

# ORANGE COUNTY BUSINESS JOURNAL

## HUMAN RESOURCES GUIDE

### How To Protect Your Company From Employment Class Actions

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**O**ver 3,000 class actions have been filed in California since 2000, many of which alleged that employers failed to pay proper wages and benefits to their employees. There is typically a four-year statute of limitations on these claims. These class actions have resulted in

multi-million dollar verdicts and settlements, with several employers forced into bankruptcy. Accordingly, all California employers should take immediate proactive measures to protect themselves from these costly class actions, including an audit of their wage and hour practices. Below are the most common violations that lead to employment class actions in California:

- **Misclassification.** All employees are entitled to overtime pay, unless they qualify for an exemption. It is the employer's obligation to prove that an employee qualifies for that exemption. However, many employers simply assume that their employees fall under one of these exemptions when they simply do not. Employers need to analyze whether their employees truly fall under any enumerated exemption. The most common exemptions are: executive, administrative, professional, outside sales, inside sales, and computer professional. These exemption issues are complicated and often require a detailed legal analysis. If employers have properly classified their employees as exempt, they should still take steps to protect the exemption with documentation, such as job descriptions, training manuals, performance evaluations, surveys, self evaluations, and testing, in order to reinforce the exemption.

- **Overtime.** Yet even when employers properly classify their employees as non-exempt, they still frequently fail to pay proper overtime. Employers must include all forms of remuneration in the calculation of the regular rate for overtime purposes, including commissions, non-discretionary bonuses, retroactive pay increases, and more. Employers also have to pay overtime to commissioned non-exempt employees. Employers must also remember to pay daily overtime under

California law, not just weekly overtime.

- **Meal and Rest Periods.** Since October 2000, employers who fail to provide their non-exempt employees with proper meal and rest periods may be subject to stiff penalties, which can be significant in class actions. Recently, the DLSE proposed new regulations concerning meal periods that are currently under review, so employers should monitor these new developments. Employers should have written policies concerning meal and rest periods that strictly comply with the law. Further, employers should document the fact that their employees are being provided with and are taking proper meal and rest periods, including regular certifications signed by the employees each pay period.

- **Paystubs.** Employers must list the following nine items on their paystubs: gross wages earned, total hours worked (for non-exempt employees only), number of piece rate units earned (if applicable), all deductions, net wages earned, dates of pay period, name of employee and social security number, name and address of employer, and all applicable hourly rates in effect during the pay period. Employers often inadvertently omit one or more of these requirements since the law has frequently changed concerning these requirements. Employers who do so face penalties of up to \$4,000 per employee, plus attorney's fees and costs.

- **"Off The Clock" Work.** Many recent class actions include claims for "off the clock" work, primarily because it is so difficult for employers to disprove such claims. It is the affirmative duty of the employer to ensure employees do not work off the clock. The key issue is whether the employer knew, or had reason to believe, that off the clock work was being performed. Employers cannot tacitly encourage or ignore this practice. Employers should implement a policy preventing off the clock work, strictly enforce this policy, and exercise reasonable diligence to make sure that no off the clock work is being performed. Employers should train their supervisors to prohibit such conduct, and discipline those who allow it. Again, employers should require their employees to certify in writing that their time

entries are accurate and that they did not work off the clock.

- **Uniforms.** California law broadly defines the term uniform. If uniforms are required to be worn by non-exempt employees as a condition of employment, the uniforms must be provided and maintained by the employer, including dry cleaning if necessary.

- **Alternative Work Schedule ("AWS").** Employers may use an AWS to create a schedule that includes overtime but does not require overtime pay under certain circumstances. However, employers must comply with very strict technical requirements of the AWS, including disclosures, meetings, secret ballot elections, notice to the government, etc. Failure to comply with these requirements can result in the invalidation of the AWS, and significant liability for overtime pay.

- **Expense Reimbursements.** Employers must indemnify their employees for all necessary expenditures or losses incurred by the employee in direct consequence or discharge of their duties. Employers must pay for expenses that are part of the normal cost of doing business. For example, employers must reimburse employees for mileage for using their vehicles for work, and it is safest to use the IRS rate when doing so. Employers cannot require employees to pay to maintain excess insurance coverage in the vehicles they use for work. Moreover, employers cannot simply provide a flat rate stipend to cover all possible expenses. Employer should review their expense reimbursement policies to ensure that all appropriate expenses are being reimbursed.

- **Conclusion.** In order to protect themselves from the very real risk of significant liability in class actions, employers must take action to ensure that their wage and hour practices strictly comply with the law in all areas. Due to the amount of money at stake for even minor technical violations, employers should have experienced labor counsel conduct an audit of these practices to ensure compliance.

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