

CALIFORNIA EMPLOYMENT LAW

1.0

A CRASH COURSE FOR SMALL EMPLOYERS

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Introduction

- How many of you are already employers?
 - How many employees do you have?
- How many are planning to be employers?
 - How many employees do you plan to have?
- What city do/will you operate in?
- What is the one thing you hope to learn today?

Overall goals

Unfortunately, you have to “think big” even if you are small.
Know the rules—pick the best alternative even if both are bad.

Employer Myths

1. If your business is a corporation you cannot be sued personally.
2. You do not have to give an employee a copy of anything unless he/she has signed it.
3. No attorney will take his/her case.
4. If you are “nice” to employees, e.g., not taking taxes out of their pay, they will be good to you.

The most common mistakes small employers make

1. Trusting employees.

a. “No deed goes unpunished—good or bad.”

b. Someday, someone will turn against you.

i. Recognize that.

ii. Act accordingly.

iii. Like defensive driving.

iv. Don't take it personally

2. Hiring family members.

- 3. Paying salary vs. hourly/making everyone a manager.**
 - a. Many small employers try to save money by putting employees on salary and/or making them managers.**
 - b. You and the law do not see managers the same way.**
 - c. There are many ways you can get in trouble by paying salary to hourly employee.**
 - i. EDD.**
 - ii. DLSE.**
 - iii. Private lawsuits.**
- 4. Making employees “independent contractors.”**

5. Keeping people too long.

a. Generally, people do not improve over time.

6. Failure to document.

a. Why this is unhelpful.

b. How much documentation is enough.

7. Too much documentation.

a. No need for employment agreements.

Employee versus independent contractor

- Why is this important?
- Problems created by misclassification.
- Indicia of employee:
 - “Common law,” as we know it, has evolved slowly over the centuries based upon judgments rendered by the courts on individual cases. The common law of employment, as it exists today, is the total of all court decisions related to the question of what constitutes an employment relationship.

- An employer-employee relationship exists when a person who hires an individual to perform services has the right to exercise control over the manner and means by which the individual performs his or her services. The right of control, whether or not exercised, is the most important factor in determining the relationship.

- The right to discharge a worker at-will and without cause is strong evidence of the right of direction and control.

The following factors are taken into consideration. Let's try to figure out which way they cut (employee v. independent contractor):

- Whether or not the one performing the services is engaged in a separately established occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision.

- **The skill required in performing the services and accomplishing the desired result.**
- **Whether the principal or the person providing the services supplies the tools, equipment, and place of work for the person doing the work.**
- **The length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.**
- **The method of payment, whether by time, a piece rate, or by the job.**
- **Whether or not the work is part of the regular business of the principal.**
- **Whether or not the parties believe they are creating the relationship of employer and employee.**

- The extent of actual control exercised by the principal over the manner and means of performing the services. **MOST IMPORTANT!**
- Whether the principal is or is not engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.
- Whether the worker can make business decisions that would enable him or her to earn a profit or incur a financial loss. Investment of the worker's time is not sufficient to show a risk of loss.

A written contract which claims to create the relationship of principal and independent contractor is not controlling if the practice of the parties shows that the principal retains the right of control under the common law test.

The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service relative to the employer.

What types of employees are “exempt”

- Why does it matter?
 - If employee is non-exempt, he/she has to be paid overtime and has to be provided with rest and meal breaks.

Exempt status is defined by law—not by the parties’ agreement or intentions.

- Cannot make someone an exempt employee merely by giving him/her a title.
- In the same manner if someone is exempt, he/she is not entitled to overtime.

- **“White collar” exemptions.**
 - **For executive, administrative and professional employees.**
 - **There are salary and duty requirements.**
- **■ There is a “salary test.”**
 - **Minimum level of compensation is no less than two times state minimum wage for full time employment.**
- There is a “duty test.”**
 - **Employee must be “primarily engaged in” exempt duties.**
 - **Means more than one-half of the employee’s time is spent doing exempt duties.**

- **Executive means an employee who is “primarily engaged” in exempt tasks:**
 - Management of enterprise or a department of it.
 - Customarily and regularly directs the work of two or more employees.
 - Has the authority to hire and fire.
 - Customarily and regularly exercises discretion and independent judgment.

■ Examples:

- Interviewing, selecting and training employees.
- Setting and adjusting employees rates of pay and hours worked.
- Directing work of employees.
- Maintaining productivity or sales records of employees.
- Appraising productivity.
- Handling complaints.
- Discipline if necessary.

- Planning work.
 - Determining type of material to be purchased.
 - Providing for employee safety.
- **Administrative means an employee who is “primarily engaged” in exempt tasks:**
- Performance of office/non-manual work directly related to management policies or general business operations.
 - Administration of a school system.
 - Customarily and regularly exercises discretion and independent judgment.
 - Regularly and directly assist proprietor or employee in executive or administrative capacity.

- Performs under only general supervision along with specialized or technical lines requiring special training, experience or knowledge.

- Examples:
 - Buyer.

 - HR Manager.

 - Purchasing Agents.

 - Insurance claims adjustors.

 - Team leaders.

 - Executive assistants to senior executives if they exercise discretion.

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○ **Professional means an employee who is “primarily engaged” in exempt tasks:**

- Licensed or certified by the State of California and primarily engaged in practice of medicine, law, dentistry, optometry, architecture, engineering, teaching or accounting.
- Primarily engaged in an occupation commonly recognized as a learned or artistic profession.
- Customarily and regularly exercises discretion and independent judgment.

What is compensable employee time?

- “Compensable time” = hours worked.
- Every single minute an employee works for you.
- You must compute compensable time before you can comply with minimum wage and overtime requirements.
 - If an employer knows or has reason to believe employee is working, work is compensable.
 - Examples:
 - Unauthorized overtime.
 - Employee may be disciplined, but still has to be paid.

- “Off-the-clock” work.
- Work done at home or elsewhere.
- Includes:
 - Any time an employee is “suffered or permitted to work,” even if not instructed or requested to do so.
 - Any time an employee is on duty, even if waiting to work.
 - If employee is completely relieved of duty, do not have to pay as long as the time can be used effectively for his/her own purposes.
 - Must be told ahead of time that he/she may leave the job and that he/she will not have to start working until a specific hour.

- **“Uncontrolled standby” = employee is not required to remain on employer’s premises but is merely required to leave word where he/she can be reached.**
 - **Typically requiring a beeper does not make time compensable.**
 - **Has to be added to other time to determine if overtime is due.**
 - **Cannot require an unreasonable geographic limitation.**
- **“Call back” = employee responds to call from employer to perform extra work without pre-arrangement after scheduled hours have ended.**
 - **Do not have to compensate for travel time to get back to work although safer to do so.**

○ Does not include:

- Meal breaks.
- Travel time to and from work, generally.
 - Travel time during workday is compensable.
 - Travel time in addition to regular hours is compensable if performed per employer's instructions.
 - Employer may establish different rate for travel time as long as not below minimum wage and disclosed to employees before travel.
 - If employer requires employees to meet at a certain place to take bus to job site, for example, time is compensable.

- One day out of town travel, travel time counts.
 - But you can deduct the usual commute time.
- Longer travel—California law says travel time is hours worked even if not working.
 - Time spent traveling to get to out of town event is compensable.
 - But, personal pursuits on a business trip are not compensable, such as sleeping.
- “Reporting time pay.”
 - One can agree to work fewer than two hours.
 - If employee is required to report for meeting on day off, gets two hours minimum pay.

- **How wages must be calculated and paid.**
 - **Employer is required to keep track of hours worked.**
 - **No specific way this has to be done.**
 - **Have to use ink or something else lasting.**
 - **Common concerns.**
 - **Rounding.**
 - **Employees should record exact starting/stopping times.**
 - **In computing time worked, employer may “round off” to the nearest five minutes or nearest one-tenth or or nearest one-quarter of an hour as long as this averages out over time.**
 - **Must not result in failure to compensate employee for time worked.**

- **Erroneous time card punches.**
 - **If employees punch in early/punch out late, do not have to pay as long as they are not working.**
 - **Should not allow employees to do this, as employer is required to have accurate records.**
 - **Best practice is to fix record and have employee sign off and acknowledge punch was wrong.**
- **Cannot simply rely on schedules to compute time worked. Must record:**
 - **Must record meal periods when operations do not cease.**
 - **Split shifts.**
 - **Total daily hours worked.**

- Clocks must be provided in or within reasonable distance of all major work areas.
- Employer may use electronic time card system as long as it is accurate and can print out copy of records to employee on request.
- Preparation of payroll.
 - Means you have to determine what wages to pay, what taxes to deduct, etc.
 - Generally speaking, there are “payroll taxes” and SDI taxes that you have to deduct from pay.
 - Employer is responsible for doing that.

- Computation of this is beyond scope of class.
- Talk to accountant, ask your bank if it has a payroll service.
- Note as employer you also have to pay taxes quarterly and submit payroll tax returns to the state.

California Paid Sick Leave

Entitlement:

- An employee who, on or after July 1, 2015, works in California for 30 or more days within a year from the beginning of employment is entitled to paid sick leave.
- Paid sick leave accrues at the rate of one hour per every 30 hours worked, paid at the employee's regular wage rate. Accrual shall begin on the first day of employment or July 1, 2015, whichever is later.
- Can take sick leave for employee or "family member" (parent, child, spouse, registered domestic partner, grandparent, grandchild or sibling).

- Accrued paid sick leave shall carry over to the following year of employment and may be capped at 48 hours or 6 days. However, subject to specified conditions, if an employer has a paid sick leave, paid leave or paid time off policy (PTO) that provides no less than 24 hours or three days of paid leave or paid time off, no accrual or carry over is required if the full amount of leave is received at the beginning of each year in accordance with the policy.

City of Los Angeles Paid Sick Leave

- Beginning July 1, 2016, Los Angeles employees are entitled to take up to 48 hours of paid sick time per year.
 - Law goes into effect for employers with 25 or fewer employees on July 1, 2017.
- There is no minimum leave an employee has to take. Employee can take even one hour of sick time.
- Can take sick leave for employee or “family member.” (parent, child, spouse, registered domestic partner, grandparent, grandchild or sibling).
- “Family members” include those covered by California law plus “any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.”

- Employees who work at least two hours per week in the City of Los Angeles, work for the same employer for 30 or more days within a year from commencement of employment and who are entitled to minimum wage are eligible for paid sick leave.
- Employees must accrue time at the rate of at least one hour for every 30 hours worked.
- Employers may cap accrual at 72 hours and may limit use to 48 hours per year.
- Employers are free to include employees' paid sick time with an all-inclusive PTO policy.

Workplace posting/recordkeeping requirements

- You can get all of the required postings for free.
- Do not buy them unless you want to buy an “all-in-one” from Staples/Costco, etc.
- If you become a corporation or other type of business, you will be solicited for things that you “need” for a price. Do not be fooled.
- Which posters you have to have.
- Where should you post posters?

RECORDS: Effective January 1, 2013, California law provides that current and former employees (or a representative) have the right to inspect and receive a copy of the personnel files and records that relate to the employee's performance or to any grievance concerning the employee. [Labor Code Section 1198.5](#) Inspections must be allowed at reasonable times and intervals, but not later than 30 calendar days from the date the employer receives a written request. Upon a written request from a current or former employee, or a representative, the employer shall provide a copy of the personnel records, at a charge not to exceed the actual cost of reproduction, not less than 30 calendar days from the date the employer receives the request.

Employers should:

(1) maintain a copy of each employee's personnel records for a period of not less than three years after termination of employment, (2) make a current employee's personnel records available for inspection, and if requested by the employee or representative, provide a copy at the place where the employee reports to work, or at another location agreeable to the employer and the requester. (3) make a former employee's personnel records available for inspection, and if requested by the employee or representative, provide a copy at the location where the employer stores the records.

Special employment issues facing smaller businesses

- **Which business form should I use?**
 - Sole proprietorship.
 - Corporation.
- When should I make this decision and why?
- Whom should I consult about this decision?
- What difference does it make which form I use?
 - Legal requirements differ.
 - Taxes.

- Do I need insurance?
 - Type your business requires.
 - Workers' compensation—can exclude owner.
 - Liability insurance.
- When and what kind of paperwork do I need for my employees?
 - Recommendation is to have at least bare minimum.
 - File for each employee containing required filings/forms.
 - Basic employment handbook.

- **At-will agreement.**
- **Meal and rest break policy.**
- **Payroll documentation.**