

Presenting a live 90-minute webinar with interactive Q&A

Wage and Hour Compliance Under California's Employee-Friendly Framework and New Legislation

Navigating Unique Overtime Pay, Increased Minimum Wage,
Mandated Recovery Periods, and Expanded Employer Penalties

WEDNESDAY, JANUARY 22, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Michael N. Westheimer, Shareholder, **Buchalter Nemer**, San Francisco
Teresa R. Tracy, Principal, **Gladstone Michel Weisberg Willner & Sloane**, Los Angeles

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Wage and Hour Compliance Under California's Employee-Friendly Framework

Michael N. Westheimer

Buchalter Nemer, PC

San Francisco, California 94105

Direct: (415) 227-3530

Fax: (415) 904-3111

Email: mwestheimer@buchalter.com

California Wage & Hour Law

- Top 10 list: California-specific wage & hour laws
- Recent trends / hot topics
- Takeaways

10. Minimum Wage

California Minimum Wage

- \$8 per hour (current); \$9 per hour (7/1/14); \$10 per hour (1/1/16)
- Increases salary threshold for OT exemptions (2x min wage), and pay threshold for commissioned sales OT exemption (> 1½ x min wage)

Municipal Minimum Wage

- San Francisco: increased to \$10.74 per hour; new poster
- San Jose: increased to \$10.15 per hour

Computer Software Exemption

- Increased to \$40.38 (hour); \$7,010.88 (month); \$84,130.53 (annual)

9. Overtime

Daily Overtime

- 1½ x regular rate for work over 8 hours per day or 40 hours per week
- 2x regular rate for work over 12 hours per day
- Seventh day pay (only on 7th day, all days worked in same workweek)
 - » 1½ x regular rate for first eight hours
 - » 2x regular rate for work over 8 hours
- Alternative workweeks

State Law OT Exemptions

- Vary from federal exemption tests

Calculating OT for Salaried Nonexempt Employees

- No fluctuating workweek, salary covers max 40 hours per week
- Full-time regular rate = weekly salary divided by 40

8. Meal & Rest Breaks

Brinker v. Superior Court (2012) 53 Cal.4th 1004

Meal Breaks (unpaid)

- “Provide” meal break means make available, do not impede use
- Uninterrupted 30 minutes, employee is relieved of all duty
- 1st break for work over 5 hours, must begin by end of 5th hour, may be waived for work no more than 6 hours
- 2nd break for work over 10 hours, must begin by end of 10th hour, may be waived for work no more than 12 hours and 1st break taken
- On-duty meal break permitted in limited circumstances

Rest Breaks (paid)

- 10 minutes for each four-hour work period or major fraction
- 1st for 3½ - 6 hours, 2nd for 6 - 10 hours, 3rd for 10 - 14 hours, etc.
- To be taken in middle of the work period insofar as practicable

7. Commissions

Commissioned Sales OT Exemption

- Employer is covered by Wage Order 4 or 7
- Employee is principally engaged in selling a product or service, commission is based proportionally on amount or value thereof
- Employee's earnings exceed $1\frac{1}{2}$ x state minimum wage
- More than 50% of earnings represent commissions

Written Commission Plan (Labor Code § 2751)

- Writing signed by employer and employee, sets forth method by which commissions are computed and paid
- Presumed to remain in full force and effect until superseded or employment is terminated

Employees Paid Solely on Commission

- Non-sales activities, paid rest breaks

6. Vacation Pay

Treated as Earned Wages

- No forfeiture, “use-it-or-lose-it” prohibited but accrual cap is ok
- Reasonable opportunity to use before hitting accrual cap
- Proportional vesting
- Accrued and unused time paid out with final wages at final pay rate

Based on Characteristics, Not Label

- Paid Time Off (PTO)
- Floating holiday (if not designated at start of year)
- **Not** paid sick leave

5. Travel Time

Compensable While Under Employer's Control

- Excludes normal commute time
- Compensable if employee has to meet at designated place and time to take employer-provided transportation
- Compensable if travel to remote site exceeds normal commute to and from regular worksite (or if none, reasonable commute distance)
- Continuous workday rule

Out-of-Town Business Travel

- Compensable while in transit (excluding normal commute), until destination is reached and free to engage in personal pursuits

Travel Time Pay Rate

- Ok to establish different pay rate for travel time

4. Tracking Hours Worked

Timesheets

- Work shift start and end times
- Meal break start and end times

Must Compensate for All Time Worked

- *De minimus* exception: uncertain and indefinite periods of a few seconds or minutes, cannot as practical or administrative matter be precisely recorded, failure to count justified by industrial realities
- *Brinker*: company policy prohibiting off-the-clock work was a factor in rejecting certification of unpaid off-the-clock class

3. Itemized Wage Statements

Labor Code § 226(a): accurate itemized statement in writing with each paycheck

1. Gross wages earned
2. Total hours worked (unless paid solely on salary and exempt)
3. Number of piece rates earned (if applicable)
4. All deductions
5. Net wages earned
6. Inclusive dates for pay period
7. Employee name, last 4 digits of SSN or employee ID number
8. Name and address of employer
9. All applicable hourly rates, corresponding number of hours for each

2. Pay Frequency / Payment on Termination

Pay Frequency

- Nonexempt employees at least semi-monthly or more frequent
 - » Semi-monthly: 1st-15th by the 26th day of same month; 16th-end by the 10th day of next month
 - » Bi-weekly, weekly: within 7 days after end of pay period
- Exempt salaried employees may be paid monthly, within 7 days after end of monthly pay period
- Commission is due when it is earned and ascertainable

Termination Wages / Waiting Time Penalties

- Final wages generally are due on last day of employment
- If employee quits with less than 72 hours notice, final wages are due within 72 hours after termination
- Earned commission that is not yet ascertainable is due when it becomes ascertainable

1. PAGA

Labor Code Private Attorneys' General Act (PAGA),
Labor Code § 2699

- Creates civil penalties for Labor Code violations that do not already have a civil penalty
- Aggrieved employee may pursue an action to recover civil penalties on behalf of himself/herself and other current or former employees
- 75% of recovered penalties to the state, 25% to aggrieved employees
- Exhaustion of administrative remedies, additional opportunity to cure for some violations

Employment Arbitration with Class Action Waiver

U.S. Supreme Court

- *AT&T Mobility v. Concepcion* (2011): state law barring arbitration agreement with class action waiver held invalid, preempted by FAA
- *American Express v. Italian Colors* (2013): arbitration agreement with class action waiver must be enforced under FAA notwithstanding plaintiff's argument that cost of proving claim would greatly exceed potential individual recovery

National Labor Relations Board

- Position: class or collective action regarding wages, hours or working conditions is protected concerted activity under Section 7 of NLRA
- NLRB's position was rejected by four Circuit Courts of Appeal in 2013: *Sutherland* (2nd), *D.R. Horton* (5th), *Owen* (8th), *Richards* (9th)
- NLRB's policy of nonacquiescence

California: Employment Arbitration with Class Action Waiver

Sonic-Calabasas v. Moreno

- Issue: enforceability of arbitration agreement barring employee from pursuing wage hearing before Cal. Labor Commissioner
- *Sonic I* (2011): Cal. Supreme Court rejects, U.S. Supreme Court vacates and remands for reconsideration in light of *Concepcion*
- *Sonic II* (2013): Cal. Supreme Court upholds, *provided* the arbitration agreement provides same benefits as Labor Commissioner forum

Issues Pending Before Cal. Supreme Court (*Iskanian*)

- Whether *Gentry v. Superior Court*, 42 Cal.4th 443, is still good law in light of *Concepcion* and *Italian Colors*
- Whether an individual arbitration agreement could also bar “representative” actions under PAGA

Certification of Employment Class Actions

U.S. Supreme Court

- *Wal-Mart v. Dukes* (2011): rejected nationwide pay discrimination class action because class lacked commonality and employer was deprived of right to raise individual affirmative defenses
- *Comcast v. Behrand* (2013): rejected class action because plaintiffs failed to establish that damages could be measured class-wide

California Supreme Court

- *Brinker v. Superior Court* (2012): upheld certification of rest break class because company had a uniform policy that allegedly violated the law; denied certification of off-the-clock class because company had a compliant uniform policy and individual issues predominated

Unpaid Interns

Recent Spate of Lawsuits by Unpaid Interns

- Fox Searchlight Pictures, Condé Nast, Warner Music Group, etc.

Six-factor Test (DLSE Opinion Letter 4/7/10; DOL Fact Sheet #71)

1. Training is similar to that given in a vocational school
2. Training is for the benefit of the trainees or students
3. The trainees or students do not displace regular employees, but work under their close observation
4. The company receives no immediate advantage from the activities of the trainees or students, and on occasion the company's operations may be impeded
5. The trainees are not necessarily entitled to a job at the conclusion of the training period
6. Mutual understanding that the trainees or students are not entitled to wages for time spent in training

Seating Cases

- Seating provisions in Wage Orders:
 - » Employees provided with suitable seats when nature of work reasonably permits use of seats
 - » When nature of work requires standing and employees are not engaged in active duties, adequate number of seats placed in reasonable proximity to work area and employees permitted to use them when it does not interfere with their duties
- Suits seek PAGA penalties for violation of Labor Code § 1198, which prohibits employment under conditions prohibited by Wage Order

Federal Preemption of State Wage & Hour Laws

- FLSA does **not** preempt state laws that offer greater protection
- Federal preemption arguments in Transportation industry
 - » Airline Deregulation Act: airlines
 - » Federal Aviation Act Authorization Act (FAAAA): truck drivers

Establish compliant personnel policies and practices for California employees

- California supplement to company-wide employee handbook?
- San Francisco supplement to California supplement?

Implement programs to identify potential issues and minimize potential exposure

Get ahead of the curve, address issues sooner rather than later

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Presented by
Teresa R. Tracy, Esq.
Principal

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New Laws

- Increased Minimum Wage
- Exempt Salaries or Hourly Wage Increase
- Damages for Minimum Wage Violations Increased
- Meal and Rest Period Expanded to “Recovery” Periods and Penalties
- New Penalties for Employer Failure to Make Benefit Fund Payments
- New Protections for Protected Wage Activities
- Employer Right to Attorney's Fees Limited
- Labor Commissioner Award Results in Lien on Real Property
- Domestic Worker Bill of Rights

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Amendments/Additions To Prevailing Wage Laws

- SB 776 Wage Rates and Employer Payment Credits
- SB 7 Charter Cities and Construction Projects
- SB 54 Hazardous Materials
- SB 377 Determination of Public Works Project
- AB 1336 Prevailing Wages and Payroll Records
- AB 195 Public Contracts and Appropriations
- AB 797 Santa Clara County Valley Transportation Authority

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New Laws Applicable to Schools

- Criminal Background Checks for Private Schools
- Moorpark Unified School District and Four-Day School Week
- Teacher Authorization in Special Education
- Professional Development for Classified School Employees
- California Bathroom Bill

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Judicial Developments

- The *Gonzalez* Decision: Alternative Compensation Systems at Risk
 - Alternative Compensation Systems After *Gonzalez*:
 - Flag Rate/Minimum Wage System
 - Hourly Rate Based on Average Compensation
 - Hourly Rates with Bonus
 - Back Liability
- Auto-Deduction Timekeeping
- Preemption by Federal Law

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Current Class and Representative Action Issues

- Class Certification
- Rule 23 Class Actions & FLSA Collective Actions Can Be Combined
- IRS States Class Action Incentive Awards Taxable as Wages

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Best Practices

- Generally
- For Overtime
- For Off-the-Clock Issues
- For Meal and Rest Breaks
- Deductions and Reimbursement
- Vacations
- Commissions
- Paperwork and Payroll

Teresa R. Tracy, Esq.

Teresa R. Tracy is chair of Gladstone Michel Weisberg Willner & Sloane, ALC's Labor & Employment Group. She has practiced exclusively in labor and employment law for over 30 years and has extensive experience representing employers in wrongful termination, discrimination, harassment, wage and hour matters, class actions and traditional labor law. She also advises clients on compliance with the myriad of state and federal regulations governing employers. Ms. Tracy is the author of numerous articles, and has been selected six times by her peers as a Southern California Super Lawyer in the area of Labor and Employment. In 2005, she was named one of the "Top 75 Women Litigators" by the *Los Angeles Daily Journal*.

(310) 821-9000, x 723
ttracy@gladstonemichel.com

Thank you!

4551 Glencoe Avenue, Ste. 300
Marina del Rey, CA 90292
Tel. (310) 821-9000
www.GladstoneMichel.com

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