

2022 CALIFORNIA STATE HR

CALIFORNIA'S WAGE-
HOUR "HOT" LIST

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ADVOCACY & LEGISLATIVE CONFERENCE

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CALIFORNIA'S WAGE-HOUR "HOT" LIST

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ERIKA FRANK

Erika Frank is Of Counsel with Shaw Law Group. She is a well-respected employment attorney with a passion for advising and educating employers about California's complex workplace laws.

Leveraging more than two decades of legal, regulatory and legislative experience, Erika offers a practical and insightful approach to helping clients deal with the effects of California's employment laws on employee relations and workplace policies.

Erika is a sought-after speaker. She has produced and conducted numerous seminars and webinars on topics including leaves of absence, wage and hour compliance, and harassment, discrimination and retaliation prevention. She is known for her relentless energy and ability to transform legal concepts into simple stories and realistic scenarios. Erika enjoys educating employers and convincing them that the law can be fun (at least most of the time!)



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Please Note...

- This program is intended to be a general overview, and should not be considered legal advice regarding your specific situation
- Consult with your regular employment law counsel before making any changes to your practices

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The Law in this Area Can Be Really Confusing

- Federal Fair Labor Standards Act
- California Labor Code
- California Division of Labor Standard's Enforcement Manual/opinion letters/FAQs
- California Industrial Welfare Commission wage orders (applicable to industries and occupations; 17 total)

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And the Consequences for Getting it Wrong Can Be Severe

- If an employee is paid improperly or in an untimely manner, the employer may be liable for:
 - Unpaid wages
 - Unpaid premiums
 - Penalties; and
 - Fines
- The Private Attorneys General Act (PAGA) allows employees to seek penalties on behalf of other employees
- To protect our employees and our business, we need to do this right!

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The Two Major Questions in Determining How Employees Are Paid

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The Two Major Questions in Determining How Employees Are Paid

- Knowing the answers to these questions will determine a host of issues, such as:
 - Must they record their time?
 - Do they get overtime?
 - Do they have to take a rest break?
 - Do they have to take lunch?
 - Do they get paid for taking a rest break or lunch?

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Question #1 - Is the Individual Our Employee?

- The general rule in California - If you get paid for doing work, you are an employee.
- However, in very limited circumstances, the individual might be an independent contractor (or someone else's employee)
 - In such a case, special rules apply, such as:
 - We don't issue them a paycheck
 - We don't pay them for overtime, or worry if they have taken a break or lunch, because we are not their employer

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Question #2 - Is the Employee Exempt or Non-Exempt?

- Exempt employees are paid for their specialized skill sets, expertise, and judgment
 - As the name suggests, exempt employees are exempt from many wage and hour laws, including overtime and timekeeping requirements
 - Exempt employees are expected to use their discretion to put in the time necessary to get their jobs done

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Question #2 - Is the Employee Exempt or Non-Exempt? (cont.)

- Non-Exempt employees are paid primarily for their time
 - Therefore, we have to ensure they are fairly and accurately paid for every minute they work (and more for overtime)
 - Wage and hour laws ensure that non-exempt employees are treated fairly, such as:
 - Receiving paid rest breaks during the workday
 - Having at least 30 minutes for an unpaid lunch
 - Receiving accurate wage statements
 - Being paid in a timely manner when their employment ends

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Question #2 - Is the Employee Exempt or Non-Exempt? (cont.)

- So which is “better”?
 - Being a contractor or an exempt employee or a non-exempt employee?
- California doesn't allow employers or individuals to decide on their own!
 - And “misclassifying employees” is a big litigation risk

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The Test for Determining Exempt Status

- Start with the presumption that the employee is non-exempt
- It is the employer's burden to prove exempt status
- Job title is irrelevant
- The test is (typically) a combination of:
 - Minimum Salary (two times the state minimum wage)
 - Job Duties (depends on the exemption)
 - Exercise of Independent Judgment
- Exempt employee's salary must be a pre-determined amount not subject to variation based on the quantity or quality of work

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Wage and Hour Issues for Non-Exempt Employees

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Timekeeping Requirements

- Non-exempt employees must be paid for every minute they work
- They must clock in when they start work and clock out when they stop work
- Ask employees to verify their time
- Allowing an employee to falsify their time worked is fraud
- Only get involved in entering time in rare circumstances, such as if the employee forgets to do so or the software is down

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Timekeeping Requirements (cont.)

- Employees are not paid for their commutes (absent extraordinary circumstances)
- The rules for telework are the same as in-office work
- “Off the clock” texts and phone calls is paid time
- Failing to pay an employee for time worked is unlawful
- So what do we do about the “Oh, one more thing” problem?
 - Have the employee clock back in and pay them

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Timekeeping Requirements (cont.)

- Can't we just overcome all this timekeeping stuff by paying someone a salary?
 - No, a salary for a non-exempt employee is just a way of expressing their rate of pay

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Overtime

- Typically, non-exempt employees must be paid overtime (1.5x their regular rate of pay) when they work:
 - More than 8 hours in a day
 - More than 40 hours in a week
 - A seventh consecutive day in any workweek
- Because of the expense and potential liability, most employers carefully track and place restrictions on overtime

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Overtime (cont.)

- So what do we do with the employee who takes unauthorized overtime?
 - **Pay them**
 - Consider performance management tools

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Rest Breaks and Meal Periods

- Know what Brinker ACTUALLY means
- Meal periods are not about eating lunch!
- Enforce your policies
- Post-Augustus, schedule rest breaks and meal periods
- No auto-deduct; no automatic premium pay
- Pay premiums at the regular rate of pay (the “overtime” rate) (Ferra v. Loews Hollywood Hotel, Cal. Sup. Ct.)

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Rest Breaks

- Non-exempt employees are entitled to a 10-minute rest break for every four hours worked or “major fraction thereof” = 2:01 – 4:00 hours
- A rest break is not required if an employee’s total daily work time will not exceed 3½ hours
- Rest breaks are paid – no clocking in or out
- Rest breaks must occur before a meal period if employee is entitled to two rest breaks
- They should fall in the middle of each work period, so far as practicable

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Rest Breaks (cont.)

- “Duty-free:” no restrictions on activities (e.g., employee may leave premises, make phone calls, eat, etc.)
- Employees cannot “waive” rest breaks
- You must schedule for rest breaks
- What to do with the employee who doesn’t want to take a rest break?
- What to do if you need to interrupt their rest break?

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Meal Periods

- Non-exempt employees are entitled to a meal period of at least 30 minutes if they work five hours or more
- First meal period can be waived by mutual agreement if total shift is < 6 hours
- Meal periods must be duty-free
- They are unpaid – so they need to clock out and back in
- The employee can use the time as they wish
- The meal period must begin any time before the end of the 5th hour of work (4:59 minutes into the shift)

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Meal Periods (cont.)

- A second meal period due if employee will work more than 10 hours; must begin before the end of the 10th hour of work
- Second meal period can be waived if employee took first meal period and total shift < 12 hours
- No rounding of meal period punches!

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Meal Periods (cont.)

- What to do if the employee voluntarily chooses not to take a full 30 minutes or one at all?
 - **Pay them** (but no premium is due)
 - Document the reason! Ensure you've got documentation stating that the employee made the choice.
 - Consider performance management tools
- What to do if the employee fails to clock out for lunch?
 - Manually correct their time, and remind them to clock out
 - But do not simply automatically deduct 30 minutes from their time

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Premiums for Missed Breaks and Meal Periods

- A non-exempt employee is entitled to a “premium” of one hour of pay whenever:
 - They are denied either or both breaks in a day; or
 - Their meal period is missed, interrupted, or granted late (beyond the 5th hour)
- Paid at the employee’s regular rate of pay (not base rate)
- You can’t avoid the obligation to provide a meal period by just automatically giving premium pay

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Precarious Pay Rules

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Know Your Minimum Wage Rate

- Federal minimum wage does not apply in California
- State minimum wage rate based on employer size
- 38 local minimum wage ordinances
- Pay your non-exempt employee the highest minimum wage that applies to them

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“De Minimis” Time

- California employees must be paid for all time during which they are suffered to permitted to work, or are under the employee’s control
- The FLSA allows employers to exclude “de minimis” time from hours worked
- Does not apply in California
- Be careful with bag checks, locking up after clocking out, etc.

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Reporting Time Pay

- Reporting time pay of between 2 hours and 4 hours owed to employees who report to work but furnished less than one-half of their scheduled work hours
 - Not just about physically reporting to work
 - At a minimum, always pay for time actually worked
- Reporting time pay required when employees are required to call in to determine if they are needed for work
- Limited exceptions

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Rounding Practices

- Rounding is an old practice; fear of math
- With electronic timekeeping, now it's about avoiding overtime
- Rounding practices must be "fair" and "neutral"
- Can apply to clocking in and clocking out punches
- Cannot apply to meal period punches

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Wage Statement/Paycheck Compliance

- Satisfy all requirements of Labor Code sections 226(a) and 212
- Ensure the correct employer name is included (beware “DBAs”)
- Sick Leave and COVID-19 Supplemental Sick Leave!
- PAGA nightmare

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Wage-Hour Audits

- Critical for identifying vulnerabilities
- Do not focus only on non-exempt employees
- Involve legal counsel to maintain the privilege
- Protect against “retaliation”

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Your To Do List!

- Apply the correct minimum wage rate to non-exempt employees
- Properly record non-exempt employee time
- Remind non-exempt employees to take their rest and meal breaks
- Schedule rest breaks for all non-exempt employees
- Conduct wage and hour audit through legal counsel

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2022 Upcoming Webinars

"Train-the-Trainer": The Essentials of EEO Compliance Training

April 26

Sexual Harassment Prevention and Other EEO Issues (SB 1343 Compliance Training for Staff)

May 5

August 11

October 20

December 6

Sexual Harassment Prevention and Other EEO Issues

(AB 1825/SB 1343 Compliance Training for "Supervisors"/All Employees)

May 10

August 9

October 13

December 8

Intensive Workshop: Effectively Managing Leaves of Absence and Reasonable Accommodations

September 20 and September 29

Intensive Workshop: Conducting Effective Internal Investigations

October 4, October 11, and October 18

California Employee Handbook Update (2023)

November 10

Annual Employment Law Update (2023)

December 1

December 7

January 10, 2023

[Click Here to Register Online](#)



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Every month, Jen and Adam Romero, the DFEH’s Deputy Director of Executive Programs, cover a key employment law topic and answer your questions! Topics TBA as developments dictate.

Check out dates and topics here:

<https://shawlawgroup.com/employment-law-training-calendar/>

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