



Work**Smarts** Virtual Seminar

Hot Employment Topics in California for the Multi-Family Housing Industry

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Agenda

- Compensation of on-site employees
- On-call time, standby time, call-back time
- Reporting time pay
- Independent contractor versus employee issues
- Exempt versus non-exempt issues
- Timekeeping considerations
- Overtime, including regular rate of pay issues
- Meal period and rest breaks rules
- Wage statement compliance
- Payment of final wages
- Key class action and PAGA considerations



Employee Compensation Considerations

Compensation of On-Site Employees

- In California, two ways to compensate an on-site employee
 - Employees who are required to live on-site as a condition of their employment
- (1) Provide a completely free apartment
 - Can use lodging credit toward minimum wage obligation
- (2) Charge employee up to 2/3 of fair market value of apartment
 - Must pay employee for all hours worked (at least minimum wage). You cannot use lodging credit

Compensation of On-Site Employees

- **Lodging credit against minimum wage**
 - Must satisfy both conditions:
 - (1) Apartment furnished as a condition of employment, and
 - (2) Must have a voluntary written agreement with employee
 - Amount of lodging credit is limited by California's wage orders.
 - \$903.60 per month for single person.
 - \$1336.65 where a couple is employed.

Lodging credit is adjusted every time minimum wage increases

Compensation of On-Site Employees

- **Charging rent to employee**
 - Must satisfy following two conditions:
 - (1) No lodging credit used to meet minimum wage obligations; and
 - (2) Must have a voluntary written agreement allowing rent charge to employee.

Employee Compensation: Other Considerations

- **On-call time**

- (1) Whether there is on-premises living requirement;
- (2) Whether there are excessive geographical restrictions on employees;
- (3) Whether the frequency of calls was unduly restrictive;
- (4) Whether a fixed time limit for response was unduly restrictive;
- (5) Whether on-call employee could easily trade on-call responsibilities;
- (6) Whether use of a pager could ease restrictions;
- (7) Whether employee actually engages in personal activities; and
- (8) Whether on-call waiting time is spent primarily for the benefit of employer.

Employee Compensation: Other Considerations

- **Call-back time**

- Under California law, if employee is required to report to work a second time in any one workday and is furnished less than two hours of work on the second reporting period, employee must be paid for minimum of two hours.
- A call-back penalty is paid at regular rate.
- Any actual hours worked count as hours worked and may affect overtime liability.

Employee Compensation: Other Considerations

- **Reporting time pay**

- Employees who are scheduled to report to work but are not put to work or furnished with less than half of their usual or scheduled day's work .
 - (1) Employee must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at regular rate of pay.
 - (2) If employee is required to report to work a second time during same workday and is furnished less than two hours of work second time, employee must be paid for two hours at his or her regular rate of pay.

Employee Compensation: Other Considerations

- **Reporting time pay**

- No reporting time pay is due:
 - (1) When employer's operations cannot begin or continue due to threats to employees or property, or when civil authorities recommend that work not begin or continue.
 - (2) When public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system.
 - (3) When the interruption of work is caused by an Act of God or other cause not within the employer's control, for example, an earthquake.

Employee Compensation: Other Considerations

- **Exempt or non-exempt**

- Both state and federal law apply
- What are the “white collar exemptions”
 - Administrative, executive, and professional exemptions
 - Two basis: Duties test (different under each exemption) and salary test
 - Salary threshold in CA higher than under federal standard and adjusted for inflation each year
 - 2024 CA threshold: \$66,560
- What’s not relevant under duties test?
 - Title
 - Industry custom
 - Payment on a salary basis as opposed to hourly basis
 - Education or experience
 - Management of subordinates

Employee Compensation: Other Considerations

- **Independent contractor versus employee distinction**
 - Relevant to determining:
 - Need to withhold payroll taxes;
 - Eligibility for overtime;
 - Application of meal period and rest break rules;
 - Eligibility for health insurance and other benefits; and
 - Application of leave laws and other employment protections.

Employee Compensation: Other Considerations

- **ABC test**

- (A) The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract and in fact;
- (B) The worker performs work that is outside the usual course of the hiring entity's business; and
- (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Employee Compensation: Other Considerations

- Narrow exceptions to ABC test codified in the Labor Code
 - Business-to-business exception most applicable, but still limited
- Action item: audit classifications and properly apply ABC test, specifically part B of test.



Timekeeping Considerations

Timekeeping in California



- What should your timekeeping logs show?
- What about rounding?
 - *Camp v. Home Depot USA, Inc.* (2022) – employers are not permitted to round when they can capture and/or have captured the exact amount of time an employee has worked during a shift.
 - Applies to shift start/stop times and meal period start/stop times.
- What about editing of time records by managers?
 - Neutral time editing is no longer a defense in California.



Overtime Considerations

California's Overtime Requirements

- 1.5 times the employee's regular rate of pay for:
 - All hours worked in excess of 8 hours up to and including 12 hours in any workday; and
 - The first 8 hours worked on the 7th consecutive day of work in a workweek.
- Twice the employee's regular rate of pay for:
 - All hours worked in excess of 12 hours in any workday; and
 - For all hours worked in excess of 8 on the 7th consecutive day of work in a workweek.
- **What do you do with unauthorized overtime?**

Overtime: Regular Rate of Pay

- **What types of payments should be included in the regular rate of pay?**
 - Shift differentials (such as premiums for work on holidays)
 - Attendance bonuses (*i.e.*, earnings for weekend work as a form of incentive pay)
 - Non-discretionary bonuses
- **Excluded from regular rate of pay:**
 - Reimbursements
 - Discretionary payments
 - Gifts
- **How does an employer determine if a bonus is non-discretionary versus discretionary?**
 - Is the bonus compensating an individual for hours worked or productivity?
 - Role of timing and expectation

Overtime: Regular Rate of Pay

- **Flat sum bonuses and production bonuses – both non-discretionary incentive pay that must be factored into regular rate of pay.**
- Flat sum bonus:
 - Step 1: $(\text{total bonus amount}) / (\text{regular hours worked in bonus-earning period}) = \text{regular rate of pay}$
 - Not total hours worked (*i.e.*, non-overtime hours only)
 - Step 2: pay OT on bonus at 1.5 or 2 times the regular rate calculation for any overtime hours worked in bonus-earning period.
 - **FLSA calculation method is different**

Overtime: Regular Rate of Pay

- **Flat sum bonuses and production bonuses – both non-discretionary incentive pay that must be factored into regular rate of pay.**
- Production bonus:
 - Step 1: production bonus / total hours worked in bonus earning period = regular rate of pay
 - Step 2: pay OT on bonus at .5 or one times the regular rate for all overtime hours worked in bonus-earning period.

Overtime on either type of bonus may be due on either a daily or weekly basis and must be paid in the pay period following the end of the bonus-earning period.

Overtime: Regular Rate of Pay

- **Weighted average method**
 - Applies if employee paid two or more rates by the same employer in the same workweek.
- Formula: total earnings for workweek, including overtime pay / total hours worked during the workweek, including overtime hours.
- If employee works 32 hours at \$11 an hour and also 10 hours at \$9 an hour in same workweek, weighted average (regular rate of pay) for that workweek is \$10.52.
 - $(32 * \$11) + (10 * \$9) = \$442$
 - $\$442 / 42 \text{ hours}$

Overtime: Regular Rate of Pay

- **Where else does the regular rate of pay come up?**
 - Commissioned employees where a component of their pay is hourly;
 - Piece rate workers;
 - Sick time payments; and/or
 - Meal period and rest break premium payments.
 - What are they?
 - One hour of additional pay for each workday a meal period or rest break was not provided.
 - What rate should they be paid at?
 - Regular rate of pay (not base rate of pay)
 - Best practice: separate pay codes in payroll system for meal period premiums and rest break premiums.
- **Why should employers care about getting overtime payments right?**
 - Non-payment of overtime creates derivative wage and hour liability.



Meal Periods and Rest Breaks

California's Meal Period Requirements

- Five-hour and 10-hour rules applicable to non-exempt employees
 - First 30-minute meal period by the end of fifth hour of work
 - Second 30-minute meal period by the end of 10th hour of work
- Time records must show start/stop times associated with meal periods

California's Meal Period Requirements

- Non-compliant meal period = short, late, or missed
- Meal period waivers: What if an employee doesn't want to take meal periods?
 - May waive first meal period if work no more than six hours in a day.
 - May waive second meal period if: (i) work no more than 12 hours in a day; and (ii) do not waive first meal period.
 - How can employers implement meal period waivers?
 - What happens if an employee works more than 12 hours?
 - What happens if an employee works 11 hours, but does not take a first meal period?

California's Meal Period Requirements

- *Brinker Restaurant Corp v. Superior Court* (2012 CA SC)
 - Must not discourage employees from taking meal periods.
 - Essentially means employers must provide the opportunity to take meal periods, but don't have to police.
- Meal periods must be uninterrupted, employees must be allowed to leave employer premises, and must be relieved of all job duties.
 - Exception: On-duty meal periods
 - Permitted only when the nature of work prevents employee from being relieved of all duty
 - Must have written agreements

California's Rest Break Requirements

- California requires employers to provide non-exempt employees with the opportunity to take 10-minute paid rest breaks for every four hours of work or major fraction thereof:

Hours of Work in Workday	Number of Rest Breaks
Less than 3.5	0
At least 3.5 but less than 6	1
At least 6 but less than 10	2
At least 10 but less than 14	3
At least 14 but less than 18	4

California's Rest Break Requirements

- Time records need not show start/stop times associated with rest breaks.
- Employees are entitled to leave their work premises.
- Rest breaks cannot be combined with meal periods.
- Rest breaks should be taken in the middle of each work period to the extent practicable.
- Rest breaks should not be taken at the beginning or end of a shift.
- Must “authorize and permit,” but not need to “ensure” taken.

California's Meal Period and Rest Break Requirements

- **Consequences of violations = employers owe meal period and/or rest break premiums**
- *Naranjo v. Spectrum Security Services* (2022 CA SC): meal and rest break premiums are “wages,” so there is liability for failure to pay these.
- One additional hour of pay at the regular rate of pay for each workday a meal period or rest break was not provided (*i.e.*, short, missed, late).
 - Reminder: regular rate of pay is not the same as base rate of pay
 - How should employers determine whether to pay:
 - Meal period premiums?
 - Rest break premiums?



Wage Statements and Final Pay

Wage Statement Compliance

- Employers must provide accurate, itemized wage statements along with paychecks, showing:
 - Gross wages earned;
 - Total hours worked;
 - Piece rate units;
 - Deductions;
 - Net wages earned;
 - Inclusive dates of pay period;
 - Name of employee and last four digits of SSN or employee ID number other than SSN;
 - Legal name and address of employer; and
 - All applicable hourly rates in effect.

Timing of Payment of Wages

- When should wages be paid?
 - Due and payable twice during each calendar month, on days designated in advance as regular paydays.
 - Labor performed between first and 15th days, inclusive, of any calendar month, must be paid between 16th and 26th day of same calendar month.
 - Labor performed between 16th and last day, inclusive, of any calendar month, must be paid between first and 10th day of following month.
 - Different rule for exempt employees: can be paid once each calendar month on or before the 26th of the month during which labor was performed (entire salary, including unearned portion must be paid).

Final Wages

- Discharge/termination: wages due on date employment ends (different than last active day of work)
- Resignation:
 - If employee provides less than 72 hours' notice, final wages due in 72 hours
 - If employee provides 72 hours or more notice, wages due on termination date
- Accrued and unused vacation or PTO are final wages.
- Commissions:
 - If can be calculated at termination, payable at termination
 - If cannot be calculated at terminated, payable as soon as can be calculated
- Reimbursable expenses can be paid separately from final paycheck subsequent from termination date.

Final Wages

- Mailing versus receipt of check:
 - Employee must receive final wages within time periods discussed.
 - Termination – delivered to employee or deposited directly into bank account on same date (with employee's express consent).
- Consequence for non-payment: maximum penalty equivalent to 30 days of wages.



Class Action and PAGA Considerations

Key Wage and Hour Considerations

- Paper versus electronic timekeeping?
- Recording of rest breaks?
- Automatic meal period premium payments?
- Meal period waivers?
- Attestation language in connection with meal periods and rest breaks?
- Interruptions of meal periods and rest breaks?
- Grace time policies to avoid off-the-clock work related claims?
 - Walking time
 - Waiting time
 - Donning/doffing time

Why Use Arbitration Agreements?

- Pros

- Currently, law allows employers to enter into mandatory arbitration agreements with employees
- Limits class action claims
- More private of a forum than litigation
- Streamlined discovery and procedures

- Cons

- Arbitration is an expensive forum
- Arbitration agreements do not completely cut-off PAGA claims
- Risk of multiple individual arbitrations, if arbitration is not correctly postured

Thank You!



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About the Presenter Jennifer Coleman

Jennifer Coleman is a trial lawyer with an active practice in intellectual property, labor and employment, and complex litigation cases. Her experience includes patent damages, trade secret misappropriation, remediation, single plaintiff and class action wage and hour controversies, unfair competition and employee mobility matters.

Jen also handles employment disputes involving claims of wrongful termination, discrimination, harassment, and retaliation; leaves of absences; employment policies and procedures; employee discipline; hiring practices; workplace violence; and fraud relating to complex financial transactions. She regularly advises and counsels employers of all sizes on various day-to-day legal issues.

Adding to a diverse practice, Jen represents clients with respect to GDPR compliance issues and complex remediation issues. She has been involved in cases with diverse technologies, ranging from customer management AI software to electronic financial transactions and real-time web transactions from web applications and wireless modems to wireless local area network peripheral control.

Jen additionally has significant experience with federal and state court e-discovery issues and has received an LPM LaunchPad Certificate in Fundamentals of Legal Project Management and an Advanced Certificate of Achievement in the LPM Institute Legal Project Management Advanced Course. Her legal background includes criminal defense trial experience through working on various pro bono felony cases with the Santa Clara (California) County Public Defender's Office, including unlawful practice of medicine without a license, tax fraud, and robbery.



About the Presenter

Karen K. McCay

Karen McCay is the Office Managing Partner of the California offices of Spencer Fane LLP, which has offices in twenty-six cities across the country. Ms. McCay's practice involves all aspects of real estate and contract law, with particular emphasis on operational issues in the multi-family housing industry. Her residential rental housing experience encompasses two spheres: market-rate housing and subsidized housing. Ms. McCay's clients include large REITs, individual property owners, management companies, developers, and large and small non-profits.

With almost thirty years of experience, much of Ms. McCay's law practice is dedicated to preventative advice and compliance counseling for non-profit and for-profit businesses, although she remains strategically involved in her clients' litigation as well. In addition, she conducts trainings in fair housing, preventing sexual harassment, disability accommodation and similar subjects for clients and industry organizations such as the California Apartment Association, AHMA-NCH, LeadingAge California, Housing California and CSH.



About the Presenter

Elaisha Nandrajog

Elaisha Nandrajog represents employers in a wide range of matters in state and federal court as well as before administrative agencies, providing preventative counsel that helps successfully resolve litigious matters. She has experience defending companies in single-plaintiff and multi-plaintiff cases against claims of wrongful termination, discrimination, harassment, retaliation, and failure to accommodate. Her work involves complex wage and hour class actions as well as representative actions brought under California's Private Attorneys General Act.

In addition to her litigation practice, Elaisha advises employers and managers on hiring, screening, retention, and termination practices as well as various wage and hour compliance issues. She is also involved in the development and review of company policies to identify risk and ensure compliance.

Elaisha also provides due diligence review of target companies in mergers and acquisitions and has conducted internal employment investigations for public and private employers throughout the Bay Area. Her commercial litigation experience includes work on breach of contract, fraud, and unfair competition and interference claims.



About the Presenter

Servando Sandoval

Servando R. Sandoval is a Partner of the San Jose office of Spencer Fane LLP. His areas of concentration include all aspects of real estate, with special emphasis on the multi-family housing industry. He represents both for-profit and non-profit owners, property managers and developers.

Mr. Sandoval provides operational advice in all areas of employment and real estate, including fair housing and compliance issues, and has an extensive litigation practice representing landlords and other businesses in both court actions and administrative proceedings. He conducts trainings on preventing sexual harassment, operational issues and similar topics.