

The Top 10 Things Employers Do to Get Sued

Here are the top 10 things employers often do with the best intentions, along with the reasons employers are likely to get sued for doing them. (Note: Although this list applies in most situations, there may be exceptions to some of the following laws and regulations under collective bargaining agreements or in other very limited situations.)

The best way to make sure your company's actions don't become one of the top 10 things employers do to get sued is to become an informed employer. You can do so by purchasing the Chamber's [California Human Resource Essentials](#), created specifically for small businesses.

1. Save Money. Establish a "Use-It-or-Lose-It" Vacation Policy.

Many employers are unaware use-it-or-lose-it vacation policies are illegal in California. A "use-it-or-lose-it" policy means employees lose accrued vacation days if the employee doesn't take the days by a specific deadline. According to the California Supreme Court, vacation is a vested benefit that can't be taken away once it is earned.

Acceptable alternatives to use-it-or-lose-it policies are reasonable caps and cash-out policies. Under a reasonable cap plan, once an employee has earned a set amount of vacation but has not taken it, the employee stops earning vacation until the employee uses some accrued vacation time. Employees also may be required to cash out accrued vacation they haven't taken.

All accrued but unused vacation must be paid out at the end of the employment relationship, even if the employee wasn't yet eligible to take the vacation time. This is true regardless of whether the employee quits, is terminated or is laid off. Vacation pay is subject to the same time limits as other final pay. (See #2 for more information about final paycheck deadlines.)

Disputes over vacation pay often stem from poorly drafted vacation policies. It is not uncommon for a policy to say something like, "Employees are eligible for one week of vacation after a year of employment." While the employer may mean no vacation is earned until after a year of work, in a legal dispute the policy probably would be interpreted to mean the employee accrues vacation during the entire first year and is eligible to take that vacation during the second year. An employee who terminates during the first year would be entitled to a proportional amount of one week's vacation.

2. Hold Your Employee's Final Paycheck Until He Turns in His Pager and Uniform. After All, He Agreed in Writing to Return Them.

Holding a final paycheck seems like a reasonable, perfectly fair way to get an employee to return uniforms or other property, or complete required termination paperwork, especially since you have an agreement, signed by your former employee, promising to return your property. However, failing to provide a final paycheck within the legal time limits, regardless of what the employee still holds, can be a costly and time-consuming mistake.

Final paycheck deadlines depend on whether the employee was terminated, laid off, quit without notice, or quit with at least 72 hours notice. A terminated employee is entitled to all final wages, including unused vacation, at the time of termination. The same applies to a layoff, unless there is a return-to-work date within the same pay period.

An employee who quits with fewer than 72 hours notice must receive a final paycheck no later than 72 hours after notice is given. An employee who quits with more than 72 hours notice is entitled to a final paycheck on the last day of work.

An employer may refuse to pay final wages only if the employee owes the employer money due to gross negligence, willful misconduct or dishonesty. These often are difficult and expensive to prove.

Failure to meet a final paycheck deadline subjects an employer to waiting time penalties. This penalty is a continuation of the employee's wages on a day-to-day basis until the final paycheck is ready, up to a maximum of 30 days.

3. Get Rid of Anyone Who Files a Workers' Compensation Claim but Wait Until They Come Back to Work So It Won't Look Bad.

California's Labor Code Section 132(a) prohibits an employer from terminating, threatening to terminate, or discriminating in any way against an employee because s/he has received a workers' compensation award, or has filed or even intends to file a workers' compensation claim.

Violation of this law increases the employee's workers' compensation benefits by one-half, up to \$10,000, and requires payment of costs and expenses up to \$250. The employee also becomes entitled to reinstatement and reimbursement for lost wages and benefits.

An employer is not shielded from a lawsuit simply because the employee has returned to work for a period of time after a workers' compensation injury. Once the employee claims a termination (or other discrimination) was a result of filing a workers' compensation claim, the burden falls on the employer to show there was a legitimate business necessity for its actions.

4. Let Everyone Work Four 10-Hour Days or, Better Yet, Whatever Schedule They Want.

Wage and hour laws place many restrictions on the number of hours an employee may work each day and week without overtime pay. Allowing everyone to work four 10-hour days (or any schedule they choose) without first getting sound legal advice could end up being extremely costly. Even an employee who agrees in writing to this type of schedule is generally entitled to file a claim against the employer and receive back overtime with interest.

California and federal laws require that non-exempt employees be paid time-and-a-half if they work more than eight hours in a workday or more than 40 hours in a workweek. Time-and-a-half also is required if an employee works seven consecutive days in a workweek, with double-time pay required after eight hours on the seventh consecutive day. (Of course, certain types of high-level employees are exempt from these wage and hour laws. See the 2002 California Labor Law Digest, Chapter 7, for more information about exempt and non-exempt status.)

There are two ways an employee can work more than eight hours in a day without overtime pay:

- **Make-up time.** Make-up time allows an employee to request time off for a personal obligation and make up the time on another day without overtime pay. For each incident of make-up time:
 - 4 the employee must submit a signed, written request;
 - 4 the time must be made up within the same workweek;
 - 4 the employee may work no more than 11 hours on another workday, and no more than 40 hours in a workweek, to make up the time off; and
 - 4 the employer may not encourage or otherwise solicit an employee to request make-up time.

Employers are not obligated to offer employees the option to use make-up time.

- Alternative workweek agreements. Alternative workweek agreements allow all employees in a work unit to put in more than eight hours in a day (but never more than 40 hours in a week) without overtime pay.

The typical alternative workweek schedule is a four-day workweek of 10 hours per day, known as a 4/10 schedule. Also common is a two-week schedule of nine-hour days, allowing every other Friday off, known as a 9/80 schedule.

Employers must follow certain steps to institute an alternative workweek agreement, including employee meetings, a secret ballot vote, a formal agreement and a filing with the state Labor Commissioner.

Failure to comply with all the complex regulations for creating and carrying out alternative workweek schedules can result in enormous obligations for back overtime and fines.

5. Don't Waste Time Training Front-Line Managers about Labor Laws. After All, the Company Pays HR People to Handle Any Problems That Arise.

Front-line managers—the people who interact with your employees most closely every day—are your best defense against being sued. Basic training on such topics as sexual harassment, discrimination, safety and wage and hour laws (such as exempt versus non-exempt status—see #7) are essential.

Example: Ellie Employee tells Mike Manager that Carl Casanova has been making inappropriate sexual remarks to her. Since Mike never received training in handling sexual harassment complaints, he has the common misconception that Ellie can't sue unless she at least tells Carl she doesn't like the remarks.

Mike doesn't think the remarks Ellie reported are that bad, so he tells Ellie to try to handle the problem on her own first by telling Carl to stop. Ellie sues for sexual harassment and wins a large award, since she reported the harassment but the company did not take immediate and appropriate corrective action.

The law presumes that once Ellie's manager is aware of the harassment, the company is aware of the harassment and has a duty to correct the problem. Had Mike been properly trained, he would have reported the situation to human resources immediately rather than asking Ellie to try to handle it herself.

6. Congratulate Your New Employee for Passing Her 90-Day Probationary Period and Let Her Know She's Now Eligible for "Permanent Employee" Benefits Such as Vacation and Health Insurance.

Under California law the employment relationship is presumed to be at-will, meaning either party can terminate the employment relationship with or without a reason. Using the term "permanent" can imply the employer no longer has a right to terminate the employee without just cause. A better term is "regular employee."

Of course an employer should do more to ensure at-will employment relationships. At-will employment should be confirmed on employment applications and in employee handbooks. Managers should be trained to avoid creating oral contracts for permanent employment.

For example, a manager may reassure an employee that “so long as she does a good job, she’ll have a job.” That sets up the employer to be sued for breach of an oral contract if the company has to lay off employees for economic reasons.

7. Pay Everyone a Salary. Payroll Is So Much Easier Without Having to Calculate Overtime.

Who wants to deal with timecards and calculating overtime pay? If all employees agree to work for a straight salary, regardless of the hours they work, what’s wrong with that?

Under both state and federal law, certain employees are exempt from overtime requirements and can be paid a straight salary no matter how many hours a week they work. Employees who don’t qualify for an exemption are entitled to overtime pay, and can’t agree to forego overtime pay in exchange for receiving a salary.

An exempt employee normally is a high-level executive, administrative or professional employee. Other types of exempt employees are certain artists or outside salespeople. All others generally are non-exempt. Titles are irrelevant to the determination of whether an employee is exempt or non-exempt.

Merely placing an employee on a salary does not exempt that employee from wage and hour laws. While a non-exempt employee legally can be paid in the form of a “salary,” that employee earns overtime the same as hourly wage earners.

For example, a non-exempt employee paid a salary of \$400 a week must be paid overtime based on \$10 per hour (\$400 divided by 40 hours), which is \$15 per hour for time-and-a-half and \$20 an hour for double-time.

8. To Increase Productivity, Let Employees Work through Lunch Breaks on Busy Days and Make Up the Missed Time Off on a Slower Day.

Non-exempt employees generally are entitled to a half-hour meal break for every work day of more than five hours. For each workday an employer doesn’t give an employee a required meal break, the employer owes the employee one additional hour of pay.

According to the state Labor Commissioner, to avoid this penalty the employer has an “affirmative obligation to ensure that workers are actually relieved of all duty, not performing any work, and free to leave the worksite.”

On-duty meal periods, where employees are paid for their normal meal period and allowed to eat on the job, generally are permitted only in extremely limited situations where the nature of the work truly prevents an employee from leaving. For example, the night clerk at a small motel may be the only employee on the premises at 3 a.m. when she would normally take a meal break, and so may be given an on-duty meal period.

Exempt employees are not subject to the meal break requirements and may work any number of hours without a meal break.

9. Protect Business Secrets and Prevent Turnover by Requiring All Employees to Sign Non-compete Agreements.

An employee who signs a non-compete agreement is consenting not to work for one of your competitors for a certain period of time after leaving your company. While this practice is legal in many other states, California law specifically prohibits non-compete agreements.

In November 2001, a California Court of Appeal up-held a \$1.26 million jury award for an account manager who was terminated by Aetna U.S. Healthcare when she refused to sign a non-compete agreement. The court held the termination for refusing to sign an illegal agreement was a willful and oppressive violation of California law, entitling the manager to punitive damages.

10. Avoid Employment Law and Tax Hassles by Making Everyone an Independent Contractor.

Many employers operate under the myth that a worker is an independent contractor if s/he:

- wants to be treated as an independent contractor;
- signs a written contract;
- does assignments sporadically, inconsistently or on call;
- is paid commission only;
- has no supervision; or
- does assignments for more than one company.

In fact, independent contractor status is determined primarily by the degree of control the worker has over the manner and means of performing the work. Some other important factors include:

- Who supplied the instruments, tools and place of work. For example, a worker who inputs sales data into the hiring firm's computer at the hiring firm's office is probably an employee.
- Whether the work performed is part of the regular business of the hiring firm. A worker hired to upgrade a computerized inventory control system at a heating and air conditioning company may be an independent contractor, while a worker hired to install air conditioners during the busy summer season is an employee.
- Whether the person performing services is engaged in a distinct occupational business. A bookkeeper who works from her home office running payroll for a dozen local businesses is more likely to be an independent contractor than a college student who runs the payroll for a single business working two afternoons a week.

The consequences for misclassifying an employee as an independent contractor can be significant tax, wage and benefits liabilities, as well as massive fines that may be imposed by state and federal agencies