CALIFORNIA EMPLOYMENT LAW COUNCIL ANNUAL MEETING

NOVEMBER 2016

ANNUAL WAGE & HOUR UPDATE

"WE KNEW THAT AND HAVE TAKEN CARE OF IT"

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No.	We Are Aware That . . .	We Also Are Aware of the Underlying Law	So, We Are OK
1.	**Minimum Wage**: We are aware that the California minimum wage will increase to $10.50 per hour on January 1, 2017 and to $15 per hour on January 1, 2022. We also are aware that there is no CBA exemption from state minimum wage requirements. Therefore, we have taken the steps necessary to ensure compliance.	California Law (SB 3) increases the current $10 per hour minimum wage each year over the next seven years for employers with more than 25 employees, starting with $10.50 per hour on January 1, 2017, and ending with $15 per hour on January 1, 2022. The new law provides for annual increases thereafter based on a formula tied to the U.S. Consumer Price Index. Each of the fixed minimum wage increases is delayed one year for employers with 25 or fewer employees.	☐ Yes ☐ No
2.	**Minimum Salary for California Exempt Status**: We are aware that the minimum salary for exempt status under California law is 2 X minimum wage x 2080. Therefore, we understand that the current minimum salary will increase to $43,680 on January 1, 2017 and, ultimately, to $62,400 on January 1, 2022.	Same.	☐ Yes ☐ No
3.	**Minimum Salary for Computer Software Professionals**: We are aware that the Department of Industrial Relations has adjusted the computer software employee's minimum hourly rate of pay exemption from $41.85 to $42.39, the minimum monthly salary exemption from $7,265.43 to $7,359.88, and the minimum annual salary exemption from $87,185.14 to $88,318.55, effective January 1, 2017, reflecting a 1.3% increase in the cost of living. Therefore, we have taken steps to make sure that our salaried computer professionals are paid at least these amounts.	California Labor Code Section 515.5; State of California, Department of Industrial Relations, Office of the Director—Research Unit, Memorandum on the Overtime Exemption for Computer Software Employees, October 5, 2016, https://www.dir.ca.gov/oprl/ComputerSoftware.pdf.	☐ Yes ☐ No

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4.	**Minimum Salary for Federal Exempt Status**: We are aware that the minimum salary for exempt status under federal law is currently scheduled to increase to $47,476 on December 1, 2016. We also are aware that the minimum salary to permit application of the Highly Compensated Executive exemption currently is scheduled to increase to $134,004 on the same date. We are further aware that these minimums are scheduled to increase every three years according to the stated formula. Finally, we also are aware that there are court and other challenges to the increase that may delay its effective date or eliminate the increase altogether.	Vol. 81 Fed. Reg. 32391 (May 23, 2016).	☐ Yes ☐ No
5.	**Meal Periods**: We are aware that we must pay premiums for non-compliant meal periods on a pay-period-by-pay-period basis. Therefore, we have implemented procedures for identifying and paying those premiums in a timely manner.	*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1108 (2007) ("The Senate amendments also eliminated the requirement that an employee file an enforcement action, instead creating an affirmative obligation on the employer to pay the employee one hour of pay. (§ 226.7, subd. (b).) Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime. . . . By contrast, Labor Code provisions imposing penalties state that employers are 'subject to' penalties and the employee or Labor Commissioner must first take some action to enforce them. The right to a penalty, unlike section 226.7 pay, does not vest until someone has taken action to enforce it.") (emphasis added). *Safeway, Inc. v. Superior Court (Esparza)*, 238 Cal.	☐ Yes ☐ No

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		App. 4th 1138 (2015) (Court of Appeal approved the trial court's certification of a meal period class under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, based on the allegation that Safeway had a practice of never paying one-hour premiums for meal period violations, as required by California law).	
6.	**Rest Periods**: We are aware that a court could conclude that the logic of *Murphy* and *Safeway* with respect to the payment of premiums for non-compliant meal periods could apply to rest periods. Therefore, we have implemented procedures for identifying and paying those premiums in a timely manner, or we have accepted the risk of not doing so.	Same.	☐ Yes ☐ No
7.	**Rest Periods**: We are aware that the California Supreme Court currently is considering whether employees may remain on call during rest periods without the obligation to pay a rest period premium. We are monitoring this development.	*Augustus v. ABM Security Services, Inc.*, 233 Cal. App. 4th 1065 (2015) ("This case presents the following issues: (1) Do Labor Code, § 226.7, and Industrial Welfare Commission wage order No. 4-2001 require that employees be relieved of all duties during rest breaks? (2) Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Security Solutions, Inc.* 60 Cal. 4th 833(2015) (*Note*: Case argued September 29, 2016. Decision will issue before the end of December.)	☐ Yes ☐ No

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8.	**Heat Recovery Periods**: We are aware that employees are entitled to heat recovery periods (and premiums for non-compliant heat recovery periods) if they work in "outdoor places of employment" which can include more than open air locations (e.g., loading docks). We also are aware that, effective January 1, 2017, a new law adds section 6720 to the California Labor Code and requires Cal-OSHA to develop standards that minimize heat-related illness and injury among workers working in indoor places of employment by January 1, 2019. Based upon the standards currently in effect, we have promulgated heat illness policies and practices (including provision for water and shade), implemented heat illness training, and provided a mechanism to pay heat recovery period premiums as required.	Cal. Dep't of Industrial Relations, Heat Illness Prevention Enforcement Q&A (May 14, 2015), http://www.dir.ca.gov/dosh/heatIllnessQA.html.	☐ Yes ☐ No
9.	**Meal, Rest and Heat Recovery Premiums – Payment at the "Regular Rate of Compensation"**: We are aware that there is an issue whether the requirement in Labor Code § 226.7 to pay meal, rest and heat recovery premiums at the "regular rate of compensation" means an employee's base hourly rate or an employee's "regular rate of pay" used to calculate the value of overtime premiums. If we pay such premiums at an employee's base hourly rate, we are aware of the risk and know that we should monitor developments in this area.	Cases Holding That Premiums Should Be Paid At The Base Rate: *Bredescu v. Hillstone Restaurant Group, Inc.*, No. SACV 13-1289-GW RZX, 2014 WL 5312546 (C.D. Cal. Sept. 18, 2014) ("there is no authority supporting the view that 'regular rate of compensation,' for purposes of meal period compensation, is to be interpreted the same way as 'regular rate of pay' is for purposes of overtime compensation"). *Wert v. U.S. Bancorp,* No. 13–cv–3130–BAS (BLM), 2014 WL 7330891(S.D. Cal. Dec. 18, 2014) (plain language of §§ 226.7 and 510 does not suggest that the phrases "regular rate of compensation" is synonymous to and may be used interchangeably with "regular rate of pay." The very fact that the awards under §§ 226.7 and 510 are of a different nature for	☐ Yes ☐ No

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		potential plaintiffs--awards being a penalty under § 226.7 and a wage under § 510--strongly suggests that the definition of the awards--i.e., "regular rate of compensation" versus "regular rate of pay"--are also different).	
10.	**Labor Contractor Joint Liability – Generally**: We are aware that we are jointly liable with every one of our labor contractors with respect to the wages and workers' compensation of their employees. Therefore, we have reviewed our master contracts with our labor contractors and made sure: (1) the contractors are responsible for the proper payment of wages and providing workers' compensation coverage for their employees; and (2) that we have made appropriate changes to the indemnification provisions of those contracts in the event that the provider does not comply with its obligations.	Cal. Lab. Code § 2810.3(b) ("A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for both of the following: (1) The payment of wages. (2) Failure to secure valid workers' compensation coverage as required by Section 3700."). *Johnson v. Serenity Transportation*, No. 15-CV-02004-JSC, 2016 WL 270952 (N.D. Cal. Jan. 22, 2016) (finding a private right of action to sue under Labor Code § 2810.3).	☐ Yes ☐ No
11.	**Labor Contractor Joint Liability – Meal and Rest Period Premiums**: We are aware that meal premiums are "wages." Therefore, we have alerted our labor contractors that we expect them not only to provide meal and rest periods as required by California law, but also to pay meal and rest premiums to their employees who work on our premises as required by California law.	Same.	☐ Yes ☐ No
12.	**Liability for Wage Payments to Employees of Farm Labor, Garment, Janitorial, Security Guard or Warehouse Contractors**: We are aware that, if we enter into certain labor contracts, we must take steps to ensure that the amount we pay is sufficient to permit the contractor to comply with all federal and state laws governing the services to be provided. Therefore, we have reviewed all	Cal. Lab. Code § 2810(a) ("A person or entity shall not enter into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable	☐ Yes ☐ No

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	such contracts to make sure that they provide sufficient funds and that we have included the provisions in all such contracts as specified by the controlling statute.	local, state, and federal laws or regulations governing the labor or services to be provided."). Cal. Lab. Code § 2810(d) ("[A] contract or agreement with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor for labor or services shall be in writing, in a single document, and contain all of the following provisions, in addition to any other provisions that may be required by regulations adopted by the Labor Commissioner from time to time: (1) The name, address, and telephone number of the person or entity and the construction, farm labor, garment, janitorial, security guard, or warehouse contractor through whom the labor or services are to be provided. (2) A description of the labor or services to be provided and a statement of when those services are to be commenced and completed. (3) The employer identification number for state tax purposes of the construction, farm labor, garment, janitorial, security guard, or warehouse contractor. (4) The workers' compensation insurance policy number and the name, address, and telephone number of the insurance carrier of the construction, farm labor, garment, janitorial, security guard, or warehouse contractor. (5) The vehicle identification number of any vehicle that is owned by the construction, farm labor, garment, janitorial, security guard, or warehouse contractor and used for transportation in connection with any service provided pursuant	

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		to the contract or agreement, the number of the vehicle liability insurance policy that covers the vehicle, and the name, address, and telephone number of the insurance carrier. (6) The address of any real property to be used to house workers in connection with the contract or agreement. (7) The total number of workers to be employed under the contract or agreement, the total amount of all wages to be paid, and the date or dates when those wages are to be paid. (8) The amount of the commission or other payment made to the construction, farm labor, garment, janitorial, security guard, or warehouse contractor for services under the contract or agreement. (9) The total number of persons who will be utilized under the contract or agreement as independent contractors, along with a list of the current local, state, and federal contractor license identification numbers that the independent contractors are required to have under local, state, or federal laws or regulations. (10) The signatures of all parties, and the date the contract or agreement was signed.”).	

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13.	**Labor Contractor – Joint Liability – Affordable Care Act**: We are aware that, as of January 1, 2015, the ACA applies to our labor contractors who meet the test for employer coverage. As a consequence, we are aware that, either by statute (e.g., Labor Code § 2810) or by the application of joint employer principles, we may need to pay higher fees to account for such coverage or we may be liable for the penalties associated with a contractor's failure to provide that coverage. Therefore, we have included in all of our service contracts a clause specifically addressed to compliance with the ACA.	26 C.F.R. § 54.4980H-1.	☐ Yes ☐ No
14.	**Independent Contractor – Standard for Determining**: We are aware that the standards for determining whether a worker is an employee or independent contractor is in flux and before the California Supreme Court in the *Dynamex* case. To the extent that we classify any workers as independent contractors, we are aware of the risks.	*Dynamex Operations West, Inc. v. Superior Court (Lee)*, 230 Cal. App. 4th 718 (2014) ("This case presents the following issue: In a wage and hour class action involving claims that the plaintiffs were misclassified as independent contractors, may a class be certified based on the Industrial Welfare Commission definition of employee as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35, or should the common law test for distinguishing between employees and independent contractors discussed in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341 control?").	☐ Yes ☐ No
15.	**Wage Statements – More Than Nine Format Requirements**: We are aware that there are five formatting obligations beyond the nine obligations listed in Labor Code § 226(a). Therefore, we have audited our wage statement policies and procedures to make sure that we are fully compliant with these additional obligations. 1. For overtime paid in the following pay period, Labor Code 204(b)(2) requires that the stub show the	1. Cal. Lab. Code § 204(b)(2) ("An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the	☐ Yes ☐ No

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	inclusive dates of the pay period to which the correction pertains. 2. For any correction to hours worked in a prior period, the DLSE requires that the stub show the inclusive dates of the pay period to which the correction pertains. 3. Effective July 1, 2015, the California Healthy Workplaces, Healthy Families Act requires that employers add to wage statements (or provide in a separate writing on the designated pay date) the amount of covered paid sick leave available for use. 4. For employees paid by commission, the DLSE interprets the requirement in Labor Code section 226(a)(3) to record the number of piece rate units earned and any applicable piece rate to require that employers record commission rates and sales. 5. Effective January 1, 2016, Labor Code section 226.2 required that pay stubs for employees paid on a piece-rate basis for any work performed during a pay period contain prescribed information.	inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.") 2. Cal. Dep't of Indus. Rel., Div. of Labor StandardsEnforcement, Opinion Letter, at 4 (May 17, 2002) https://www.dir.ca.gov/dlse/opinions/2002-05-17.pdf ("Any corrections set out in a subsequently issued paystub must state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.") 3. Cal. Lab. Code § 246(h) ("An employer shall provide an employee with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee's itemized wage statement described in Section 226 or in a separate writing provided on the designated pay date with the employee's payment of wages. If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer may satisfy this section by indicating on the notice or the employee' s itemized wage statement 'unlimited.' The penalties described in this article for a violation of this subdivision shall be in lieu of the penalties for a violation of Section 226."). 4. 2002 Update of DLSE Enforcement Policies and Interpretations Manual, § 14.1.1 (June 2002), http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf ("[T]his section has been interpreted by DLSE to also require the same information for commissioned employees, i.e., commission rate	

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		and amount of sales"). 5. Cal. Lab. Code § 226.2(a)(2) ("[F]or employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period: . . . (2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable: (A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period. (B) Except for employers paying compensation for other nonproductive time in accordance with paragraph (7), the total hours of other nonproductive time, as determined under paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay period."). *Soto v. Motel 6 Operating, L.P.*, No. D069403, 2016 WL 6123927 (Cal. Ct. App. Oct. 20, 2016) ("Section 226(a) does not require employers to include the monetary value of accrued paid vacation time in employee wage statements unless and until a payment is due at the termination of the employment relationship.").	
16.	**Smart Phone, Internet and Other Monthly Fee Reimbursements**: We are aware that, if we require employees to use their personal electronic devices for business purposes, we are at risk if we reimburse them only for their out-of-pocket expenses. Therefore, we have revised our electronic device policy to make sure that we	*Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1140 (2014) ("We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited	☐ Yes ☐ No

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	pay for the percentage of each such employee's cell phone bill that corresponds to their required business use.	minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.") (footnote omitted) emphasis added); *Id*. at 1144 ("Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expenses onto the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill. Because of the differences in cell phone plans and worked-related scenarios, the calculation of reimbursement must be left to the trial court and parties in each particular case.") (emphasis added). *Aguilar v. Zep Inc.,* No. 13-CV-00563-WHO, 2014 WL 4245988 (N.D. Cal. Aug. 27, 2014). (Obligation to reimburse the reasonable percentage of monthly fees for required use of cell phones also applies to the reasonable percentage of monthly fees for required use of the internet). *Cortes v. Market Connect Group, Inc.* No. 14CV784-LAB DHB, 2015 WL 5772857 (S.D. Cal. Sept. 30, 2015) (class certified regarding Labor Code §2802 claims for the cost of the use of cameras and internet connections, irrespective of whether these items are common or whether the employees incurred no extra expense).	

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17.	**<u>One Days Rest in Seven – Determination of Entitlement</u>**: We are aware that the California Supreme Court currently is considering the standards that should apply to the determination whether an employee is entitled to one days rest in seven. Therefore, we are aware of risks, to the extent that we are not permitting employees to take one days rest in seven or four days rest in thirty.	*Mendoza v. Nordstrom, Inc.*, 778 F.3d 834 (9th Cir. 2015) ("The questions presented are: "(A) California Labor Code section 551 provides that '[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven.' Is the required day of rest calculated by the workweek, or is it calculated on a rolling basis for any consecutive seven-day period? (B) California Labor Code section 556 exempts employers from providing such a day of rest 'when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.' (Emphasis added.) Does that exemption apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week? (C) California Labor Code section 552 provides that an employer may not 'cause his employees to work more than six days in seven.' What does it mean for an employer to 'cause' an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?").	☐ Yes ☐ No
18.	**<u>Commission Plans – Timing of Commission Payments</u>**: We are aware that we must pay the commissions of both exempt and non-exempt employees no later than the pay period after which they are earned. Therefore, we have reviewed our commission plans to align our advanced and earned commissions to avoid late payments.	*Peabody v. Time Warner Cable, Inc.*, 59 Cal. 4th 662 (2014) ("[S]ection 204, subdivision (a) . . . provides, '[a]ll wages . . . earned by any person in any employment are due and payable twice during each calendar month . . . .' Wages include 'all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, *commission basis*, or other method of calculation.' . . . In other words, all earned wages, *including commissions*, must be paid	☐ Yes ☐ No

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		no less frequently than semimonthly.") (third ellipses added) (emphasis in original) (citation omitted); *Id*. at 669 ("Section 204(a) . . . requires that semimonthly paychecks include the wages earned *during that pay period*.") (emphasis in original).	
19.	**Commission Plans – Prescribed Form**: We are aware that our commission plans for both exempt and non-exempt employees must be in writing, must explain the method by which we calculate commissions, must be signed by the employer, and must include a signed receipt from each employee.	Cal. Lab. Code § 2751 ("(a) Whenever an employer enters into a contract of employment with an employee for services to be rendered within this state and the contemplated method of payment of the employee involves commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid. (b) The employer shall give a signed copy of the contract to every employee who is a party thereto and shall obtain a signed receipt for the contract from each employee. In the case of a contract that expires and where the parties nevertheless continue to work under the terms of the expired contract, the contract terms are presumed to remain in full force and effect until the contract is superseded or employment is terminated by either party.") (emphasis added).	☐ Yes ☐ No
20.	**Regular Rate of Pay – Generally**: We are aware that the regular rate of pay must be determined by workweek, not by pay period, and must include all wages for work performed. We have reviewed our payroll calculation practices and confirmed that: (1) we know what forms of wages must be included in and excluded from the regular rate of pay; (2) we know how to include all forms of wages in the regular rate of pay; and (3) we calculate the regular rate of pay for each workweek of each payroll period.	29 C.F.R. §§ 778.103-104.	☐ Yes ☐ No

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21.	**Regular Rate of Pay – Inclusions**: We are aware that all of the following forms of wages must be included in the regular rate of pay (absent a Labor Code § 514 exemption from California overtime rules): • Shift differentials • Stipends for on-call time • Pay tied to the completion of a project or remaining employed for a designated period of time • Incentive pay of any kind (e.g., bonuses for efficiency, productivity or safety), unless both the existence of the pay plan and the amount of any payment are withheld until a day very close to the date of payment • Premiums for work on Saturdays, Sundays, Holidays or other days of rest that are not at least 1.5 times the base rate of pay • Premiums for work outside normal shift hours, unless those premiums apply to any hour outside a designated shift "window" and are at least 1.5 times the base rate of pay	2002 Update of DLSE Enforcement Policies and Interpretations Manual, § 49 (June 2002), http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf.	☐ Yes ☐ No
22.	**Regular Rate of Pay – No Federal CBA Exemption**: We are aware that there is no federal exemption from overtime for employees covered by CBAs as there is in California. Therefore, we pay overtime premiums based upon the regular rate of pay to our CBA-covered employees for all hours worked over 40 in one workweek.		☐ Yes ☐ No

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23.	**Regular Rate of Pay – Uncertainty Regarding Calculation for Payments of Fixed Sum Bonuses**: We are aware that the California Supreme Court is considering whether employers must calculate overtime due on fixed sum bonuses by including only straight time hours worked in the denominator of the regular rate equation (rather than all hours worked) and by using a 1.5 overtime multiplier (rather than a .5 multiplier). We are monitoring the progress of this litigation.	*Alvarado v. Dart Container Corp. of California*, 243 Cal. App. 4th 1200 (2016).	☐ Yes ☐ No
24.	**Regular Rate of Pay – Payments In Lieu of Benefits**: We are aware that, if we pay employees for foregoing medical coverage, those payments belong in the regular rate of pay.	*Flores v. City of San Gabriel*, 824 F.3d 890 (9th Cir. 2016) ("we hold that the City's cash-in-lieu of benefits payments are not properly excluded from the calculation of the regular rate of pay under either § 207(e)(2) or (e)(4)").	☐ Yes ☐ No
25.	**Regular Rate of Pay – Cash Out of Sick Leave**: We are aware that, unlike payments for unused vacation or PTO, payments for unused sick leave must be included in the regular rate of pay on the ground that such payments are akin to attendance bonuses.	DOL Opinion Letter FLSA2009-19 (Jan 16, 2009); *Acton v. City of Columbia,* 436 F.3d 969, 979 (8th Cir. 2006) (where sick leave buybacks were conditioned on several years of coming to work regularly, they functioned as nondiscretionary reward for regular workplace attendance, so counted as part of regular rate); *Chavez v. City of Albuquerque,* 630 F.3d 1300, 1309-1310 (10th Cir 2011) (sick leave buybacks are generally in nature of attendance bonuses, which count as part of regular rate, because of employers' incentives to reduce unscheduled leave that burdens employer with finding replacement).); *but see Featsent v. City of Youngstown,* 70 F.3d 900, 905 (6th Cir 1995) (rejecting view that buyback of sick leave should be seen as an attendance bonus and counted in the regular rate).	☐ Yes ☐ No

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26.	**Piece Rates – Calculation of Wages for Rest and Recovery Periods at a Special Weighted Average Rate**: We are aware that, if we pay any wages to any employees measured by the piece, we will have new pay calculation and wage statement obligations as of January 1, 2016.	Cal. Lab. Code § 226.2(a)(3): ("(A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of: (i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods. (ii) The applicable minimum wage. (B) For employers who pay on a semimonthly basis, employees shall be compensated at least at the applicable minimum wage rate for the rest and recovery periods together with other wages for the payroll period during which the rest and recovery periods occurred. Any additional compensation required for those employees pursuant to clause (i) of subparagraph (A) is payable no later than the payday for the next regular payroll period.").	☐ Yes ☐ No
27.	**Piece Rates – Safe Harbor Back Wage Payment**: We are also aware that, if we have paid any employees any wages measured by the piece since July 1, 2012, there are new back pay decisions that we must have made by July 1, 2016. Therefore, we have reviewed all of the earnings codes in our payroll system and confirmed either that we have not paid piece rate wages of any kind since July 1, 2012 or that we have and will make all of the decisions required by the new law.	Cal. Lab. Code § 226.2(b).	☐ Yes ☐ No

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28.	**Piece Rates – New Pay Calculation**: We are aware that, if we continue to pay any wages to any employee measured by the piece, the special calculations required to compensate rest and recovery periods are unlike any imposed in the Labor Code. The new method requires a weighted average calculation in which the numerator and denominator exclude the pay and hours applicable to rest and recovery periods. Therefore, we have made sure that our Payroll team is aware of the special calculation and its required display on wage statements.	Cal. Lab. Code § 226.2(a)(3)(A)(i) ("An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.") (emphasis added).	☐ Yes ☐ No
29.	**Day Divide and Week Divide – Generally**: We are aware that federal and state calculations of weekly and daily overtime require that we use only the hours worked in each workweek and in each work day to determine the regular rate of pay. Therefore, we do not include in any workweek or work day the hours that span the divide between a workweek or work day.	29 C.F.R. § 778.104. Cal. Lab. Code § 500.	☐ Yes ☐ No
30.	**Day Divide and Week Divide – Unlawful to Make Changes in Either to Evade Overtime**: We are aware that, although federal and state law permit an employer to establish and to modify the times on which the workday and weekend end for all or groups of employees, changes that result in lower overtime costs will be reviewed to determine whether they were instituted to evade overtime. Therefore, to the extent that we have changed our day divides or week divides, or intend to do so, we are taking that step for reasons other than the reduction in overtime costs.	*Henry v. Home Depot U.S.A. Inc.*, No. 14-CV-04858-JST, 2016 WL 39719 (N.D. Cal. Jan. 4, 2016) (employer who moved workday to midnight to midnight not entitled to SJ, where it could not provide evidence that the move was not intended to evade overtime); *Jakosalem v. Air Services Corp*, No. 13-CV-05944-SI, 2014 WL 7146672 (N.D. Cal. Dec. 15, 2014) (same).	☐ Yes ☐ No

No.	We Are Aware That . . .	We Also Are Aware of the Underlying Law	So, We Are OK
31.	**California Sick Leave – Generally**: We are aware that, for both exempt and non-exempt employees, we must have created no later than July 1, 2015 either: (1) a free-standing 24-hour/3-day lump sum or accrual policy; or (2) modified an existing PTO, vacation or sick leave policy to include the special terms and conditions required by the HWHFA.	Cal. Lab. Code §§ 245-248.5.	☐ Yes ☐ No
32.	**California Sick Leave – Proper Pay for HWHFA Leave Time**: We are aware that we must pay for HWHFA sick leave at either a specially designated 90-day weighted average rate or at the regular rate. Therefore, we have programmed our systems to pay HWHFA either at one of these rates or at no less than one of these rates (e.g., by using the highest rate in effect over the previous 90 days or within the workweek of the sick leave).	Cal. Lab. Code § 246(k) ("For the purposes of this section, an employer shall calculate paid sick leave using any of the following calculations: (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek. (2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.") (emphasis added).	☐ Yes ☐ No
33.	**Payment of Accrued but Unused Vacation Upon Termination – Calculation to the Date of Termination**: We are aware that we owe accrued but unused vacation to terminated employees through their termination dates. Therefore, we do not pay terminated employees the vacation balances shown on our payroll records, which typically are calculated by month, by payroll period or at some other interval. Instead, we have adopted a practice of ensuring that terminated employees receive all of their posted vacation and any additional vacation that may have accrued since the last update of vacation balances.	*Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982).	☐ Yes ☐ No

No.	We Are Aware That . . .	We Also Are Aware of the Underlying Law	So, We Are OK
34.	**Payment of Accrued but Unused Vacation Upon Termination – Sums Included in the Calculation**: We are aware that an employee is entitled to the payment of all accrued but unused vacation upon termination at his or her "final rate." We also are aware that an employer can pay vacation at any specified rate, and that the courts and the DLSE will require employers to pay vacation upon termination at whatever rate the vacation policy provides. Therefore, because we pay hourly rates, salaries, commissions, shift differentials, bonuses and other forms of pay, we have clarified the rate at which we pay for vacation in our vacation policy, so that we can avoid calculation disputes with terminated employees and the potential for expensive waiting time penalties.	*Drumm v. Morningstar, Inc.*, 695 F. Supp. 2d 1014 (N.D. Cal. 2010). Cal. Dep't of Indus. Rel., Div. of Labor Standard Enforcement, Opinion Letter (January 28, 2003), http://www.dir.ca.gov/dlse/opinions/2003-01-28.pdf.	☐ Yes ☐ No
35.	**Waiting Time Penalties – Calculation**: We are aware that there is authority holding that waiting time penalties include not only daily compensation based upon an employee's salary or hourly rate, but also any differentials, commissions or incentive compensation that comprise an employee's continuing wages. Therefore, we either include those sums when calculating waiting time penalties or have elected to run the risk of their exclusion.	*Drumm v. Morningstar, Inc.*, 695 F. Supp. 2d 1014 (N.D. Cal. 2010). Cal. Dep't of Indus. Rel., Div. of Labor Standard Enforcement, Opinion Letter (January 28, 2003), http://www.dir.ca.gov/dlse/opinions/2003-01-28.pdf.	☐ Yes ☐ No
36.	**Time Recording – Generally**: We are aware that, under California law, we are required to report the in/out times for each work period and the in/out times for meal periods. Therefore, we have ceased all time rounding, all pre-population of time entries and automatic deductions for presumed meals, or, if we have maintained any of those practices, we have accepted the risk of alleged off-the-clock work claims.	Industrial Welfare Commission Wage Order § 7-2001, http://www.dir.ca.gov/iwc/IWCArticle7.pdf.	☐ Yes ☐ No

No.	We Are Aware That . . .	We Also Are Aware of the Underlying Law	So, We Are OK
37.	**Time Recording – Time Rounding**: We are aware that federal and state law permit time rounding provided that it does not result, over a period of time, in failure to compensate employees properly for all the time they have actually worked. Therefore, to the extent that we permit rounding, we have reviewed our actual and rounded time entries and found no shortfall for the employees covered by our rounding policy.	29 CFR §785.48(b); DLSE Enforcement Policies and Interpretations Manual §47.2. *Corbin v. Time Warner Entertainment – Advance/Newhouse Partnership*, 821 F.3d 1069(9th Cir. 2016) (court finds 15-minute rounding lawful under federal and state law and specifically holds that rounding claims require proof of adverse results for groups, not individuals).	☐ Yes ☐ No
38.	**Time Recording – Preliminary and Postliminary Time**: We are aware that California law requires pay for all time worked and that *de minimis* time exceptions are available only for amounts of time that are small, irregular and incapable of capture as a practical matter. Therefore, we pay from punch-to-punch and have instructed employees to include all donning, doffing, and other pre-shift and post-shift activities on the clock. To the extent that we do not pay from punch-to-punch and, instead pay from shift start to shift end, we are confident that no compensable work activity occurs off-the-clock or have accepted the risk.	*Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984) ("[I]n determining whether otherwise compensable time is *de minimis*, we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.").	☐ Yes ☐ No
39.	**Time Recording – Application of FLSA De Minimis Defense to Post-Shift Activities**: We are aware that the California Supreme Court currently is considering, in a question certified by the Ninth Circuit, whether the de minimis doctrine applies to relieve an employer of wage payment obligations brought by a shift supervisor who seeks compensation for time he spent initiating close-store procedure, activating security alarm, walking out of store, turning lock on store's front door, walking his coworkers to their cars and staying outside store with coworker who was waiting for ride, and reopening door on rare occasions	*Troester v. Starbucks Corp.*, (9th Circ. No. 14-55530; nonpublished order) ("The question presented is: Does the federal Fair Labor Standard Act's *de minimis* doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) and *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984), apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?").	☐ Yes ☐ No

No.	We Are Aware That . . .	We Also Are Aware of the Underlying Law	So, We Are OK
	when coworker forgot personal items or when store's patio furniture was inadvertently left outside. To the extent that we also do not pay for such tasks, we are aware of the risks.		
40.	**Electronic Wage Payment**: We are aware that the electronic payment of wages – e.g., by direct deposit or by pay card – must be voluntary and that employees have the right to request paper checks and wage statements. Our procedures do not compel resort to electronic wage payment.	Cal. Dep't of Indus. Rel., Div. of Labor Standard Enforcement, Opinion Letter (July 6, 2006), http://www.dir.ca.gov/dlse/opinions/2006-07-06.pdf.	☐ Yes ☐ No
41.	**Wage Theft Prevention Act Notices**: We are aware that this is an ongoing obligation, and we have procedures in place to make sure that all new employees receive a WTPA notice in all of our facilities and employee groups.	Cal. Lab. Code § 2810.5.	☐ Yes ☐ No