

California's Wage Orders: Landmines and Goldmines

by TIFFANNY BROSNAN

All California employers must comply with a multitude of wage and hour laws that go well beyond setting minimum wages and calculating overtime pay.

For example, do your clients know that: *Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours. . . . These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean?*

Or that: *Adequate elevator, escalator, or similar service consistent with industry-wide standards . . . shall be provided when employees are employed four floors or more above or below ground level?*

Orders. (Wage Order 1-2001, subsections 3(G), 13(A), 15(C) and 16.) The Industrial Welfare Commission (IWC) is part of California's Department of Industrial Relations. It is comprised of five members appointed by the Governor and it has a continuing duty to ascertain wages, hours and working conditions for employees in California. Cal. Lab. Code § 1173 (Deering 2012). To that end, the IWC has issued 17 different Wage Orders, each one applicable to a particular industry. The specific industries range from Manufacturing to Mercantile. And there are fine distinctions made between them.

For example, Wage Order 14 governs "Agricultural Occupations," while Wage

2012). Wage Orders are not contained on the glossy posters found in most employee break rooms, however. Instead, Wage Orders are typically 8 ½ pages long (single-spaced), and they contain dozens of "mines" with very specific requirements (such as the four listed above).

Employers who violate the Wage Orders face a range of penalties, including being required to pay \$50 for each employee for every pay period during which there is a violation (Wage Order 1-2001, (20)), actions brought under the Private Attorneys General Act of 2004 (Cal. Lab. Code § 2699 (Deering 2012)), and even a misdemeanor criminal conviction (Cal. Lab. Code § 1199 (Deering 2012)).



Wage Order 14



Wage Order 13



Wage Order 8

Or that: *A temperature of not less than 68° shall be maintained in [employees'] toilet rooms, resting rooms, and change rooms during hours of use?*

Or: *If a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink?*

The What, Where, and How Much of Wage Orders

These are just four of the requirements placed upon employers in the Industrial Welfare Commission's minefield of Wage

Order 13 governs "Industries Preparing Agricultural Products for Market, on the Farm," and Wage Order 8 governs "Industries Handling Products after Harvest." Just determining which Wage Order to follow can be difficult for some employers. The IWC recognizes this challenge, and it publishes a pamphlet titled "Which IWC Order?" in an effort to provide some guidance. The pamphlet, along with the Wage Orders themselves, can be found on the Department of Industrial Relations' website under the IWC's page: www.dir.ca.gov/iwcl/. Employers are required to print and then post in a "conspicuous location frequented by employees," a copy of their applicable Wage Order. Cal. Lab. Code § 1183(d) (Deering

Are the "Well Mined" Parts of the Wage Orders Really that Well Mined?

Most employers are generally familiar with the portions of the Wage Orders dealing with overtime exemptions. These list the factors that are necessary for a position to qualify as being exempt from overtime, whether it is the executive, administrative, or professional exemption, or other more limited exemptions. But these factors are not without their own complications. For example, an employee who is licensed or certified and practicing medicine, dentistry, or optometry can be exempt, while pharmacists and most registered nurses cannot. (Wage Order 4-2001, (1)(A)(3).) Also, one of the requirements for exempt

executive, administrative and professional employees is that they be paid a monthly salary equivalent to no less than two times the state minimum wage (or \$2,773.33), but *computer* professionals must have an hourly rate of pay that is not less than \$38.89 (or \$6,752.19 per month, assuming a 40-hour workweek) and this rate may be adjusted each year by the Division of Labor Statistics and Research. (Wage Order 4-2001, (1)(A)(3)(g)(iv).)

The Class Action Bonanza

While the Wage Orders contain landmines for employers, they are goldmines for class action lawyers. Historically, misclassification of employees as exempt when they should be non-exempt has been the subject of countless class action lawsuits in California. *See Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th 805 (2001) (affirming summary judgment for class of claims representatives on grounds that they were misclassified as exempt administrative employees); *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004) (reversing Court of Appeal writ of mandate directing trial court to vacate order certifying class of assistant managers claiming that they were misclassified as exempt executive employees).

Over the last five to ten years, however, employers have faced a new wave of class

action lawsuits dealing with failure to provide meal and rest periods. Again, these are subjects covered in the Wage Orders. “No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work, the meal period may be waived by mutual consent of the employer and employee.” Wage order No. 4-2001, (11)(A). “Every employer shall authorize and permit all employees to take rest periods, which insofar as is 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 of major fraction thereof.” (Wage order No. 4-2001, (12)(A).) Interpreting this language—and the difference between “no employer shall employ” in the section on meal periods and “every employer shall authorize and permit” in the section on rest periods—led to perhaps the most-watched case for employment lawyers in over a decade, *Brinker Restaurant Corp. v. Superior Court*, 2012 Cal. LEXIS 3149 (Cal. Apr. 12, 2012).

The latest claim being mined by class action lawyers deals with “suitable seating.” The Wage Orders provide that “[a]ll working

employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats. When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.” (Wage Order No. 1-2001, (14).) Large employers such as Bank of America, Home Depot, Rite Aid, and others have all been targeted by plaintiffs’ class action lawyers for alleged violations of this “suitable seating” requirement.

What Will Be the Next Mother Lode?

What section of the Wage Orders will class action lawyers prospect next? Bathrooms that are too cold? Locker rooms that are not clean enough? We know they are sifting through the Wage Orders looking for the next nugget. Employers must prepare themselves by knowing their Wage Order inside and out.



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