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## Employment Law Newsletter: March 2012

### Employment and Wage and Hour Law Newsletter™

A Newsletter by the Low, Ball & Lynch Employment Law Group

March 2012

#### In this issue:

- NOTES FROM THE EDITOR
- CORRECTLY CLASSIFYING EMPLOYEES AS EXEMPT OR NON-EXEMPT IN ORDER TO AVOID LITIGATION
- INDEPENDENT CONTRACTOR OR EMPLOYEE: THE CONTROL TEST
- THE IMPORTANCE OF EFFECTIVE DOCUMENTATION

#### Next issue:

- THE SUPREME COURT'S RULING IN *BRINKER*
- PREPARING TO DEFEND A CLAIM FILED BY AN EMPLOYEE
- DOES YOUR ATTENDANCE POLICY VIOLATE THE AMERICANS WITH DISABILITIES ACT?

### Notes from the Editor

Our second edition contains practical knowledge that will assist your company in avoiding employee claims and lawsuits. It is crucial that employers correctly classify each employee as exempt or non-exempt in order to comply with California and federal wage and hour laws. Our first article provides you with information to assist you in determining the proper classification. It is also important to clarify whether a worker providing services for your company is an employee as opposed to an independent contractor. The factors analyzed by the California Employment Development Department in making the determination are discussed in our second article. The final article reminds employers of the importance of effective documentation and identifies what should be documented



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and why.

In the next edition of the newsletter, we will discuss the *Brinker* decision and its impact. We will provide tips on how to prepare for defending a claim filed by an employee and will help you evaluate whether your attendance policy violates the Americans with Disabilities Act. If you have any questions or comments regarding the newsletter and/or its contents, please don't hesitate to call. We hope you find this information useful and encourage any and all forms of feedback.

If you would like to subscribe, contact Scarlet Herrera at [SHERRERA@LOWBALL.COM](mailto:SHERRERA@LOWBALL.COM) or by phone at 415.981.6630 x298.

Sincerely,

LAURA FLYNN

415.981.6630 x255

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## **Correctly Classifying Employees As Exempt Or Non-Exempt In Order To Avoid Litigation**

by PAMELA HELMAN

Wage and hour laws require employers to give certain employees overtime compensation. An exempt employee is not entitled to overtime while a non-exempt employee is entitled to overtime. California offers its employees even more protection than federal law. Since California's requirements exceed the federal standards adopted by the U.S. Department of Labor, an employee in California must be exempt from the overtime requirements of both state and federal law. Employee misclassification occurs frequently in the workplace resulting in an increasing number of lawsuits based on wage and hour violations. In this article, we discuss the tests an employee must satisfy in



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order to be considered exempt.

**Exempt Employees:** For employees to be considered exempt, there are three tests the employees must meet: (1) salary level test, (2) salary basis test and (3) the duties test.

**Salary Level Test:** To meet the salary level test, employees must earn a minimum monthly salary of no less than two times the state minimum wage for full-time employment. The minimum salary for exempt employees in 2012 is \$2,733 per month.

**Salary Basis Test:** To meet the salary basis test, employees must have a “guaranteed minimum” amount of pay. Exempt employees are not entitled to any overtime, no matter how many hours worked in a day or week. Furthermore, an exempt employee’s predetermined salary cannot be reduced because of variations in the quality or quantity of the employee’s work.

**Duties Test:** To meet the duties test, exempt employees must spend over 50% of their working time engaged in work that is primarily intellectual, managerial, or creative, and requires the exercise of discretion and independent judgment. Discretion and independent judgment involve comparing and evaluating different options and then making a decision. The exempt employee must have the power to make independent choices in matters of importance or to recommend to a supervisor a course of action in matters of consequence to the business. An exempt employee is normally an executive, administrative or professional employee. However, it is important to recognize that job duties, not job titles, determine whether employees are exempt or not.

**Non-Exempt Employees:** Pursuant to the Fair Labor and Standards Act (FLSA), non-exempt employees are entitled to overtime pay which is one and a half times their regular hourly pay rate when they work more than eight hours in a day or more than forty hours in a work week. Time and a half is also required for the first eight hours that non-exempt employees work on the seventh consecutive work day in a week. For all hours worked over twelve in a day, and the hours over eight on the seventh consecutive work day in a week, employers must pay non-exempt employees double their regular hourly rate.

Laws relating to overtime pay vary from one state to another. Thus, employers with employees in more than one state need to ensure they are complying with the laws of all of the states in which they have employees. In California, if an employer fails to compensate a non-exempt employee for proper overtime pay, the employer is subject to the unpaid wages, interest, penalties and the employee’s attorneys’ fees and costs.



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**Conclusions and Recommendations:** Wage and hour claims are on the rise. Misclassification of a non-exempt employee as an exempt employee can result in significant damage awards which include overtime payments going back four years, plus penalties and legal expenses. It is advisable to treat employees as non-exempt unless they clearly meet the definition of exempt employees. The appropriate classification should be determined at the time of recruitment. In addition, an employer should regularly audit the job duties of its employees in order to determine if the employees still meet the correct classification.

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## **Independent Contractor Or Employee: The Control Test**

by KAREN MOORE

The determination of whether an individual is an employee or independent contractor depends on the facts and applicable law. The California Employment Development Department (EDD) utilizes the “control test” to determine employee versus independent contractor status. The control test is often used to determine whether a claimant is eligible for unemployment benefits. If the claimant is determined to be an independent contractor, unemployment benefits will be denied.

An independent contractor retains the right to control the manner in which the contract work is performed. In contrast, an employee is subject to the absolute control and direction of the employer. Even though a principal may not overtly exercise control over an employees activities, the key factor is whether the principal retains the right of control. The strongest evidence of retained right of control is the ability to discharge an employee at will, without cause. There are twenty-three (23) factors involved in EDD assessment of employee versus independent contractor status.

1. **Instructions:** A worker who is required to comply with instructions about when, where and how to accomplish the work is an employee. An independent contractor decides how to do the job, establishes procedures and is not supervised. The entity engaging the independent contractor is only interested in the end results.

2. **Training:** Mandatory training is an indicator that the employer wants the services performed in a



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particular manner. An independent contractor uses their own methods and does not require training to accomplish job results.

3. **Integration:** If the individual's services are so integrated into an employer's operations that the success of the business depends on the performance of the services, it indicates employment. If an individual's performance of the service only affects his or her own business reputation as opposed to those who purchase his/her services, it indicates an independent contractor relationship.

4. **Services Rendered Personally:** If the services must be personally rendered, it indicates the employer is interested in the methods as well as the result. An individual's right to substitute another's services without the employer's knowledge suggests the existence of independent relations.

5. **Hiring Assistants:** If an employee hires and supervises assistants at the direction of the employer, he is acting under the control of the employer. An independent contractor hires, supervises and pays personnel under a contract that requires him/her to provide materials and labor.

6. **Continuing Relationship:** The existence of a continuing relationship between an individual and the person for whom he or she performs services indicates an employer-employee relationship. The relationship between an independent contractor and his/her own client ends when the job is finished.

7. **Set Hours of Work:** The establishment of set hours of work by the employer is a factor of control. An independent contractor is the master of his/her own time.

8. **Full-Time Work:** Full-time work for the business is indicative of control by the employer since it restricts the worker from performing other gainful work. An independent contractor is free to work when he or she chooses, sets their own schedule and normally works less than full time.

9. **Work Done on Premises:** Doing work on an employer's premises or locations designated by an employer implies control. Doing work away from the employer's premises when it could be done on the employer's premises indicates lack of control, especially if there is no supervision.

10. **Order or Sequence:** If a person must perform services in the order or sequence set by an employer or such a right is retained, employer control is established. An independent contractor controls work order and sequencing.

11. **Reports:** The submission of regular oral or written reports indicates control since the worker



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must account for his/her actions. An independent contractor is not required to file reports.

12. **Payments:** Payment by the hour, week or month represents an employer-employee relationship. Payment on a commission or job basis is customary where the worker is an independent contractor.

13. **Expenses:** Payment of a worker's business and travel expenses by the employer indicates control over the worker. A person who is paid on a job basis and who has to take care of all incidental expenses is generally an independent contractor.

14. **Tools and Materials:** The furnishing of tools and materials by the employer indicates control over the worker. When a worker furnishes tools and materials, there is an indication of independence.

15. **Investment:** The furnishing of all necessary facilities by the employer tends to indicate an employment relationship. A significant investment by the worker in facilities used by him in performing services tends to show an independent status.

16. **Profit and Loss:** When workers are insulated from loss or are restricted in the amount of profit they can gain, excluding commissions, they are usually considered employees. The possibility of profit or loss for the worker as a result of his services generally shows independent contractor status.

17. **Works For More Than One Person/Firm:** While it is possible for a person to work for a number of firms and still be an employee because each firm exercises control, work for a number of persons or firms at the same time usually indicates independent contractor status.

18. **Offers Services to General Public:** If a worker performs service for one person, does not advertise to the general public and does not hold a license or hire assistants, employee status is likely. If to the contrary, independent contractor status is likely.

19. **Right to Fire:** If an employer can discharge an employee at will, without liability, the worker is considered an employee. An independent contractor cannot be discharged as long as he produces a result that complies with contract specifications.

20. **Right to Quit:** An employee has the right to quit at any time with no liability. An independent contractor is legally obligated to finish a job pursuant to contract specifications. If terminated without cause, a principal is liable to a contractor.

21. **Custom In Industry and Locations:** If the work is typically performed under the direction of a



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supervisor, it indicates employment. If work is traditionally performed by independent contractors, it indicates independent contractor status.

22. **Required Level of Skill:** A low level of technical skill indicates employment. A high level of technical skill indicates independent contractor status.

23. **Belief of Parties:** It is an indication of employment if the worker and/or the State believe the relationship is employment. However, even though all parties may believe the relationship is an independent contractor relationship, the State may conclude differently based on its analysis of the relevant factors.

An employer should analyze whether its workers should be categorized as employees versus independent contractors. If a situation arises wherein a former worker believed to be an independent contractor makes a claim for unemployment benefits, the above factors should be addressed at any hearing held by the EDD. Knowledge of the above factors will increase the chances the employer will prevail in a dispute as to whether a worker is entitled to unemployment benefits.

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## The Importance Of Effective Documentation

by JENNY LI

To effectively defend wrongful termination cases, an employer needs to produce evidence to support its purported basis for the decision to terminate. The strongest evidence of the basis for the employer's decision is documentation created during the decision making process. Not only does such contemporaneous documentation support the employer's reasons for the decision while raising doubt as to the employee's claimed reasons, it also refutes any argument the employer's reasons are somehow false.

Additionally, juries and judges will often have a higher expectation from the employer – especially a corporate employer with a human resources department – to keep detailed records of its employment decisions, compared with the individual employee who claims he or she was the victim of an unfair decision. A corporate employer who does not document its decision to terminate an



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employee may be viewed with more suspicion than the terminated employee who failed to document an alleged “discriminatory” comment made by his or her supervisor. All too often, the verbal, after-the-fact testimony by the decision makers alone is simply not enough to carry the employer’s burden of proof. With this in mind, below are some tips as to what should be documented and how to effectively document.

#### **What Should Be Documented:**

**Initial hiring records:** This should include anything that goes into forming the employment relationship: the application; personnel handbook (the version provided to and reviewed by the employee); if the employment is at-will, the employee’s written acknowledgment of at-will employment; the employee’s written acknowledgment of having been notified of other policies, such as the employer’s policies regarding harassment or leaves of absence; any authorizations and/or waivers; tax forms; background check documentation; and references.

**Anything signed by the employee:** We cannot overstress the importance of the employee’s written acknowledgment of his or her terms of employment and/or the employer’s policies, most notably, any acknowledgment of at-will employment. This should not only include the initial written acknowledgments signed by the employee, but also any updated acknowledgments.

**Time worked and compensation (payroll):** Accurate record keeping of hours worked and compensation are not only critical in the event of any dispute involving the amount of compensation, especially for non-exempt employee, but are required under California law. (California Labor Code section 1174.) Make sure to maintain and accurately document the hours each employee works, their rest breaks, days off, leaves of absence, and proof of compensation.

**Changes in terms or conditions of employment:** This includes any promotion or demotion; and changes in the employee’s job duties, pay, hours, or titles.

**Performance reviews:** Critical to any case for wrongful termination is the employee’s history of performance reviews. Managers should timely and consistently perform and document performance reviews.

**Disciplinary “write ups”:** In wrongful termination cases, in particular, those where the employee was terminated or disciplined for poor performance or behavior, it is critical to have contemporaneous documentation of the specific infractions or acts of misconduct. The documents





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should include how and when the infraction or misconduct occurred, who was involved, and what was done by the employer in response.

**Reasons for termination or other adverse action:** In a situation where an employee is terminated or is subject to an adverse employment decision (such as a decrease in pay) for non-performance related reasons, be sure the reason for the termination or other action is well documented. The most common situation is where an employee is laid off due to the financial condition of the employer, and then makes a claim that he or she was terminated for a prohibited reason, such as discrimination or retaliation. To defend such a claim, the stronger the employer's documentation of the real, or legitimate reason for the termination, the better. For example, if the employee was laid off because of a profit decrease in his or her department, accounting documents showing an actual decrease in the department's revenue would significantly support the legitimate reason for the layoff.

**Investigations:** Any investigation regarding the employee or undertaken at the request of the employee should be documented, e.g. where there is a complaint for harassment by a supervisor, co-employee or client.

**Health and disability issues:** In a separate and confidential file, keep all records relating to any medical information, workers compensation claims, disability, and any accommodation requested and undertaken in association with the employee's disability. If an accommodation was not feasible, the reasons for the infeasibility should be documented in detail.

**Separation of employment:** This documents would include any formal separation agreement, a notice of separation, severance agreement, and COBRA-related documents.

In sum, an employer's documentation habits can make or break a case. Effective documentation can strengthen an employer's chance of prevailing in an employment-related dispute, or better yet, prevent a claim from being filed.

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