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The Wild World Of Calif. Wage Orders

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California's wage orders, some of which date back over 25 years, are an important, but often overlooked feature of the employment law landscape that can trip up even the most careful employers. As such, employers should take steps to understand what wage order applies to their business, and make sure they comply with the requirements of the applicable order.

Wage orders are rules created by the Industrial Welfare Commission (IWC), which govern employees' wages, hours and working conditions. While the IWC no longer operates, the wage orders are still enforced by the labor commissioner.

There are 17 wage orders all told. Twelve of them cover industries, such as manufacturing, professional, clerical, amusement and recreation, and transportation, and are known as "industrial orders." The other five, known as "occupational orders," cover occupations, such as construction or mining and agriculture. Most jobs are covered by one of the industrial orders. If a job is not covered by an industrial order, an occupational order will apply. For the occasional situations in which both an industrial and an occupational order apply, the industrial order takes precedence. Whichever order applies, though, it needs to be posted in an area frequented by employees, where it may be easily read during the workday.

One of the major concerns for employers in dealing with wage orders is determining which wage order applies to your business. While it may seem obvious at first glance, it is not uncommon for the same job to fall under completely different wage orders, solely on the basis of where the particular job is performed. For example, if you work as an office assistant at a company that builds cars, you are under Wage Order No. 1, which covers the manufacturing industry. However, if you do that exact same job at a law firm, because law firms are not covered by an industry order, you would be covered by Wage Order No. 4 (an occupational order). Similarly, nurses who work in a doctor's office are covered by Wage Order No. 4 — doctor's offices, like law firms, are not covered by an industry order — but nurses in hospitals fall under Wage Order No. 5, which covers the public housekeeping industry.

Confusion also occurs when a business engages in more than one type of operation, each of which, if operating independently, would fall under different wage orders. Take, for example, XYZ Corp., whose main purpose is operating a warehouse, but who also employs a sales staff to sell goods. If the businesses were separate, the wage orders that apply would be straightforward: Wage Order No. 9 — which covers the transportation industry — would cover employees who work in the warehouse

operations business, while Wage Order No. 7 would cover the employees in the sales business. In our example, however, the two sides of the business are “under one roof.” In such situations, one looks to the business’s “main purpose” to determine which wage order controls. Here because XYZ Corp’s main purpose is operating the warehouse, Wage Order No. 9 is not only the controlling wage order, it also applies to all of the employees, i.e., warehouse operations and sales staff.

In addition, there are exceptions and exemptions to the rules. Some employees and occupations — such as attorneys, doctors and teachers — are exempt from specified sections of the wage orders. However, even if an employee or occupation is exempt from a wage order, the provisions of the Labor Code still apply.

After you determine which wage order applies, the next issue is why you need to know the wage orders in the first place. Wage orders are important because they contain detailed requirements with which many employers may not be familiar. Some requirements that employers must follow that appear in most wage orders include, but are not limited to:

- Providing clocks in the workplace;
- Furnishing paystubs or wage statements containing specific information;
- Providing suitable seating for employees;
- Furnishing uniforms and equipment;
- Making changing rooms and resting facilities available;
- Maintaining reasonably comfortable temperatures in work areas; and
- Keeping detailed wage and time records.

Employers who do not comply with those requirements may be sued for damages suffered by an individual employee, or by a class of employees, which can lead to significant results. Indeed, two cases decided by the California Supreme Court within the last year demonstrate how decisions involving wage orders can have ripple effects for employers and employees.

In Kilby v. CVS Pharmacy Inc. (2016) 63 Cal.4th 1, the court ruled on questions certified to it by the Ninth Circuit arising from claims made in two related cases against employers under the Private Attorneys General Act for allegedly failing to provide their employees with suitable seating. The applicable language from the wage orders provides that: “All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.”

In interpreting this language, the court concluded that “nature of the work” refers to “an employee’s tasks performed at a given location for which a right to a suitable seat is claimed,” as compared to “a ‘holistic’ consideration” of everything an employee may do at work during his or her shift. As far as if the work “reasonably permits” use of a seat, that is a question “to be determined objectively based on the totality of the circumstances.” While the employer’s “business judgment” and the layout of the workplace will be relevant, such factors will not be dispositive. An employer's business judgment and the physical layout of the workplace are relevant but not dispositive factors. Thus, an employer cannot

just rely on a desire for employee's to stand, or purposefully create a workspace where it would not be possible to sit. Finally, and most significantly for employers, if a seat is not provided and the "nature of the work" will "reasonably permit" seats to be used, then it is the employer's burden to show that no suitable seat is available.

The other, more recent, decision is Augustus v. ABM Security Services Inc. (2016) 2 Cal.5th 257. There, the court held that, in order to comply with the rest break requirement under Wage Order No. 4 — as well as Labor Code Section 226.7 — employees must be given rest breaks during which they are "relieve[d] … of all duties" and employers must "relinquish any control over how employees spend their break time." Thus, a requirement that security guards had to be "on-call" during their breaks violated the wage order.

Whether it is evaluating your workplace to determine if "suitable seating" must be provided given the nature of the work and if reasonable permitted, or having to review one's rest break policy to ensure that employees are free from employer "control" during such breaks, it is not hard to understand how cases interpreting wage orders can have a major effect on the workplace for all involved. Furthermore, as the Augustus decision arose from an appeal in which the trial court awarded the class action plaintiffs over $90 million in statutory damages, interest, and penalties on summary judgment, one can see how a violation of a wage order can lead to damages and penalties that can quickly escalate.

Recognizing which wage order applies to your business and ensuring that you are in compliance with that order's requirements are vital to your business. Do not let wage orders get you!

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