

NOVATIME TECHNOLOGY, INC. PRESENTS

# WAGE AND HOUR LAWS, TRENDS AND CLASS ACTIONS

*WHAT EVERY BUSINESS OWNER NEEDS TO KNOW*

Presented by

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Landegger Baron Law Group, ALC

*Exclusively Representing Employers*

*Employment Law, Advice, Litigation and Solutions*





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# ABOUT OUR SPEAKER

## **Marie D. Davis, Esq.**



- Attorney with the Landegger Baron Law Group
- Specializes in helping businesses navigate complex employment laws
- Member of the Ventura County Bar Association, the Consumer Attorneys Association of Los Angeles County, and the Ventura County Hispanic Chamber of Commerce
- Received her J.D. from the U.C. Hastings College of Law

# WAGE & HOUR

- Federal law is codified in the Fair Labor Standards Act (FLSA)
- California Labor Code
- Federal and state regulations interpreting the law
- Generally significant overlap between federal and state laws
- Employer must comply with whichever law provides greater protection to employees

# WAGE & HOUR UNIQUE ISSUES

- Burden is on employer to establish exemptions and maintain record of hours worked
- Technical violations can create liability
- Most laws provide for recovery of attorneys' fees to employees, not employers
- California law and the FLSA requires that employees be compensated for all time worked

# PERSONNEL AND PAYROLL RECORDS

- Labor Code Section 1198.5
  - Current/former employees or representatives
  - 30 calendar days from receipt (may be extended 5 calendar days)
- Labor Code Section 226
  - As soon as practicable but no later than 21 days from the date of the request

# PERSONNEL RECORDS

- Personnel file - Documents relating to employee's performance or to any grievance concerning the employee
  - Application and resumes
  - Job descriptions
  - Job offers, promotions, compensation, education and training
  - Performance assessments and goal setting records

# PERSONNEL FILE

- Personnel file – cont.
  - Employee acknowledgements and agreements
  - Letters of recognition
  - Warnings, counseling and disciplinary actions
  - Grievances
  - Termination records



# PERSONNEL RECORDS

- Documents not to include:
  - Records relating to the investigation of a possible criminal offense
  - Letters of reference
  - Ratings, reports or records obtained prior to employee's employment, prepared by an identifiable examination committee member, or obtained in connection with a promotional examination

# PERSONNEL RECORDS

- Other documents to be kept in separate files
  - Reference/background checks
  - Drug test results
  - Immigration (I-9) forms
  - Medical/insurance records
  - Child support/garnishments
  - Litigation documents
  - Workers' Compensation claims
  - Investigation records

# PAYROLL RECORDS

- Documents to include in payroll file
  - Timesheets
  - Wage statements – a duplicate of the wage statement or a computer generated record showing all required information
    - Payroll registry not sufficient

# POTENTIAL PENALTIES

- Labor Code Section 1198.5
  - \$750.00 penalty
- Labor Code Section 226
  - \$750.00 penalty
  - Infraction

# EMPLOYEE MISCLASSIFICATION

- Exemptions relieve an employer from having to meet the statutory minimum wage and overtime requirements
- There are only three major overtime exemptions
  - Executive
  - Administrative
  - Professional
- Employer must comply with the one that provides the most protection for the employee

# EMPLOYEE MISCLASSIFICATION

- The job description is helpful, but only the start of the analysis.
- Employee is paid for QUALITY of work not QUANTITY of work.
- Salary test:
  - Must earn salary minimum of \$ 3,466.67 per month/ \$41,600.00 per year.
- Duties test

# EXEMPT EMPLOYEES

- Executive exemption:
  - Duties test:
    - Supervise 2 or more employees, and
    - Primary duty is management of the enterprise or a subdivision, and
    - Authority to hire or fire, or suggest such action, and
    - Customarily and regularly exercises discretion and independent judgment, and
    - Primarily engaged in those duties (more than 50%)

# EXEMPT EMPLOYEES

- Professional exemption:
  - Duties test:
    - Primary duty must be the performance of work requiring advanced knowledge.
    - Customarily and regularly exercises discretion and independent judgment.
    - Must be in the field of science or learning.
    - Required by a prolonged course of specialized intellectual instruction



# EXEMPT EMPLOYEES

- Administrative exemption:
  - Duties test:
    - Primary duty is performance of office or non-manual work directly related to the management or general business operations
    - Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance
    - Executes special assignments or tasks or performs work along specialized or technical lines, under general supervision only
    - Primarily engaged in those duties (more than 50%)



# EXEMPT EMPLOYEES

- Salesperson exemption/California:
  - Inside sales:
    - Employee may be exempt from overtime only
    - 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 – meal and rest breaks

# EXEMPT EMPLOYEES

- Salesperson exemption/outside sales:
  - Primary duty to make sales or obtain orders for services
  - Employee must be customarily and regularly engaged away from the employer's business
  - California: Employee must spend more than one-half of their time outside of office

# EXEMPT EMPLOYEES

- DOL proposed revisions to FLSA
  - Overtime exemptions
  - Increase minimum salary to qualify for exemption
  - \$970.00 per week or \$50,440.00 per year
  - Highly compensated – no specific proposal but approximately \$150,000
  - Annual increases

# EXEMPTION AUDITS

- Key documents to collect/review
  - Job descriptions contain key information about duties relevant to the exemption, including (a) in what order are the job duties listed (duty requiring greatest amount of time should be first), (b) any indication as to the percentage of time spent on a particular duty, and (c) level of autonomy the employee exercises.

# EXEMPTION AUDITS

- Key documents to collect/review
  - Job evaluations indicate what the evaluator sees as the most important duties
  - Job postings indicate the characteristics, background and experience needed
  - Organizational chart

# NON-EXEMPT EMPLOYEES

- Preliminary considerations:
  - A “workweek” is “any 7 consecutive days, starting with the same calendar day each week.”
  - “Workday” means period between the time when EE starts his/her “principal activity” and when he/she ceases such activities.
  - “Workday” may be longer than scheduled shifts or hours.

# OVERTIME RULES

- New California Minimum Wage
  - Effective January 1, 2016
  - \$10.00 per hour
- California requires overtime pay in 5 different situations:
  - Over 8 hours of work in a work day (time and one-half)
  - Over 40 hours of work in a workweek (also consistent with federal law) (time and one-half)



# OVERTIME RULES

- Cont.
  - The first 8 hours of work on the 7<sup>th</sup> consecutive day of work in a workweek (time and one-half) (note that the employee must work all 7 days in the workweek: merely working 7 consecutive days, if the days cross over into another workweek, will not qualify the employee for the 7<sup>th</sup> day premium)
  - Over 12 hours of work in a work day (double time)
  - Over 8 hours of work on a 7<sup>th</sup> consecutive day in a workweek (double time) (private employers only)



# OVERTIME RULES

- Cont.
  - “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, so only one set of overtime need be paid.

# DOMESTIC WORKER BILL OF RIGHTS

- Under Wage Order 15 (Household Occupations), Personal Attendants were exempted from overtime and meal periods; however,
- Domestic Worker Bill of Rights
  - Labor Code 1450 et seq. provides for the payment of overtime wages.

# DOMESTIC WORKER BILL OF RIGHTS

- Domestic Worker – provides services related to the care of people in the home, or maintain private household or their premises, e.g., nannies, childcare, caregivers, personal attendants, cooks, housekeepers.
- Personal Attendant – employed by a private household or 3<sup>rd</sup> party employer to supervise, feed and dress a child or person who needs assistance due to advanced age, disability or mental deficiency

# DOMESTIC WORKER BILL OF RIGHTS

- Personal Attendants are entitled to overtime pay for any hours worked over nine (9) hours per day or over forty five (45) per week at the rate of one and one-half ( $1\frac{1}{2}$ ) the regular rate.
- Excluded employees include:
  - Anyone who provides services to the developmentally disabled through a state or regional center voucher program



# DOMESTIC WORKER BILL OF RIGHTS

- Excluded employees include:
  - Family members
  - Casual babysitters
  - Anyone who provides childcare pursuant to certain child care acts (the Child Care and Development Services Act of the Education Code or the California Work Opportunity and Responsibility to Kids Act of the Welfare and Institution Code)



# OVERTIME RULES

- New Department of Labor Domestic Service Final Rule – Federal Law
  - Effective November 12, 2015 (not January 1, 2015)
  - Overtime for work over 40 hours in a workweek
  - Not applicable to live-in employees employed directly by an individual, family, or household

# OVERTIME RULES

- 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
    - Employee is 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.
    - Employee 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

- Other non-exempt issues
  - Notice to Employee Form (Labor Code Section 2810.5)
  - Travel time
  - Mileage reimbursement
  - Rounding
  - Deductions
  - Off-the-clock work

# TRAVEL PAY

- Time spent travelling 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, then all time spent traveling after is hours worked.
- Coming & Going Rule – normal commute to and from work is not counted as hours worked.
- However, sporadic travel to remote locations or varied worksites may trigger partial travel pay.

# EMPLOYEE EXPENSES CALIFORNIA

- 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



# EMPLOYEE TIMEKEEPING

- Off-the-clock work
  - Employer's obligation to record all time worked.
  - Employee should be directed not to perform work that is not accounted for in the timecard.
  - Employee should sign timecard, acknowledging true and accurate recordkeeping.



# NON-EXEMPT AUDITS

- Key documents to collect/review
  - Timekeeping records, including a review of clock in and clock out punches.
  - Questionable entries include consistently rounded start and end times and rounding that does not even out over time
  - Compare employees' timesheets with pay stubs

# NON-EXEMPT AUDITS

- Key documents/review
  - Meal period punches—Was meal period taken before the end of the 5<sup>th</sup> hour? Did employee receive less than a 30-minute meal period?
  - Ensure premium pay was paid in situations where meal period violations were due to something within the employer's control and not as a result of employee's choice.

# MEAL PERIODS IN CALIFORNIA

- Meal periods:
  - Employee must receive 30-minute, duty-free meal period if they work more than 5 hours in a workday.
  - Period may be waived by mutual consent if the employee works 6 hours or less.
  - Absent exigent circumstances, period can not be waived if employee works more than 6 hours.
  - Employer should permit and authorize employee to take meal period.
  - Meal period starting and stopping times should be documented.

# MEAL PERIODS IN CALIFORNIA

- Meal periods:
  - If an employer fails to provide an employee a meal period 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.



# MEAL PERIODS IN CALIFORNIA

- Meal periods:
  - 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 took meal period. 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.

# MEAL PERIODS

- Recent Case – *Alberts v. Aurora Behavioral Health Care*
  - Requirement of “facially valid” policy
- Court noted that meal policy which stated employees were entitled to “an unpaid thirty-minute break for a meal period, approximately half way between the beginning and ending of the employee’s shift” was not a “facially valid” policy, because California law requires that a meal break be provided during the first five hours of an employee’s shift, and because California law also requires that an employee be entitled to take a second meal period for shifts that exceed 10 hours.

# REST PERIODS IN CALIFORNIA

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

# FINAL PAY RULES

- 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.
- Cannot mail final pay without authorization of 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.

# HEALTHY WORKPLACE, HEALTHY FAMILY ACT OF 2014

- Paid Sick Leave v. PTO/Vacation
  - No payment of accrued paid sick time at time of termination
  - Payment of accrued vacation or paid time off at time of termination
  - Vacation/paid time off considered wages
  - Labor Code Section 203 penalties

# CLASS ACTIONS/PAGA

- Recent case
  - Arbitration Agreement may preclude employee from filing a class action but not a PAGA claim.
  - Increase in filings of PAGA claims
  - Employee steps into the shoes of the state.
  - “Aggrieved Employee” can collect civil penalties on behalf of the employees and other “aggrieved employees.”

# CLASS ACTION/PAGA

- No need to certify a class or comply with class action requirements
- Penalties under PAGA
  - EE can recover civil penalties as provided by the specific Labor Code statute, or, if statute is silent,
  - EE can recover \$100 for the first violation per employee per pay period, and \$200 for any subsequent violation per employee per period.

# EXAMPLE OF EXPOSURE

- Labor Code Section 226 requires 9 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
  - “Legal” name and address of employer
  - All hourly rates and hours worked for each rate



# EXAMPLE OF EXPOSURE

- Missing any one of the items listed in Section 226 above can result in penalties as follows:
  - Employee suffering injury is entitled to recover \$50 for the initial pay period and \$100 per employee for each violation in a subsequent pay period up to a maximum of \$4,000.
  - Civil penalty in the amount of \$250 per employee per violation in an initial violation and \$1,000 per employee for each subsequent violation.



# HOW NOVATIME CAN HELP

- NOVAtime performs complex overtime calculations, including daily, weekly, day-of-week, consecutive day, and weekend overtime.
- Overtime calculations take into account the start and stop times, scheduled hours, and type of duty performed.
- FLSA / Weighted Overtime enhancement considers all hours and pay types in FLSA / weighted overtime adjustments.



# HOW NOVATIME CAN HELP

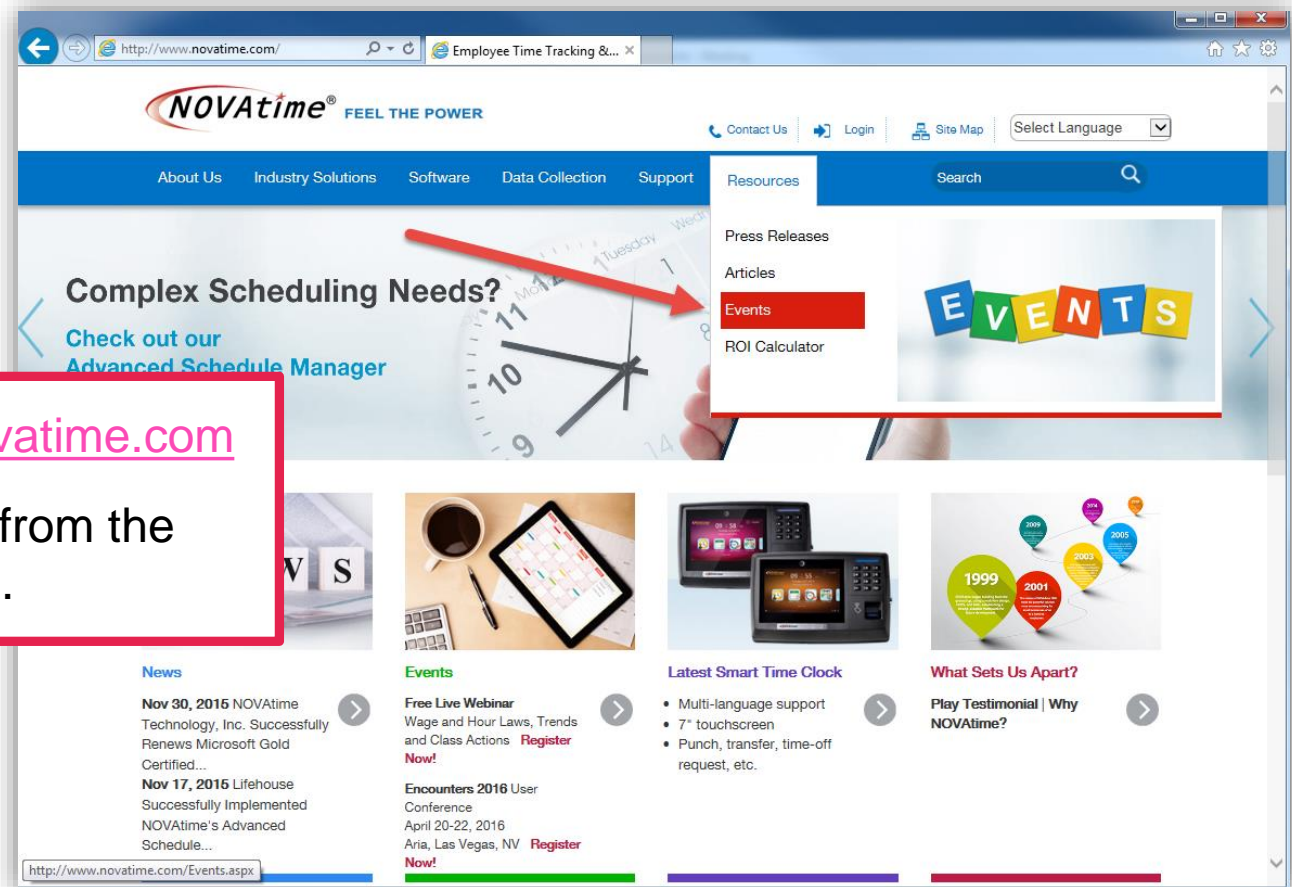
- Meal periods are configurable by shift in accordance with state and federal law.
- California Meal Rule enhancement ensures employees take a meal break before their 5<sup>th</sup> hour of work.



# HOW NOVATIME CAN HELP

- The system's Leave Management module supports unlimited, user-definable leave events, including sick leave, vacation, military leave, FMLA leave, and personal time off .
- NOVAtime's California Sick Leave enhancement calculates accruals in compliance with the Healthy Workplace, Healthy Family Act.

# DOWNLOAD SLIDES



The screenshot shows the NOVAtime website homepage. The navigation bar includes links for About Us, Industry Solutions, Software, Data Collection, Support, Resources, and Search. The Resources dropdown menu is open, showing options for Press Releases, Articles, Events (highlighted in red), and ROI Calculator. A red arrow points to the Events link. Below the navigation bar, there is a main banner with the text "Complex Scheduling Needs? Check out our Advanced Schedule Manager" and a large clock graphic. The main content area features four columns of featured content: News, Events, Latest Smart Time Clock, and What Sets Us Apart? The Events column includes a link to a "Free Live Webinar" and "Encounters 2016 User Conference".



1. Go to [www.novatime.com](http://www.novatime.com)
2. Select *Events* from the *Resources* tab.

# DOWNLOAD SLIDES

3. In the *Events on Demand* section, find the event and click *View*.

## Events

### Upcoming Events

Date	Event Name	Description	Location
Jan 19, 2016	Wage and Hour Laws, Trends and Class Actions 	In this free live webinar, Marie D. Davis, Esq. of Landegger Baron Law Group will discuss the changing landscape of wage and hour laws and how employers can avoid common lawsuits.	Live Webinar <a href="#">Register</a>
	Encounters 2016 User Conference 	All NOVAtime clients are invited to our annual user conference in Las Vegas. The three-day event is a great opportunity to meet the NOVAtime team, get trained on key features of the system, and learn about what's on the horizon at NOVAtime.	Aria, Las Vegas, NV <a href="#">Register</a>

### Events On Demand

Date	Event Name	Description	Location
Nov 04, 2015	FMLA and CFRA: Landmines for Employers	Presented in partnership with Landegger Baron Law Group, this webinar covers the complex regulations of the Family Medical Leave Act and the California Family Rights Act.	<a href="#">View</a>
Sep 30, 2015	OSHA 101: Or What You Don't Know About OSHA Could Hurt You	Learn the basics of dealing with OSHA in this free webinar presented in partnership with Constangy, Brooks, Smith & Prophete, LLP. New reporting requirements, as well as exceptions to those requirements, will also be covered.	<a href="#">View</a>

# THANK YOU FOR ATTENDING!

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