



Navigating California's Wage & Hour Laws

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## CEA Introduction & Disclaimer

- Providing HR support for employers since 1937
- Available Over the Phone, Online or Onsite
- Subject Matter Experts & In House Attorney
- Training-Compliance-Investigations-Recruiting

**This presentation should not be relied upon as legal advice. Consult any attorney about any issues of legal significance to you.**

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Our HR experts are now available to take calls from Premier and Associate members morning, noon and night!  
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## What We'll Cover Today

- 2018 Minimum Wage Laws
- Exceptions and Exemptions
- Independent Contractors and Interns
- Meal and Rest Periods
- Overtime Rules
- Sick Leave & Holidays
- Recordkeeping and Final Paychecks

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20 Minimum Wage Laws & Counting...

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### Where Do We Get Guidance?

**CALIFORNIA LABOR CODE**  
and  
**INDUSTRIAL WELFARE COMMISSION**  
**ORDERS**  
REGULATING  
WAGES, HOURS AND WORKING CONDITIONS



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### Who Is An Employee?

An "Employee" is anyone who performs services for the benefit of an employer. This includes minors and undocumented workers.

**Employees are Not:**

- independent contractors
- volunteers
- students and trainees
- partners and owners



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## Minimum Wage Definitions

- **Minimum Wage** \$10.50/hr. (25 or fewer) \$11/hr. (26+)
- **Workday**
  - Any consecutive 24-hour period beginning at the same time each calendar day
- **Workweek**
  - Any 7 consecutive days, starting with the same calendar day each week
- **Importance of Defining Your Workday & Workweek**
- **Regular Rate of Pay includes:**
  - Commissions, production/nondiscretionary bonuses, piece work earnings, and (perhaps) value of meals and lodging

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## SB3: Minimum Wage Increase

### WHY?

Gov. Brown established a mandatory wage increase (SB3- 2017)

All employees earn at least \$15/hr by 2023




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## 2018 Minimum Wage Increase

January 1st	Small Employer	Large Employer
➔ 2018	\$10.50	\$11.00
2019	\$11.00	\$12.00
2020	\$12.00	\$13.00
2021	\$13.00	\$14.00
2022	\$14.00	\$15.00
2023	\$15.00	\$15.00

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## 29 Cities and Counting...

- Berkeley, Cupertino, El Cerrito, Emeryville, Long Beach, Los Altos, Los Angeles City and County, Malibu, Milpitas, Mountain View, Oakland, Palo Alto, Pasadena, Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, and Sunnyvale.
- Hotels in Long Beach, Los Angeles, Santa Monica
- Great fact sheet on our website – HR Answers/Additional Resources



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## Minimum Wage + Tips

- California law requires that employees receive the minimum wage **plus** any tips left for them by patrons of the employer's business.
  - Tips do NOT impact the "regular rate of pay"
- "Tip pooling" is acceptable and can include "back of the house" (dishwashers, cooks, janitors, etc.) employees.
  - New federal law eff. March 24, 2018 overriding February 2016 9<sup>th</sup> Circuit case.



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## Exempt vs. Non-Exempt

### EXEMPT

- Paid a flat salary for the skill they bring to the job
- Exempt from wage orders & overtime laws, etc.
- Must pass exemption test which has a duties test and a salary test

### NON - EXEMPT

- Paid by the hour for the work they do
- Not exempt from wage orders & overtime laws
- Breaks/lunches/OT

Exemption tests are critical!



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## More on Exemptions

### Qualifications

- ❑ Non-exempt until classified otherwise.
- ❑ Employees must pass both a duty & salary test.
- ❑ Salary Test:  
2 x State Minimum Wage x 2,080 hours
  - ❑ \$43,680 0-25 employees
  - ❑ \$45,760 26+ employees

### Types of Exemptions

- ❑ Administrative
- ❑ Executive
- ❑ Professional
- ❑ Computer Professional (\$42.35/hr.; \$88,088)
- ❑ Physicians (\$77.15/hr.; \$160,472)
- ❑ Commissioned Sales People
- ❑ Exemption worksheets are available on CEA Website




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## Exceptions to Wage and Hour Laws

### Parent, Child, Spouse of Employer

- ❑ Completely exempt from Wage Orders

### Partner and Shareholders

- ❑ Owners of business exempt from wage and hour laws
- ❑ Power to influence, exposure to liability, ability to control

### Independent Contractors & Interns

- ❑ Do you 1099 anyone?
- ❑ What defines someone as an Independent Contractor?
- ❑ What defines a paid or unpaid intern?




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Employee or Independent Contractor?

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## Independent Contractors

- Neither exempt or non-exempt employee
- Consider the relevant factors to determine status
  - ✓ right to control work
  - ✓ whether it's an integral part of work
  - ✓ distinct occupation - skill required
  - ✓ ability to manage their opportunities for profit or loss
  - ✓ economic independence from the organization
  - ✓ length of time
  - ✓ method of payment

Source: EDD – Form DE 38




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## Employee or Independent Contractor Quiz #1

*You own a bakery company and need a driver. Regina signs an independent contractor agreement with your company. Regina does not have any other clients except you. She will wear a uniform and be given a schedule of where to make daily deliveries. Is she an employee or Independent Contractor?*

**Regina is an employee because she performs work essential to the company's business, works exclusively for the company, and the company controls the details of her job performance. The fact that she signs an independent contractor agreement is inconsequential.**




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## Employee or Independent Contractor Quiz #2

*Marion signs an agreement to create a website for your bakery. You pay her \$25/hour and explain how you want it to look and function. Marion spends six weeks on the website with regular check in meetings with you. Is Marion an independent contractor or employee?*

**Marion is an independent contractor because she is hired to complete a specific project that is not an integral part of the company's business, and she is not controlled as to the means and manner to achieve the final result. This is true despite the company checking on her progress weekly.**




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## IC's and the Gig Economy



- An economy based on Independent Contractors
- 7.7 Million Americans will be employed in the Gig Economy by 2020

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## ABC Independent Contractor Test

The California Supreme Court has found that a hiring entity, in order to prove that an independent contractor is not an employee, must establish each of the three factors embodied in the **ABC test** — namely, that the worker:

- A. Is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- B. Performs work that is outside the usual course of the hiring entity's business; and
- C. Is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

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## Paid vs Unpaid Interns – State

In California, an unpaid intern's training must meet all of the following four tests:

1. The training must be an essential part of an established course of an accredited school or of an institution approved by a public agency to provide training for licensure or to qualify for a skilled vocation or profession.
2. The program may not be for the benefit of any one employer.
3. A current employee may not be displaced by the trainee.
4. The training must be supervised by the school or a disinterested agency. DLSE source: 46.6.6

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## Paid vs. Unpaid Interns – Federal

- 1/18 - the DOL clarified their understanding of paid versus unpaid interns by creating a 7 factor primary beneficiary test.
  - If the *employer* is the primary beneficiary, then the intern must be compensated as an employee under the minimum wage provisions of the Fair Labor Standards Act (FLSA).
  - If the *intern* primarily benefits from the relationship, the internship can be unpaid.
- No single factor is determinative of whether an intern is paid or unpaid.



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## DOL 7 Factor “flexible test”

1. The intern and the employer clearly understand that there is no expectation of compensation. For example, any promise of compensation, express or implied, suggests that the intern is an employee.
2. The internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.



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## Meal Periods and Rest Breaks

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## Meal Periods / Lunches

- An employer **may not permit an employee to work for a period of more than five hours** per day without providing a meal period of not less than 30 minutes.
- Employees must start their meal period **BEFORE** the end of the 5<sup>th</sup> hour.
- On Duty Meal Periods

Hours Worked	Meal Periods
Less than 5	0
Over 5 up to 10	1
Over 10	2



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## A Meal "Break" For Employers

- Employers need only *provide* meal breaks, not "ensure" employees take them. The court found the staffing company had satisfied its own duty to provide meal periods by:
  - Having adopted its own lawful meal period policy,
  - Contractually requiring its client to comply with all applicable laws, and
  - Instructing its employee to immediately report to it if she was being prevented from taking authorized meal periods.
- See *Serrano v. Aerotek, Inc.*



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## Employer Do's and Don'ts

### Employers Must:

- Relieve employees of all duty
- Relinquish control over employees' activities
- Permit the employee a reasonable opportunity to take an uninterrupted meal period

### Employers May Not:

- Impede or Discourage employees from taking meal period
- Coerce employees not to take a meal period



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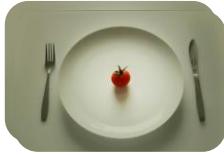
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## Meal Period Example

**Shift: 8:00 am to 5:00 pm**

- 1<sup>st</sup> hour: 8:00 to 8:59
- 2<sup>nd</sup> hour: 9:00 to 9:59
- 3<sup>rd</sup> hour: 10:00 to 10:59
- 4<sup>th</sup> hour: 11:00 to 11:59
- 5<sup>th</sup> hour: Noon to 12:59



First meal period must begin before 12:59 pm



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## Waiving Meal Periods

**First meal period may be waived by mutual consent of the employee and the employer, if:**

- The employee works no more than six hours on the day in question.

**Second meal period may be waived if:**

- The first meal period was not waived; and
- The employee works no more than 12 hours on the day in question.



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## Wage Order – Rest Periods

*“Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period.*

*The authorized rest period time shall be based on the total hours worked daily at the rate of **ten (10) minutes net rest time per four (4) hours or major fraction thereof.**”*



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## Rest Periods & DLSE FAQ's

- An employer is to “authorize and permit” an employee to take ten minutes “net” rest time for every 4 hours worked
- Rest periods need not be recorded on time cards
- NEW DLSE Interpretation of *Augustus v. ABM* – “...employers must relieve their employees of all duties and relinquish any control over how employees spend their break time.”

Hours Worked	Rest Periods
0 – 3.5	0
Over 3.5 up to 6	1
Over 6 up to 10	2
Over 10 up to 14	3




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Overtime Laws

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## Daily Overtime Requirement

### Must be paid 1-1/2 times regular rate of pay

- For work over 8 hours in a day
- For any work over 40 hours in a workweek
- For the first 8 hours worked on the 7<sup>th</sup> day worked in a workweek

### Must be paid 2 times regular rate of pay

- For work in excess of 12 hours in a day
- After 8 hours on the seventh workday in a workweek

### Minors

- It is a misdemeanor to require a minor to work more than eight hours in any one workday, regardless of whether overtime is paid.




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## Calculating Overtime Pay

Overtime pay rates are based on an employee's "regular rate" of pay. Don't confuse regular rate & hourly rate.

The regular rate includes:

- hourly rate
- non-cash payments
- non-discretionary bonuses (planned)
- standby or "on-call" payments
- shift differentials
- retroactive pay increases




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## Employee Friendly Court Decision

- **March 5, 2018** *Alvarado v Dart Container Corp.*
- Alvarado received hourly pay + \$15/day attendance bonus on weekends
- Question for court: How do you figure out OT pay?
- Dart relied on FLSA regulations; Alvarado argued DLSE Wage Orders should apply and won.
- Result:
  - Non-exempt receives a flat rate bonus for a single pay period
  - Regular pay + bonus = new regular pay rate for pay period
  - OT rate is based on employee's regular, non-OT, hours in pay period




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## Flat Rate Bonus Impact to Pay

- Employee is paid \$11.00/hr.
- Flat bonus of \$15/day wknd attendance bonus
- 45 hours worked in workweek (40 regular, 5 OT)
- $\$11.00 \times 40 \text{ reg hours} = \$440.00$
- $\$11.00 \times 5 \text{ OT} \times 1.5 \text{ hours} = \$82.50$
- But wait there's more....
- Calculate OT on bonus:  $\$15/40 \text{ hrs} \times 1.5 = \$2.80$
- Total Comp:  $\$440 + \$82.50 + 2.80 + 15 = \$540.30$




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## Reporting Time Pay

- **Definition:** Each workday an employee is required to report to the worksite and does report, but is not put to work or gets less than ½ usual or scheduled day's work.
- **Requirement:** Pay ½ scheduled hours but no less than 2 nor more than 4 hours.
  - ▣ Scheduled meetings, acts of God, are exceptions.
- **Idea:** Ask for volunteers to leave if you don't have work – don't have to pay them.

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## Reporting Time Quizzes

*Jose usually works eight-hour days. After working one hour, Jose is sent home because all electrical power in the city has been cut. Is Jose entitled to reporting time pay?*

**No.** Jose is not entitled to reporting time pay because he is sent home for a reason beyond his employer's control. Jose would be entitled to reporting time pay if he had been sent home because of an isolated electrical shortage caused by his employer's failure to maintain the building.

*Craig generally works eight-hour shifts. One day, he comes to work and is immediately sent home because his employer doesn't have work for him. Is Craig entitled to reporting time pay?*

**Yes.** Craig is entitled to reporting time pay because he reported to work.

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## Standby Time

- Employees are on standby if they are required to be available to work after the regular workday ends or on a day off. For example, if they are required to respond to pages or monitor phones during off hours.
- Standby time is considered hours worked if employees are subject to their employer's "control" and unable to pursue personal activities.
  - Example: off-duty employees who must return to the office within 15 minutes of a call are on controlled standby because they cannot go out of town or make dinner plans. This time counts as hours worked, and **employees must be paid** for the time.
- Employees who are free to use their standby time for personal pursuits are on "uncontrolled" standby. This time is **not compensable** and therefore employees need not be paid for this time.




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## Time Off Benefits

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## Holiday Pay

### Employers are NOT:

- required to pay employees Holiday pay if they close for a holiday.
- required to pay additional pay for work on a holiday unless the employee has worked in excess of a 40 hour, 8 hour per day work week.
- required to close on a holiday or give employees the day off.

**If an employee works on a holiday – they are only entitled to their usual rate of pay.**




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## Paid Sick Leave

### Statewide:

- ❑ Minimum 3 days/24 hours
- ❑ Can accrue the time – one hour for every 30 worked
- ❑ Lump Sum of 24 hours
- ❑ Can require employee to wait 90 days to use
- ❑ Not paid out at termination

### Local Ordinances:

- ❑ Be aware of ordinances for where your employees are working!



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## Paying Out Benefits

Mon	Tues	Wed	Thurs	Fri
8 Holiday Pay	8 hours Paid Sick Leave	8 hours PTO	8	8

- ❑ Jessica works M – F
- ❑ Monday is a Holiday
- ❑ Tuesday - she calls in sick
- ❑ Wednesday - she takes a prescheduled day off
- ❑ How many hours did Jessica actually work this week?

**Answer:** Jessica worked 16 hours because she performs her job duties Thursday and Friday. Hours worked do not include time when employees receive pay without performing job duties such as for holidays, paid time off and paid sick leave time.



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## Wage Statements

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## Wage Statement Requirements

- ❑ Gross earnings
- ❑ Net wages earned
- ❑ Total hours worked (except for exempt)
- ❑ Hourly rates of pay + corresponding number of hours worked / pay rate
- ❑ All deductions (can aggregate employee authorized deductions)
- ❑ Dates of the payroll period
- ❑ Employee's name
- ❑ Employer's legal name and address
- ❑ Employee's SSN can be last 4 digits but not whole SSN
- ❑ Paid Sick Leave Balance (or on a separate document)




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## Accurate Wage Statements Labor Code § 226(a)

The name and address of the legal entity that is the employer: **SMITH AND COMPANY, INC.**  
123 West Street Smalltown, CA 98765

Last 4 digits of the employer's social security number or an employee ID number: XXX-XX-8789

All applicable hourly rates: 18.00 regular, 27.00 overtime

The inclusive dates of the period for which the employee is paid: 2/11/02 to 2/17/02

Name of the employee: **JOHNSON, BOB**

EARNINGS	HOURS	AMOUNT	DEDUCTIONS	AMOUNT
Regular	40.00	720.00	Federal W/H	60.45
Overtime	2.00	54.00	FICA	49.67
			Medicare	12.39
			CA State W/H	10.04
			CA State Df	7.12
			401k	77.40
<b>GROSS EARNINGS:</b>		<b>774.00</b>		
<b>TOTAL DEDUCTED:</b>		<b>217.04</b>		
<b>NET EARNINGS:</b>		<b>556.96</b>		

Paid Sick Leave time here or on separate sheet with check.

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## Employees' Right to Inspect or Copy

- ❑ Upon a written request from current or former employee (or representative), employer must provide a copy of personnel records within 30 days.
- ❑ Maintain records for minimum of 3 years after termination of employment
- ❑ Employer can make the records available for inspection or provide them by mail
- ❑ \$750 penalty
- ❑ LC 1198.5 and LC 226




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## Employee Inspections

Right to inspect does not include:

- ▣ Letters of reference
- ▣ Reports obtained prior to employment/letters of reference
- ▣ Investigation notes of a possible criminal offense

Right to inspect does include, for example:

- ▣ Notices of commendation and/or discipline
- ▣ Notices of layoff, termination, LOA, vacation
- ▣ Notices of wage garnishments
- ▣ Education and training notices
- ▣ Attendance records
- ▣ Performance reviews



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## Pay at Termination

- ▣ Final Pay should be a "live" (aka manual) check
- ▣ Final Pay is paid at employee's primary work location
- ▣ Involuntary termination **OR** voluntary resignation with more than 72 hours notice (calendar days), all earned wages and accrued vacation **due on last day of employment**
- ▣ Voluntary resignation without notice, all earned wages and accrued vacation **due within 72 hours after notice is given**
  - ▣ Not obligated to mail paycheck unless employee requests in writing payment by mail and provides mailing address
  - ▣ Date of mailing is considered date of payment
- ▣ Special rule for commissions and expense reports



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## Penalties

- ▣ Employee may file action with DLSE
  - ▣ Unpaid wages up to 3 years back
  - ▣ Waiting time penalties up to 30 days wages
  - ▣ Interest
  - ▣ Employee has up to **4 Years** to file claim for unpaid wages from the date the wages were earned
- ▣ Failure to pay minimum wage
  - ▣ \$100 for each pay period, and each employee underpaid
  - ▣ \$250 for similar subsequent violations



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## AB 168: No Salary Information

### WHY?

Women earn 79 cents on the dollar compared to men\*

- Prohibits ALL employers from asking about or relying on an applicant's salary history as a factor in hiring.
- Employers must provide, upon request, a position's pay scale information
- If an applicant voluntarily *and without prompting* discloses past salary info? Be careful...

\*<http://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3>




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## In a Hiring ?



- CEA's Recruiting Team has you covered!
- Exceptional candidates
- Remarkable service
- Contained costs with an hourly fee vs a percentage of the new hire's salary.




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