

WAGE AND HOUR LAW – THE BASICS

BY:

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OVERVIEW

- Who is an employer?
- Employee or independent contractor?
- What are wages?
- Basic wage rules and potential violations
 - OT
 - Sick leave
 - PTO/Vacation
 - Breaks (Meal and Rest)
- Private Attorney General Act (PAGA)
- Questions (can also email me at skye.esq@gmail.com)

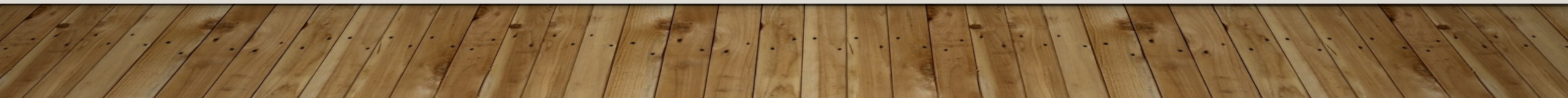
WHO IS AN “EMPLOYER”?

- Individual liability began Jan. 1, 2016, through SB 588 (Fair Day’s Pay Act):
 - Created Labor Code section 558.1
 - Imposes personal liability on owners, directors, officers and managing agents of employers for wage and hour violations
 - Formerly only PAGA could achieve this, and only for penalties, not wages
- Labor Commissioner can enforce these through all civil collection means: personal property liens, bank levies

WHO IS AN EMPLOYER?

- California Labor Code 558.1

Any employer *or other person* acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated:

- Section 203 (payment of wages on termination of employment)
 - Section 226 (paystub reporting requirements)
 - Section 226.7 (meal period premium)
 - Section 1193.6 (recovery of attorney fees for lawsuits to recover unpaid minimum wage and/or overtime)
 - Section 1194 (failure to pay minimum wage for all hours worked)
 - Section 2802 (reimbursement of business expenses)
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WHO IS AN “EMPLOYER”?

- Joint employers
 - FLSA adopted a four-factor balancing test. Did potential employer exercise “substantial control” over the terms and conditions of the employee’s work?
 - Look at whether potential employer:
 - Hires or fires;
 - Supervises and controls work schedule or conditions of employment to a substantial degree;
 - Determines rate and method of payment; and
 - Maintains the employee’s employment records

WHO IS AN “EMPLOYER”?

- Joint employers
 - California has its own test, *broader* than the FLSA
 - Also, different tests for different types of claims
 - For wage and hour claims:
 - Right of control
 - New Labor Code section 2810.3 (holds companies accountable for wage and hour and other violations when they use staffing agencies or other labor contractors to supply workers); Labor Code section 558.1
 - Protects industries that contract low and skimp on employee wages

WHO IS AN “EMPLOYER”?



- Cheesecake Factory example
 - **\$4,570,000 million** fine, to 559 workers, imposed by DLSE
 - Consisting of OT, meal/rest break denial, interest, waiting time penalties
 - Americlean Janitorial Services Corp., Cheesecake Factory’s janitorial contractor, subcontracted the work to Magic Touch Commercial Cleaning
 - Cheesecake and Magic Touch jointly liable; Magic Touch’s owner jointly and personally liable, as well as her new business, Z’s Commercial Cleaning
 - Maintenance Cooperation Trust Fund, <http://www.janitorialwatch.org/business/>
 - Why? Magic Touch workers were not released until Cheesecake Factory kitchen managers conducted walkthroughs to review their work

WHO IS AN EMPLOYEE?

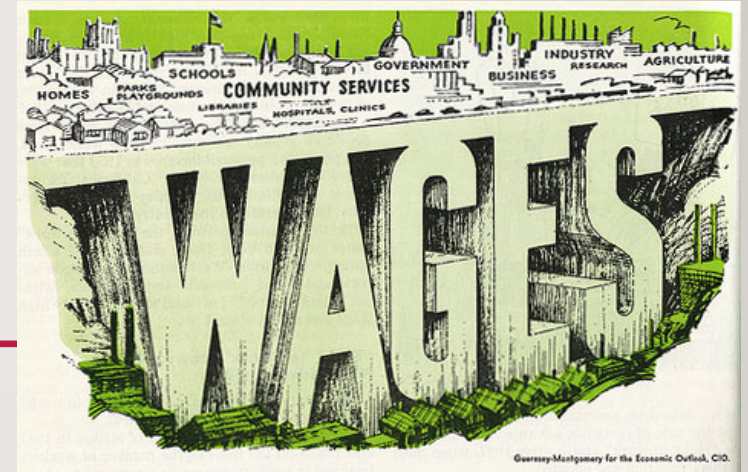
- *Dynamex ABC Test* – why?
 - Decision expressly limited to Wage Order issues
 - A. Worker must be free from control and direction in the performance of work (both in actuality and as contracted)
 - B. Work performed is outside the usual course of the hirer's business
 - C. Worker is customarily engaged in independently established trade
- AB5 codified ABC Test
 - Exceptions - over 50 professions or types of businesses are exempt, such as include doctors, dentists, insurance agents, lawyers, accountants, real estate agents, hairstylists, a variety of creative professionals; business-to-business contractors that meet 12 specific requirements and referral agencies that meet 10 specific requirements
 - <https://www.nolo.com/legal-encyclopedia/exempt-job-categories-under-californias-new-ab5-law.html>
 - http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200AB5

WHO IS AN EMPLOYEE?

- Everyone else and the exempted ... the *Borello* factors apply:
 - Whether the work performed is part of the hiring firm's regular business
 - Who supplies the equipment, tools, and location of work
 - The worker's financial investment in the equipment or materials required to perform the work
 - The skill required; and who tells the worker how to perform the job
 - The worker's opportunity for profit or loss depending on his or her own managerial skill
 - How long the services are to be performed; the degree of permanence of the working relationship
 - The payment method, whether by time or by the job
 - Whether the parties believe they are creating an employer/employee relationship
- The most important factor under *Borello* is the “right of control.” *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 351

WHAT ARE WAGES?

- Sacrosanct
- All amounts for labor performed by employees, whether the amount is fixed or ascertained by a standard of time, task, piece, commission basis, or other method of calculation. [Labor Code Section 200\(a\)](#). A "wage" is defined as money or other value that is received by an employee as compensation for labor or services performed.
- "Other value" could include room, board, clothes, and other benefits to which the employee is entitled as a part of his or her compensation.
- Definition of “wages” matters in several ways...



WHAT ARE WAGES?

- Wages vest as they are earned
- Failure to timely pay wages can lead to serious penalties (Labor Code sec. 203)
 - Such as, interest on unpaid amounts and waiting time penalties
- Bonuses can be earned or unearned
 - No matter the classification, bonuses are wages and must be paid as earned
- Non-discretionary versus discretionary bonuses
 - Non-discretionary bonuses are added into the OT calculation
 - Discretionary bonuses are not added to the OT calculation

WAGES VERSUS PENALTIES

- Penalties apply to failure to properly and timely pay wages
 - Waiting time penalties and itemized wage statement penalties snowball on top
 - No attorney's fees (except ... PAGA)
- Premium Pay
 - When does it apply?
 - Is it a wage?
 - *Naranjo v. Spectrum Security Servs., Inc.* (2019) 40 Cal.App.5th 444 – failure to pay missed meal break premium pay was not an action for “nonpayment of wages”; BUT there is a split on this issue
 - Attorney's fees (Labor Code sec. 218.5)
 - Also, derivative remedies of waiting time penalties (LC sec. 203) and itemized wage statement (LC sec. 206) do not apply to meal break premium pay, only wages



WHAT ARE WAGES – CALCULATING

- OT is owed under federal law = more than 40 hours per week
- OT under CA law = more than 8 hours in a day OR more than 40 hours in a week
- Calculating wages for OT pay when it comes to bonuses is tricky:
 - Discretionary versus non-discretionary bonus
 - “Regular rate of pay” applies to OT calculation; bonuses and commissions get added in
 - Labor Code section 510
- Calculating wages for meal/rest break violations is different than OT:
 - “Regular rate of compensation” (Labor Code sec. 226.7), meaning, base hourly wage
- Tips are not wages

SICK TIME

- Three principal concepts to know:
 - Accrual
 - Cap
 - Usage
- No pay out
- No use it or lose it
- City of San Diego
 - Enter the business address to determine if it is in the geographic boundaries of the City of San Diego. <http://www.arcgis.com/home/webmap/viewer.html?webmap=2caf87466f1e427e8151fd67c5af9551&extent=-118.1078,32.3242,-116.0795,33.3224>



VACATION TIME/PTO

- Not required
- Created by contract
- Count as vested wages and must be paid out promptly on termination
 - Within 72 hours if employee quits without notice
 - The day of termination if employer fires/lays off employee
- No frontloaded vacation:
 - See DLSE Enforcement Manual, available at: https://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf, § 15.1.1 et seq. [“Vacation entitlements constitute deferred wages which vest as they are earned; thus, any entitlement to vacation is a proportionate right and vests as labor is rendered.”]; § 15.1.5 [“Earnings Must Be Proportional. The anniversary dates on which entitlement to vacation pay are based must provide for an earning of a proportionate share of the agreed vacation. Arbitrary dates or accelerated earning periods which would allow for a disproportionate rate of earning are prohibited. (Such plans could possibly entitle an employee who works only one or two days to the same amount of vacation as an employee who works as long as six months.) (O.L. 1987.03.16, 1988.08.04, 1986.12.30).”]

MEAL BREAKS

- Nonexempt employees are required to take a daily thirty-minute unpaid meal period when working at least five hours (must be taken before 5th hour worked), and an additional thirty-minute unpaid meal period when working at least ten hours in a single workday
- Meal break waivers
 - Generally requires – “nature of duty,” written consent, revocable
 - As to second meal break - only if first meal break not waived
- Employer has obligation to record and keep for three years
 - Where it all goes wrong

REST BREAKS



- On duty, uninterrupted 10 minutes in middle of every 4-hour shift, not recorded
 - Examples of how this goes wrong
- *Brinker* standard (also applies to meal breaks)
 - Written policy, notifying employee of rights
 - Employer must make a good faith effort to authorize and permit rest breaks in middle of shift, but may deviate where practical considerations make it unfeasible
 - Must “make available” meal periods to employees, by relieving them of all duties for uninterrupted 30-minute period
 - Must not “impede” ability to take meal or rest break, or “discourage” them

MEAL AND REST BREAKS – BRINKER (CONT.)

- Compounding nature of meal/rest break violations
 - OT
 - And potentially waiting time penalty plus improper wage statement penalty and attorney's fees if "Premium Pay" is deemed a wage versus a penalty. Split of authority. See *Brewer v. Gen. Nutrition Corp.*, No. 11-CV-3587 YGR, 2015 WL 5072039, at *17-*18 (N.D. Cal. Aug. 27, 2015) (discussing split of authority and cataloging cases)
- Statutes of limitations
 - 1 year for penalties
 - 3 years for wages (unresolved issue of whether premium pay is a wage can impact this)
 - 4 years under UCL (Bus. & Prof. Code sec. 17200)

PRIVATE ATTORNEY GENERAL ACT (PAGA)

- Labor Code section 2698, et seq.
- Requires notice
- Safe harbor period and opportunity to cure
- Look anyone up at <https://cadir.secure.force.com/PagaSearch/>
- No picking off PAGA claimants by removing their standing through settlement
 - *Kim v. Reins Internat'l Cal., Inc.* (Mar. 12, 2020): “Settlement of individual claims does not strip an aggrieved employee of standing, as the state’s authorized representative, to pursue PAGA remedies.
- Cannot arbitrate away PAGA either

WAGE AND HOUR LAW – THE BASICS

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