

Wage and Hour Update:
Part Two – the Gold Rush
Breakout Six

California Strong 2017 Employment Law Conference

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Agenda

- Introduction
- Minimum Wage Laws
- Fair Labor Standards Act
- California's Fair Pay Act
- Paid Sick Leave
- Managing Risks and Tips to Avoid Claims


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Introduction

- Why are we still talking about wage and hour lawsuits?
 - Technical and inflexible laws
 - Massive settlements
 - The settlements are in the headlines
- Wage and hour laws are increasingly complex
 - Overlapping federal, state, and local laws
- Pyramiding of damages, penalties, and attorneys' fees = financial incentives for plaintiffs attorneys
- Constant Legislative activity and frequent court decisions

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Why is Wage and Hour Law Important?



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Because...

- **Wage and Hour Laws:** Tells us how to properly pay employees
- **Liability:** Violations lead to SIGNIFICANT liability
- **Experience:** Claims and litigation continue and wage and hour lawsuits outpace every other form of employment litigation

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The Numbers

- Wage and hour federal filings decreased slightly in 2016, but expected to increase in 2017
- Top ten wage and hour settlements in 2016 totaled \$698.5 million, nearly doubling from 2015 and more than triple the 2014 valuation
- Overall certification of class action lawsuits increased over 10 percent in 2016
- United States Supreme Court decided two cases in 2016 that made it generally easier for an employee to obtain class certification

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The Numbers

- Average settlement amount of wage and hour class action between 2007 and 2015
 - \$6.9 million
 - Median settlement amount of \$2.2 million
- Average settlement amount per employee
 - \$5,742 per employee
- Department of Labor Investigations
 - 75% of investigations result in finding of violations
 - DOL recovered \$1.2 billion in back wages in last five years
 - \$267 million recovered by DOL in 2016



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Bet the Company Litigation

- “Gig Economy” - Employee vs. Independent Contractor?
 - \$27 million settlement on behalf of 200,000 Lyft drivers (N.D. California March 2017)
 - Court initially rejected proposed \$12.5 million settlement of case
- Bartering
 - “Yoga for Trade” — work 3 hour weekly shift as custodian and get free Yoga studio membership
 - Lawsuit alleges federal and state minimum wage law violations
 - \$1.65 million settlement for approximately 8,000 workers (California, February 2017)

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Bet the Company... (Continued)

- Interns
 - Lawsuit against Mary-Kate and Ashley Olsen alleging “wage theft” for failing to pay interns quick settlement under \$200,000
 - SNL intern lawsuit settled for \$6.4 million
 - Viacom paid \$7.2 million to settle intern lawsuit
- Employee vs. Independent Contractor
 - Total settlements for one ground handling company from 2013 to 2016 exceeded \$500 million
 - Southern California Port Drivers settled misclassification case for \$5 million in 2016 (Final Approval Pending, Los Angeles Sup. Ct.)
 - The trucking companies filed bankruptcy, which was challenged by employees


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The Golden State

- Being a California employer you enjoy:
 - Amazing weather
 - Great beaches
 - In-N-Out
 - Happiest place on Earth is pretty close

AND


- You do business in an award winning state
 - California voted worst JUDICIAL HELLHOLE
 - American Tort Reform Association dubbed the Golden State “the worst of the worst”
 - Plaintiffs attorneys “seeking riches at expense of employers”
 - ATRA noted “lawmakers, prosecutors, and judges have long aided and abetted this massive redistribution of wealth.”



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Minimum Wage Laws

- Governed by Federal, State, and Local Laws
 - Employers must pay the highest applicable minimum wage
 - Federal minimum wage: \$7.25 per hour
 - California minimum wage depends on the number of employees:
 - \$10.00 per hour for employers with 25 or fewer employees;
 - \$10.50 per hour for employers with 26 or more employees




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Minimum Wage Laws

- California minimum wage scheduled increases

Date	Employers with 25 Employees or Less	Employers with 26 Employees or More
January 1, 2017	\$10.00/hour	\$10.50/hour
January 1, 2018	\$10.50/hour	\$11.00/hour
January 1, 2019	\$11.00/hour	\$12.00/hour
January 1, 2020	\$12.00/hour	\$13.00/hour
January 1, 2021	\$13.00/hour	\$14.00/hour
January 1, 2022	\$14.00/hour	\$15.00/hour




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Location, Location, Location!

- Location matters!
- Nearly two dozen cities and counties have enacted their own local minimum wage (“living wage ordinance”).
 - Berkeley
 - Mountain View
 - San Leandro
 - Cupertino
 - Oakland
 - San Mateo
 - El Centro
 - Palo Alto
 - Santa Clara
 - Emeryville
 - Pasadena
 - Santa Monica
 - Los Altos
 - Richmond
 - Sunnyvale
 - Los Angeles (County & City)
 - San Diego
 - San Francisco
 - Malibu
 - San Jose

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Derivative Impact of Minimum Wage Increases



- Impacts exempt employees
- Under California law the minimum salary threshold for exempt employees is tied to the state minimum wage
 - California exempt employees must earn at least twice the state minimum wage.
 - Currently this means that an exempt employee in California must earn at least \$43,680 annually to qualify as exempt under California law.
 - Caution: Federal salary exemption requirements differ from California.
 - Current federal salary requirement is at least \$455 per week.
 - Was set to increase to \$913 per week (\$47,476 annually)
 - On hold due to federal court ruling in Texas

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Derivative Impact of Minimum Wage Increases

- Impacts employers with collective bargaining agreements
- California Labor Code and Wage Order provides certain wage and hour exemptions to union employers.
 - Union employers are exempt from mandatory sick leave, overtime, meal period and rest break requirements *if*:
 - Employees earn at least 30% more than the minimum wage (currently \$13.65);
 - Agreement provides for meal periods, rest breaks and premium wage rates for overtime hours; and
 - Agreement provides for binding arbitration

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Derivative Impact of Minimum Wage Increases

- Tool reimbursements
 - Under Wage Order 16 (construction), employer does not have to reimburse employee for tools required as part of the particular trade or craft *if* employee earns at least twice the minimum wage.
- Commissioned employees
 - Wage Orders 4 and 7 provide overtime exemption to commissioned employees *if*:
 - Earnings exceed 1.5 the minimum wage and
 - More than half of the earnings are from commissions

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Derivative Impact of Minimum Wage Increases

- Other wage and hour rules impacted by minimum wage increases:
 - Split shift premium rates
 - Meal and lodging credits

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The Five W's of Minimum Wage

- **What** does a minimum wage claim look like in litigation?
 - Employee: I wasn't paid for all the hours I worked...nor were my co-workers
- **Who** can make claims of minimum wage violations?
 - Employee, California Labor Commissioner, United States Department of Labor
- **Where** can they pursue these claims?
 - Before Labor Commissioner, Department of Labor or in court
- **When** did the alleged underpayment occur?
 - Statute of limitations is generally 4 years
- **Why** would an employee do this?
 - Rarely has to do with the \$\$\$ the employee claims they are owed

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Minimum Wage Claims

- Minimum wage claims are common in wage and hour lawsuits and are frequently pursued on a class or representative basis.
 - One employee can sue on behalf of *all* employees
- A minimum wage claim is rarely based on the actual failure of an employer to pay its employees the legal minimum wage.



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Minimum Wage Claims

- Minimum wage claims are often alleged as “off-the-clock” work or a “failure to pay for all hours worked.”
- Common allegations:
 - After hours work related emails or telephone calls
 - Time spent working before clocking in or out
 - Time spent putting on or taking off uniforms or safety equipment
 - Training/seminar time
 - Travel time
 - Downtime when paid on a piece-rate basis (“other non-productive time”)
 - Rounding of time improperly

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Paying for All “Hours Worked”

What counts as Hours Worked?

<ul style="list-style-type: none">• Federal law<ul style="list-style-type: none">– All time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workstation– All time during which an employee is <i>suffered or permitted to work</i>	<ul style="list-style-type: none">• State<ul style="list-style-type: none">– All the time during which an employee is <i>subject to the control of an employer</i>– Includes all the time the employee is <i>suffered or permitted to work</i>, whether or not required to do so
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Minimum Wage Claims in Litigation

- Damages and penalties available to an employee alleging minimum wage violations include:
 - Unpaid wages, including interest
 - Liquidated damages equal to unpaid wages
 - Waiting time penalties of 30 days wages for terminated employees
 - Inaccurate wage statement penalties up to \$4,000 per employee
 - Civil penalties under PAGA, ranging from \$100 to \$200 per pay period per employee
 - Potential personal liability for owners, directors, officers and managing agents
 - Reasonable attorneys' fees and costs of suit.

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Minimum Wage Claims in Litigation

- **How a \$300 Wage Claims Becomes a \$37,000 Judgment**
 - Non-exempt employee Joe Smith earns \$25 per hour at ABC Co.
 - Joe quits his job with ABC Co. after two months
 - Manager determines based on records that Joe's final check should be for 43 hours at \$25 per hour (\$1,075)
 - ABC Co. asks third party payroll company to prepare check for \$1,075, inexplicably, final check is issued for \$771 and is short \$304. ABC Co. does not catch the error and gives check to Joe.
 - Joe files claim with Labor Commissioner for \$304. Joe is awarded \$304 in wages plus \$5,757 in liquidated damages, statutory penalties and interest for total award of \$6,061.

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Minimum Wage Claims in Litigation

- ABC Co. files an appeal with the Superior Court and issues payment of \$304 for the "wage" portion of the Labor Commissioner award.
 - Effective January 1, 2017, employer has to post monetary bond with Superior Court to appeal Labor Commissioner finding of unpaid minimum wages (L.C. 1197.1)
- Joe adds a wage statement claim while case is pending in Superior Court alleging an additional \$60,000+ in penalties.
- What does Joe recover at trial?

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Minimum Wage Claims in Litigation

Claim	Award
Waiting Time Penalty, Labor Code section 203	\$6,000
Wage Statement Penalty, Labor Code section 226	\$750
Interest	\$29
Total Award to Employee	\$6,779
Attorneys Fees and Costs Awarded to Employee	\$31,365
Total Amount Awarded on \$304 Wage Claim	\$38,144

- Based on *Beck v. Stratton* (2017) Case No. B270826

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In Litigation: Rounding of Time



- California law permits employers to round employee time, *but...*

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In Litigation: Rounding of Time

- Rounding policy must be fair and neutral on its face
 - The rounding must round time up as well as down
- As applied, policy must not result in underpayment "over time"
 - When analyzed the rounding policy must not result in systemic underpayment of wages to employees over time (*See's Candy v. Superior Court* (2012) and *Silva v. See's Candy* (2016))
 - Rounding analysis as to under/overpayment is not limited to a single pay period, courts will look at long term impact (*Corbin v. Time Warner* (9th Cir. 2016))

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**Rounding Lawsuit
Example and Analysis**

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In Litigation: Rounding of Time

- Employee Joan Jetsen alleges that she and 100 of her co-workers in a production facility were not paid for all hours worked due to time rounding.
- She claims that for an 8 a.m. shift employees clock in by 7:50 a.m. and immediately begin work, however, because of the rounding policy time is always rounded up to 8 a.m.
- Rounding policy posted but does not prohibit the employee from working before start time of shift and there is no grace period policy.
- Time is always down at end of shift down. If shift ends at 4:30 p.m. and employees clock at 4:44 p.m. time is rounded down to 4:30 p.m.

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In Litigation: Rounding of Time

- Joan claims that employees work 10 minutes unpaid in the morning and an average of 14 minutes unpaid at the end of the shift.
- Total alleged unpaid time is 24 minutes per day per employee.
- Each employee earns \$15 per hour and is paid weekly.
- Joan files a class action lawsuit.
- If she is successful what is the value of her lawsuit?

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In Litigation: Rounding of Time

Unpaid Wages	\$600 per day
[.40 hrs.*\$15 = \$ 6 day per employee*100 employees]	
	\$3,000 per week
\$3,000 per week * 50 weeks	\$150,000 per year
\$150,000 * 4 years in liability period	\$600,000
Statutory Liquidated Damages	\$600,000
Inaccurate Wage Statement Penalty	\$400,000
Private Attorneys General Act Penalties	
\$200 * 51 pay periods*100 employees +	
\$100 * 1 pay period * 100 employees =	\$1,030,000
Waiting Time Penalty for 25 Terminated Employees	
30 days wages [8 hours*\$15 *30 days*25 employees]	\$90,000
Grand Total	\$2,720,000
(Excluding Attorneys Fees and Costs)	

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In Litigation: Record Keeping

- Good Tacos + Bad Records = Hefty Settlement
 - *Carrillo v. Tacolicious* (S.F. Superior Court, March 21, 2017)
 - Good policies, bad recordkeeping
 - Class action lawsuit filed by two former line cooks
 - “loose record keeping...opened us up to the lawsuit...”
 - “We love our people and take great care of our people. But we chose to settle because if we chose to fight it, **we’d go out of business**. There’s nothing we can do about it. So it is what it is, but things aren’t all they appear.”
- Settled for \$900,000 for 967 employees
 - Settlement reported in newspapers, foodie blogs, and tweeted about

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Independent Contractors or Employee?

- Independent contractor status is determined by law, not agreement
- Employees are covered by Labor Code and Wage Order protections, independent contractors are not
- Independent Contractor Factors
 - Amount of control
 - Right to terminate the relationship at will
 - Distinct occupation or primary business
 - Level of supervision
 - Duration of relationship
 - How are services paid? By the job, hourly or piece rate?

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Fair Labor Standards Act (FLSA)

- The Fair Labor Standards Act (FLSA) sets the federal standards for minimum wages, overtime, equal pay and overtime exemptions (among other things).
- Investigations by the Department of Labor focus only violations of the FLSA, not state law



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FLSA

- Interplay between FLSA and State Law
- FLSA Hot Topic
 - Exempt status and possible increases to salary threshold
 - Current exempt salary threshold under FLSA is \$23,660 per year
 - Was set to increase December 1, 2016 to \$47,476
 - Federal court issued injunction halting implementation of increased salary threshold, matter is currently under review in Fifth Circuit

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FLSA and Bonus Issues

- FLSA and California law require that overtime be based on the employee's "regular rate"
 - Regular rate is not necessarily the employee's hourly rate
 - The regular rate must include "all remuneration for employment paid to, or on behalf of, the employee"
- Discretionary vs. Non-Discretionary Bonuses
 - It does not matter how you characterize the bonus
 - Most bonuses are legally considered non-discretionary
 - Bonuses must be included in the regular rate calculation

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FLSA and Bonuses

- Year end or quarterly “discretionary” bonuses
 - If regularly paid, even if amount uncertain, they may lose their discretionary status
 - *Walling v. Garlock Packing Co.* (2nd Cir. 1947) (quarterly bonuses paid consecutively over two years lost discretionary status)
 - *Walling v. Richmond Screw Anchor Co.* (2nd Cir. 1946) (employer’s right to discontinue bonuses did not render bonus discretionary when it had been regularly paid to employees)
- Goal based bonuses
 - Promised in advance if certain goals are met

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Calculating Regular Rate under FLSA

- Company offers hourly employees a production bonus of \$400 if quarterly production goals are met.
- Should the bonus be included in the regular rate?
 - Yes.
- How do you calculate the regular rate on a bonus earned over several pay periods?
 - The retention bonus described above was earned over 12 weeks. The weekly equivalent is \$33.33 (\$400 ÷ 12 weeks). If an employee works overtime during the 12 week period, the increase in the regular rate is calculated by dividing \$33.33 by the total hours worked during the overtime week.
 - Employee works 10 hours of overtime during the 9th week of the quarter.

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Calculating Regular Rate under FLSA


$\$ 33.33 / 50 \text{ hours} = \$.67 \text{ increase in regular rate}$
 $\$.67 \times \frac{1}{2} = \$.34 \text{ increase in the additional half-time premium}$
 $\$.34 * 10 \text{ hours of OT} = \$3.40 \text{ increase in overtime earnings due to bonus}$

- If employer did not calculate the increase in the regular rate resulting from the bonus they would have underpaid employee by \$3.40.

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California's Fair Pay Act

- Employees performing **substantially similar work** must receive equal pay regardless of gender, race or ethnicity
- Relying on different job titles to explain wage gap is insufficient.
- Employer bears burden of justifying wage gap
 - Prior salary is *not* a basis for different wage rates
 - Can be based on seniority, merit, education, training or experience



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California's Fair Pay Act

- Employer must maintain records of the wages, wage rates, job classifications, and other terms and conditions of employment and to keep these records three years.
- Cannot prohibit employees from discussing their wages, inquiring about others wages, or disclosing their wages
- Anti-retaliation provision
- Employer liability for Fair Pay Act violations include:
 - Amount of the wages and interest that employee was deprived of
 - Liquidated damages in an amount equal to the wages
 - Reinstatement if employee was terminated as a result of retaliation
 - Attorneys' fees and costs

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Paid Sick Leave




- California sick leave requirements
- Local sick leave laws and ordinances

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California Sick Leave

- ✓ Effective July 1, 2015
- ✓ Minimum of 3 sick days or 24 hours
- ✓ Accrual starts on the first day of employment, but may limit use until 90th day of employment
- ✓ Accrual rate is 1 hour for every 30 hours of work



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Local Sick Leave Laws

- **Los Angeles:** 6 days
 - effective 7/1/16 – 26+ employees
 - 7/1/17 <25 employees
- **San Diego:** 5 days (effective 7/11/16)
- **Santa Monica:** (1/1/17)
 - 32 hours (<25 employees)
 - 40 hours (26+ employees)




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Looking Beyond 2017

- Increased filings of wage and hour lawsuits
 - Worker awareness of wage and hour issues
 - It's in the news
 - Aggressive, multi-platform advertising by employee-side attorneys
 - Low investment, high reward
 - Facebook and Social Media
 - Flyers
 - Radio

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Looking Beyond 2017



- Growth of local regulation on employers
 - Oakland's "Opportunity to Work Ordinance"
 - Requires that employers provide additional work hours to existing, qualified part-time employees before hiring new employees
 - Posting of notice of rights created by the ordinance
 - Retain records for four years, including work schedules, payroll records, and offers made to current and former part-time employees
 - Expect more local minimum wage and sick leave requirements
 - More local "Workers Bill of Rights"
 - San Francisco Workers Bill of Rights requires:
 - Advance notice to employees of scheduling changes
 - Pay for on-call shifts
 - Post notice


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Pending Legislation

- Fair Pay Proposal (A.B. 46)
 - Proposal to define employer to include both private and public employers
- Private Attorneys General Act (A.B. 281, 1429, 1430)
 - Expand time period and scope of employer cure rights
 - Add requirement that employee suing on behalf of others must have suffered the injury.
 - Cap on civil penalties of \$10,000 per employee
- Piece Rate Tracking by Labor Commissioner (S.B. 391)
 - For "safe harbor" payments Labor Commissioner would be required to post information on website regarding payments received by commissioner and success of program.

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Tips to Reduce Risk



1. Compliant policies remain the best tool to reduce employer risk
2. Review employment practices and policies on a regular basis
3. Train management and supervisors
4. Conduct scheduled audits of employee records and data, consider use of counsel in audit process to maintain privilege of audit findings

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Tips to Reduce Risk



5. Maintain complete and accurate employee records for the appropriate amount of time
6. Do not allow employees to “volunteer” their time or work off the clock
7. Implement an arbitration agreement...and regularly update it
8. Recognize that every employer, big and small, must comply with wage and hour laws


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Thank You

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