Brower v. Kolla's, Inc., 14 Cal.5th 719 (2023)**
 - Complaint about violations that is already known to employer is protected by whistleblower retaliation statute.
- **Thai v. International Business Machines Corp., 93 Cal.App.5th 364 (2023)**
 - Employer obligated to reimburse work-from-home expenses even though the employer did not cause the expenses.



Recent Cases Cont'd.

- **Duran v. EmployBridge Holding Co., 92 Cal. App. 5th 59 (2023), as modified (May 30, 2023)**
 - The court of appeal affirmed, concluding that the trial court correctly interpreted the agreement's carve-out provision stating that "claims under PAGA ... are not arbitrable under this Agreement."
 - The provision was not ambiguous, and that it was not objectively reasonable to interpret the phrase "claims under PAGA" to include some PAGA claims while excluding others.
 - The carve-out provision excluded all the PAGA claims from the agreement to arbitrate.



Questions?



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