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## **Overtime and Non-Exempt Employees**

California and federal law both provide for Payment of overtime compensation based on a multiple of the employee's 'regular rate' of pay (generally time-and-a-half) for hours above the statutory maximum (generally over 40 hours in a week under federal and state law, but also over eight hours per day under California law.

Under both federal and California law, a 'workweek' means seven consecutive days beginning with the same calendar day each week.

State law requires employers to authorize rest periods of specified minimum duration (generally 10 minutes of paid rest for every four hours worked). No employer may require an employee to work during any meal or rest period under IWC Wage Order mandates.

Employees who work more than five hours in a day are entitled to a meal period of at least 30 minutes and a second meal period of at least 30 minutes if they work more than 10 hours in a day. An employer who fails to provide meal or rest periods as required by an applicable Wage Order must pay the employee one additional hour of pay at the employee's regular rate of pay for each work day that the meal or rest period was not given.

### **When Does Overtime Start?**

In California, the IWC Wage Orders broadly define 'hours worked' to include 'the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.'

### **How Are Overtime Pay and Other Penalties Calculated?**

### **When Does Overtime Start?**

### **Who Is Responsible For Recordkeeping?**

### **How Can Unauthorized Overtime Be Prevented?**

The critical issue in determining hours worked is whether the employee was ‘suffered and permitted’ by the employer to work. It is irrelevant whether it was necessary for an employee to work long hours in order to complete an assignment, or whether another employee could have done the work in less time. ‘It is immaterial whether it was necessary for (the employee) to work long hours, so long as he did, with the actual or constructive knowledge of his employer.’ Donovan v. Kentwood Develop. Co., Inc.; see also Skipper v. Superior Dairies, Inc. – fact another employee could or did perform same duties in less time does not negate claimant’s right to overtime pay; Davis v. Food Lion – no overtime pay where employer had no actual or constructive knowledge of employee’s ‘off the clock’ work.

An employee must be paid for time considered to be on duty while on the employer’s premises. See Bartholomew v. Heyman Properties. Preparatory activities that are an integral part of the employee’s principal activity are compensable as time worked. Examples include: Mitchell v. King Packing Co. – in meatpacking plant, time spent sharpening knives before and after work considered integral and compensable; Alvarez v. IBP, Inc. – time spent donning and doffing unique protective gear, walking to job station and waiting for assembly line to begin, were ‘integral and indispensable’ to job and therefore compensable; but see Tum v. Barber Foods, Inc. – employer not required to compensate employees for time spent walking to place where safety gear was stored and a ‘short amount of time’ waiting in line to obtain protective gear.

Employers need not compensate employees for activities preliminary or postliminary to their principal duties unless those activities are an ‘integral and indispensable part’ of the principal activities for which the workers are employed. See Alvarez v. IBP, Inc. – donning and doffing required by law and done for the benefit of employer is integral and indispensable part of workday; compare Turner v. Barber Foods, Inc. – time spent donning and doffing of non-required gear not compensable.

Some activities that may qualify as ‘work’ and nevertheless do not require compensation because the activities involve such little time that they are adjudged de minimis: ‘A few seconds or minutes of work beyond the scheduled working hours ... may be disregarded.’ Anderson v. Mt. Clemens Pottery Co. Whether the additional time spent on preliminary and postliminary activities is ‘de minimis’ may depend on:

- The aggregate amount of time spent on such activities;
- The activity’s regularity;
- The ‘practical administrative difficulty of recording the additional time.’ Reich v. Montfort, Inc.

As little as 10 minutes spent on preliminary and postliminary activities ‘goes beyond the level of de minimis.’ Reich v. Montfort, Inc. – time spent in donning and removing safety gear and cleaning knives at meat processing plant.

## Who is responsible for record-keeping?

Every employer is required to make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records' for specified periods of time.

The following records must be maintained for at least three years from the last date of entry:

- Payroll records, including each employee's name, address, occupation hours worked each day and week, wages paid and date of payment, amounts earned as straight-time pay and overtime, and deductions;
- Plan, trusts and collective bargaining agreements;
- Employee notices; and
- Sales and purchase records.

The following additional records must be retained for a minimum of two years from the date of last entry:

- Basic time and earning cards;
- Wage rate tables;
- Work schedules;
- Order, shipping, and billing records; and
- Records of additions to or deductions from wages.

Employees are not penalized because of their employer's failure to keep adequate records. They can meet their burden of proof in wage actions by their own testimony showing that they have in fact performed work for which they have not been properly compensated. They need not prove the precise hours worked; they need only produce sufficient evidence to show the amount and extent of such work as a matter of a just and reasonable inference. Beliz v. W.H. McLeod & Sons Packing Co. – 'Because precise evidence of the hours worked by each individual is not available due to the failure of (employers) to keep adequate records, the workers may satisfy their burden with admittedly inexact or approximate evidence'; see also Mumbower v. Callicott – court properly relied on plaintiff's own recollections to determine number of hours she worked where employer failed to maintain adequate records.

The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or that negates the reasonableness of the inference the employee's evidence supports. If the employer fails to produce such evidence, the

court may then award damages to the employee, even though the result is only approximate. Anderson v. Mt. Clemens Pottery Co.

The employer must provide an employee or former employee copies of his or her payroll records within 21 days after a request, or permit the employee to inspect those records. (Failure to comply results in a \$750 fine, and the employee may sue to obtain the information and recover

costs and fees). Also with each pay check the employer must give an itemized wage statement showing the hours worked by the employee. A knowing failure to comply can result in a \$100 penalty per an offense and a maximum statutory penalty of \$4,000.

## How can unauthorized overtime be prevented?

Courts examine the employer's personnel documents to determine if there is an implied agreement. Tomlison v. Qualcomm, Inc. Thus, an employee handbook may give rise to an implied-in-fact contract, by setting self-imposed limitations, such as discipline and termination procedures. Foley v. Interactive Data Corp. When an employer promulgates formal personnel policies and procedures in handbook, manuals, and memorandua disseminated to employees, a strong inference may arise that the employer intended workers to rely on these policies as terms and conditions of their employment, and that employees did reasonably so rely. Guz v. Bechtel Nat. Inc.

Failure to have a handbook will not necessarily prevent a finding of an implied-in-fact contract since the implied contract may be based in part on employer policies and procedures. Whether those procedures have been memorialized in a handbook does not seem to be determinative. See, for example, Harden v. Maybelline Sales Corp. (no discussion of handbook, yet court concluded that employee could state action based on implied-in-fact contract based in part on oral representations from personnel department of just cause for standard for termination.)

The first step to prevent employees from taking unauthorized overtime is to have a firm policy stated in an employee handbook prohibiting overtime or permitting overtime only if certain requirements are met. Although an employee's failure to follow the procedures in an employee handbook may not be able to defeat a wage and hour claim, the employee handbook should help greatly when it comes time to determine what the employer's stated policy regarding overtime was. Obviously you must be sure to enforce your own written policies and not make regular informal exceptions to the written policy.