



### LEGALLY SURVIVING THE HOLIDAY SEASON



#### Office Shutdowns and Paying Exempt Employees

In general, as a result of the salary basis rules, a White Collar Exempt employee performing *any amount* of work in a workweek is to be paid for a full workweek. Where absolutely no work is performed in a workweek, no pay is required. However, there are several exceptions to the general rule, which permit an employer to dock pay (pay less than the full salary) for certain absences. Where an exempt employee is absent for a **full day** under certain limited circumstances, the weekly salary can be docked. Under certain scenarios, **partial day** absences may result in the ability of the employer to require the employee to use accrued paid benefits in order for employee to be compensated for such absence. Employers cannot dock an exempt employee's pay for any absences during a week that result from jury duty, serving as a witness, or temporary military leaves of absence.

Exempt employees are not permitted to be subject to partial *pay* deductions based on the number of hours worked, *except*:

- for full day personal absences other than sickness or disability; (partial day deductions from an employee's vacation leave bank for partial day absence of at least 4 hours)
- for full day sickness or disability if pursuant to a bona fide plan for paid benefits for illness and no accrued time on books; (can charge sick account for partial day absence)
- hours taken as unpaid FMLA leave;
- offsets for jury fees, witness fees and military pay; (no partial pay deductions for partial week absence due to jury or military

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- initial or terminal weeks of employment;
- deductions for penalties imposed for violations of significant safety rules.

Employers often wonder whether they can require an exempt employee to use vacation benefits to be paid during partial or full week office closings. If a business shuts down for *less than a full week* (even for a holiday), all exempt employees must receive their full salary. The same would apply if the employer does not have work available for the employee. Full week closures do not require paying exempt wages unless vacation/ PTO benefits are used by the employee. Non-exempt employees need only be paid for hours worked and can be required to use paid benefits during office closings.

## Recommendations For Reducing Risks Associated with Holiday Parties

Employers hosting events, such as upcoming holiday parties, should be concerned with issues such as sexual harassment, discrimination, liability for acts of employees against third parties, and workers' compensation claims. First and foremost, the party should not be labeled with a reference to a particular religion (*i.e.*, "Christmas") but rather "Holiday Party." All employees should feel comfortable and welcome to attend. Should the event be sponsored such that it allows the employee to bring someone with them, the invitation should not refer to a "spouse" but rather guest.



To help reduce or eliminate some of these potential legal pitfalls, employers should consider eliminating and/or reducing the availability of alcohol at the event. Perhaps a lunch party instead. Utilizing drink tickets or a cash bar can also minimize alcohol consumption. Additionally, hiring professional bartenders who have authority to cut off employees who appear to have had too much, as well as require identification from those who look under the legal age to drink alcohol can assist with the goal.

To establish the right environment, any applicable employee handbook policies should be reviewed that pertain to alcohol and drug use, harassment, discrimination, and other improper conduct. Employees, including supervisors, should be reminded of policies relating to discrimination, harassment and retaliation. For obvious reasons, mistletoe is strongly advised against. Further, a reminder of the hands-free cellular phone use policy and law, while driving, should be redistributed to avoid any desire for calls/texting after an employee has imbibed any alcohol at a company sponsored event. Last, but certainly not least, it should be made perfectly clear that attendance at any company sponsored event is purely voluntary.

**Take Away Tip:** Issue clear guidelines for employee attendance at company-sponsored holiday events. Before docking any exempt employee's paycheck for full and partial day absences, see Exemption Chart located on our website and/or contact Elizabeth Koumas with any additional questions.

## THREE YEAR STATUTE OF LIMITATIONS APPLIES TO WAITING TIME PENALTIES



California law requires an employer pay an employee's final wages immediately upon termination of employment or resignation. Labor Code section 203 provides that, if an employer *willfully* fails to timely pay all final wages due, the wages will continue "as a penalty from the due date at the same rate until paid or until an action therefore is commenced." The wages will not continue for more than 30 days.

Typically a one year statute of limitations applies to actions to recover penalties, but Section 203 provides that an employee may sue at any time before the expiration of the status of limitations on an action for the wages from which the penalties arise. On November 18, 2010, the California Supreme Court addressed two very important issues relating to the waiting time penalties in Section 203:

1. Whether different statute of limitations apply when an employee seeks to recover only Section 203 penalties (e.g., because final wages were paid before the lawsuit was filed), as opposed to when an employee seeks both final wages plus penalties.
2. Whether Section 203 penalties could be recovered as restitution under California's unfair competition law in Business & Professions Code Section 17200 *et seq.* (UCL)

The Court's decision is a mixed blessing. On the one hand, the lawsuit for waiting time penalties can be filed within three years of an employee's separation. But the four-year limitations period applicable to UCL claims will not apply to waiting time penalty claims.

## REFLECTING BACK ON 2010..... LOOKING FORWARD TO 2011



**A** brief recap of *some* of the various employment related laws and rulings this past year affecting employers in 2011 include:

### Sales and Administrative Exemptions

- Duties of sales and servicing of clients are *not* administratively exempt tasks (*Pellegrino v Robert Half*, 104 Cal.Rptr.3d 790 (2010), review granted;
- Pharmaceutical sales reps are not "selling" *In re Novartis Wage and Hour Litigation*, 611 F. 3d 141 (2010);
- Mortgage loan officers are not exempt (*DOL Administrator's Interpretation No. 2010-1*, March 24, 2010).

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### Leave, Benefits and Workers Compensation

- CA Supreme Court addresses “Kin Care” (Labor Code § 233) finding where unlimited sick leave benefits are provided, no kin care rights available (*McCarther v Pacific Telesis Group*, 48 Cal.4th 104 (2010)).
- An employer seeking to clarify ambiguous return to work documents, thus delaying reinstatement, does not violate Labor Code §132a (*Gelson’s Markets, Inc. v W.C.A.B.*, 179 Cal.App.4th 201 (2009)).

### Privacy Issue

- Employee text messages including sexual based content on company cell phones are not private (*City of Ontario, Cal. V Quon*, 130 S. Ct. 2619 (2010)).

### Retaliation & Wrongful Termination

- Employee fired for signing a non-compete with former employer has viable claim for wrongful termination (*Siguero v Creteguard, Inc.*, 187 Cal.App.4th 60 (2010)).

### Legislative Update

- SB 1304– Michelle Maykin Memorial Donation Protection Act– employer paid leave for organ and bone marrow donation; up to 30 days for organ donation; 5 days for bone marrow; applies to employers with 15 or more employees.
- AB 569– Exemptions to Meal Breaks– Labor Code §512(e)- exempts certain industries (construction workers, commercial drivers, certain security officers and employees of electrical and gas corporations or local publicly owned electric companies, from Labor Code meal period if covered by CBA that meets specific requirements.

## **EMPLOYMENT LAW COMPLIANCE AND RISK REDUCTION SERVICES**

### **Annual Audit of Employee Handbook**

"When was the last time an audit was conducted of your written policies, to ensure compliance with current labor laws?"

It is critical to the success of any business operations to learn how to protect your company’s interests while conveying your employees’ rights and obligations in a handbook. Periodic review of your policies and practices will help ensure compliance with the ever changing labor laws. By way of example only, if you are a covered employer, do your leaves of absence policies contain the new protections for leave relating to active duty reservists (enacted in October 2008), or to care for injured military personnel (effective January 2009)? To prevent your written policies from being used against you, including but not limited to, your discipline policy creating an implied contract to discharge employees only for good cause, and granting leave of absence rights where you are not otherwise



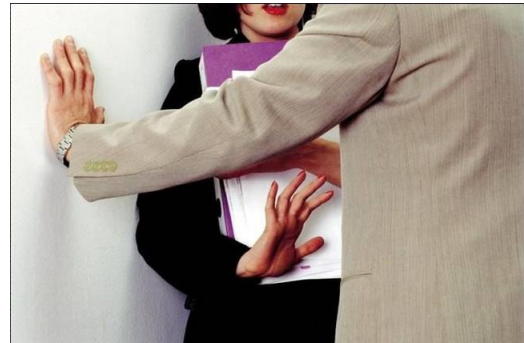
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obligated to provide them, schedule an audit of your employee handbook immediately.

### **Sexual Harassment Training Workshops for Employees and/or Supervisors to Protect Business from Legal Claims**

" When was the last time you provided training to your employees and supervisors to prevent sexual harassment in the workplace?"



Whether you are an organization that employs 50 or more employees, (or one who regularly receives services from 50 or more persons), *required* by California Assembly Bill 1825 to conduct California supervisor training every other year since January, 2005, or a smaller business equally interested in preventing workplace harassment, in order to demonstrate that you exercise reasonable diligence to establish a work environment that is harassment free, schedule your 2007 Sexual Harassment Prevention Training workshop. This can be an important factor if a court needs to decide whether or not there is employer liability for the conduct of one of its employees.

Supervisor Workshops are intended to ensure that your managers not only understand the law and the possibility of personal exposure for their own actions, but also their role and duties in preventing harassment; as well as understanding the proper procedures to follow should a complaint be received from an employee. Since January 2005, Assembly Bill 1825 requires all supervisors to be provided with at least two (2) hours of training relating to sexual harassment. All new supervisors (hired or promoted) must receive training within 6 months of obtaining the position. The training must be repeated every 2 years. The *minimum* training must:

- Provide guidance on federal and state statutory provisions re: harassment, discrimination, retaliation,
- Provide information on the correction of sexual harassment and the remedies available to victims,
- Provide practical examples for instructing supervisors on prevention,
- Be conducted by trainer or educator with knowledge and expertise in preventing such conduct, and
- Provide classroom or other effective interactive method (videos or non-interactive web based product are not enough.)

Staff Workshops are intended to inform employees what harassment is (and is not), your company's specific policy, and the reporting procedures in place to protect the employee's rights.

**Have you conducted your workshop yet?**



