



# The top ten reasons your client is owed money

## FINDING REMEDIES TO RIGHT EMPLOYMENT WRONGS IS EASIER IF YOU USE THIS LIST

It's disheartening to have to tell a potential client that his or her employer's actions – while mean, unfair, and perhaps even immoral – aren't legally actionable. This is particularly true when they come to us for help after being fired.

However, by inquiring about the following ten issues, we can find money for most potential clients. Please note that these issues apply to private (rather than public) employers that are not governed by a collective bargaining agreement.

### 1. Meal breaks

A non-exempt (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1018) employee who works more than five hours is entitled to an unpaid meal break of at least 30 minutes, uninterrupted by any work (*Id.* at p. 1034-1035), and the employee must be free to leave the premises (*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975, disapproved on other grounds by *Tidewater Marine W, Inc. v. Bradshaw* (1996) 14 Cal.4th 557).

However, if the employee works no more than six hours, he or she and the employer may mutually agree, in writing, to waive the meal break. (Lab. Code, § 512(a).)

A non-exempt employee who works more than 10 hours is entitled to a second meal break. (*Brinker, supra*, at p. 1036-1037.) However, if the employee works no more than 12 hours, and didn't waive the first meal break, the employee and the employer may mutually agree to waive the second meal break. (Lab. Code, § 512(a).)

Although most employees get their meal break around the middle of their shift, that is not required. The only requirement is that the first meal period be provided no later than the end of the fifth hour and the second break no later than the end of the tenth hour. (*Brinker, supra*, at p. 1041.)

Employers are required to maintain records of meal breaks. (Section 7(a)(3)

of the applicable Industrial Welfare Commission (IWC) Order.) If an employer fails to do so, the burden shifts to the employer to prove that the employee was actually provided with the disputed meal breaks. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1189.)

**Remedies:** An employee who was not provided with a proper meal break is owed premium wages of an extra hour's pay at his or her regular rate (Lab. Code, § 226.7(b)), plus interest (Lab. Code, § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per section 20(A) of the applicable IWC Order), and, if the employee is no longer with the company, waiting time penalties (Lab. Code, § 203(a)). Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.) penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

However, the employer's obligation is limited to relieving the employee of all duty and permitting him or her a reasonable opportunity to take a break, without impeding or discouraging him or her from doing so. (*Brinker, supra*, at p. 1040.) An employer is not required to police meal breaks and ensure that no work is performed. (*Ibid.*)

An employee can only collect for one missed meal break per workday. (*United Parcel Serv., Inc. v. Superior Court* (2011) 196 Cal.App.4th 57, fn. 10.) But an employee can collect for both a missed meal break and a missed rest break in the same workday. (*Id.* at p. 70.)

**Statute of limitations:** Three years for premium wages. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1099.) However, if you include an Unfair Competition (UCL) (Bus. & Prof. Code, § 17200) cause of action you can seek restitution of premium wages (*Lopez v. United Parcel Service, Inc.* (N.D. Cal. 2010) 2010 WL 728205, 10) for the fourth year (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th

163, 179). Penalties are limited to one year. (Code of Civ. Proc., § 340(a).)

**Exhaustion of administrative remedies:** Not required unless you're also pleading a PAGA cause of action (see Exhaustion of administrative remedies under #10 PAGA, below).

**Attorney fees/costs:** None. (*Kirby v. Immoos Fire Prot., Inc.* (2012) 53 Cal.4th 1244, 1259.) However, if you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

### 2. Rest breaks

A non-exempt (*Brinker, supra*, at p. 1018) employee, who works at least three-and-a-half hours, is entitled to a paid 10-minute rest break for every four hours, or major fraction thereof, of work (*Id.* at p. 1028). However, since it's a paid break, the employee may be required to remain on the premises. ([www.dir.ca.gov/dlse/FAQ\\_RestPeriods.htm](http://www.dir.ca.gov/dlse/FAQ_RestPeriods.htm), #5.) A bathroom break does not count as a rest break. (*Id.*, #7.) Also, the employer must make a good faith effort to provide the rest break in the middle of the work period. (*Brinker, supra*, at p. 1031.)

**Remedies:** An employee who was not provided with a rest break is owed premium wages of an extra hour's pay at his or her regular rate (Lab. Code, § 226.7(b)), plus interest (Lab. Code, § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per section 20(A) of the applicable IWC Order), and, if the employee is no longer with the company, waiting time penalties (Lab. Code, § 203(a)). PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

An employee can only collect for one missed rest break per workday. (*United Parcel Serv., supra*, at p. 57, Fn.

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10.) But, they can collect for both a missed meal break and a missed rest break in the same workday. (*Id.* at p. 70.)

**Statute of limitations:** Three years for premium wages. (*Murphy, supra*, at p. 1099.) However, if you include a UCL cause of action, you can seek restitution of premium wages (*Lopez, supra*, at p. 10) for the fourth year (*Cortez, supra*, at p. 179). Penalties are limited to one year. (Code of Civ. Proc., § 340(a).)

**Exhaustion of administrative remedies:** Not required unless you're also pleading a PAGA cause of action (see Exhaustion of administrative remedies under #10 PAGA, below).

**Attorney fees/costs:** None. (*Immoos, supra*, at p. 1259.) However, if you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

### 3. Overtime

Unless the employee is an exempt executive/manager (section 1(A)(1) of the applicable IWC Order), administrator (section 1(A)(2) of the applicable IWC Order), or professional (section 1(A)(3) of the applicable IWC Order), he or she is entitled to overtime pay for all work over eight hours a day or 40 hours a week (Lab. Code, § 510(a)). And the employer bears the burden of proving the exemption. (*Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 281.) The employee's job title is not dispositive. (*In re United Parcel Serv. Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1015.)

The most common exemption is the executive/manager. To qualify, the manager must meet *all* of the following requirements: (1) have duties and responsibilities of managing the enterprise, department, or subdivision; (2) customarily and regularly direct the work of two or more other employees; (3) have authority to hire/fire other employees or whose recommendations regarding hiring/firing, advancement, and promotion of other employees are given particular weight; (4) customarily and regularly exercise discretion and independent judgment; (5) spend most of his or her

time on management duties; and (6) earn a monthly salary of at least twice the state minimum wage. (Section 1(A)(1) of the IWC Order.)

Employers are required to maintain records of the hours worked by an employee. (Section 7(a)(3) of the applicable IWC Order.) If an employer fails to do so, the burden shifts to the employer to prove that the employee didn't work the claimed overtime. (*Amaral, supra*, at p. 1189.)

**Remedies:** Overtime pay is normally one-and-a-half times the employee's regular hourly pay; it jumps to double the regular rate for work over 12 hours in a workday or over eight hours on the seventh day of a workweek. (Lab. Code, § 510(a).) Plus interest (Lab. Code, § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per section 20(A) of the applicable IWC Order) and, if the employee is no longer with the company, waiting time penalties (Lab. Code, § 203(a)).

If the employee was not paid at least minimum wage for any work, the employer is subject to a \$100 penalty for each underpaid employee for the initial underpaid pay period, plus \$250 for each underpaid employee for each subsequent underpaid pay period. (Lab. Code, § 1197.1(a).) PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

**Statute of limitations:** Three years. (*Murphy, supra*, at p. 1109.) However, if you include a UCL cause of action, you can seek restitution of the unpaid overtime wages for the fourth year. (*Cortez, supra*, at p. 179.) Penalties are limited to one year. (Code of Civ. Proc., § 340(a).)

**Exhaustion of administrative remedies:** Not required unless you're also pleading a PAGA cause of action (see Exhaustion of administrative remedies under #10 PAGA, below).

**Attorney fees/costs:** A prevailing employee is entitled to recover reasonable attorney's fees and costs *if they are requested in the complaint* (Lab. Code, § 218.5(a).); a prevailing employer is so entitled only if the court finds the action

was brought in bad faith. (*Ibid.*) A prevailing employee is also entitled to recover reasonable attorney's fees and costs if they were not paid at least minimum wage for any work. (Lab. Code, § 1194(a).) If you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

### 4. Misclassification

Some companies improperly classify their employees as independent contractors to avoid paying overtime and providing benefits like meal and rest breaks. (Lab. Code, § 226.8(a)(1).)

The primary test of whether the worker is an *employee* or an *independent contractor* is whether the principal has the right to control the manner and means by which the worker accomplishes the work. (*Estrada v. FedEx Ground Package Sys., Inc.* (2007) 154 Cal.App.4th 1, 10.)

Other factors include (1) whether the worker is engaged in a distinct occupation or business; (2) whether the work is usually done under the principal's direction or by a specialist without supervision; (3) the skill required; (4) whether the principal or worker supplies the instrumentalities, tools, and place of work; (5) the length of time for which the services are to be performed; (6) the method of payment: whether by time or by job; (7) whether the work is part of the principal's regular business; and (8) whether the parties believe they are creating an employer-employee relationship. (*Estrada, supra*, at p. 10-11.)

Misclassification cases may not be arbitrable because they involve Labor Code violations rather than the agreement between the parties. (*Elijahjuan v. Superior Court* (2012) 210 Cal.App.4th 15, 20-21.)

**Remedies:** An employee who has been misclassified as an independent contractor is entitled to missed meal and rest break premium wages (Lab. Code, § 226.7(b)), overtime pay (Lab. Code, § 510(a)), interest (Lab. Code, § 218.6), penalties (\$50 for the first violation and

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\$100 for each subsequent violation, for each pay period in which a violation occurred per Section 20(A) of the applicable IWC Order), and reimbursement of expenses (Lab. Code, § 2802(a)).

If the employee is no longer with the company, he or she may also be entitled to waiting time penalties. (Lab. Code, § 203(a).) An employer who engages in a pattern or practice of misclassification is subject to a civil penalty ranging from \$10,000 to \$25,000 per violation. (Lab. Code, § 226.8(c).)

If the misclassification resulted in the employee not being paid at least minimum wage for any work, the employer is subject to a \$100 penalty for each underpaid employee for the initial underpaid pay period, plus \$250 for each underpaid employee for each subsequent underpaid pay period. (Lab. Code, § 1197.1(a).) PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

**Statute of limitations:** Three years. (Code Civ. Proc., § 338(a).) However, if you include a UCL cause of action, you can seek restitution for the fourth year. (*Cortez, supra*, at p. 179.) Penalties are limited to one year. (Code Civ. Proc., § 340(a).)

**Exhaustion of administrative remedies:** Not required unless you're also pleading a PAGA cause of action (see Exhaustion of administrative remedies under #10 PAGA, below).

**Attorney fees/costs:** Reasonable attorney's fees and costs for a prevailing employee if the award includes *wages*, e.g., unpaid hours or overtime; a prevailing employer is entitled to fees and costs only if the court finds the action was brought in bad faith. Premium wages from missed meal/rest breaks don't count. (*Immoos, supra*, at p. 1259.) A prevailing employee is also entitled to recover reasonable attorney's fees and costs if he or she was not paid at least minimum wage for any work. (Lab. Code, § 1194(a).) If you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

## 5. Discrimination

Although California is an *at-will* employment state (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 665), an employer may not refuse to hire, fire, fail to promote, fail to train, or otherwise discriminate against a person because of his or her race, national origin, color, gender, sexual orientation, age, religion, disability including pregnancy (Gov. Code, § 12945), medical condition, marital status, military status, or other protected characteristic (Gov. Code, § 12940(a)).

Discrimination also includes the failure to accommodate a known physical or mental disability (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 946-947) and failure to engage in a timely, good faith, interactive process (*Wilson v. Cnty. of Orange* (2009) 169 Cal.App.4th 1185, 1193).

**Remedies:** Back pay, front pay, reinstatement, injunctive relief, pain and suffering, and punitive damages. (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2013) ¶ 7:1110.) PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

**Statute of limitations:** A verified complaint must be filed with the Department of Fair Employment and Housing (DFEH) within one year of the alleged discrimination. (Gov. Code, § 12960(d); *Basurto v. Imperial Irrigation Dist.* (2012) 211 Cal.App.4th 866, 879.) The lawsuit must be filed within one year after receipt of the Right-to-Sue notice from the DFEH. (Gov. Code, § 12965(b).)

**Exhaustion of administrative remedies:** A verified complaint must be filed with the DFEH within one year of the alleged discrimination and a Right-to-Sue notice obtained. (Gov. Code, § 12960(d)). If you want to include a PAGA cause of action, see Exhaustion of administrative remedies under #10 PAGA, below.

**Attorney fees/costs:** Reasonable attorney's fees and costs, including expert witness fees, are discretionary. (Gov. Code, § 12965(b).) If you include a PAGA cause of action, a prevailing

employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

## 6. Working off-the-clock

If an employee begins work before clocking in, or keeps working after clocking out, and the employer knows about it or should know about it, the employee is entitled to be paid for that work. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584-585.)

**Remedies:** Unpaid regular and overtime (Lab. Code, § 510(a)) wages, plus interest (Lab. Code, § 218.6), penalties (\$50 for the first violation and \$100 for each subsequent violation, for each pay period in which a violation occurred per Section 20(A) of the applicable IWC Order) and, if the employee is no longer with the company, waiting time penalties (Lab. Code, § 203(a)). PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

**Statute of limitations:** Three years. (*Murphy, supra*, at p. 1099.) However, if you include a UCL cause of action, you can seek restitution of the wages (*Lopez, supra*, at p. 10) for the fourth year (*Cortez, supra*, at p. 179). Penalties are limited to one year. (Code of Civ. Proc., § 340(a).)

**Exhaustion of administrative remedies:** Not required unless you're also pleading a PAGA cause of action (see Exhaustion of administrative remedies under #10 PAGA, below).

**Attorney fees/costs:** A prevailing employee is entitled to recover reasonable attorney's fees and costs *if they are requested in the complaint* (Lab. Code, § 218.5(a).); a prevailing employer is so entitled only if the court finds that the action was brought in bad faith. (*Ibid.*) If you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

## 7. Medical or family leave

Under the California Family Rights Act (CFRA), a qualified employee may

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take up to 12 weeks of unpaid leave to care for a serious health condition of their own, a parent, spouse, or child. (Gov. Code, § 12945.2(a).) And, when the employee returns to work, he or she must be given the same or a comparable job. (*Ibid.*)

To qualify, the company must have at least 50 full- or part-time workers and the employee must have worked there a full year and worked at least 1,250 hours during the prior year. (Gov. Code, § 12945.2(a).)

**Remedies:** An employee who suffers an adverse action (e.g., termination, demotion, retaliation) in violation of his or her CFRA rights is eligible for reinstatement, promotion, transfer, back pay, front pay, emotional distress, and punitive damages. (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2013) ¶ 7:1110.) And CFRA damages are not capped, unlike the Family and Medical Leave Act. (*Id.* at ¶ 12:1396.) PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

**Statute of limitations:** A verified complaint must be filed with the DFEH within one year of the alleged adverse action. (*Diaz v. Safeway Inc.* (N.D. 2007) 2007 WL 2793367.) The lawsuit must be filed within one year after receipt of the Right-to-Sue notice from the DFEH. (Gov. Code, § 12965(b).)

**Exhaustion of administrative remedies:** A verified complaint must be filed with the DFEH within one year of the alleged adverse action and a Right-to-Sue notice obtained. (Gov. Code, § 12960(d).) If you want to include a PAGA cause of action, see Exhaustion of administrative remedies under #10 PAGA, below.

**Attorney fees/costs:** Either side may recover reasonable attorney's fees and costs, including expert witness fees, at the court's discretion. (Gov. Code, § 12965(b).) If you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

## 8. Late or bounced payroll

When an employee is fired (Lab. Code, § 201(a)) or quits with at least 72 hours' notice (Lab. Code, § 202(a)), he or she must be paid everything he or she is owed immediately, at the end of his or her employment. If an employee quits without such notice, the employer has 72 hours to pay them. (Lab. Code, § 202(a).) Also, paying wages with a bad check is illegal. (Lab. Code, § 203.1.)

**Remedies:** Waiting time penalties of a day's wages per day paid late (Lab. Code, § 203(a)) or until paid with a valid check (Lab. Code, § 203.1), up to 30 days. PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

**Statute of limitations:** Three years. (Code of Civ. Proc., § 338(a).)

**Exhaustion of administrative remedies:** Not required unless you're also pleading a PAGA cause of action (see Exhaustion of administrative remedies under #10 PAGA, below).

**Attorney fees/costs:** None. However, if you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

## 9. Failure to reimburse expenses

An employer is required to reimburse its employee for all expenses the employee necessarily incurs in the discharge of his or her duties. (Lab. Code, § 2802(a).) It is not waivable. (*Stuart v. RadioShack Corp.* (N.D. Cal. 2009) 641 F.Supp.2d 901, 902.) Nor does the employee need to have sought reimbursement; it is automatically required whenever the employer knows or has reason to know that the employee has incurred a reimbursable expense. (*Id.* at 902-904.)

Reimbursable costs may include the use of the employee's car (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 563-564), support staff,

office equipment, phone, magazine subscriptions, and advertisement costs (*Takacs v. A.G. Edwards and Sons, Inc.* (S.D. Cal. 2006) 444 F.Supp.2d 1100, 1124-1125).

**Remedies:** Reimbursement (Lab. Code, § 2802(a)) plus interest (Lab. Code, § 2802(b)). PAGA penalties, if pled, may also apply (see Remedies under #10 PAGA, below).

**Statute of limitations:** Three years for reimbursement. (*Brandon v. National R.R. Passenger Corp. Amtrak* (C.D. Cal. 2013) 2013 WL 800265, 2.) One year for penalties. (Code of Civ. Proc., § 340(a).)

**Exhaustion of administrative remedies:** Not required (*Melgar v. CSK Auto, Inc.* (N.D. Cal. 2014) 2014 WL 546915, 3) unless you're also pleading a PAGA cause of action (see Exhaustion of administrative remedies under #10 PAGA, below).

**Attorney fees/costs:** A prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2802(c).) If you include a PAGA cause of action, a prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

## 10. PAGA

Think of the PAGA as a litigation supercharger. It doesn't make anything illegal (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 579) but dramatically increases the value of a case by turning it into a quasi-class action and providing for attorney's fees.

A PAGA action is a *representative* action. It's similar to a *class* action but you don't have to prove ascertainability, commonality, or other class action elements (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 975); certification, notices, and opt-outs aren't required (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 503); it can't be removed under the Class Action Fairness Act of 2005 (28 U.S.C. § 1332(d)) (*Baumann v. Chase Inv. Services Corp.* (9th

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Cir. 2014) 2014 WL 983587, 5); and attorney's fees and costs are mandatory for prevailing employees (but not employers) (Lab. Code, § 2699(g)(1)).

Additionally, PAGA claims are not subject to arbitration. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 386-387.)

**Remedies:** \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for subsequent violations. (Lab. Code, § 2699(f)(2).)

**Statute of limitations:** One year. (*Thomas v. Home Depot USA Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1003, 1007-1008.) However, the statute is tolled during the 33-day notice period, below. (Lab. Code § 2699.3(d).)

**Exhaustion of administrative remedies:** You must file a complaint with the California Labor and Workforce Development Agency (LWDA) (<http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>); send a copy of the complaint, *by certified mail*, to the employer; and pay a \$75 filing fee. A lawsuit containing a PAGA cause of action may not be filed until either the LWDA sends notice that it does not intend to investigate or 65 calendar days have passed since the complaint was filed with the LWDA. (Lab. Code, § 2699.3(a)(2)(A).) Alternatively, you can file the lawsuit without the PAGA cause of action and then, after the notice period has expired, amend the complaint within 60 days to include the PAGA cause

of action, *as a matter of right*. (Lab. Code, § 2699.3(a)(2)(C).)

**Attorney fees/costs:** A prevailing employee (but not an employer) is entitled to recover reasonable attorney's fees and costs. (Lab. Code, § 2699(g)(1).)

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