

June 26, 2025

### Best Practices to Avoid Wage & Hour Lawsuits

Presented by:  
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Ogletree Deakins

**BEST LAW FIRMS**  
NORTHWEST DIVISION  
EMPLOYMENT LAW  
2024

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### Agenda

- Context
- Rounding
- Regular Rate
- Sick Pay
- Meal and Rest Breaks
- Expenses
- Off Clock
- Wage Statements
- Exempt Classifications



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### Context

- California wage law is hyper-technical and counter-intuitive.
- Hundreds of employers are sued every day
- Employee's lawyers are motivated to sue because:
  - Small amounts owed = large fee awards
  - PAGA statute allows for lucrative recoveries
  - Most employers don't take the huge risk of going to trial



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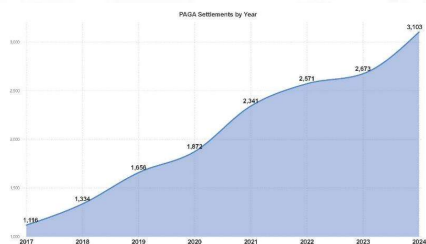
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## PAGA Settlements by Year: 2017-2024



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## PAGA Reform = Reasons to Comply

### What does the amended law allow?

Reduced penalties if employer does:

- Training
- Audits
- Cure errors



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## Rounding Time Entries

What is rounding?

- A time entry is rounded to the nearest 5 minutes, 1/10<sup>th</sup> of an hour, or quarter hour.

Is it legal?

- Technically yes, so long as on average the rounding doesn't deprive the employee of pay.



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## Rounding Time Entries

### What is the problem?

- Rounding can skew in favor of the employer.
- For example, workers may often punch in 5 minutes early but rarely 5 minutes late.
- Litigation of this issue can be expensive and PAGA claims are common.
- Note: Rounding meal period punches is **not allowed**.



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## Rounding Time Entries

### Solutions

#### Don't Do It.

- Consider not rounding time entries.
- Definitely don't round meal punches.

#### Or Do It Right.

- If you do round, consider combining with a "grace period" policy that allows some clock in/out flexibility.
- Check the data for skewing



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## Regular Rate of Pay



### What is the "regular rate"?

- Overtime is paid at 1.5x or 2.0x the regular rate
- Meal and rest period premiums are paid at the regular rate
- When calculating, must include most forms of non-discretionary pay, such as bonuses, commissions, shift differentials, etc.

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## Regular Rate of Pay

### What is the problem?

- Erroneously excluding some kinds of pay will result in payment at the incorrect rate.

Example: Employee works 45 hours, is paid \$20 base rate of pay and earns a \$200 production bonus. 5 hours of overtime are paid at \$32.22 per overtime hour.

- Overtime rate (1.5x) on base pay is \$30 and on bonus is \$2.22  $(200/45) \times 0.5 = 2.22$



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## Regular Rate of Pay

### Solution

- Include all required forms of pay in the regular rate calculation. (See regular rate chart.)
- Note special rule for "flat sum bonus"
- Remember that meal and rest premiums also paid at regular rate.
- Consider conducting and audit and retro pay if done incorrectly in the past.



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## Sick Pay

Common sick pay mistakes:

Improper accrual rates

Must meet minimum standard of at least 24 hours/year or 1 hour per 30 worked.

Higher in some CA cities or counties

Miscalculated pay out rate

Must pay non-exempts at the regular rate for the work week or use a 90 day lookback.



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## Sick Pay

### Common sick pay mistakes:

- Balance not provided each pay day
  - Must be put on pay stub or other document provided to employee each pay day.
- Attendance points
  - Employees should not receive attendance points or other discipline if they properly use accrued sick pay.



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## Meal and Rest Breaks



### The Basics:

- 30 minute off duty meal break to start before the end of fifth hour of shift; second meal break for shifts over 10 hours.
- 10 minute off duty rest break for every 4 hour shift segment, or major fraction thereof.

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## Meal and Rest Breaks

### Common Meal Break Problems

- Written policy is defective/incomplete
- Meal punches missing or rounded
- Auto-deductions
- Late, short or skipped (with no premium paid)
- Not allowed to leave
- Working while clocked out
- Premium paid at wrong rate



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## Meal and Rest Breaks

### Common Rest Break Problems

- Written policy is defective/incomplete
- Late, short or skipped (with no premium paid)
- Not allowed to leave
- Too busy
- Supervisors interfere / discourage (or don't encourage)
- Working while on break
- Premium paid at wrong rate



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## Meal and Rest Breaks

### Good Practices

- Write an excellent policy
- Train staff and managers (a lot)
- Pay premiums, at correct rate, and display on pay stub
- Use attestations to document when/why improper meal/rest breaks
- Hold slackers accountable (supervisors and staff alike)



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## Off The Clock Errors



Compensable time  
All hours worked must be paid time

Common Mistakes

Missing small amounts of time before or after clocking

- E.g. closing down, locking doors, arming the alarm
- E.g. waiting in a security line
- Errands before or after shift

Paying on a commission or piece rate basis, but not paying for non-productive time

Working during breaks

After hours emails, texts, calls when not clocked in

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## Off The Clock Errors

### Good practices

- Strong policy instructing employees to clock all hours and never work off clock
- Evaluate whether any off clock work occurs
- Provide a mechanism for capture pre- or post- shift work performed
- Limit off shift work
- Require employees to verify they have clocked all hours
- Ensure breaks are not interrupted



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## Expenses

### Expense Reimbursement

- Labor Code 2802 requires all expenses be reimbursed.

### Common Mistakes

- Failure to reimburse for incidental mileage
- Out of pocket expenses for supplies
- Tools
- Cell phone, internet, other work from home expenses



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## Expenses

### Good Practices

- Expense reimbursement policy
- Provide all necessary tools, equipment, supplies
- Mileage logs and reimbursement forms
- Either prohibit cell phone use for work, or pay for it
- Determine whether employee incurs any other WFH expenses



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Wage Statements

	rate	hours	this period	year to date
Regular	8.2500	40.59	334.87	5,108.7
Gross Pay			\$334.87	

Deductions

Statutory				
Social Security Tax			-20.79	
Medicare Tax			-4.95	
IL State Income Tax			-16.24	
Net Pay			\$292.89	
Net Check			\$292.89	

Good Practices

- Expense reimbursement policy
- Provide all necessary tools, equipment, supplies
- Mileage logs and reimbursement forms
- Either prohibit cell phone use for work, or pay for it
- Determine whether employee incurs any other WFH expenses

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Wage Statements

Labor Code 226

- Gross and net wages
- Total hours worked
- All hourly rates in effect and corresponding hours
- Piece rate if applicable
- Inclusive dates of pay period
- Legal name of employer and address
- Employee name and ID #
- Deductions

Also: Sick pay accrual

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Wage Statements

Common Mistakes

- Incorrect business name / address
- Missing pay rates, especially overtime
- Sick pay hours missing
- Statements lost / unavailable due to change in payroll vendor (3 year requirement)

	rate	hours	this period	year to date
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Exempt Classification



White Collar Exemptions  
Executive  
Administrative  
Professional  
Also:  
Inside/outside sales

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Exempt Classification

Common Mistakes

- Salary too low: \$68,640 minimum
- Not paid on a “salary basis”
- Duties of executive, administrative or professional exemptions not performed more than 50% of the time
- Outside salespersons are not spending more than 50% working time “outside” (especially during pandemic)



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Arbitration Agreements

- Properly worded arbitration agreements can stop class action lawsuits.
- They might not stop PAGA claims
- Arbitration is really expensive, but so is going to trial in front of a jury.
- Consider the pros and cons!



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# Thank you!

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# About the Firm

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.

The firm has more than 900 attorneys located in 54 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



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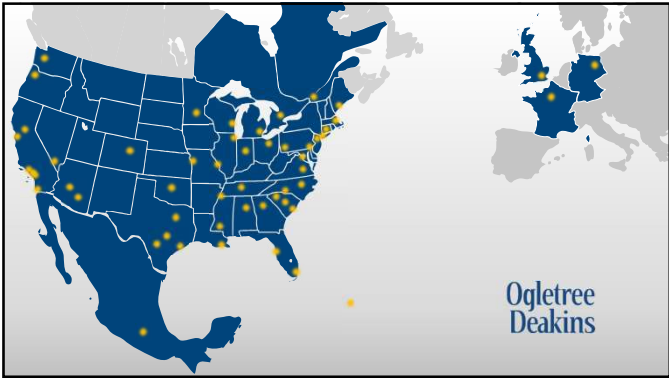
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