



Five Steps Toward Legal Pay Practices

by Alison Hightower, Esq., Littler Mendelson, P.C.

ahightower@littler.com

Employees look forward to payday, and employers generally expect that these paychecks meet all legal requirements. In recent years, both current—and especially former—employees are bringing hyper-technical claims that their employers failed to dot the “i’s” and cross the “t’s” with respect to their pay.

This is no small matter because California’s Labor Code permits employees to recover actual damages and in some situations statutory penalties for violations of legal requirements.

But there is hope! A few steps can be taken to reduce employer’s risks.

Step One

Review the paycheck stubs for your non-exempt employees. Do they specify the number of hours worked during each pay period? California law requires that all employees, except those non-exempt employees whose compensation is solely based on salary, accurately specify the total number of hours worked, as well as all deductions, net wages earned, and all applicable hourly rates in effect with the number of hours worked at each applicable hourly rate.

While California’s Labor Commissioner has authorized the use of electronic wage statements, the employee must be given the right to elect to receive a written paper record and the employee must have the ability to convert the electronic statement into a hard copy at no expense.

Step Two

Classify your employees correctly. Lawsuits challenging the exempt status of employees are on the rise. Which employees qualify for exempt status under federal and California law is not always clear. Employers generally must apply the standard that provides the employee greater protection (and thus the right to receive overtime).

While there are parallels in these two different exemption systems, there are also important differences. For instance, the inside salesperson exemption under the federal scheme applies only to employers in the “retail or service” industry, whereas under California law, no such industry restriction exists. Industries that may not qualify under the federal exemption include accounting firms, many financial companies, insurance brokerages, loan offices, credit companies, and tax services.

Employers with operations in multiple states of course must verify compliance with all applicable state laws. And even if the job description fits an exemption to a tee, check on whether the employees are doing the tasks the way you expect, and that managers are aware of what tasks employees are supposed to be doing.

Step Three

Calculate overtime pay correctly. Under California law, overtime is paid at the employee’s “regular rate of pay.” This “regular rate” must be calculated by the hour, even if an employee is paid per month, or by commission or other compensation. Further, the “regular rate” is based on not only on hourly earnings or salary, but generally includes remuneration in the form of many bonuses, commissions, cost-of-living allowances, and the value of meals and lodging. Under California law, the employer does not include in this calculation any tips, reporting time pay and split-shift premiums.

Another potential compliance issue arises because under California law, a salaried employee who works 50 hours in a week is paid overtime calculated by dividing the salary by one-fortieth of the employee's weekly salary, not by dividing that weekly salary by 50 hours. This required calculation results in a higher overtime hourly rate for California employees.

Step Four

Be sure your employees are being paid for all time worked. Employees are entitled to pay for all time the employee "suffered or [was] permitted to work, whether or not required to do so." 8 Cal. Code Regs. § 11010. If the employer knew, or even simply should have known, that the work was being done, the employee is entitled to pay, including overtime, irrespective of whether the time or work was "authorized" or "pre-approved."

Nor can employees waive their right to pay, even if they appear to be doing so voluntarily. Claims that employees were forced to work "off-the-clock" have proliferated, even when employers have policies and procedures that forbid such work.

Compensatory time off in lieu of overtime is permitted under California law, but only under specific circumstances where: (1) the employee has agreed in writing to such an arrangement before he or she performs the work; (2) compensatory time is provided at the rate of one and one half hours of time off for each hour of overtime worked; (3) the employee has not accrued more than 240 hours of compensatory time off; (4) the employee is regularly scheduled to work no less than 40 hours a week; and (5) the employee requests compensatory time off in writing.

Well-intentioned managers can offer compensatory time not realizing these limitations. Educating managers on legal requirements and documenting compliance are helpful measures to reduce if not eliminate such claims.

Step Five

Check on when you pay employees who resign or are terminated. A California employee who resigns is entitled to all compensation due and owing with 72 hours of resignation. But if the employee gives more than 72 hours notice, then that final paycheck is due on the employee's last day of work.

When you terminate a California employee, that employee generally is entitled to receive all compensation "due and owing" on the last day of work (unless covered by a collective bargaining agreement). Mailing the final paycheck to the employee's home without the consent of the employee thus may not be adequate. However, if the employee authorized direct deposit of wages into a specified bank account, the employer may deposit the final paycheck into this bank account.

Failure to comply with these requirements may entitle the employee to recover "waiting penalties," calculated at the employee's daily wage for up to 30 calendar days (including weekends). If the employee is eligible for commissions or bonuses, consult counsel to determine whether payments must be paid upon separation.

Conclusion

The old proverb that an ounce of prevention is worth a pound of cure is as valid now as ever. Reviewing compliance with these legal requirements could save your entity many expensive headaches.