

10 Common Employment Law Mistakes California Employers Make That Lead to Litigation

BUSINESS & PEOPLE STRATEGY CONSULTING GROUP
FREE HR & EMPLOYMENT LAW WEBINAR SERIES

Agenda

1. Misclassifying employees as exempt
2. Misclassifying employees as independent contractors
3. Employees working off the clock
4. Not providing meal and rest periods
5. Inappropriate handling of sexual harassment complaints
6. Improper deductions from paychecks
7. Use-it-or-lose-it vacation policies
8. Not reviewing/revising the Employee Handbook regularly
9. Inappropriate administration of protected leaves of absence
10. Improper handling of workplace disabilities

Your Presenter

Dr. Carlyle Rogers

- 25 years Human Resources Experience
- Expert in Labor and Employment Law
- Doctorates in Law & Psychology
- Certified Interviewer and Interrogator
- Author of Dirty Little Secrets: Declassifying the Employment Game

Be Aware

2004 Private Attorneys General Act of 2004 (PAGA)

- Aka...Sue Your Boss Law
- Encourages lawsuits and discourages use of internal complaint procedures.
- Aggrieved employee can seek civil penalties for violations personally suffered and for violations of other current or former employees.
- Penalties for single violation can equal \$100 per employee per pay period.
- For example...an employer with 100 employees could face penalties of \$10K per pay period.
- What's worse is penalties can be doubled for subsequent violations.
- Employee receives 25% pf penalties.
- In essence...the employee is deputized as a Private Attorney.

Misclassifying Employees as Exempt

Costs of Mistakes

Rite Aid	\$20.9 Million
Aon Insurance	\$10.5 Million
Farmers Insurance	\$120 Million
BJs Wholesale Club	\$9.3 Million
Fastenal	\$10 Million
First Republic Bank	\$1 Million
Alliance Bernstein	\$2.98 million
Family Dollar	\$14 Million
Brinker	\$10 Million

Pending

- Dennys
- Chipotle
- InterMountain Management (Residence Incc. Courtyard Inn, TownePlace)
- J&B Friendly's
- Lowes
- Patelco
- Steak & Shake
- Catholic Healthcare West (IT professionals)
- Charter College
- EDS (IT professionals)
- IBM (IT professionals)
- Union Bank (IT professionals)
- Logitech (Engineers, QA, etc.)

Terminology

Exempt employees are those:

- Often referred to as “salaried”
- Aren’t entitled to overtime pay

Non-Exempt employees are those:

- Often referred to as “hourly”
- Are entitled to overtime pay
- Are subject to specific wage and hour laws

Common Mistakes

- Always classifying supervisors and managers as exempt
- Classifying exemptions based upon job descriptions or titles only
- Always classifying salaried employees as exempt
- Making deductions from exempt employee paychecks
- Classifying all employees who work with computers as computer professionals
- Always classifying commissioned employees as exempt
- Equating all jobs performed by highly educated employees with exempt jobs
- Classifying college graduates under the professional exemption

Determining Status

An employee's status of exempt or non-exempt is determined based upon applicable law and such factors as:

- The nature of the employee's work
- Duties and responsibilities
- Compensation
- Also known as the "Duties and Salary Tests"

The status is not determined by:

- Title
- Desire to avoid paying overtime

Salary Test

Executive, Administrative and Professional Exemption

- Must be paid no less than 2 times the prevailing minimum wage
- 2015 = \$9/hour = \$720/week = \$37,440/year
- 2016 = \$10/hour = \$800/week = \$41,600/year

Computer Professional Exemption (minimum salary)

- \$41.27/hour = \$7,165.12/month = \$85,981.40/year

Exemption Summaries

No more than 50% of time performing work that subordinates perform.

Work has significant impact on the entire business.

Executive: Manage no less than 2 full-time employees equivalent; is in charge of a department; authority to hire and fire; free from immediate direction or supervision with matters of significance.

Administrative: Works under limited supervision; work is specialized or technical requiring special training or experience; reports directly to a senior executive

Professional: Licensed professional; advanced degree; authority and power to make decisions of significance without direction or supervision.

Computer Professional: Highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering; work involves application of systems analysis techniques OR design, development, documentation, testing, creation or modification of computer systems or programs.

Common Misclassified Employees

- Recent college graduates
- Assistant managers
- Accountants
- Bookkeepers
- Store managers
- Supervisors
- Help desk professionals
- Employees with mixed duties (i.e., receptionist and graphic design)

Consequences

- Overtime violations
- Employment taxes
- Meal and rest period violations
- Benefits
- Penalties
- Damages
- Attorney and Legal Fees
- Interest

Misclassifying Employees as Independent Contractors

Common Mistakes

Classifying an individual as an IC to:

- Avoid paying taxes or benefits
- To perform the work of other employees
- To avoid being subject to administrative labor law agencies
- To avoid offering benefits

Controlling the terms and relationship

Having the IC perform work that is part of the regular business

Determining how the individual will perform the work

Not having a contract or believing a contract automatically creates an IC relationship

Challenges of Classification

Determining IC vs employee can often be a challenge

Complex federal and state laws

Multiple tests to evaluate the relationship:

- IRS
- EDD
- DOL
- California Test

Cost of Mistakes

Recent Decisions

- Freedom Communications Inc. \$42 Million
- Fed Ex \$27 Million

Potential Costs

- Back taxes
- Meal and rest period penalties
- Overtime
- Fines and damages
- Legal fees

Making the Decision

Must be able to do their job in the own way using the methods they choose to use.

- If required to follow company procedure...probably an employee

Can't be fired before the job is complete unless violating the terms of the contract.

- If employer has the right to fire at will and without cause...probably an employee

Must be a task/work that isn't part of the regular business.

- If the role is required to operate the business...probably an employee

Must be able to control business decision and location of work.

- If required to work onsite, within regular business hours, or required to have specific insurance...probably an employee

Events that Increase the Chances of Being an Employee

- Other employees performing the same work (even if on a one-time basis)
- Providing the tools, equipment and supplies
- If the work is unskilled or semi-skilled
- Providing training to perform the work
- If the worker was a previous employee (or others performing the same work)
- Not allowing the individual to work other jobs with other employers
- Not having a contract
- Paying without an invoice and consistent with payroll

Bottom Line

Behavioral Control: If the employer controls what will be done and how it will be done...most likely an employee

Financial Control: If the employer directs or controls the business aspects of the work...most likely an employee

Relationship of Parties: How is the relationship perceived? Long-term, benefits, and incentives are indicative of an employee

Employees Working off the Clock

Common Mistakes

- Managers have employees clock out and work off the clock to avoid overtime or exceeding budgets.
- Employers having knowledge that an employee is working off the clock...even when the employee has chosen to on their own...and not compensating them for the time worked.
- Employee clocks out for their meal period and works through their designated meal period.
- Not compensating non-exempt employees for required business travel time.
- Requiring employees to wait at the end of a shift for internal theft inspections after clocking out.

Bottom Line

- Employers have to pay non-exempt employees for time worked.
- This includes work performed that is known or should have been known.

What Employers Should Do

- Have a clearly defined policy prohibiting working off-the-clock.
- Train management to never require or request an employee work off-the-clock.
- Have employees sign the policy acknowledging that they are prohibited from working off-the-clock.
- Have employees sign their time cards acknowledging that all hours worked are accounted for.
- Disallow non-exempt employees from working after hours on projects without clocking in and out for the time worked.
- Have a clearly defined policy and procedures for non-exempt employees who are subject to business travel.

Bottom Line

- Employers have to pay non-exempt employees for time worked.
- This includes work performed that is known or should have been known.
- **Exception:** If the employer can prove that they lacked actual or constructive knowledge that such work was being performed (Jong v. Kaiser Foundation Health Plan)

Not Providing Meal and Rest Periods

Common Mistakes

- Understaffed, thus prohibiting employees from taking meal periods and breaks
- Allowing employees to combine meal periods and breaks
- Not providing meal periods to employees working over 5 hours, but less than 8
- Creating an environment of perceived consequences for taking meal periods and breaks
- Not tracking meal periods and breaks
- Deducting meal periods from hours when not taken
- Employees working through meal periods
- Common practice of “waived” meal periods

Industries Commonly Affected

- Restaurants
- Retail
- Services
- Hospitality
- Call Centers

Overview of the Rules

Meal Periods

- If the employee works 5 hours then 30 minutes unpaid meal period
- If 6 hours completes the day, then the meal period can be waived

Breaks

- For every 4 hours or major portion worked...1 X 10 minute break
- If only up to 3 ½ hours...no break required
- Major portion = 2 hours
- Thus, if employee works 6 hours, then 2 X 10 minute breaks

Consequences

- Failure to provide meal period = 1 additional hour at the regular rate of pay (not counted as hours calculated for overtime)
- Failure to provide a rest period = 1 additional hour of pay at the regular rate of pay (only one hour penalty per workday; not per missed break per workday)
- Dangers
 - Class actions
 - 3 years calculations

Solution

- If employee works 5 or more hours...provide a 30 minute unpaid meal period.
- If 6 hours completes the day, it can be waived (this should be an exception, not a practice)

- If an employee works 3 ½ - 5.99 hours, then 1 X 10-minute breaks
- If an employee works 3 ½ - 6 hours, then 2 X 10-minute breaks
- 1st break between start and meal period
- 2nd break between meal period and end

- Track all meal periods and breaks of non-exempt employees
- Have employee's sign their time sheet/hours at the end of each pay period

Inappropriate Handling of Sexual Harassment Complaints

Common Mistakes

- Employers with 50+ employees...not having all supervisors compliant with AB1825.
- Inappropriately handling (or ignoring) complaints of sexual harassment.
- Terminating employees (or forcing to resign) who make complaints of sexual harassment.
- Not conducting good faith and impartial investigations.
- Not documenting the process from complaint through resolution.
- Not having an anti-harassment policy with procedures to identify, complain, or handle complaints.
- Transferring an employee who makes a complaint of sexual harassment.
- Managers not reporting complaints of sexual harassment made by employees.

Costs of Mistakes

- Mercy General Hospital \$168 Million
- CSX Transportation \$2.6 Million
- Qwest Communications \$2.3 Million
- Fry's Electronics \$2.3 Million
- Ferguson Enterprises \$1.2 Million

Employer Obligations

- If 50+ employees...mandatory 2 hour training for supervisors every 2 years
- Must post the DFEH poster
- Distribute DFEH sexual harassment pamphlets to employees at hire
- Have a clearly defined anti-sexual harassment policy
- Conduct good faith and timely investigations
- Take appropriate action based upon investigation results
- Provide a work environment free of sexual harassment

Improper Deductions from Paychecks

Common Mistakes

- Deducting from a final paycheck for unreturned uniforms or property
- Deducting from an exempt employee's pay for attending jury or witness duty
- Suspending an exempt employee without pay
- Deducting from exempt pay due to the business shutting down for a day due to lack of revenues or other reason

Prohibitions

Simple negligence: Shortages and losses without fault of simple negligence

Employee loans and debt: Labor Code section 221 prohibits from recovering wages already paid to an employee.

Unreturned tools and uniforms: No deduction without proving theft or culpable negligence...even with a written agreement

Used, Unearned Paid Time Off

Solution

- Promissory note
- Payments not tied to payroll
- Otherwise, will have to seek recovery in small claims or superior court

Exempt Employees

Prohibited from deducting for:

- Quality of quantity of work
- Unavailability of work
- Disciplinary reasons
- Jury, witness and military duty

Limited deductions for:

- Work comp absences
- Family and medical leave
- Personal leave
- Vacation

Use-It-Or-Lose-It Vacation Policies

Common Mistakes

- Forfeiture of earned or granted and unused floating holidays or personal days.
- Forfeiture of vacation or PTO that is earned and not used by the end of a year.
- Not paying out earned and unused PTO or vacation at termination.

The Reality

Vacation time that is granted or accrued

Floating holidays and personal days not assigned to a specific date

PTO that is granted or accrued

...are all compensation

...must be paid out at termination

...can't be forfeited

Options

Assign a date to Floating Holidays and Personal Days.

- For instance...anniversary date or birthday

Place a cap on how much an employee can accrue (the cap must be reasonable and 1.5 to 1.75 times the annual hours that can be accrued is considered reasonable by the DLSE).

For PTO plans...separate the plan into vacation and sick leave (although sick leave is now subject to the Paid Sick Leave law).

Payout accrued and unused time on a designated date each year.

**Not Reviewing/Revising the
Employee Handbook Annually**

Common Mistakes

- No company Employee Handbook
- Employee Handbook is outdated
- Employee Handbook is drafted by an unqualified individual

The Reality

Employee Handbooks

- Set forth expectations between the employer and employee
- Help solidify the employment relationship
- Protects employers by preventing liability
- Provides affirmative defenses for employers in litigation
- Eliminate ambiguity

The Issues

Absence of an updated and compliant Employee Handbook...

- Provides plaintiff attorneys with leverage for their clients
- Provides inaccurate direction to managers and staff related to company practices and expectations
- Increases the chances of discriminatory, harassing and retaliatory behaviors
- Provides the opportunity to challenge the “at-will” relationship

Inappropriate Administration of Protected Leaves of Absence

Common Mistakes

- Not designating a required leave of absence
- Not extending leaves of absence when a disability is involved
- Denying an eligible employee a protected leave of absence
- Replacing an employee while on a protected leave of absence
- Terminating an employee while on a protected leave of absence
- Engaging retaliatory actions or behavior towards an employee returning from a protected leave of absence

Know the Leaves

- Be aware that there are state and federal leaves of absence
- Leaves are tied to the number of employees that an employer employs
- Understand how the leaves interact (i.e., PDL, FMLA, CFRA)
- Understand how benefits continuation, time calculations, documentation, use of PTO, and other defined areas are affected by the leave
- Understand notice and designation requirements
- Be aware of when leaves are paid and unpaid

Examples of Protected Leaves of Absence

- Family Medical Leave (FMLA)
- California Family Rights Leave (CFRA)
- Pregnancy Disability Leave (PDL)
- Bone Marrow Donor Leave
- Organ Donor Leave
- Jury and Witness Duty
- Civil Air Patrol Leave
- School Activities Leave
- Crime Victims Leave
- Domestic Violence, Sexual Assault & Stalking Leave

What to Do

- Identify which leaves you are required to provide
- Draft thorough and clearly defined policies for each leave of absence
- Include a leaves of absence section in your Employee Handbook
- Ensure that all policies and procedures are consistent throughout the leaves
- When faced with an unusual situation with a protected leave of absence...contact an employment lawyer or HR professional with LOA expertise
- Train your managers and HR to understand the policies and procedures for the leaves

Improper Handling of Workplace Disabilities

Common Mistakes

- Not engaging the Interactive Process
- Not providing reasonable accommodation
- Not considering extended protected LOAs when disabled
- The “No light duty” deflection
- A “No restrictions” policy
- Claiming undue hardship without analysis
- Wrongfully terminating disabled employees
- Not hiring or promoting an employee due to pregnancy

Costs of Disability Mistakes (CA)

\$60 Million	Denied employment due to disability (Fed Ex)
\$8.5 Million	Discrimination (Tesoro Refining & Marketing)
\$3.5 Million	Discrimination (Rite Aid)
\$545K	Failed to accommodate or provide medical leave & wrongful termination
\$435K	Discrimination due to having AIDS
\$345K	Discrimination, failure to accommodate (United Airlines)
\$180K	Wrongful termination (Walgreens)

Common Disabilities in the Workplace

- Psychiatric impairments (depression, anxiety, PTSD, bi-polar, etc.)
- Neurological impairments (migraines, epilepsy, etc.)
- Substance abuse (doesn't include illegal use of drugs)
- Diabetes
- Hearing impairments
- Vision impairments

Important Terms

- **Interactive Process:** A process to determine effective reasonable accommodations.
- **Reasonable Accommodation:** Includes modifications or adjustments that enable employees with disabilities to perform the essential functions of their job.
- **Essential Functions:** The tasks that are fundamental to the job if:
 - The position exists to perform the function
 - There are a limited number of employees to whom the performance of the function can be distributed
 - It is highly specialized and the incumbent in the position was hired for their expertise in performing the function.

The Reality

- An employee (or applicant) need only be able to perform the functions of the job, with or without reasonable accommodation.
- Candidates do not have to reveal disabling conditions during the interviewing process...only that they can perform the job with or without reasonable accommodation.
- Disabilities are defined much different in CA than under the federal ADA.
- Employers have a duty to engage the Interactive Process.
- Reasonable accommodation, although often not viewed as reasonable by employers, can be an ongoing and evolving process that requires time and financial investments from the employer.

The Solutions

Statutory requirement to engage the interactive process when an employee approaches with the need for reasonable accommodation, employer observes potential need for RA based upon disabling condition, or notice from another party of potential need for RA.

- Once you have reason to believe that there is a disabling condition that requires reasonable accommodation...start the process, document, and analyze ASAP!

Eliminate policies requiring a doctor's note that the employee has no restrictions to return to work...as the return may require reasonable accommodation.

When an employee requests an extension to certain protected leaves (i.e., PDL, FMLA, CFRA) and there is a potentially disabling condition involved, review it with an employment lawyer or competent HR professional.

Unless you can prove that the accommodation truly creates an undue hardship...accommodate, accommodate, accommodate.

Examples of Accommodation

- Working from home
- Modified schedule
- Modification of office temperature
- Periodic breaks
- Relocation of marginal tasks to another employees
- Detailed instructions for completing tasks
- Acquired or modified equipment
- Revising the job to not include non-essential tasks
- Worksite modification
- Assistive devices

QUESTIONS



Thanks for joining our webinar today!

For more information about today's webinar or for assistance with any of your HR, employment law or compliance needs, please feel free to contact us at:

661-312-7737 or carlyle@bpscllc.com

To view or download today's or past webinars, please visit <http://bpscllc.com/free-webinar-series.html>