

## The Top 10 Things Employers Do to Get Sued

Employers unintentionally may violate employment laws, simply by trying to provide some flexibility for an employee, save money for the company, or just be nice.

Here's a list of the top 10 mistakes that may lead to employment lawsuits. Keep in mind that this list will not apply to all employers, as regulations and collective bargaining agreements may override these general rules.

### 1. Classify All Employees as Exempt, Whether They Are or Not.

It is easier to pay everyone a salary, rather than dealing with meal and rest breaks, overtime, time records and such. Why not just pay everyone a salary? They'll like the fact that they always make the same amount of money each pay period, and it won't be a problem.

Under both state and federal law, certain types of positions may be exempt from overtime requirements, as well as meal and rest breaks. Other positions may be exempt only from overtime. An exempt employee is usually someone who is paid a specified amount of money, regardless of the number of hours worked in a week. An employee who does not qualify for one of the exemptions is considered to be nonexempt and therefore subject to overtime, as well as the required meal and rest breaks and time-keeping requirements.

Merely paying someone a salary does not guarantee that employee is truly exempt, nor do job titles. An exempt employee is normally someone who is a high-level executive, administrative or professional employee. Additionally, certain artists and outside sales staff may be exempt.

Employers sometimes designate employees as "nonexempt salaried." This status does not exist. A nonexempt employee must be paid for all hours worked in the pay period, including overtime. And, there is a specific requirement in California that all hours worked and the corresponding rates of pay be included on the detachable portion of the employee's check.

More employers are being sued for failure to provide meal and rest periods for nonexempt employees. This may result from improper classification of an employee as exempt. If an employee is truly nonexempt but classified as exempt, the employer is neither tracking the hours worked, nor meal and rest breaks, since exempt employees are not subject to such requirements.

Once the employee challenges the exempt status of the job, the additional wages and penalties start to add up. These include back pay for overtime, penalties for failure to pay overtime, additional "wages" for failure to provide meal and rest breaks, and penalties for failure to pay all wages at termination, if the employee is no longer with the company. There are also penalties for failure to provide employees with the required wage statement information.

The nonexempt employee may be joined by other employees who wish to challenge their exempt status. The class-action lawsuit on the basis of missed meal and rest breaks as well as exempt status is rapidly becoming popular with plaintiffs' attorneys.

To make sure you know which employees are exempt and nonexempt, use the Exempt/Nonexempt Wizard on HRCalifornia.

## 2. Be Nice to Employees — Let Them Take Lunch Whenever They Want to.

Employees must be provided at least a 30-minute, unpaid off-duty meal period if they are employed for a work period for more than five hours. The meal period must be provided no later than the end of the employee's fifth hour of work.

Failure to provide the meal break within this time frame can result in one additional hour of wages owed to the employee at the employee's straight time pay. The additional wage must be paid in the pay period in which the missed meal break occurred.

Your recordkeeping practices should reflect that you provide your employees their meal break before the end of the fifth hour of work. "Late lunches," after the end of the employee's fifth hour, are not permitted. "Early lunches" may be allowed, as long as the lunch is provided no later than the end of the fifth hour of work.

Check the HR Library on HRCalifornia for more information on Meal and Rest Breaks.

## 3. Make Everyone an "Independent Contractor" Because Having Employees is Too Much Trouble.

Just because you want the employee to be one, or because the employee prefers independent contractor status, does not make it so. This is another area of the law just ripe for claims and/or litigation. The "independent contractor" is quite happy until money is an issue — such as a workers' compensation claim, unemployment insurance, state disability insurance or paid family leave benefits. Another problem scenario is when the Franchise Tax Board or the Internal Revenue Service want tax money, but the "independent contractor" hasn't been paying his/her quarterly payments, owes lots of money, can't be found or has no assets. The employer has money and failed to make the required tax withholdings — so now the employer owes.

Independent contractor status does not have a fixed definition by all the government entities that may have a claim for money owed. The primary determining factor is degree of control: Who determines the manner in which the work is performed, how it is performed, who supplies the tools or equipment, and where is the work performed?

Also important in determining employee or independent contractor status is whether the work is a regular part of the employer's business. If your company makes a product and you hire an independent contractor to help make the product, chances are the individual is an employee. But if you make a product and you hire someone to paint your building, that person is an independent contractor.

Not sure if someone is an independent contractor? See the Recruiting & Hiring section of the HR Library.

## 4. Don't Bother Providing Training About Harassment and Discrimination to Managers and Supervisors. They Won't Need the Information.

The best defense you have against a discrimination or harassment complaint is usually your first-line supervisors because they are the eyes and ears of the organization. Invest in training on topics such as sexual harassment, discrimination, disability, safety and wage-and-hour laws if you want to provide an additional layer of protection from lawsuits. Employers with 50 or more employees are required by law to provide two hours of training on sexual harassment for their supervisors. This training must be conducted every two years.

For example, Supervisor Susie is standing in the employee lounge when one of her employees, Frank, tells an off-color joke to Brenda, a new female employee. Because Brenda laughs, Supervisor Susie does not say anything to Frank or to anyone else in the organization. Several months later, Brenda quits and files a claim against the company for sexual harassment. The lawsuit claims that the company permitted a hostile work environment that included inappropriate jokes and comments.

An investigation, after the claim is filed, reveals that Frank and several other male employees had been telling inappropriate jokes, sending sexually oriented emails through the company's computers and posting inappropriate cartoons and jokes in their work area, where Brenda was the only female employee. The law presumes that once Supervisor Susie is aware of the harassment, the company is also aware and has a duty to correct the problem. Because Supervisor Susie did not look into the matter after she overheard the comments, the employer is at risk.

Learn how to stay out of trouble and avoid discrimination and harassment in the workplace. Make sure to provide mandatory supervisor sexual harassment training.

## 5. Let Employees Decide Which Hours and How Many They Want to Work Each Day.

Most employees are restricted by law as to the number of hours they can work without payment of overtime. One exception to overtime laws is an alternative workweek schedule. However, employees can't simply decide that they want to work four days a week, 10 hours each day. A valid alternative workweek schedule requires that employers follow specific steps to institute such a program. Failure to meet the specific requirements can mean back pay for overtime, as well as penalties.

Employees may request make-up time and work without payment of overtime if they are taking time off for personal reasons under certain special conditions: they make up the time in the workweek in which the time is to be or was missed; they work no more than 11 hours in a day or 40 in the week; the employer agrees; and the request to do so is in writing.

Find rules regarding proper payment of employees in the Pay & Scheduling section of the HR Library. If you do not know what Wage Order applies to your business, use our Wage Order Wizard.

## 6. Terminate Any Employee Who Takes a Leave of Absence, Whatever the Reason. It Is Too Much Trouble to Administer Leaves of Absence, and Who Knows if The Employee Will Return.

Employees have legal protection when they are away from work for various reasons, including workers' compensation, disability, pregnancy, family and medical leave, military leave, jury duty, and many more. The laws also provide protection from retaliation for taking the leave — thus the employer cannot wait and terminate the employee once the employee returns to work. If you terminate an employee while the employee is on a protected leave, or soon after the employee returns to work, you will have to prove that the termination was for a legitimate, nondiscriminatory business reason, unrelated to the protected leave.

Learn more about employee rights regarding leaves of absence in the HR Library.

## 7. Don't Give Employees Their Final Check if They Fail to Return Company Property.

Employees who quit or are terminated often don't turn in company property such as laptops, cell phones, pagers, uniforms and tools. Holding their final paycheck until such time as the items are returned seems reasonable. However, in California, final paycheck deadlines carry a hefty penalty if the deadline is not met.

If an employee is terminated or quits and gives more than 72 hours' notice (calendar days, not business days), the employee's final check must be ready on the last day of work. If you terminate an employee, the final paycheck is due the moment the words "You are fired" come out of your mouth. The final check(s) must include payment for all hours worked through the last day, including any overtime, as well as any accrued and unused vacation.

If an employee quits without giving at least 72 hours' notice, you have 72 hours to prepare the final check. This can be problematic if your payroll service cannot prepare a check and get it to the employee in a timely manner, or if your payroll department is located out of town or out of state. There are no exceptions for such logistical problems.

If you do not provide the final check to the employee, as required by law, waiting time penalties start accruing. The penalty is one day of wages for every day that the check is late (calendar days, not business days), up to 30 days. This money goes to the employee.

Check the HR Library for more information on final pay.

## 8. Provide Loans to Employees and Deduct the Money From Their Paycheck Each Pay Period.

California's Labor Code section 224 permits deductions authorized by law and those authorized by the employee for benefits such as health insurance or benefits. No other deductions are permitted.

State and federal law require some withholdings, such as federal and state taxes, Social Security and state disability insurance. Others fall into the benefits category that are permitted by law, such as 401(k) and flexible spending accounts. Other deductions are required to comply with child support orders and wage garnishments.

Deductions for loans made to employees are not permitted and therefore cannot be made. If you decide to loan money to an employee, or make any other type of payment for which repayment may be required, you should have the employee sign a promissory note that has been reviewed by your legal counsel. The employee should then make payments to you, according to the specified payment schedule.

Learn more about proper deductions from wages in the HR Library.

## 9. Use Non-Compete Agreements to Protect Confidential Information, Such as Business Secrets, Customer Lists and Pricing Information, and to Prevent Employees From Working for the Competition.

Non-compete agreements are prohibited in California, with only a few exceptions. There are ways to protect trade secrets — such as customer lists and pricing information.

Prohibiting an employee from working for someone else is limited because it infringes on the employee's ability to work and earn a living. You cannot force employees to stay with you, nor may you prevent them from earning a living if they choose to leave your company.

## 10. Implement a “Use it or Lose it” Vacation Policy to Avoid Paying Out Vacation at Termination.

A “use it or lose it” vacation policy is not permitted in California. If the employee has accrued vacation, it is a form of wages and cannot go away. You may place a reasonable cap on the accrual of vacation, which stops the accrual of vacation when a certain level of accrual is reached. But you cannot take away what the employee has already accrued.

All accrued and unused vacation must be paid out at termination at the current rate of salary. There is no limit on how far back in time the employee can make a claim for unused vacation.

To limit your liability, the best option is to implement a reasonable cap on vacation accrual. “Reasonable” is open to interpretation, but it is usually one and one half to two times the annual accrual. For example, an employer's policy

provides for up to two weeks of accrual each year. The employer implements a policy that caps the accrual at four weeks. If an employee has four weeks (20 days) accrued and unused, the accrual stops until such time as the employee takes vacation and falls below the cap.

Learn more about Paid Time Off (PTO), Vacation, Sick Leave and Holidays in the Leaves of Absence section of the HR Library.

## CalChamber Can Help!

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To learn more about CalChamber resources, just call our Customer Service Representatives at (800) 331-8877, Monday through Thursday from 8 a.m. to 5 p.m. PT., and Friday from 8 a.m. to 4 p.m. PT.

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