Wage and Hour Compliance for Social Service Providers

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NIAC Insurance

The Nonprofits Insurance Alliance Group is comprised of the Alliance of Nonprofit Insurance, Risk Retention Group (ARNR) and NIAC Insurance. The Alliance of Nonprofit Insurance is a 501(c)(3) nonprofit that provides specialized liability insurance to more than 15,000 501(c)(3) nonprofits in 32 states plus D.C.

Goals of the Training

Understand recent changes in the law regarding:
• Minimum Wage
• Overtime Rules and Exempt Salary Minimums
• Paid Sick Leave
• In Home Caregivers Minimum Wage and OT
• Classification of Independent Contractors

Source of Wage and Hour Laws

• Federal Fair Labor Standards Act (FLSA)
• California Labor Code
• California Industrial Wage Orders

Employers must follow the law that is most favorable to employees.
California Wage Orders

Which IWC Wage Order Applies?

**Industrial Wage Orders**
- Wage Order 5: Public Housekeeping Industry

**Occupational Wage Orders**
- Wage Order 4: Professional, Technical, Clerical, Mechanical and Similar Occupations
- Wage Order 15: Household Occupations

[http://www.dir.ca.gov/dlse/WhichIWOrderClassifications.pdf](http://www.dir.ca.gov/dlse/WhichIWOrderClassifications.pdf)

Minimum Wage in CA

<table>
<thead>
<tr>
<th>City</th>
<th>Minimum 2015</th>
<th>Minimum 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Berkeley</td>
<td>$1</td>
<td>$10</td>
</tr>
<tr>
<td>Emeryville</td>
<td>$11.00</td>
<td>$11.55</td>
</tr>
<tr>
<td>Mountain View</td>
<td>$11</td>
<td>$11.55</td>
</tr>
<tr>
<td>Oakland</td>
<td>$12.55</td>
<td>$13.55</td>
</tr>
<tr>
<td>Redwood</td>
<td>$11.52</td>
<td>$13.55</td>
</tr>
<tr>
<td>San Francisco</td>
<td>$12.25</td>
<td>$13.55</td>
</tr>
<tr>
<td>San Jose</td>
<td>$10.30</td>
<td>$13.55</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>$11.00</td>
<td>$13.55</td>
</tr>
<tr>
<td>Sunnyvale</td>
<td>$10.30</td>
<td>$13.55</td>
</tr>
</tbody>
</table>

No Waiver of Rights – Labor Code 1194

Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.
### Overtime

#### General Overtime Rule – Labor Code 510

<table>
<thead>
<tr>
<th>Less than 8 Daily</th>
<th>Less than 40 weekly</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than 8 Daily</td>
<td>Straight time</td>
</tr>
<tr>
<td>More than 40 weekly</td>
<td>Time and one half</td>
</tr>
<tr>
<td>1+ 8 hours on 7th day</td>
<td>Double time</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>More than 12 daily</th>
<th>More than 8 on 7th day</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Special Overtime Rules: Group Homes for Children

<table>
<thead>
<tr>
<th>Wage Order 5, Section 3, Paragraph E(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 40 weekly</td>
</tr>
<tr>
<td>More than 40 weekly</td>
</tr>
<tr>
<td>More than 48 weekly</td>
</tr>
<tr>
<td>More than 16 hours in a day</td>
</tr>
<tr>
<td>24 hour awake shift</td>
</tr>
</tbody>
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**Alternative Work Weeks**
Labor Code 511

- No longer than 10 hours a day (4/10's, 9/80)
- Must have an election, 2/3rd vote to pass
- Must apply to all “affected EE’s in a work unit”
- Can propose one alternative schedule or a menu of work schedule options from which each EE would choose
- Detailed notice and election procedures, results filed with the DLSE
- Must make reasonable accommodations for EE unable to work schedule

**Make Up Time – Labor Code 513**

- Work must be missed because of EE’s personal obligations NOT work duties
- Written request for each instance
- Make up must occur in the same workweek as time lost
- Make up time cannot cause EE to exceed 11 hours in a work day or 40 hours in a week
- ER cannot encourage or solicit EE to use make up time

**Overtime Exempt Status**

White Collar Exemptions (Labor Code 515)
- Executive
- Administrative
- Professional, including teachers
Two Tests for Exempt Status

- **Duties Test:** 51% of time performing exempt work
- **Salary Test:** 2x minimum wage x 2080 hours
  - 2015: $37,440/year
  - 2016: $41,600/year

FLSA Exempt Salary Minimum

Currently: $455/week; $23,660/year

**Proposed for 2016:**
$970/week; $50,440/year

Highly Compensated Employees
Current: $100,000
Proposed: $122,148

Meal and Rest Breaks
Meal Periods – Labor Code 512 & Wage Orders

- Nonexempt EE may not work for a work period of more than 5 hours without ER “providing” a 30 minute unpaid meal period.
- Meal period to start no later than the end of the 5th hour of work
- Record time in and out for meal period on timesheet

Exceptions to Meal Period Requirement

- Shifts not exceeding 6 hours: Can waive meal period by mutual written agreement
- Shifts Exceeding 10 hours: Second meal period can be waived if first was not and shift does not exceed 12 hours.

Exceptions to Meal Period Requirement (continued)

- On Duty Meal Periods: EE provided time to eat, but not relieved of all duty permissible ONLY when:
  A. The nature of the work prevents the EE from being relieved of all duty
  B. The EE agrees in writing to the on-duty meal period
  C. The agreement says it can be revoked at any time
  D. The EE is paid for the meal period
Special Meal and Rest Break Rules for Group Homes

1. On Duty Meal Period
   A. EE eats with the residents at no charge or
   B. EE has option to request off duty meal period.

2. On Duty Breaks for sole charge EE’s
   A. EE can be required to continue general supervision of residents
   B. EE must be offered another break if break interrupted to respond to needs of a resident

Counting Hours Worked

On-Call Time

• On-call time is not considered hours worked if:
  – EE able to use time for their own purposes
  – Response time to travel back to work not restrictive (>30 minutes)
  – Allow EE to trade on call assignments
  – Pay for cell phone or provide
• Minimum 2 hours Reporting Time pay owed if report back to work
**Sleep Time**

- If shift less than 24 hours, sleep time **cannot** be excluded from hours worked.
- In California, sleep time can only be excluded under Wage Order 5 for:
  - 2(k) In the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked.
  - 3(A)(2)(d) Caregivers of minors in group homes: Time spent sleeping shall not be included as hours worked.

**Travel Time**

- All travel occurring during the work day
- Not commute time to job site
- Out of town travel for special assignment
  - All hours traveling, excluding meal times
- Can have lower travel wage rate
  - At least minimum wage
  - Weighted average rate for OT calculation

**California Paid Sick Leave**

Labor Code 245.5, 246, 247.5

Employers must provide sick leave accrual to qualified employees beginning July 1, 2015.
California Paid Sick Leave

Must work 30 days in California

Eligibility for Use

- May prohibit use in first 90 days of employment
- May limit use to 3 days per year

Reasons an Employee May Use Sick Leave

- Incapacitation by injury or illness
- Preventative Care
- Treatment
- For employee or covered family member
- Also covers when an employee is the victim of domestic violence, sexual assault or stalking

Covered Family Member

- Employee
- Employee’s Family Member:
  - Child, Stepchild, or Legal Ward
  - Parent (including in loco parentis), Stepparent, or Legal Guardian of Employee or Employee’s Spouse or Domestic Partner
  - Spouse or registered domestic partner
  - San Francisco & Oakland: Designated person if no spouse/domestic partner
  - Grandparent or grandchild
  - Sibling
### Accrual Methods

<table>
<thead>
<tr>
<th>Threshold</th>
<th>Accrual Rate</th>
<th>Lump Sum</th>
<th>Other Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rate</td>
<td>3 hours per 30 hours worked (8.7 days over a 2080 year)</td>
<td>24 hours (3 days) at the beginning of the year (calendar, or 12 month period)</td>
<td>That provides at least 24 hours of sick leave by the 120th day of employment</td>
</tr>
<tr>
<td>Accrual Cap</td>
<td>48 hours (6 days)</td>
<td>N/A</td>
<td>48 hours (6 days)</td>
</tr>
<tr>
<td>Usage Cap</td>
<td>24 hours (3 days) per year</td>
<td>N/A</td>
<td>24 hours (3 days) per year</td>
</tr>
</tbody>
</table>

* San Francisco and Oakland Sick Leave laws do not provide a lump sum option.

### But We Already have PTO!

Employers can comply with Paid Sick Leave with an existing PTO policy if:
- leave is accrued at the minimum rate or greater;
- leave can be used in the same manner, and
- leave can be used for the same reasons.

### Handling Paid Sick Leave Requests

- Don’t require requests to be in writing.
- Don’t require employee to find a replacement.
- Don’t deny the request or discipline the employee for using the paid sick leave.
- Employees should provide “reasonable advance notice.”
- Don’t require a medical note.
California Domestic Worker Bill of Rights
Labor Code 1450-1453

Personal attendants

Employees who:
(1) supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision, and
(2) spend at least 80% of their time in those activities.

Overtime for Personal Attendants under CA law

1.5x regular rate for over 9 hours/day or 45 hours/week

Exceptions:
• Casual Babysitters and Babysitters under 18
• IHSS paid workers
• DDS paid workers
Overtime for Personal Attendants under Federal Law

“Companionship Exemption” to the FLSA minimum wage and overtime ended by DOL “Final Rule” effective in 2016
- 3rd party employers cannot claim companionship exemption
- Overtime over 40 in a week
- IHSS and DSS caregivers hired by 3rd party employers not exempt.

Fed and CA OT for Personal Attendants

| Overtime for hours worked over 9 in a day | Yes | No |
| Overtime for hours worked over 40 in a week | Yes | Yes |

Independent Contractors
### Federal Compliance Agencies

- Internal Revenue Service (IRS)
- Social Security Administration (SSA)
- Department of Labor (DOL) - Misclassification Initiative
  - Wage and Hour
  - Employee Benefits ERISA
  - Affordable Care Act
- Department of Homeland Security

*20 States have Information Sharing Agreements with the DOL: [http://www.dol.gov/whd/workers/misclassification/](http://www.dol.gov/whd/workers/misclassification/)*

### California Compliance Agencies

- Taxing Agency
- Department of Industrial Relations - Labor Commissioner
  - Workers’ Compensation
  - Wage and Hour Laws
- Employment Development Department
  - Temporary Disability Insurance
  - Unemployment Insurance

### How Does Anyone Find Out?

- Discrepancies in Government Reporting
  - Employment Tax Reporting
  - Unemployment Filings
- Complaints filed with Federal or State Labor Depts
- Tax Audits
  - Direct: Worker complaint
  - Indirect: Random audit
- Workers’ Compensation Claim
- Lawsuits
2015 DOL Administrative Letter

Economic reality test, with six factors:
• Is the Work an Integral Part of the Employer’s Business?
• Does the Worker’s Managerial Skill Affect the Worker’s Opportunity for Profit or Loss?
• How Does the Worker’s Relative Investment Compare to the Employer’s Investment?
• Does the Work Performed Require Special Skill and Initiative?
• Is the Relationship between the Worker and the Employer Permanent or Indefinite?
• What is the Nature and Degree of the Employer’s Control?

Primary Indicia – Control

The right to direct and control the means and details of the work performed by the service provider.

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