

# California HR/Payroll Webinar

## Sponsored by:



**Teri Kleiman**

HCM Applications  
Sales Manager



**Roxana E. Verano, Esq.**  
Landegger Baron Law  
Group



**Scott Rose**

Enterprise Sales Manager

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# *TOP THREE WAGE & HOUR CLAIMS*

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## 1. Overtime

- Misclassification
- Unpaid overtime
- Off-the-clock work

## 2. Meal & rest periods

## 3. Unreimbursed expenses



# *UNIQUE EMPLOYER ISSUES IN WAGE & HOUR CLAIMS*

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- Establishing exemptions and record hours worked
- Navigating the difference between FLSA and California Labor Code
- Complying with laws and Labor Commissioner interpretations
- Avoiding technical violations that can create liability
- Recovering attorney's fees



## *EXAMPLE OF EXPOSURE*

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- Labor Code Section 226 requires the following nine items:
  - Gross wages
  - Total hours worked
  - Piece rate and number of units
  - All deductions
  - Net wages
  - Pay period
  - Name of employee and last 4 digits of SSN
  - Name/address of employer [as of 7/13 special requirements for temporary services employer]
  - All hourly rates and hours worked for each rate
- Missing any of the above can result in penalties [\$50/\$100/\$4000]



## *EXAMPLE OF EXPOSURE*

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- A new law, effective in 2013, defines “suffering injury” to recover damages for wage statements violations.
  - Specifically, an employee suffers injury if the employer fails to provide a wage statement.



## EXAMPLE OF EXPOSURE

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- The employer fails to provide complete and accurate information and the employee cannot “promptly and easily” determine any of the following from the statement alone:
  - Amount of gross or net wages earned
  - Total number of hours worked (if not salary)
  - Deductions made
  - Inclusive dates of pay period
  - All applicable hourly rates and the corresponding number of hour worked
  - Name/address of employer





# OVERTIME RULES

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- Preliminary Considerations:
  - *Workday* = any consecutive 24-hour period commencing at the same time each calendar day
  - *Workweek* = any 7 consecutive days, beginning with the same weekday (a “fixed and regularly recurring period of 168 hours, 7 consecutive 24-hour periods.”)
    - Once the workweek is established, it cannot be changed unless the change is intended to be permanent and not designed to evade overtime requirements. Each workweek stands alone, and simply having a 2-week pay period does not allow the employer to average the 2 weeks’ hours.



# OVERTIME RULES

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- Generally, premium pay to non-exempt employees in California is required in five different situations:
  1. Over 8 hours worked in a work day [*time and one-half*]
  2. Over 40 hours worked in a workweek [*time and one-half*] (consistent with federal law)
  3. First 8 hours of work on the 7<sup>th</sup> consecutive day of work in a single workweek [*time and one-half*] (Note: if the days cross over into a second workweek, this does not qualify the employee for the 7<sup>th</sup> day premium)
  4. Over 12 hours worked in a work day [*double time*]
  5. Over 8 hours worked on a 7<sup>th</sup> consecutive day of work in a single workweek [*double time*] (private employers only)





# OVERTIME RULES

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- Additional rules:
  - Federal law only has a 40-hour week.
  - “Anti-pyramiding” rules provide that employers need not combine more than one rate of overtime compensation (example: employee works 42 hours in a week, including 10 hours on one day).
    - The 41<sup>st</sup> and 42<sup>nd</sup> hour must be compensated, but they will be deemed equivalent to the 9<sup>th</sup> and 10<sup>th</sup> hour on the one day of overtime worked. Therefore, only one set of overtime need be paid.



# OVERTIME RULES

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- Limited exceptions for overtime:
  - *Alternative workweek schedules*: Employees may be allowed a set schedule or menu of options that would allow employees to work up to 10 hours in a day (no more than 40 hours in a workweek) without the payment of overtime.
  - *Make-up time provisions*: Employees are allowed to work up to 11 hours in a day without overtime payment if they are “making up” time they lost in the SAME WORKWEEK due to personal circumstances.
    - Employees must make the request (employer is not permitted to coerce or intimidate employees in their decision).
    - Employers are permitted to have a policy and form.



# OVERTIME RULES

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- Limited exceptions for overtime (cont.):
  - *Vacation*: Vacation pay is not considered “hours worked” and thus is not included in the calculation of whether overtime premium pay is owed.
    - Employers are not required to maintain vacation pay. However, once established, vacation is a vested benefit and owed at the time of separation.
  - *Holiday/Sick*: As with vacation, holiday/sick hours are not considered “hours worked.”
    - Employers are not required to provide holiday or sick pay.
    - Floating holidays and PTO may be considered vacation and due at the time of separation.
  - *Meal/Rest Period Penalties*: Extra hours of compensation are not considered “hours worked” for overtime purposes.



## FINAL PAY RULES

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- *Termination* – Pay is due immediately at the time of termination.
- *Resignation with 72 hours notice* – Pay is due immediately at the time of separation.
- *Resignation without notice* – Pay is due within 72 hours.
- Employer cannot mail final pay without authorization of the employee.
- Labor Code Section 203 serves as a daily penalty for ANY unpaid wages (including accrued vacation and unpaid meal/rest period penalties) for up to 30 calendar days after separation.



## *TRADITIONAL EMPLOYEE BREAKS*

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- Meal Periods:
  - Employees must receive a 30-minute, duty-free meal period if they work more than 5 hours in a workday.
  - A meal period may be waived by mutual consent if the employee works 6 hours or less.
  - Employers should permit and authorize employees to take meal periods.
  - Meal period starting and stopping times should be documented.





## *TRADITIONAL EMPLOYEE BREAKS*

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- Meal Periods (cont.):
  - If an employer fails to provide a meal period to an employee in accordance with the provisions of the applicable Wage Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.
  - Employee who works 5 hours or less is not required to have a meal period.





## TRADITIONAL EMPLOYEE BREAKS

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- Meal Periods (cont.):
  - The California Supreme Court in Brinker held employer satisfies obligation to employee by relieving employees of all duties, relinquishing control over their activities, and not impeding or discouraging employees from taking the meal period. Employer does not, however, have to “police” employees to ensure they take a meal period.
  - A meal period must start by the end of the fifth hour.
  - A second meal period is required if an employee works more than 10 hours.
  - If more than 10, but less than 12, second meal period can be waived by written agreement if the first meal period was taken.



## *TRADITIONAL EMPLOYEE BREAKS*

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- Rest Periods:
  - Employees must receive 10-minute, duty-free rest period for every 4 hours of work, or major fraction thereof.
  - Employers should permit and authorize employees to take rest periods.
  - Rest periods and meal period cannot be pooled.
  - Rest period starting and stopping times do not have to be documented.



# EMPLOYEE MISCLASSIFICATION

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- Three major overtime exemptions in California:
  1. Executive
  2. Administrative
  3. Professional
- These three exemptions are similar but different under federal law.
- Employers must comply with the one that provides the most protection for its employees.
- *Note: Although the job description is helpful to determine the classification, it is only the start of the analysis.*



# *EMPLOYEE MISCLASSIFICATION*

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- Executive exemption:
  - Salary Test:
    - Must earn salary minimum of \$37,440.
    - Employee is paid for QUALITY of work, not QUANTITY of work.
  - Duties Test:
    - Supervise 2 or more employees.
    - Exercise discretion and independent judgment in management.
    - Must be engaged in these activities more than 50% of their time.



# EMPLOYEE MISCLASSIFICATION

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- Administrative Exemption:
  - Salary Test:
    - Must earn salary minimum of \$37,440.
    - Employee is paid for QUALITY of work, not QUANTITY of work.
  - Duties Test:
    - Provide direction on the operations of the enterprise – not the service or sale of goods.
    - Exercise discretion and independent judgment.
    - Must be engaged in these activities more than 50% of their time.





# EMPLOYEE MISCLASSIFICATION

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- Professional Exemption:
  - Salary Test:
    - Must earn salary minimum of \$37,440.
    - Employee is paid for QUALITY of work, not QUANTITY of work.
  - Duties Test:
    - Must be licensed in one of the enumerated professions recognized by the State of California.
    - Exercise discretion and independent judgment.
    - Must be engaged in these activities more than 50% of their time.





# *EMPLOYEE MISCLASSIFICATION*

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- Salesperson Exemption:
  - Outside Sales:
    - Employee is completely exempt from overtime.
    - Employee is also exempt from meal and rest periods.
    - Employee must spend more than 50% of their time outside of office.



## *EMPLOYEE MISCLASSIFICATION*

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- Salesperson Exemption (cont.):
  - Inside Sales:
    - Employee may be exempt from overtime.
    - Must earn at least one and one-half times the minimum wage for all hours worked and more than half of that employee's compensation represents commissions.
    - Still subject to all other protections (e.g. meal and rest breaks).



# EMPLOYEE TIMEKEEPING

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- Off-The-Clock Work
  - Includes travel time, training, meetings, lectures, conferences, etc.
  - Employers are obligated to record all time worked.
  - Employees should be directed to not perform work that is not accounted for in the timecard.
  - Employee should sign timecard, acknowledging true and accurate recordkeeping.
  - *Note: Employees can have different rates for different type of work, such as travel time at minimum wage.*
- Unauthorized Overtime
  - Employees who work unauthorized overtime **MUST** be paid premium pay, but can be disciplined.



## TRAVEL PAY

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- Time spent traveling from worksite to worksite during the work day may be considered “hours worked.”
- Mandatory mode of transportation to a worksite may also be considered “hours worked.”
- If an employee is required to report to a central location/worksite and then travel to another site, all time spent traveling after is “hours worked.”
- *Coming & Going Rule* – normal commute to and from work is not considered “hours worked.” However, sporadic travel to remote locations or varied worksites may trigger partial travel pay.



## *AUTOMATIC DEDUCTIONS*

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- If the employee only clocks in at the start of the shift and clocks out at the end, the employer may be liable for unpaid wages *if* a deduction was made by employer for meal break but break was never taken (or taken in the full amount).
- Some employers automatically deduct from employees' wages for a non-compensable break or meal period.
- California law and the FLSA require employees to be compensated for all time worked.





## *EMPLOYEE EXPENSES*

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- Labor Code Section 2802:
  - Provides that all expenses necessarily incurred by the employee in discharge of their duties to the employer must be reimbursed.
    - Use of personal automobile – reimburse IRS rate
    - Cell phone
    - Personal computer or office equipment
    - Uniforms
    - Meals and entertainment
    - Liability





## *PREVENTATIVE SOLUTIONS*

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- Develop timekeeping procedures
- Develop reimbursement policies
  - Uniforms
  - Mileage
  - Tools & equipment
- Consider varying evaluations, job descriptions, standards, rules, and procedures by location or individuals
- Communicate legal requirements to employees



## *PREVENTATIVE SOLUTIONS*

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- Conduct audits to determine areas of potential exposure
  - Review job descriptions/classifications
  - Follow record keeping requirements
  - Review payroll practices
- Review and understand applicable wage orders
- Train supervisors/HR personnel to do regular weekly audits
- Enforce meal/rest period policies



## *BENEFITS OF AUDITS*

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- Audits minimize/limit potential liability.
  - Helps identify potential problems that must be addressed.
- Without audits, financial exposure increases with each day that passes.
  - In turn, this increases the likelihood of a court finding violations/actions to be willful violations of the law.
- Audits can provide evidence to defend against wage and hour claims.



# QUESTIONS?

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**Roxana E. Verano, Esq.**

LANDEGGER BARON LAW GROUP

[Roxana@Landeggeresq.com](mailto:Roxana@Landeggeresq.com)

Los Angeles Office: 818.986.7561

15760 Ventura Blvd., Suite 1200

Encino, California 91436

Ventura County Office: 805.987.7128

751 Daily Drive, Suite 325

Camarillo, California 93010

