

Assisting Low-Income Clients With California Wage & Hour Violations

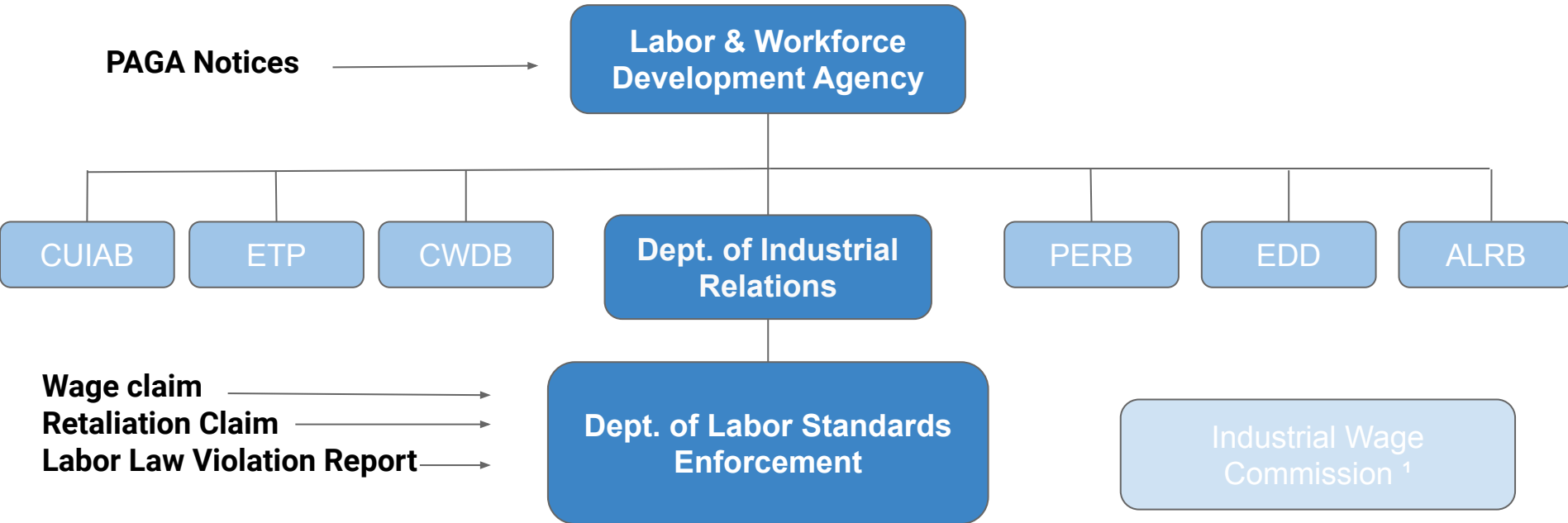
Minimum wage, overtime, misclassification,
missed payroll, statutes of limitations, and where
and how to file claims

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California Agencies & Functions



¹ The IWC was defunded in 2004, but its wage orders remain in effect. *Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 471, fn. 34. Wage orders are enforced by the DLSE.

Exempt vs. Non-Exempt

From IWC Industrial Wage Orders

IWC created 17 wage orders regulating wages, hours and working conditions in different industries, which are accorded “the same dignity as statutes.” *Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 471, fn. 34; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

1. Determine which wage order applies (main purpose of the business)
2. Determine whether employee’s role meets exemption criteria (Executive, Administrative, and Professional exemptions)

Cheat sheet: <https://www.dir.ca.gov/dlse/WhichIWCOrderClassifications.PDF>

Must satisfy both DUTIES test and COMPENSATION test

Job title is not determinative.

“The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer’s realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.”

Payment on a salary basis is not determinative.

Most Common Labor Code Violations for Low-Income Workers

- ❖ Failure to pay minimum wage
- ❖ Failure to pay overtime to non-exempt employee
- ❖ Misclassification of non-exempt employee
- ❖ Failure to provide meal and rest breaks
- ❖ Failure to provide paid sick leave
- ❖ Failure to pay wages due on termination
- ❖ Bounced payroll check / final pay
- ❖ Failure to provide day of rest
- ❖ Inaccurate / incomplete wage statement
- ❖ Late or irregular payroll
- ❖ Pay equity

Minimum Wage Violations: LC § 1197, MW-2023

2023: \$15.50 for all California employers (previous years vary by size of employer)

Local minimum wages: employer must follow stricter standard. Check City/County websites for current amounts. Alameda, Berkeley, Burlingame, Cupertino, Fremont, Menlo Park, Oakland, Palo Alto, Mountain View, Redwood City, Richmond, San Carlos, San Mateo, San Francisco, San Jose, South San Francisco, Sunnyvale all have higher minimum wages than state amount.

- ❖ Cannot be waived by employee (Civil Code §§ 1668 and 3513)

Penalties (LC § 1197.1)

Initial violation: \$100 per employee per pay period, plus the underpaid wages

Subsequent violations: \$250 per employee per pay period, plus the underpaid wages

Meal & Lodging

- (1) can only be credited against minimum wage if there is a voluntary written agreement
- (2) amount credited is limited to amounts set forth in applicable wage order

Calculating minimum wage violation for salaried employees: “Workweek” is a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods. *Douglas v. Xerox Business Services, LLC* (9th Cir. 2017) 875 F.3d 884, 888; CA Dept of Labor Standards Enforcement Manual sec. 50.6.4.1)

Overtime Violations: LC 510 & 1194

Time & a Half



- > Eight hours per day;
- > 40 hours **per** workweek;
- < Eight hours worked on seventh day of work

Double Time



- > Twelve hours/day
- Eight + hours on seventh day of work

❖ **Regular rate of pay:** $\text{monthly pay } \$ \times 12 = \text{annual salary} / 52 = \text{weekly salary} / 40 \text{ hours}$

Might be non-exempt employee's hourly rate, but non-discretionary or flat rate bonuses, commissions, piece-rate pay, varying hourly rates during a workweek change the calculation

Meal Breaks: LC 512; Wage Orders para. 11

3 hours 59 m	= no meal period
4 hours	= one unpaid meal period < 30 minutes
5+ hours	= one unpaid 30 minute meal period
6 hours	= one unpaid 30 minute meal period <i>can be waived by mutual consent of employer & employee</i>
> 10 hours	= two unpaid 30 minute meal periods
> 12 hours	= two unpaid 30 minute meal periods <i>second period may be waived unless the first was waived</i>

“On duty” meal periods

- ❖ Is employee relieved of regular work duties? Can they leave the premises? If not, meal period must be paid. *Bono Enterprises, In. v. Bradshaw* (1995) 32 Cal.App.4th 968.
- ❖ “On duty” meal period permitted only where nature of work demands it (i.e. gas station cashier, security guard, convenience store clerk).

Exceptions: Exempt employees. Slightly different rules for motion picture industry, on-site construction / drilling / mining / logging industries, set forth in Wage Order 12 and 16.

Rest Periods: LC 226.7, Wage Orders para. 12

Wage Order 3, Section 12:

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

“Premium pay” (missed rest period penalty) does not count as overtime. LC 226.7; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105–1106.

Employer must *provide* meal & rest periods, but not required to force employee to take them. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

Wages Due On Termination of Employment

LC 201: if employer discharges the employee, wages earned and unpaid are due and payable immediately

Exceptions: seasonal employees; motion picture employees; oil drilling; concert tech union workers subject to a CBA; employees paid on monthly basis

LC 202: if employee quits without notice, wages earned and unpaid are due within 72 hours

Earned vacation pay: LC 227.3. Must also be paid out with final wages. Cannot require forfeiture of earned vacation on termination.

Waiting Time Penalty (LC 203)

If employer *willfully* fails to pay wages due on termination, employee's wages continue as a penalty from the due date up to 30 calendar days.

“Good Faith” defense – *Mamika v. Barca* (1998) 68 Cal.App4th 487. To invoke defense, employer must **immediately** pay any portion of the wages that are not disputed.

Misc. Labor Code Violations

550-558.1	One day's rest in seven
203.1, 212	Bounced payroll check
204	Regular payroll 2x/month (some exceptions based on industry)
206.5	Requiring employee to falsely report hours worked
222.5	Employer must pay for medical or physical examinations (i.e. for drivers)
226	Payroll statement must contain gross & net wages earned, hours worked, pay rate(s), pay period, employer's legal name, and deductions

Employer Self-Help Prohibited: LC § 221

“It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.”

Applies to deductions from paycheck and/or recovering payment from employee after wages are paid; charges for cashing payroll check. Deductions must be for the direct benefit of the employee.

- ❖ Includes credit card charges incurred for tips paid via credit card. *Hudgins v. Neiman Markus* (1995) 34 Cal.App.4th 1109

Wage Order 15-2021(8): “No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.”

- ❖ Employer who exercises self-help for losses suffered as a result of gross negligence or dishonest or willful act of employee “does so at its own risk.” If employee is determined not guilty, employee recovers waiting time penalties (30 days wages) ¹

Penalty: LC § 225.5

¹ DLSE Policies and Interpretations Manual § 11.2.3.1 (https://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf)

Retaliation

Where to file:

<https://www.dir.ca.gov/dlse/dlseRetaliation.html>

Labor Code protections are available to all individuals regardless of immigration status. LC § 1171.5.

Taking adverse action against a person because the person engaged in protected activity.

Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1042.

1. Employee engages in protected activity;
2. Employer was aware of protected activity;
3. Employer takes adverse action (termination, disciplinary action, demotion, suspension);
4. A causal connection exists between the protected act and the adverse action.
Burlington Northern & Santa Fe Railroad v. White (2006) 548 U.S. 53.

Making immigration-related retaliation threats is specifically prohibited. LC §§ 98.6; 244; 1019-1019.4.

No exhaustion requirement. LC § 98.7(g).

98.6	Exercising any right protected by the Labor Code (inc. filing or threatening to file claim with DLSE)
230	Jury service
230.1, 230.2, 230.5	Crime victim / family member of crime victim – testimony, attend trial/hearings, sexual assault treatment
230.8	Participation in school activities / attend to childcare emergency
232	Disclosure of wages
232.5	Disclosure of information about employer's working conditions
233, 234, 246.5	Using accrued and available sick leave
1024.6	Lawful name change, SSN, or federal work authorization
1025-1028	Participation in drug or alcohol rehab program
1030-1033	Expression of breast milk
1101-1102	Engagement in political activity
1102.5	Whistleblowing (good faith disclosure of violation of state or federal statute, local rule or regulation to government agency, law enforcement, a supervisor) or refusing to participate in unlawful activity
1198.3	Refusal to work overtime

Misclassification of Employee as Independent Contractor

“Worker misclassification is a serious problem in the state, depriving workers of critical labor law protections, depriving the state of tax revenue, and depriving law-abiding businesses from a level playing field on which to compete.” ¹

¹ DLSE Policies & Interpretations Manual, § 28.1 (2019)

- ❖ Wage & hour, workplace safety, and retaliation laws protect employees but not ICs. Almost 10% of ICs make less than federal minimum wage.²
- ❖ Employees receive paid family leave, workers’ compensation, and unemployment benefits; ICs are less likely to have health insurance
- ❖ ICs are largely unable to bargain for higher wages³
- ❖ ICs must purchase and maintain personal resources or equipment to perform their job
- ❖ Employees can enforce labor laws through the Labor Commissioner’s Office; independent contractors must enforce in civil action
- ❖ ICs have more burdensome and time-consuming tax reporting and filing requirements ³
- ❖ Regular payroll deductions vs. Self-Employment Tax
- ❖ ICs are more likely to earn below \$20,000/year ³
- ❖ Harms federal, state & local governments via losses in unemployment tax and payroll taxes

² Washington Center for Equitable Growth, Fact Sheet, “Executive actions to combat wage theft against US workers” (February 2021)
<https://equitablegrowth.org/wp-content/uploads/2023/04/022421-wage-theft-fs.pdf>

³ Washington Center for Equitable Growth, letter to US DOL Wage & Hour Division re: Independent Contractor Status under the FLSA (October 26, 2020)
<https://equitablegrowth.org/wp-content/uploads/2020/10/Equitable-Growth-DOL-Independent-Contractor-Rule-Comment-October-26-2020.pdf>

Misclassification: LC § 226.8

It is unlawful to willfully misclassify any individual as an independent contractor.

- ❖ “Willfully” = avoiding employee status by voluntarily and knowingly misclassifying individual as independent contractor. *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 349.
- ❖ **Presumption of employment.** Burden is on employer to show that worker is independent contractor rather than employee. LC § 2775; *Borello, supra*.
- ❖ *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903.
- ❖ Determination is made by the LWDA or a court.

Penalties (in addition to posting notice of violation)

Penalty for one-time violation: \$5,000-15,000 for each violation

Penalty for pattern or practice: \$10,000-25,000 for each violation

ABC test (*Dynamex*) vs. *Borello* test

A worker is presumed to be an employee and not an independent contractor, unless the hiring entity satisfies all three of the following conditions:

1. The individual is free from control and direction, both under contract and in fact; AND
2. The individual performs work that is outside the usual course of the hiring entity's business; AND
3. The individual has their own independently established business of the same type as the work performed.

- The "business service provider" ("service provider"), i.e., the worker, must be a sole proprietor, or a business entity formed as a partnership, limited liability company, limited liability partnership, or corporation.
- The service provider must be free from the control and direction of the hiring entity, i.e., the business for which the services are performed, regarding the performance of the work, both under the contract and in fact.
- The service provider must provide services directly to the hiring entity rather than to its customers. However, this requirement does not apply if the service provider's employees are solely performing the services under the name of the service provider (not the hiring entity) and the service provider regularly contracts with other businesses.
- The contract with the service provider is in writing and specifies the payment amount, including any applicable rate of pay, for services to be performed, as well as the due date of payment for such services.
- If the work is performed in a jurisdiction that requires the service provider to have a business license or business tax registration, the service provider meets these requirements.
- The service provider maintains a business location, which may be the service provider's residence, that is separate from the business or work location of the hiring entity.
- The service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- The service provider can contract with other businesses to provide the same or similar services and maintain a clientele without restrictions from the hiring entity.
- The service provider advertises and holds itself out to the public as available to provide the same or similar services.
- Consistent with the nature of the work, the service provider provides its own tools, vehicles, and equipment to perform the services, not including any proprietary materials that may be necessary to perform the services under the contract.
- The service provider can negotiate its own rates.
- Consistent with the nature of the work, the service provider can set its own hours and location of work.
- The service provider is not performing the type of work for which a license from the Contractors' State License Board is required.

Private Attorney Generals Act (PAGA)

Labor Code sec.
2698-2699.5

- ❖ Requires filing civil suit
- ❖ Recovery of civil penalties on behalf of self and other similarly affected employees
 - 75% to LWDA
 - 25% to affected employees
- ❖ Requires notice to LWDA online via <https://dir.tfaforms.net/128> and to employer by certified mail
- ❖ \$75 fee may be waived for low-income clients
- ❖ LWDA has 60 days to notify of intent to investigate
- ❖ Notice cannot just state legal conclusions, but must identify “facts and theories” supporting the legal violations alleged. *Arias v. Superior Court* (2009) 46 Cal.4th 969, 781; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 545.

WHICH STATUTES SUPPORT A PAGA CLAIM?

California Labor Code 2699.5: The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, paragraphs (1) to (5), inclusive, (7), and (9) of subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, Sections 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3073.6, 6310, 6311, and 6399.7.

Labor Code 558 and PAGA Recovery

LC 558 provides:

(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

(1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages.*

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages.*

(3) Wages recovered pursuant to this section shall be paid to the affected employee.

Thurman v. Bayshore Transit Mgmt., Inc. (2012) 203 Cal.App.4th 1112, 1148 (underpaid wages can be recovered under section 558 “as part of a civil penalty for Labor Code and IWC order violations that result in underpayment of wages.”)

Labor Code Statutes of Limitation

Six Months

Claim against public entity

One Year

Retaliation claims

Two Years

Wrongful termination

Equal Pay Act violation (3 years if willful)

Three Years

Overtime

Minimum Wage

Meal & rest breaks

Waiting time penalties

Four Years

Wage violations subject to Unfair Competition
Law (Bus. & Prof. Code 17200)

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Gretchen is a litigator with nineteen years of employment, business, tort, and probate litigation experience. Her employment practice includes wage and hour violations, sexual harassment, discrimination and retaliation, misclassification, fraudulent inducement, and related civil claims for defamation, emotional distress, and negligence. She also litigates contract, fraud, and other business disputes. Gretchen represents clients in state and federal superior and appellate courts, in binding arbitration, and before the Unemployment Insurance Appeals Board and the California Labor Commissioner.

In addition to providing pre-litigation advice and counsel, Gretchen advises small businesses in corporate and employment matters, including contract drafting and review, non-disclosure agreements, discipline, severance, best practices, and employment policies and manuals.

Gretchen earned her J.D. from UC Berkeley. She chaired the Palo Alto Area Bar Association Women Lawyers Section for four years and has served as Director at Large since 2015.



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