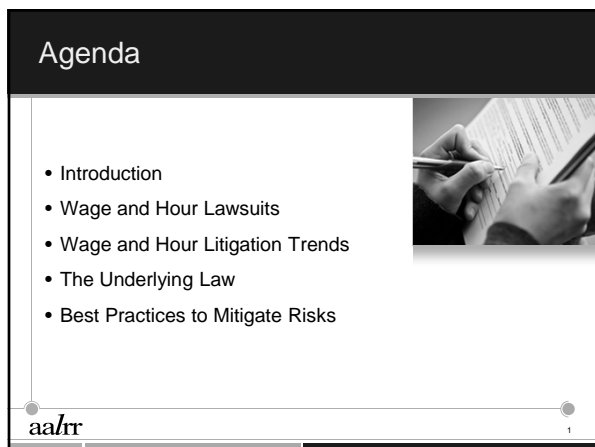


Wage and Hour Update:
Part One – *SigAlerts*
Breakout Two

California Strong 2017 Employment Law Conference

Presented by:
Jonathan Judge
Timothy Wojcik

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Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation

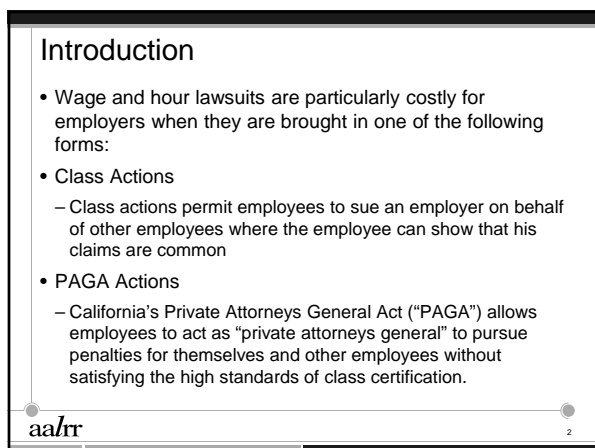


Agenda

- Introduction
- Wage and Hour Lawsuits
- Wage and Hour Litigation Trends
- The Underlying Law
- Best Practices to Mitigate Risks

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Introduction

- Wage and hour lawsuits are particularly costly for employers when they are brought in one of the following forms:
- Class Actions
 - Class actions permit employees to sue an employer on behalf of other employees where the employee can show that his claims are common
- PAGA Actions
 - California's Private Attorneys General Act ("PAGA") allows employees to act as "private attorneys general" to pursue penalties for themselves and other employees without satisfying the high standards of class certification.

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Wage and Hour Litigation Trends

- Average workweek for full-time adults in U.S. is now **47 hours**
- 50%** of full-time employees say they work more than 40 hours per week

Hours	Percentage
60+	18%
50-59	21%
41-49	11%
40	42%
Less than 40	8%

Source : Gallup data from 2013-2014 Work and Education Polls

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Wage and Hour Litigation Trends

- Salaried workers work longer hours
- Hourly workers still average over 40 per week


Hours	Paid Salary	Paid Hourly
60+	25%	9%
50-59	25%	17%
41-49	9%	12%
40	37%	56%
Less than 40	3%	8%

Source : Gallup data from 2013-2014 Work and Education Polls

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Wage and Hour Litigation Trends

- Increase in technological capabilities
 - 9-5 workday is becoming 24/7
 - Higher demands on responsiveness, shorter turnaround times
 - More telecommuting, remote work



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Wage and Hour Litigation Trends

- Workplace flexibility
 - 67% of HR professionals think EEs have a balanced work-life—**45%** of employees don't
 - **64%** of managers expect employees to be reachable outside of the office on personal time

Source: Gallup Business Journal, Dec 18, 2012

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Wage and Hour Litigation Trends

- Workplace flexibility
 - Gallup study on employee wellbeing:
 - **Engagement** > more time off
 - **Flextime** > more vacation, paid time off
 - **Flexibility** = strongest factor in overall wellbeing

Source: Gallup Business Journal, Dec 18, 2012

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Wage and Hour Litigation Trends

- Increase in "Alternative Work Arrangements"
 - Temp agency, on-call workers
 - Independent contracting
 - Freelancers, contract work

Year	% of Workforce
2010	10.1%
2015	15.8%

Source: Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015

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Wage and Hour Litigation Trends

- Increase in “Alternative Work Arrangements”
 - “Gig economy”:
 - Uber
 - CrowdFlower
 - TaskRabbit

Year	% of Workforce
2010	10.1%
2015	15.8%

Source: Lawrence Katz and Alan Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015

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Wage and Hour Litigation Trends

- Corresponding focus of DOL and plaintiffs' bar:
 - Misclassification claims (e.g., independent contractor)
 - Single and joint employer relationships
 - Off-the-clock and overtime work
 - Telecommuting, donning and doffing
 - Travel time and expense reimbursement

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Wage and Hour Litigation Trends

Employment Litigation Nationwide

Year	Civil Cases Filed
2000	35174
2001	36352
2002	39240
2003	37825
2004	38094
2005	35838
2006	31012
2007	33090
2008	31102
2009	32950
2010	34689
2011	34875
2012	36416
2013	33309
2014	32504
2015	33603

Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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Wage and Hour Litigation Trends

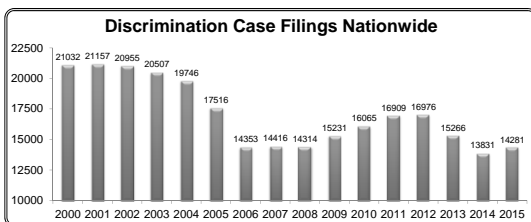


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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Wage and Hour Litigation Trends

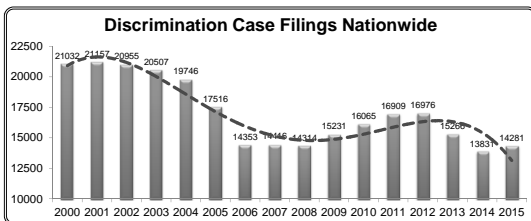


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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Wage and Hour Litigation Trends

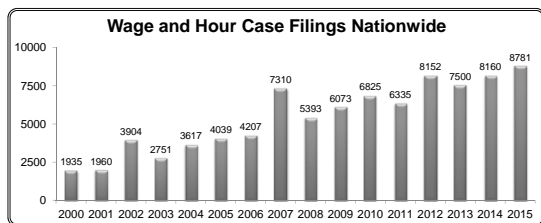


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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Wage and Hour Litigation Trends

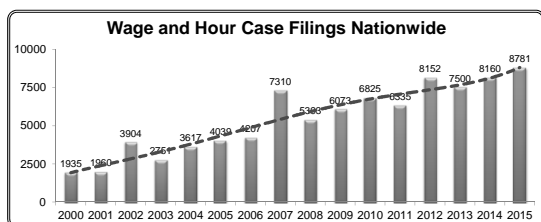


Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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Wage and Hour Litigation Trends



Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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Wage and Hour Litigation Trends

Year	Empl Cases	Wage/Hr Cases	% of Total
2010	34,689	6,825	19.7%
2011	34,875	6,335	18.1%
2012	36,416	8,152	22.4%
2013	33,309	7,500	22.5%
2014	32,504	8,160	25.1%
2015	33,603	8,781	26.1%

Source : Civil Cases Filed, by Nature of Suit report from www.uscourts.gov

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Wage and Hour Litigation Trends

- DOL Wage and Hour Division budget increased **33.6%** since 2007:


Year	Appropriations to WHD
2007	\$170,220,000
2009	\$193,092,000
2011	\$227,491,000
2013	\$215,184,000
2015	\$227,500,000
Requested for 2017	\$276,599,000

Source : FY2017 Congressional Budget Justification; U.S. DOL Wage and Hour Division

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Wage and Hour Litigation Trends


- DOL-Timesheet App:
 - EEs track hours and “determine wages owed”
 - EEs can forward time records directly to WHD



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Wage and Hour Litigation Trends

- “Workers Owed Wages” website:
 - “[W]orkers can look up in Spanish or English whether they are owed back wages.
 - Recouped \$1 million in back wages since 2015



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Wage and Hour Litigation Trends

- Challenges for employers:
 - Competing for top talent
 - Fostering employee productivity
 - Minimizing costs
 - Safeguarding against litigation
- These goals often conflict, and plaintiffs take advantage



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The Underlying Law



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Roadmap

- Meal and Rest Periods
- Overtime Compensation
- Off-The-Clock Work
- Wage Statements and Recordkeeping
- Expense Reimbursement
- Payment of Final Wages

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Meal Periods

- Employer's Obligation to "Provide" Meal Periods
- Timing of Meal Periods
- Waivers of Meal Periods
- On-Duty Meal Periods



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Employer's Obligation to "Provide" Meal Periods

- Employers satisfy their obligation to provide a meal period when they:
 - Relieve an employee of all duty;
 - Relinquish control over an employee's activities;
 - Permit a reasonable opportunity to take an uninterrupted 30-minute meal period; and
 - Do not impede or discourage the employee from taking an uninterrupted 30-minute meal period.

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Timing – Meal Periods



- Timing of Meal Periods
 - Employers must provide a first meal period no later than the end of the employee's fifth hour of work.
 - Employers must provide a second meal period no later than the end of the employee's tenth hour of work.
(Labor Code § 512(a).)

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Waivers – Meal Period

- Waivers of Meal Periods
 - Waiver of a First Meal Period
 - Employees may voluntarily agree with their employer to waive their right to a meal period as long as they do not work more than six hours in a day.
 - Waiver of a Second Meal Period
 - Employees may waive their second meal period if:
 - The employee works 12 hours or less;
 - The employee agrees with the employer to waive the second meal period; and
 - The first meal period has not been waived.
(Labor Code § 512(a).)

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On-Duty Meal Periods

- On-Duty Meal Period Agreements
 - An employee may enter into a written meal period agreement with his/her employer for an on-duty meal period that is counted as time worked only when:
 - The employee and employer agree in writing to an on-the-job meal period;
 - The written agreement states that the employee may revoke the agreement, in writing, at any time; and
 - The employee is paid for the meal period.
 - The nature of the work prevents the employee from being relieved of all duty; (8 Cal. Code Regs. § 11010 et seq.)
 - On-duty meal periods are a type of meal period – not a waiver.

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Rest Periods

- Rate at Which Rest Time Must Be Authorized and Permitted
- Rest Period Timing
- Recent Case Law Prohibiting On-Call Rest Breaks
 - *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257



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Rest Periods

- Rate at Which Rest Time Must Be Authorized and Permitted
 - The Wage Orders require employers to “authorize and permit” rest periods for nonexempt employees whose total daily work time is at least 3.5 hours.
 - Rest periods must, insofar as it is practicable, be in the middle of each work period and must be at a minimum rate of 10 consecutive minutes for each 4 hours or major fraction thereof.
 - “Major fraction thereof” as applied to a 4-hour period means any amount of time in excess of 2 hours.

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Rest Period Requirements

Hours Worked	Rest Periods Required
Less Than 3.5 Hours	None
3.5 Hours to 6 Hours	One -10-minute paid rest period
Over 6 Hours up to 10 Hours	Two -10-minute paid rest periods
Over 10 Hours up to 14 Hours	Three -10-minute paid rest periods
Over 14 Hours up to 18 Hours	Four -10-minute paid rest periods

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Rest Period Requirements

- Rest Period Timing
 - Employers have a duty to make a good faith effort to authorize and permit rest periods in the middle of each work period.
 - Employers may deviate from that course where practical considerations render it infeasible.
 - Employers are not required to permit a rest period before any meal period. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1031-32.)

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ABM Security Services, Inc.

- California Supreme Court reinstated trial court's award of \$90 million in favor of class of private security guards.
- (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257.)
- Breakdown of award:
 - \$56 Million statutory damages
 - \$31 Million pre-judgment interest
 - \$2.6 Million in waiting-time penalties



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Meal and Rest Period Premiums

- General Requirements
 - If an employer fails to provide an employee with a required meal or rest period, the employee is entitled to one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided. (Labor Code § 226.7(d).)
 - An employer may be liable for up to two premiums per day
 - » (*United Parcel Service, Inc. v. Superior Court* (2011) 196 Cal.App.4th 57, 69.)
 - When calculating the "regular rate of compensation," the safest approach is to use the same "regular rate" method that would be used for overtime purposes.
 - » Not been settled by the courts
 - » (*Wert v. U.S. Bancorp* (S.D. Cal., June 9, 2015, No. 13-CV-3130-BAS (BLM)) 2015 WL 3617165, at *3.)

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Meal and Rest Period Premiums

- Systemic Failure to Pay Premiums
 - "Safeway had thousands or tens of thousands of workers, but for years it never paid statutory meal break premiums. Why? One explanation is human perfection: Safeway never, ever erred. This explanation is possible. But human perfection is rare. Another explanation is deep, system-wide error: that Safeway was unaware of, or for some other reason[,] violated [] its duty to pay statutory premiums when required."
 - » (*Safeway, Inc. v. Superior Court of Los Angeles County* (2015) 238 Cal.App.4th 1138, 1153.)

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Overtime Compensation

- General Requirements

- Daily Overtime
- Weekly Overtime
- Seventh Day Premiums
- Pending Overtime Case Law

Mendoza v. Nordstrom, Inc. (9th Cir. 2015) 778 F.3d 834



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Daily Overtime

- Non-exempt employees must generally be paid one-and-one-half times their regular rate of pay for work in excess of 8 hours in a workday; and
- Non-exempt employees must generally be paid double their regular rate of pay for all hours worked in excess of 12 hours in a workday.



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Weekly Overtime

- Non-exempt employees generally must be paid one-and-one-half times their regular rate of pay for hours worked in excess of 40 in a workweek.



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Seventh Day Premiums

- Labor Code § 551 provides that “every person employed in any occupation of labor is entitled to one day’s rest therefrom in seven.”
- Employees must be paid at the following rates when work is performed on the seventh day:
 - One-and-one-half times their regular rate of pay or the first 8 hours worked on the seventh consecutive day of work in any workweek; and
 - Twice the regular rate for hours worked in excess of 8 on the seventh consecutive day of work.
(8 Cal. Code Regs. § 11010 et seq.)

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Mendoza v. Nordstrom, Inc.

(9th Cir. 2015) 778 F.3d 834

- Labor Code § 551 provides that “every person employed in any occupation of labor is entitled to one day’s rest therefrom in seven.”



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Mendoza v. Nordstrom, Inc.

(Cal. 2017) 216 Cal.Rptr.3d 889

- The California Supreme Court decided:
 - One day of rest in seven is determined by the workweek
 - Exception applies if employee works less than 30 hours in a workweek and no more than six hours in any one day
 - Exception applies if nature of employment requires employee to work seven or more consecutive days and employee receives equivalent of one day’s rest in seven over a calendar month
 - Employer may not encourage its employees to forgo rest or conceal the entitlement to rest, but an Employer is not liable simply because an employee *chooses* to work a seventh day

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Overtime: Calculating the “Regular Rate”

- **Example:** Employee works 46 hours during the week, receives a production bonus for \$46 attributable to that week, and receives \$12 per hour before any adjustment for the bonus.
- His regular rate and overtime premium rate is calculated as follows:

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Calculating the “Regular Rate”

Step 1	Multiply the total number of hours worked in the pay period by the straight hourly rate.	\$12 x 46 hours = \$552
Step 2	Add production bonus to the amount calculated in Step 1.	\$46 + \$552 = \$598
Step 3	Divide the amount calculated in Step 2 by the total number of hours worked in the pay period to determine the employee's regular rate.	\$598 ÷ 46 = \$13 / per hour
Step 4	Multiply the regular rate calculated in Step 3 by 1.5 to determine the employee's premium rate.	\$13 x 1.5 = \$19.50 / per hour

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Off-the-Clock Work

- State and federal laws require that employees be paid for all “hours worked.”
 - “Common Examples of Off-the-Clock Work”
 - Time spent working before clocking in;
 - Time spent working after clocking out;
 - Time spent working during an unpaid meal period;
 - Time spent putting on or taking off uniforms or safety equipment;
 - Time spent in mandatory meetings;
 - Checking emails during non-working hours; and
 - Downtime when the employee is paid on a piece-rate basis.
 - The “De Minimis” Doctrine



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Off-the-Clock Work

- The De Minimis Doctrine
 - Under the De Minimis Doctrine, alleged working time need not be paid if it is trivially small.
 - To determine whether work time is de minimis, courts consider the following factors on a case-by-case basis:
 - The practical administrative difficulty of recording the additional time;
 - The aggregate amount of compensable time; and
 - The regularity of the additional work. (*Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1063.)
 - A seemingly trivial activity, when required to be performed regularly or on many occasions, may thus become non-trivial.

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Wage Records

- Itemized Wage Statements
 - Employers must furnish each employee an itemized wage statement semimonthly or at the time of each wage payment showing:
 - Gross wages earned;
 - Total hours worked by each employee;
 - The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
 - All deductions, provided that all deductions made by written order of the employee may be aggregated and shown as one item;
 - Net wages earned;

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Wage Records *continued*

- Itemized Wage Statements
 - Employers must furnish each employee an itemized wage statement semimonthly or at the time of each wage payment showing:
 - The inclusive dates of the period for which the employee is being paid;
 - The employee's name and last four digits of his/her social security number, or an employee identification number;
 - The name and address of the legal entity that is the employer;
 - All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee; and
 - Temporary service employers must also show the rate of pay and the total hours worked for each temporary services assignment. (Labor Code § 226(a).)

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Retention of Wage Records

- Employers must keep records for at least three years of the itemized wage statements given to employees.
(Labor Code § 226(a).)
- Employers are also required to keep records showing the following information regarding each employee for three years:
 - Full name, home address, occupation and social security number;
 - Time records showing when the employee begins and ends each work period;
 - Meal periods taken (unless all operations cease);
 - Split shift intervals;
 - Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee;
 - Total hours worked in the payroll period and applicable rates of pay.
(8 Cal. Code Regs., § 11010(7) *et seq.*; Labor Code § 1174.)

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Expense Reimbursement

- General Requirements
- Common Business Expenses Requiring Reimbursement
 - Uniforms
 - Tools and Equipment
 - Automotive-Related Expenses / Mileage
 - Cellular Telephones
 - » If an employer "mandates" use of a personal cell phone for company business, the employer must reimburse employees for a reasonable percentage of their cell phone bills.
 - » Reimbursement is required regardless of whether the employees have cell phone plans with unlimited minutes or limited minutes. (*Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1140.)



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Payment of Final Wages

- Payment Upon Discharge
 - All earned wages due immediately
- Payment Upon Resignation
 - Resignation without prior notice: 72 hours
 - Resignation with 72 hours notice: immediately
- Waiting Time Penalties
 - Employers are liable for one full day's wage for each day the employee is not paid
 - Up to a maximum of 30 days
 - Doesn't just apply to wages earned in final pay period.

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Best Practices to Mitigate Risks

- 1 Implement Compliant Policies and Practices
- 2 Regularly Audit Employment Policies and Practices
- 3 Training Supervisors and Employees
- 4 Review Wage Statements
- 5 Implement Policies to Deter Off-the-Clock Work

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Best Practices to Mitigate Risks

- 6 Maintain Complete and Accurate Records
- 7 Allocate Resources to Ensure Compliance
- 8 Consider Arbitration Agreements
- 9 Realize That No One is Immune

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California's ever-changing wage and hour laws have created an exceptionally complex and confusing regulatory scheme. As a result, even the most right-minded and principled employers can find themselves faced with tremendous exposure for inadvertent noncompliance or failure to fully understand their legal responsibilities. Mitigating risks in the wage and hour context requires daily and ongoing oversight to ensure compliance.

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