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HR Expert & Business Advocate™

The Top 10 Things Employers Do to Get Sued

By CalChamber Employment Law Counsel

Employers unintentionally may violate employment laws, simply by trying to provide some flexibility for an employee, save money for the company, or just be nice.

Here's a list of the top 10 mistakes that may lead to employment lawsuits. Keep in mind that this list will not apply to all employers, as regulations and collective bargaining agreements may override these general rules.

1. Classify All Employees as Exempt, Whether They Are or Not.

It is easier to pay everyone a salary, rather than dealing with meal and rest breaks, overtime, time records and such. Why not just pay everyone a salary? They'll like the fact that they always make the same amount of money each pay period, and it won't be a problem.

Merely paying someone a salary does not guarantee that employee is truly exempt. Neither do job titles ...

Under both state and federal law, certain types of positions may be exempt from overtime requirements, as well as meal and rest breaks. Other positions may be exempt only from overtime. An exempt employee is usually someone who is paid a specified amount of money, regardless of the number of hours worked in a week.

An employee who does not qualify for one of the exemptions is considered to be nonexempt and therefore subject to overtime, as well as the required meal and rest breaks and time-keeping requirements.

An exempt employee is normally someone who is a high-level executive, administrative or professional employee. Additionally, certain artists and outside sales staff may be exempt.

Employers sometimes designate employees as "nonexempt salaried." This status does not exist. A nonexempt employee must be paid for all hours worked in the pay period, including overtime. And, there is a specific requirement in California that all hours worked and the corresponding rates of pay be included on the detachable portion of the employee's check.

More employers are being sued for unpaid off-the-clock work for nonexempt employees. This may result from improper classification of an employee as exempt. If an employee is truly nonexempt but classified as exempt, the employer is not tracking the hours worked since exempt employees are not subject to such requirements.

Once the employee challenges the exempt status of the job, the additional wages and penalties start to add up. These include back pay for overtime, penalties for failure to pay overtime, additional "wages" for failure to provide meal and rest breaks, and penalties for failure to pay all wages at termination, if the employee is no longer with the company. There are also penalties for failure to provide employees with the required wage statement information.

The nonexempt employee may be joined by other employees who wish to challenge their exempt status. The class-action lawsuit on the basis of misclassification continues to be popular with plaintiffs' attorneys.

To make sure you know which employees are exempt and nonexempt, use the Exempt/Nonexempt Wizard on HRCalifornia.

2. Be Nice to Employees — Let Them Take Lunch Whenever They Want to.

Employees must be provided at least a 30-minute, unpaid off-duty meal period if they are employed for a work period for more than five hours. The meal period must be provided no later than the end of the employee's fifth hour of work.

Failure to provide the meal break within this time frame can result in one additional hour of wages owed to the employee at the employee's straight time pay.

The additional wage must be paid in the pay period in which the missed meal break occurred ...

Your recordkeeping practices should reflect that you provide your employees their meal break before the end of the fifth hour of work. "Late lunches," after the end of the employee's fifth hour, are not permitted. "Early lunches" may be allowed, as long as the lunch is provided no later than the end of the fifth hour of work.

Check the HR Library's Meal and Rest Breaks section for complete information.

3. Make Everyone an "Independent Contractor" Because Having Employees is Too Much Trouble.

Just because you want the employee to be one, or because the employee prefers independent contractor status, does not make it so. This is another area of the law just ripe for claims and/or litigation. The "independent contractor" is quite happy until money is an issue — such as a workers' compensation claim, unemployment insurance, state disability insurance or paid family leave benefits.

Another problem scenario is when the Franchise Tax Board or the Internal Revenue Service want tax money, but the "independent contractor" hasn't been paying his/her quarterly payments, owes lots of money, can't be found or has no assets. The employer has money and failed to make the required tax withholdings — so now the employer owes.

Independent contractor status does not have a fixed definition by all the government entities that may have a claim for money owed. Similarly, the courts have applied different tests depending on

the specific employment context. Historically, the primary determining factor has been the degree of control an employer has over the work that is performed. Most recently, however, California adopted a three-part "ABC" test that applies to claims brought under the wage orders and the Labor and Unemployment Insurance Codes. Under the ABC test, you must prove each of the following elements to establish that a worker is an independent contractor and not an employee:

- The worker is free from the hiring entity's control and direction in connection with his/her performance of the work, both under the contract for performance of the work and in actually performing the work;
- The worker performs work outside the usual course of your business; and
- The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

Failure to satisfy each of the three elements will result in a worker being treated as an employee for purposes of the California wage orders.

Not sure if someone is an independent contractor? See the HR Library's Recruiting & Hiring section.

Even if you don't have five or more employees, training is highly recommended ...

4. Don't Bother Providing Training About Harassment and Discrimination to Managers and Supervisors. They Won't Need the Information.

The best defense you have against a discrimination or harassment complaint is usually your first-line supervisors because they are the eyes and ears of the organization. Invest in training on topics such as sexual harassment, discrimination, disability, safety and wage-and-hour laws if you want to provide an additional layer of protection from lawsuits.

Employers with five or more employees are required by law to provide two hours of training on sexual harassment for their supervisors and one hour of training for their non-supervisors. This training must be conducted every two years and is an expansion of prior law that applied to larger employers and limited training to supervisors. The training must also include a component on the prevention of abusive conduct, and information on harassment based on gender identity, gender expression and sexual orientation.

You have an affirmative duty to take reasonable steps to prevent and promptly correct harassing conduct, and training can be a vital component.

For example, a supervisor, Susie, is standing in the employee lounge when one of her employees, Frank, tells an off-color joke to Brenda, a new female employee. Because Brenda laughs, Susie does not say anything to Frank or to anyone else in the organization. Several months later, Brenda quits and files a claim against the company for sexual harassment. The lawsuit claims that the company permitted a hostile work environment that included inappropriate jokes and comments.

An investigation, after the claim is filed, reveals that Frank and several other male employees had been telling inappropriate jokes, sending sexually oriented emails through the company's computers and posting inappropriate cartoons and jokes in their work area, where Brenda was the only female employee.

The law presumes that once a supervisor is aware of the harassment, the company is also aware and has a duty to correct the problem. California employers are required to instruct supervisors to report any complaints of misconduct to a designated company representative, such as an HR manager, so the company can try to resolve the claim internally. Because Susie didn't look into the matter after overhearing the comments, the employer is at risk.

Learn how to stay out of trouble and avoid discrimination and harassment in the workplace. Make sure to provide mandatory supervisor sexual harassment training.

Failure to meet the specific requirements can mean back pay for overtime, as well as penalties ...

5. Let Employees Decide Which Hours and How Many They Want to Work Each Day.

Most employees are restricted by law as to the number of hours they can work without payment of overtime. One exception to overtime laws is an alternative workweek schedule.

However, employees can't simply decide that they want to work four days a week, 10 hours each day. A valid alternative workweek schedule requires that employers follow specific steps to institute such a program.

Employees may request make-up time and work without payment of overtime if they are taking time off for personal reasons under certain special conditions: they make up the time in the workweek in which the time is to be or was missed; they work no more than 11 hours in a day or 40 in the week; the employer agrees; and the request to do so is in writing.

Find rules regarding proper payment of employees in the HR Library's Pay & Scheduling section. If you do not know what Wage Order applies to your business, use our Wage Order Wizard.

6. Terminate Any Employee Who Takes a Leave of Absence, Whatever the Reason. It Is Too Much Trouble to Administer Leaves of Absence, and Who Knows if the Employee Will Return.

Employees have legal protection when they are away from work for various reasons, including workers' compensation, disability, pregnancy, family and medical leave, parental leave, military leave, jury duty, and many more. California employees also have the right to accrue and use mandatory paid sick leave.

The laws also provide protection from retaliation for taking the leave — thus the employer cannot wait and terminate the employee once the employee returns to work.

If you terminate an employee while the employee is on a protected leave, or soon after the employee returns to work, you will have to prove that the termination was for a legitimate, nondiscriminatory business reason, unrelated to the protected leave.

Visit the HR Library to learn more about employees' rights relating to Leaves of Absence.

7. Don't Give Employees Their Final Check if They Fail to Return Company Property.

Employees who quit or are terminated often don't turn in company property such as laptops, cell phones, pagers, uniforms and tools. Holding their final paycheck until such time as the items are returned seems reasonable. However, in California, final paycheck deadlines carry a hefty penalty if the deadline is not met.

If an employee is terminated or quits and gives at least 72 hours' notice (clock hours, not business hours), the employee's final check must be ready on the last day of work. The final check must include payment for all hours worked through the last day, including any overtime, as well as any accrued and unused vacation.

If you terminate an employee, the final paycheck is due the moment the words "You are fired" come out of your mouth ...

If an employee quits without giving at least 72 hours' notice, you have 72 hours to prepare the final check. This can be problematic if your payroll service cannot prepare a check and get it to the employee in a timely manner, or if your payroll department is located out of town or out of state. There are no exceptions for such logistical problems.

If you do not provide the final check to the employee, as required by law, waiting time penalties start accruing. The penalty is one day of wages for every day that the check is late (calendar days, not business days), up to 30 days. This money goes to the employee.

Check the HR Library's Final Pay page for more information.

8. Provide Loans to Employees and Deduct the Money From Their Paycheck Each Pay Period.

California's Labor Code section 224 permits deductions authorized by law and those authorized by the employee for benefits such as health insurance or benefits. No other deductions are permitted.

State and federal law require some withholdings, such as federal and state taxes, Social Security and state disability insurance. Others fall into the benefits category that are permitted by law, such as 401(k) and flexible spending accounts. Other deductions are required to comply with child support orders and wage garnishments.

Deductions for loans made to employees are not permitted and therefore cannot be made. If you decide to loan money to an employee, or make any other type of payment for which repayment may be required, you should have the employee sign a promissory note that has been reviewed by your legal counsel. The employee should then make payments to you, according to the specified payment schedule.

Visit the HR Library's Pay & Scheduling section to learn more about proper deductions from wages.

9. Use Non-Compete Agreements to Protect Confidential Information, Such as Business Secrets, Customer Lists and Pricing Information, and to Prevent Employees From Working for the Competition.

Non-compete agreements are prohibited in California, with only a few exceptions.

Prohibiting an employee from working from someone else is limited because it infringes on the employee's ability to work and earn a living. You cannot force employees to stay with you, nor may you prevent them from earning a living if they choose to leave your company.

There are ways to protect trade secrets — such as customer lists and pricing information.

10. Implement a "Use it or Lose it" Vacation Policy to Avoid Paying Out Vacation at Termination.

A "use it or lose it" vacation policy is not permitted in California. If the employee has accrued vacation, it is a form of wages and cannot go away. You may place a reasonable cap on the accrual of vacation, which stops the accrual of vacation when a certain level of accrual is reached. But you cannot take away what the employee has already accrued.

All accrued and unused vacation must be paid out at termination at the current rate of salary. There is no limit on how far back in time the employee can make a claim for unused vacation. To limit your liability, the best option is to implement a reasonable cap on vacation accrual. "Reasonable" is open to interpretation, but it is usually one and one half to two times the annual accrual.

For example, an employer's policy provides for up to two weeks of accrual each year. The employer implements a policy that caps the accrual at four weeks. If an employee has four weeks (20 days) accrued and unused, the accrual stops until such time as the employee takes vacation and falls below the cap.

Visit the HR Library's Leaves of Absence section to learn more about paid time off, vacation, sick leave and holidays.

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