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Short Rest Breaks

In October the US Court of Appeals for the Third Circuit ruled that under the Fair Labor Standards Act (FLSA), if employers choose to provide short (five to 20 minute) rest breaks, these rest breaks must be paid breaks.

While the FLSA does not require you to provide rest breaks, California law does. Under California's Industrial Welfare Commission Wage Orders, you must authorize and permit uninterrupted rest periods for all nonexempt employees whose total daily work time is 3.5 hours or more. Specifically, you need to provide a 10-minute paid rest break for every four hours worked or "major fraction thereof."

Previous state guidelines stated that the rest period should be in the middle of the work period (insofar as is practical), and that these rest breaks are not to be confused with or limited to breaks taken to use the rest room. The new guidelines published in November by California's Division of Labor Standards Enforcement (DLSE) state that during these rest breaks employees must be (a) relieved of all duty, including monitoring pagers or radios, and (b) permitted to go off-site.

! Understand that with this FLSA ruling, if you choose to provide short rest breaks for workers who do not meet California's 3.5 hours of work threshold, these rest breaks must be compensated. Be sure that your rest break policies conform to California law.

New DOT Drug Testing Rules

As part of the Department of Transportation's (DOT's) effort to combat the opioid epidemic, new drug testing rules went into effect on January 1, 2018. These new rules affect all employers who administer drug tests in the transportation industry—including companies who have employees that hold Commercial Driver Licenses (CDLs).

The required drug testing panel must now include four semi-synthetic opioids: hydrocodone, oxycodone, hydromorphone and oxymorphone. In addition, the new rule also adds methylenedioxyamphetamine (MDA) as an initial test analyte and removes Methylenedioxy-N-ethylamphetamine (MDEA) as a confirmatory test analyte.

On the positive side, to relieve costs and administrative burdens, DOT has eliminated the requirement that employers submit blind specimens for testing. For more information about what tests are required and when testing must occur, see <http://bit.ly/DOTdrugTesting>.

! If you have drug testing policies that are subject to DOT regulations, modify your policies to comply with the new rules.

IRS Form 1095-C

If you have 50 or more full-time equivalent employees, don't forget about IRS Form 1095-C, the Employer-Provided Health Insurance Offer and Coverage Insurance form. This form, which is required by the Affordable Care Act, is used to report offers of health coverage to—and enrollment in this offered health coverage by—employees and their family members.

You must fill out a separate Form 1095-C for each employee who worked full-time (i.e., an average of 30 or more hours per week) for your company during at least one month of the calendar year, as all other employees who were enrolled in your health plan. Give one copy of the completed form to the employee, and use IRS Form 1094-C as the transmittal form to submit all of your company's 1095-Cs to the IRS.

❗ If you are affected by this requirement, add this to your checklist of forms to complete at the beginning of the year.

CA Minimum Wage Increase

While employers across the state are aware that California's minimum wage increased on January 1, 2018, many may not realize that this increase affects who is considered to be exempt from overtime pay.

The new statewide minimum wage is now \$11.00 per hour for companies with 26 employees or more, and \$10.50 for companies with 25 employees or less.

California law stipulates that to qualify as "exempt," professional, executive and administrative employees must earn a fixed monthly salary of at least double the minimum wage for full time employment. This works out to \$3,813.33 per month for companies with 26 employees or more, and \$3,640 per month for companies with 25 employees or less.

❗ Review your pay scales, as well as the monthly salaries of all of your exempt employees, to ensure you are in compliance with the law. Also be aware that some California cities have minimum wage requirements that exceed the state requirement.

Incentive Compensation Clauses

Are you paying your sales people on a commission basis? To stand a chance of holding up in court, you must have a written commission contract with your sales people, and your written contract must be in compliance with California Labor Code section 2751. Some of the most important things about your commission program that must be clearly addressed in a written document signed by both you and the employee, with a copy provided to the employee, are:

- **Criteria** – What exactly counts as a commissionable sale? How are commissions earned? Be specific about the conditions that must be met to earn the commission, including the time when it is earned.
- **Amount** – What is the commission rate and how exactly is it calculated?
- **Basis** – What is the basis on which the commission is computed? Is it the invoiced amount, payment received, gross profit from the job, or something else? Exactly how is that basis item (such as "gross profit") defined? Be careful here to not make illegal deductions.
- **Time of Earning** – When is the commission earned? At the time the invoice is sent or when the payment is received? Or, is it advanced at one time, e.g., invoicing, and earned at another, e.g., payment? This must be clear, as it starts the clock regarding payment.
- **Payment** – How and when are commissions paid? Be aware that the law states that commissions must be paid in the pay period in which they are earned. Also, what happens at the time of, and after, termination?
- **Chargebacks and discounts** – Will chargebacks and post-invoice discounts or offsets affect potential or advanced commissions (as they are not allowed for already-earned commissions)? If so, be specific about exactly how, avoiding catchall terms such as "other adjustments," and specify that any monies paid prior to the earning of commissions are advances against those commissions that can be subject to charge-back. Again, be careful here to not make illegal deductions.
- **Draws and Advances** – What is the policy regarding draws and advances?
- **Arbitration** – If you are including an arbitration clause, be sure that it is carefully drafted, and very specific regarding what claims are subject to arbitration. Be aware that an overall arbitration agreement for employment should be a separate, complete document.
- **Term** – What is the term and expiration date of the compensation agreement?

❗ The commission area is very complex and full of nuances. If you have any reason to believe that your incentive compensation policy may not be in compliance, especially if you wrote it yourself, have your lawyer review and/or rewrite your agreement.

Hazardous Waste Penalties Skyrocket

If your facility produces hazardous waste—and between cleaning solvents, used oil and ink, most printers do—be aware that in California the potential price of noncompliance has nearly tripled.

AB245, which was signed into law in October, increased civil penalty for violations of hazardous waste control laws from \$25,000 per day of noncompliance to \$70,000. These fines can be imposed on those who intentionally or negligently:

- Make false statements in documents related to compliance;
- Violates a provision of the regulations; and/or
- Disposes of, treats or stores hazardous waste at a point that is not authorized according to the provisions of the law.

❗ Review your hazardous waste disposal processes and procedures, and be sure that all of your team members are following them.

