PAGA PROOFING YOUR WORKPLACE: UNDERSTANDING LAWSUIT RISKS

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BASIC TYPES OF WAGE AND HOUR LAWSUITS

INDIVIDUAL CLAIMS

- Generally maximum of $20,000-$30,000.
- Not a lot of Plaintiff's attorneys interested.

CLASS ACTION CLAIMS

- All Individual Claims for All "Similarly Situated" Employees Going Back 4 Years
- Damages Cannot Be Reduced

PRIVATE ATTORNEYS GENERAL ACT CLAIMS

- Civil Penalties for All Employees for Any Labor Code Violation
- Penalties Can Be Reduced by the Court

HAVE AN ARBITRATION AGREEMENT

PROS

- Private
- Fast
- Prevents Class Actions
- May cause plaintiff to lose standing to pursue PAGA claims on representative basis
- Can make the agreement mandatory

CONS

- $$$$$
- Cannot Prevent PAGA
- Cannot use for sexual harassment or discrimination cases

WHAT YOU CAN DO

- Get an Arbitration Agreement from Your Attorney.
- Ask About Updates At Least Annually.
- Expect Changes Frequently.
  - Mandatory Agreements are a Misdemeanor in California, but Law Unenforceable.
- Get New Versions Signed by both employer and employee.
  - Electronic signatures?
- No excuses not to have one!

EMPLOYEE UPSET?

01

No EE goes to a lawyer and says they want to file a class action lawsuit or PAGA case

02

Mostly the EE thinks they were mistreated or wrongfully terminated

03

Any hint at upset should be immediately addressed

SUPERVISORS! SUPERVISORS! SUPERVISORS!

First line of defense from lawsuits and the first ones to cause lawsuits

Watch out for old school folks who are trying to do their best for the company

Training to deal with conflict with employees

Knowledge of when to ask for help/HR to step in

Respect

Watch out for the appearance of favoritism; don't supervise family members

COMMONLY USED OFFENSIVE LANGUAGE FOR EMPLOYEE'S

Snapping fingers to hurry up

Reference to being old

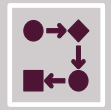
Being told to hurry up or too slow

Derogatory phrases/innuendo

DOCUMENT! DOCUMENT! DOCUMENT!

If you didn't document it, it doesn't exist.

Document disciplinary issues and poor work performance


Try to follow a progressive discipline path (but don't promise it)

Document your slower workers

Can you measure productivity? Give warnings in writing.

Don't Forget to

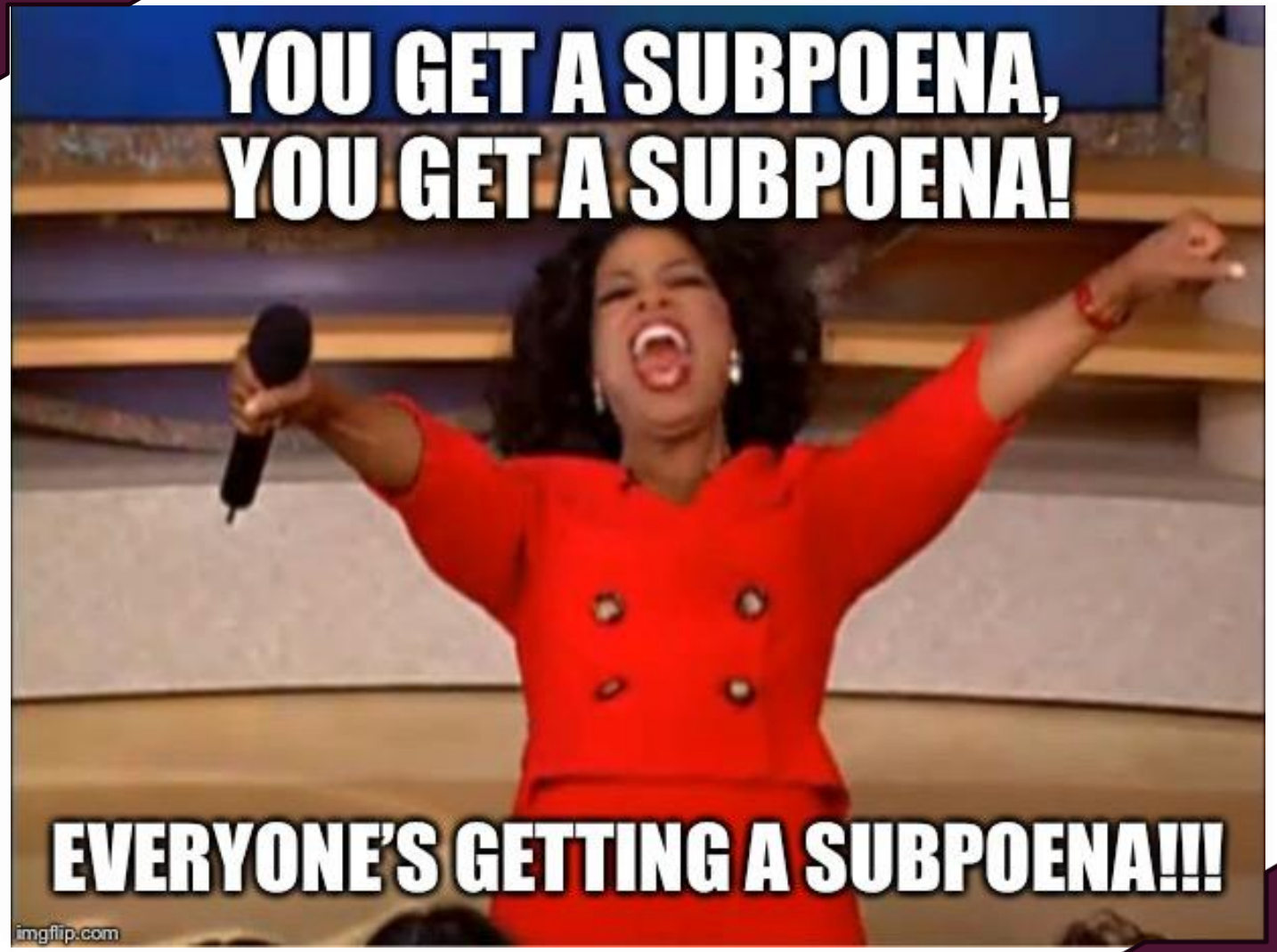
document, document, document

- Document at or near the time of the events
- Pull objective data when available
- Document consistently
- Avoid lengthy back and forth emails about an employee
  - Discuss face to face
- Watch out for defamatory statements
- Watch out for red flags –
  - disability, protected class, protected activities

WHEN DO I NEED TO CALL A LAWYER?

- Whistleblower
- Retaliation
- Violation of public policy
- Protected class
- Work related injury
- Engaged in protected activity
- Recent leave or intermittent leave
- Request for accommodation
- Treating this employee differently than others have been treated for the same offense
- Job not available upon return from leave
- Witness in a case against company

I GOT A LETTER REQUESTING MY EMPLOYEE'S PAYROLL AND PERSONNEL RECORDS.



I GOT A SUBPOENA FROM MY EMPLOYEE'S WORKER'S COMPENSATION ATTORNEY.

I **HAVE TO** PRODUCE THOSE, RIGHT?

TERMINATIONS

1

Don’t bury someone in a layoff and then don’t rehire them

2

Terminate someone who you don’t want to call back

3

Use a notice of change in relationship form to spell out why they aren’t invited back

SEXUAL HARASSMENT

- Grandpa Ed's Wisdom: Don't poop where you eat
- Strict Liability for all supervisors
- Cannot date, flirt with, etc. a subordinate
- Employees seeking citizenship can claim to be a victim of a crime – RAPE

EMPLOYEES IN CRISIS

- Drive Employees to their work comp appointments
- Help them follow up with the carrier to get timely and appropriate treatment
- Communicate with them about the claims process
- Offer any available leaves or accommodation such as FMLA, CFRA

TIME TO SAY GOODBYE?

Offer a severance

Won't stop PAGA or agency cases but EE thinks the matter is resolved

Cheaper than the smallest claim

OPEN DOOR POLICY

- HR & Safety people need to be in the fields
- EEs need to know who to go to when something is wrong, upsetting
- Have names and phone numbers in your sexual harassment policy
- Have sensitive situations addressed privately and respectfully

WAGE & HOUR AUDITS

- Have frequent and regular audits of your W&H policies
- At a minimum, a few paychecks and corresponding timecards
- Benefit from new PAGA for regular audits
- Paperwork needs to look perfect so there's a way out of PAGA
- Piece rate? Get it audited often

Penalty	Violations in Sample	Extrapolated Violations	Maximum Civil Penalties
Meal Period Violation	56/4503 (1.24%)	1,637	$163,700
Rest Period Violation	200/4503 (4.44%)	5,861	$586,100
Overtime Violation	96/8518 (0.83%)	1,841	$184,100
R&R Violation	68/8518 (0.81%)	1,069	$106,900
Wage Statement Violation	360/8518 (4.2%)	5,545	$607,300
Waiting Time Penalty	13%	1,292	$129,200
Timely Payment (§204)	4.2%	5,545	$5,545
TOTAL MAXIMUM		22,790	$2,279,000

MINOR VIOLATIONS UNDER PAGA = BIG LIABILITY

Keep out	Keep out social justice groups
Inform	Inform EEs of their rights and common scams
Watch out	Watch out for cappers and social media campaigns designed to trick your EEs

FIELD ACCESS TRAINING

PROBLEM EMPLOYEES

- Take care of problem employees
- Show your EEs you care and are listening to them

KEEP PAY PRACTICES SIMPLE

OVERTIME IS NOT A RATE OF PAY

- DLSE Does Not Want Employees to Work More than 8/40.
- Overtime is a *PENALTY* for Suffering or Permitting Too Much Work.
- Penalty or "Premium" is calculated at the end of the week at .5x the Regular Rate of Pay ("RROP") for the entire week for each OT Hour.

CALCULATING RROP

TOTAL COMPENSATION ÷ TOTAL HOURS = RROP

- TOTAL COMPENSATION
  - Includes wages, piece rate, rest and recovery pay, non-discretionary bonuses (except flat rate bonuses for now...)
  - Excludes overtime premiums, but not base wages for overtime hours.
- TOTAL HOURS
  - Includes overtime hours

NOT INCLUDED IN REGULAR RATE OF PAY

Gifts (i.e., for holidays or birthdays, as a reward for service, but only those where the timing and amount are not based on any objective factors and are left entirely to the employer's discretion)

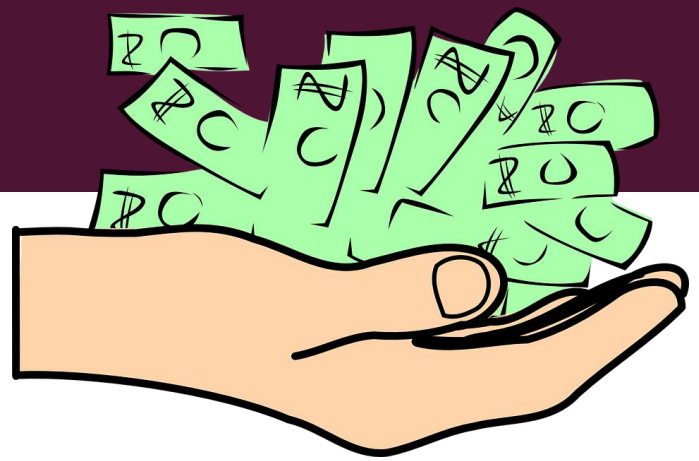
Hours paid but not worked (i.e., vacation, holidays, sick leave, reporting time pay or split shift premiums)

Expense reimbursement

Overtime Penalties

- Discretionary bonuses
  - *Note:* For a bonus to be "discretionary," the employer must retain discretion over whether to give a bonus, when to give a bonus, and what amount the bonus will be. When an employer ties a bonus to the occurrence of a particular condition, the bonus will most often be treated as wages, and must be paid if the condition occurs. Further, the bonus must be counted when calculating the regular rate of pay for overtime purposes.
- Profit-sharing plans (as long as the contributions are to a bona fide plan without regard to hours worked, production levels, or efficiency)
- ERISA plan payments (i.e., health benefit plans, many retirement plans, and similar benefits)

"Regular Rate of Pay" (RROP)

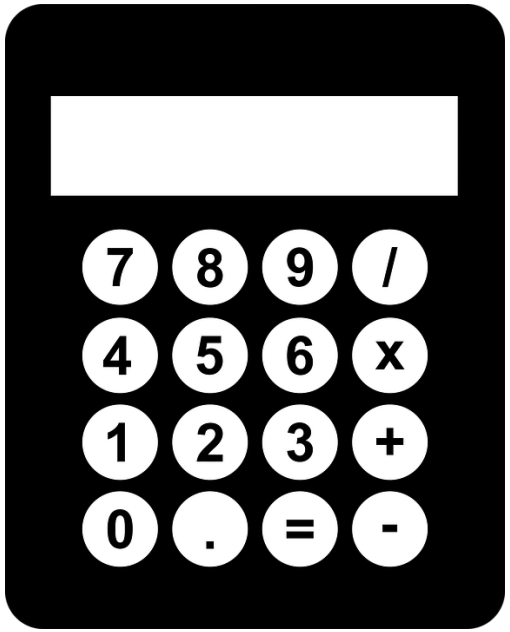


Used All Over Wage and Hour Law

- Overtime
- Sick Pay
- Meal Period Premiums
- Rest Period Premiums
- Reporting Time Pay

EXAMPLE: SINGLE FLAT RATE

Rip worked one day in a workweek and earned $16/hour over 10 hours.



Type	Hours	Rate	**Total**
Reg Hrs	8	$16/hr	$128
OT	2	$24/hr	$48
TOTAL	10		$176

Rate of Pay Method

Type	Hours	Units	Rate	**Total**
Reg Hrs	10		$16/hr	$160
OT Prem.		2	$8/hr	$16
TOTAL	10			$176

Premium Method

* $160/10=$16 RROP
  $16 x 0.5 = $8 OT Prem.

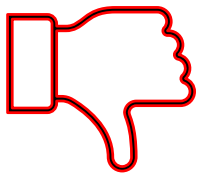
EXAMPLE: MULTIPLE RATES OF PAY

- Rip earned worked five 9-hour days in a workweek (45 hours total)
- He earned an $30/hour the first 2 days.
- He earned $16/hour on the last 3 days.
- He also earned a non-discretionary bonus of $2 for every hour worked by finishing the season.

EXAMPLE: MULTIPLE RATES OF PAY

Rate of Pay Method

Type	Hours	Units	Rate	**Total**
Hourly 1	16		$30/hr	$480
OT 1	2		45/hr	$90
Hourly 2	24		$16/hr	$384
OT 2	3		$24/hr	$72
Bonus		45	$2	$90
TOTAL	45			$1,116



Premium Method

Type	Hours	Units	Rate	**Total**
Hourly 1	18		$30/hr	$540
Hourly 2	27		$16/hr	$432
Bonus		45	$2	$90
OT Prem.		5	$11.80*	$59
TOTAL	45			$1,121

*($540+432+90=1062)÷45 hour = $23.60 RROP
$23.60 x 0.5 = $11.80 OT Premium

"I WANT TO ENCOURAGE EMPLOYEES TO STAY TO THE END OF THE SEASON BY PROMISING THEM AN EXTRA $200 IF THEY WORK UNTIL OCTOBER."

I'M SO NICE!

THEY'RE GOING TO BE SO GRATEFUL!

THE BONUS IS ON TOP OF WAGES AND OVERTIME, SO IT'S FINE!

WHY WOULD ANYONE SUE ME FOR PAYING THEM EXTRA?

WHAT IS A FLAT SUM BONUS ?

Yes:

- End of Season
- Transportation (careful here)
- Work on Saturday
- Work on Holiday
- Bring a friend to work (careful here)

No:

- Piece rate pay
- Production Bonus

FLAT SUM BONUSES

- Supreme Court Decided That They're Special and Must Be Recalculated With a Special Formula.
- **STEP 1**: Figure Out OT Penalties without Flat Sum Bonus.
- **STEP 2**: Determine Number of Non-OT Hours Worked During the Bonus Period.
- **STEP 3**: Divide Flat Sum Bonus By Non-OT Hours and then Multiply by 1.5.
- **Step 4**: Increase OT Penalty by OT Hours x Step 3 Total.
- Logical, right?

PREVIOUS EXAMPLE – RIP'S WORKWEEK

Non-Sum Rate Bonus

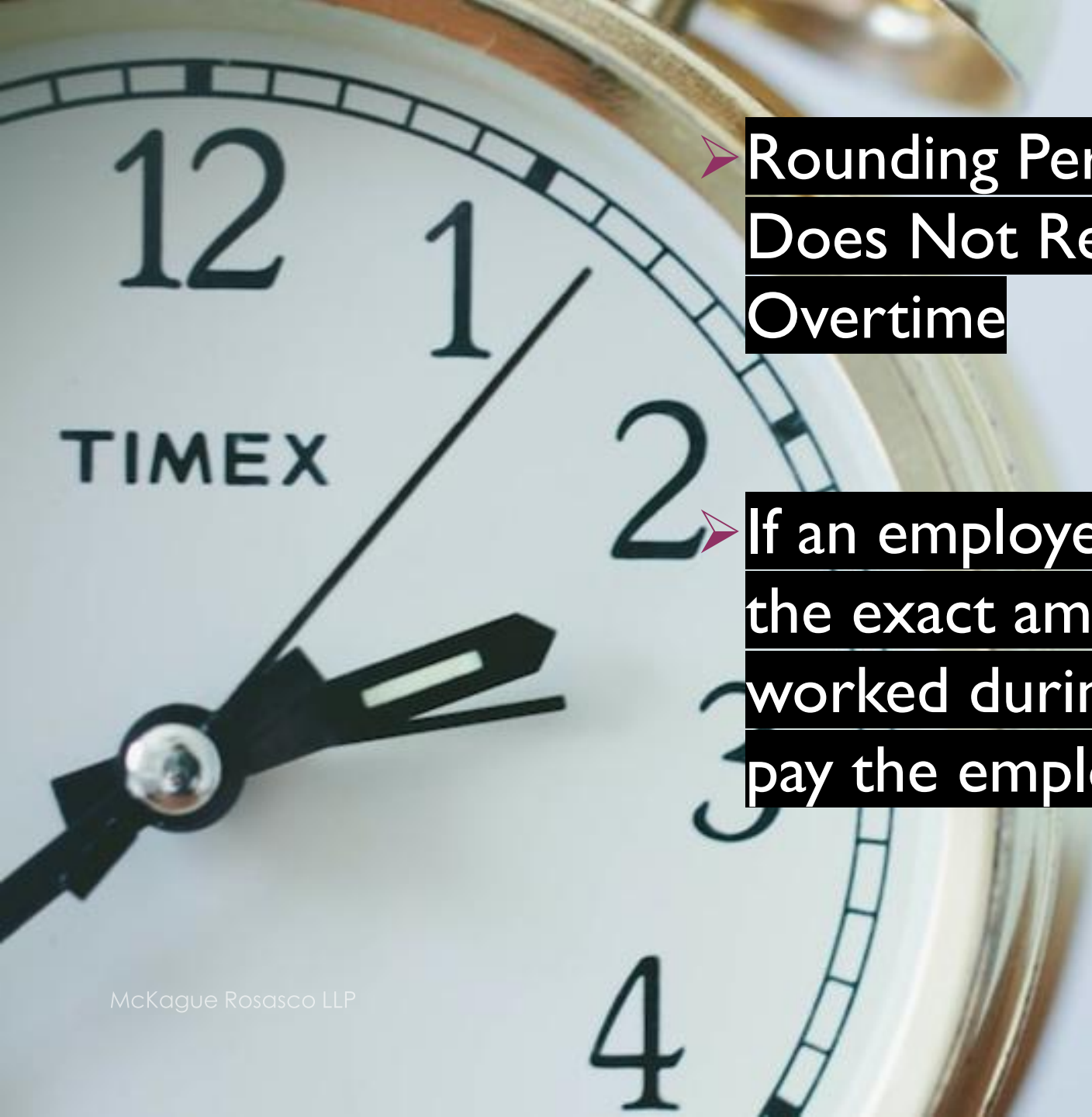
Type	Hours	Units	Rate	**Total**
Hourly 1	18		$30/hr	$540
Hourly 2	27		$16/hr	$432
Bonus		45	$2	$90
OT Prem.		5	$11.80	$59
TOTAL	45			$1,121

*$90 bonus / 40 non-OT hours= $2.25 RROP Increase

$2.25 x 1.5 =$3.38 OT Prem Bonus Increase

Flat Sum Bonus

Type	Hours	Units	Rate	**Total**
Hourly 1	18		$30/hr	$540
Hourly 2	27		$16/hr	$432
OT Prem.		5	$10.80	$54
FS Bonus		1	$90	$90
FS Bonus OT Adj.		5	$3.38*	$16.90
TOTAL	45			$1,132.90



- Rounding Permissible if Facially Neutral and Does Not Result in Underpayment Overtime

- **BUT!**

- If an employer can capture and has captured the exact amount of time an employee has worked during a shift, the employer must pay the employee for "all the time" worked.

ROUNDING AND MEAL PERIODS

- Meal Period Late or Short By One Minute is a Violation!
  - A "rounded-off" minute still causes a violation.
  - Start Meal Period Well Before 5th Hour

HOURS OF WORK MEAL PERIODS & REST BREAKS OWED

Work Hours	Rest Breaks	Meal Periods
Less than 3.5	None	None
3.5- less than 5	10-minute paid	None
5- less than 6	10-minute paid	30-minute unpaid (unless mutually waived)
6- less than 10	Two 10-minute paid	30-minute unpaid
10- less than 12	Three 10-minute paid	Two 30-minute unpaid (unless mutually waived AND first meal period was taken)
12- less than 14	Three 10-minute paid	Two 30-minute unpaid
14- less than 15	Four 10-minute paid	Two 30-minute unpaid
15- less than 18	Four 10-minute paid	Three 30-minute unpaid(?)

DOES THE LAW REQUIRE YOU TO DOCUMENT REST PERIODS?

DUTY FREE MEAL AND REST BREAKS

- Must be relieved of all duty for BOTH now.
- No closing gates.
- No telling workers they can't leave even if it would not be possible.
- Tardiness is a discipline issue.

MEAL & REST PERIOD PREMIUMS

IF AN EMPLOYER FAILS TO PROVIDE AN EMPLOYEE A COMPLIANT TIMELY DUTY-FREE UNINTERRUPTED MEAL OR REST PERIOD, THE EMPLOYER SHALL PAY THE EMPLOYEE ONE (1) HOUR OF PAY AT THE EMPLOYEE'S REGULAR RATE OF COMPENSATION FOR EACH WORKDAY THAT THE MEAL PERIOD OR REST IS NOT PROVIDED.

MAX PER DAY: 1 MEAL PERIOD PREMIUM + 1 REST PERIOD PREMIUM.

I USE A BIG, EXPENSIVE PAYCHECK COMPANY FOR ALL MY PAY CHECKS, SO I DON'T HAVE TO WORRY, RIGHT?

PAYCHECK COMPLIANCE CHECKLIST

- Gross wages earned
- Net wages earned
- Total hours worked by the employee
- All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item
- Inclusive dates of the period for which the employee is paid
- Name of the employee and only the last four digits of his or her social security number
- Employee address (DOL)
- Name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, the name and address of the legal entity that secured the services of the employer (i.e., the grower)
- Employer EIN (DOL)
- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee
- The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis
- Piece rate: Rest and Recovery (for entire workweek) and other nonproductive time (NPT)
- CA Paid Sick Leave hours. Available and accrued if accruing. Available if front loading.
- H2A - On or before each payday, each worker must be given an hours and earning statement showing hours offered and hours actually worked
- PSL paid at weekly weighted average or average over last 90 days

IT CAN BE DONE!

#1082 [redacted], JESUS XXX-XX-0516 04/18/22 to 04/24/22 Ch# 168842 04/28/22

Day	Pay Type	Field	Job	Hrs	Units	Rate	Total
[redacted], CA 94610							
18	Non-Productive Time	5025	Suckering	0.4900		18.5000	9.07
18	Piecework	5025	Suckering	4.4500	376.3333	0.2400	90.32
18	Piecework	5025	Suckering	2.5600	272.3333	0.1900	51.75
18	Rest & Recovery Perio	5025	Suckering	0.5000		24.5300	12.26
[redacted], CA 94558							
19	Regular Hours	5029	Cultivation	6.7500		25.0000	168.75
19	Rest & Recovery Perio	5029	Cultivation	0.2500		24.5300	6.13
20	Regular Hours	5029	Cultivation	2.5000		25.0000	62.50
22	Regular Hours	5029	Sulfuring	7.5100		29.0000	217.79
22	Rest & Recovery Perio	5029	Sulfuring	0.5000		24.5300	12.27
22	Overtime Premium	5029	Sulfuring	0.0000	0.0100	12.2700	0.13
[redacted], CA 94574							
19	Regular Hours	5000	Safety	1.0000		25.0000	25.00
21	Non-Productive Time	5000	Cultivation	0.1600		18.5000	2.96
21	Non-Productive Time	5000	Suckering	0.0800		18.5000	1.48
21	Regular Hours	5000	Suckering	3.0000		22.0000	66.00
21	Rest & Recovery Perio	5000	Suckering	0.2500		24.5300	6.13
21	Regular Hours	5000	Safety	2.5000		25.0000	62.50
[redacted], CA 94574							
20	Rest & Recovery Perio	5062	Cultivation	0.5000		24.5300	12.27
20	Regular Hours	5062	Cultivation	5.0000		25.0000	125.00

	Pay Type	Hrs	Units	Rate	Total
Totals by Pay Type:	Non-Productive Time	0.7300		18.5000	13.51
	Overtime Premium		0.0100	12.2700	0.13
	Piecework	2.5600	272.3333	0.1900	51.75
	Piecework	4.4500	376.3333	0.2400	90.32
	Regular Hours	3.0000		22.0000	66.00
	Regular Hours	17.7500		25.0000	443.75
	Regular Hours	7.5100		29.0000	217.79
	Rest & Recovery Period	2.0000		24.5300	49.06
	Totals:	38.0000	648.6766		932.31

Covid Leave Hours Used: 0.00

	This Check	Yr to Date
Gross Wages	932.31	7,834.80
Social Sec.	57.81	485.76
Medicare	13.51	113.60
State Wht	15.70	112.19
SDI	10.25	86.18
Net Check	835.04	7,037.07
Total Hours	38.00	821.92

[redacted], Inc.

Fed ID: [redacted] St. ID [redacted]

HOURS WORKED

If an employee is "suffered and permitted" to work even though not instructed or requested to do so, it is compensable time or hours worked.

If the employer knows or has reason to know the time is compensable.

Enforce with discipline, not lack of payment.

DE MINIMIS DOCTRINE DOES NOT APPLY IN CA

Under federal law, courts will forgive employers for not paying employees for small amounts of otherwise compensable time upon a showing that the bits of time are administratively difficult to record.

Examples of de minimis time include but are not limited to clocking in or out, turning lights and other systems on or off, and unlocking or locking the facilities.

In *Troester v. Starbucks Corporation*, the California Supreme Court held that the ***de minimis exception does not apply in California***. As a result, employers must be sure to compensate employees for any and all time that employees work, regardless of how minor or trivial the amount of time and money may seem.

COMPENSABLE TIME AND DONNING AND DOFFING

THE DEFINITION OF WORKING TIME IS VERY BROAD AND INCLUDES ALL TIME WHEN AN EMPLOYEE IS SUBJECT TO THE CONTROL OF AN EMPLOYER AND INCLUDES ALL THE TIME IN WHICH THE EMPLOYEE IS "SUFFERED OR PERMITTED TO WORK," WHETHER OR NOT REQUIRED TO DO SO.

UNDER THIS BROAD DEFINITION, AN EMPLOYER MUST COMPENSATE EMPLOYEES FOR PERIODS OF TIME IN WHICH NO DUTIES ARE PERFORMED, AS LONG AS THE EMPLOYEE IS SUBJECT TO THE CONTROL OF THE EMPLOYER.

- California donning and doffing - when employees are required to wear specialty gear—including uniforms, safety gear, or other tools and equipment—or undertake other work-related activities before they are allowed to begin their official work duties.
- Must be compensated for this time.

LABOR CODE 226.2

"For employees compensated on a piece-rate basis *during a pay period*"…

You Must Pay For, and Piece Rate Earnings **CANNOT** be attributed to:

- Rest and Recovery Periods
- Other Non-Productive Time

What is a "piece rate basis"?

LABOR CODE 226.2

Rest and Recovery Periods

- Statutory Rest Breaks
- Must Be Paid at "Average Rate of Pay"
  - Almost always the same as RROP.
- What about 15-Minute Breaks?

Other Non-Productive Time

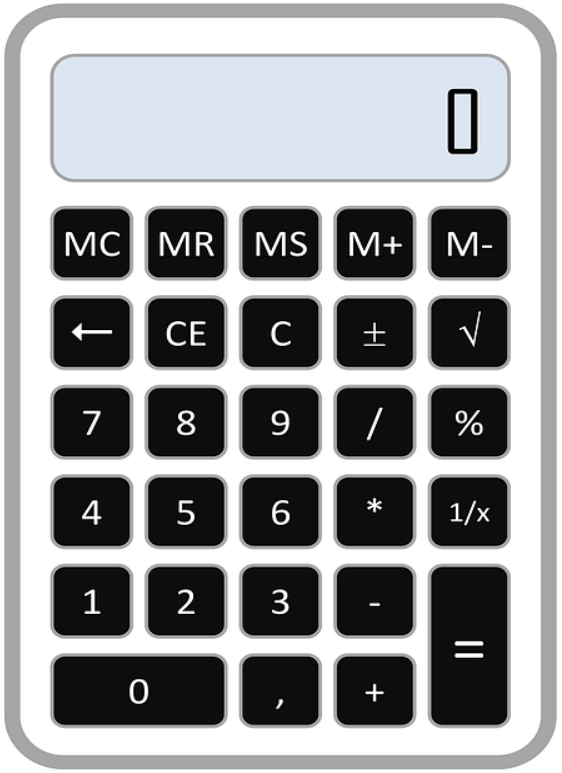
- Any time other than Rest and Recovery Periods where and Employee is Working
  - Donning and Doffing
  - Exercises and Stretching
  - Paperwork
  - Walking to and From Fields/Ranches/Break Areas
- Can Be Anything At Or Above Minimum Wage
- Can Be A Reasonable Estimate

PIECE RATE EXAMPLE:

An employee a 40-hour week on a piece rate basis. Her piece rate was $1,000 per unit. In the week, she completed 10,000 pieces.

Paystub:

Type	Hours	Units	Rate	Total
Piece Rate	40	1,000	$1,000/unit	$1,000,000
TOTAL	40			$1,000,000



Any issues?

PIECE RATE EXAMPLE:

An employee a 40-hour week on a piece rate basis. Her piece rate was $1,000 per unit. In the week, she completed 10,000 pieces.

Paystub:

Type	Hours	Units	Rate	Total
Piece Rate	38.33	1,000	$1,000/ea	$1,000,000
Rest & Recovery	1.67		$26,089.23/hr	$43,569.01
TOTAL	40			$1,043,569.01

Any issues?

PIECE RATE EXAMPLE:

An employee a 40-hour week on a piece rate basis. Her piece rate was $1,000 per unit. In the week, she completed 10,000 pieces.

Paystub:

Type	Hours	Units	Rate	Total
Piece Rate	37.08	1,000	$1,000/ea	$1,000,000
NPT	1.25		$15.50/hr	$19.38
Rest & Recovery	1.67		$26,089.73/hr	$43,569.85
TOTAL	40			$1,043,589.22

QUESTIONS?

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