

San Diego Chapter American Payroll Association Newsletter ~ 4th Quarter 2012



How a DOL Mobile App Can Create Wage & Hour Issues for Your Business

By Nancy Mullin



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Look for Year-End updates and payroll change notices throughout the coming months with supplemental postings!

Did you know that over the last year, employees have filed more than 7,000 federal wage and hour lawsuits under the Fair Labor Standards Act (FLSA)? This statistic represents about a

400% increase since 2000. In addition to employee generated FLSA claims, the government has renewed their focus on enforcing wage and hour violations against U.S. employers.

The most common wage and hour claims typically involve misclassification of employees, uncompensated work that is performed off the clock and miscalculation of overtime pay for non-exempt workers. When employers cannot produce accurate records of employees' wages and hours or if the business is violating wage and hour laws, employees can be awarded millions of dollars in back wages. In 2011, employers of all sizes collectively paid \$221.5 million dollars to settle FLSA cases. This upwards trend shows no sign of slowing down.

Wage & Hour Lawsuits Impact Small & Large Employers

Don't think that these lawsuits only impact large employers with thousands of employees. They impact small employers as well. Take for instance Sea-Thru Windows Inc., a home improvement company in Virginia Beach, VA. Following an investigation by the U.S. Department of Labor's Wage and Hour Division, Sea-Thru Windows will have to pay \$83,454 in back wages to 45 workers. Sea-Thru Windows violated the FLSA's overtime and record-keeping provisions.

According to an August 23, 2012 Wage and Hour Division press release, investigators found that the company required employees to perform vehicle cleaning, detailing and other work "off the clock," that is, before and after their scheduled shifts. For example, hours worked by employees to load the company's trucks at the beginning of the day and then return to the shop to unload at the end of the day were not recorded or paid. These practices resulted in the improper calculation of overtime as well as record-keeping violations. Additionally, the company paid the required overtime rate of time and one-half only for hours worked beyond 80 in a two-week period, instead of for hours worked in excess of 40 per workweek.

"Employers subject to the FLSA must ensure that their employees are fully compensated for all work hours in compliance with federal minimum wage and overtime pay requirements," said Patricia Pickett, assistant district director of the Wage and Hour Division's Norfolk Area Office, which conducted the investigation. "This investigation should serve as a notice to other employers to review their compensation and record-keeping practices to be sure that they are paying their employees in compliance with the law."

What is the DOL Timesheet Mobile App?

If an employer does not keep accurate timekeeping and payroll records, any records an employee retains are considered acceptable if a lawsuit is filed. Now employees have the ability to electronically track their own hours. The Department of Labor (DOL) has made it easy for employees to independently track the hours they work and determine the wages they are owed. It's called the DOL Timesheet.

With the DOL Timesheet mobile application, employees can keep their own electronic records on their smartphones to track regular work hours, break time and any overtime hours. They can email a summary of work hours and gross pay as an attachment to their employer. The app even provides a link so employees can email a complaint to the Wage and Hour Division if they

believe there is a dispute between what they are paid in their paycheck and what is calculated via the mobile app.

The DOL Timesheet app is available in English and Spanish. This new technology is significant because, instead of relying on their employers' records, workers now can keep their own records.

Employer's Responsibility to Maintain Accurate Employment Records

The FLSA requires that employers maintain accurate time tracking and payroll records. This includes detailed documentation of employees' wages, hours and other conditions of employment. The FLSA law also requires that covered employees be paid at least the federal minimum wage of \$7.25 per hour for all hours worked, plus time and one-half their regular rates, including commissions, bonuses and incentive pay, for hours worked beyond 40 per week. In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal work activity to the end of the last principal activity of the workday.

The FLSA provides that employers who violate the law are, as a general rule, liable to employees for their back wages and an equal amount in liquidated damages. Liquidated damages are paid directly to the affected employees.

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Non-Competition Agreements Done Right, Done Wrong

By Christopher Olmsted

In California, how do you stop your employee from taking his knowledge and skills to a competitor? You can't, for the most part. There are limited exceptions, and a California appellate court addressed this in a recent case titled *Fillpoint v. Mass*. In an interesting factual scenario, the court reviewed two non-competition agreements signed by the same employee, finding one enforceable but the other one unenforceable.

Michael Maas worked for Crave, a video game publisher. He also owned company stock. In 2005, another company, Handleman, acquired Crave. It purchased Maas' stock. The purchase agreement included a covenant not to compete that prohibited Maas, as well as the other former Crave stockholders, from engaging in the business of distribution and publishing of video games for 36 months after the closing date. The purchase agreement also promised that Maas would receive an employment



agreement with Handleman upon closing of the sale. The purchase agreement incorporated the blank employment agreement, which was attached to the agreement as an exhibit.

About a month later, Maas signed a three year employment agreement. The employment agreement also included a covenant not to compete or solicit, but it included different terms than those found in the stock purchase agreement. The period of the noncompete provision in the employment agreement was for one year after the expiration of the employment agreement or after the earlier termination of Maas's employment.

Maas resigned from Crave in 2008, after satisfying the three-year covenant not to compete contained in the purchase agreement, and fulfilling the three-year term of the employment agreement.

Maas subsequently went to work for a competitor. His former employer Handleman (which later became Fillpoint) sued Maas for breach of the employment agreement.

In court, Maas argued that the noncompete clause in the employment contract was unenforceable under California law. The trial court granted a nonsuit motion in favor of Maas, and the employer, Fillpoint, filed an appeal.

Noncompete Clauses Void, Mostly

Under California law, covenants not to compete are generally unenforceable: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." (Bus. & Prof. Code, § 16600.)

But one important exception applies where a person sells his or her ownership interest in a company. The Business & Professions Code states: "Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, (b) all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein."

The rationale for this exception is that it would be unfair for the seller to engage in competition with the company he previously owned, diminishing the value of the asset he sold.

Noncompete In Purchase Agreement Enforceable

In this case, Maas signed two noncompete agreements. One was found in the stock purchase agreement, and the other one was found in the employment contract. The court noted that the term in the stock purchase agreement had been fulfilled. Maas agreed not to compete with Crave/Handleman for three years after the sale, and he complied with this provision by working for the company three years before resigning and going to work for a competitor.

Noncompete In Employment Agreement Unenforceable

By contrast, the noncompete clause found in the employment agreement was not enforceable. That clause prohibited Maas from working for a competitor for one year after his termination.

The court rejected the employer's argument that the employment agreement clause should be enforced because it was part and parcel of the stock sale transaction. After all, argued the employer, the stock purchase agreement expressly incorporated the employment agreement.

The problem here was not that the restrictive term was found in the employment agreement, rather than the stock purchase agreement. The court cited a 1995 case titled *Hilb, Rogal & Hamilton Ins. Services v. Robb*. The appellate court in *Robb* concluded the placement of the covenant not to compete in the employment contract, rather than the merger agreement, did not affect the covenant's enforceability under Business and Professions Code section 16601.

The problem here was that there were two noncompete clauses, which included different terms, but had to be read together as one integrated agreement. The stock purchase agreement clause prohibited competition for three years, and the employment agreement prohibited competition for one year post-termination.

The stock purchase agreement noncompete was enforceable because it was designed to protect the goodwill of Crave for a limited time of three years, serving the purpose of Business and Professions Code 16601. By contrast, the employment agreement's covenant, which was keyed into the date of employment termination, targeted an employee's fundamental right to pursue his or her profession.

Moreover, the court noted that the nonsolicitation terms in the employment agreement were too broad to enforce under the law. The court wrote: "The employment agreement even barred sales to or solicitation of potential customers. Nonsolicitation covenants barring the seller from soliciting all employees and customers of the buyer, even those who were not former employees or customers of the sold business, extend their anticompetitive reach beyond the business so sold. They do more than ensure the buyer receives the full value of the business it bought, whose goodwill does not include the patronage of the general public. The covenants would give the buyer broad protection against competition wherever it happens to have employees or customers, at the expense of the seller's fundamental right to compete for employees and customers in the marketplace."

Practical Tips:

Draft within limits. Make sure that any non-competition agreements fall within the limits of California's Business and Professions Code. In most circumstances, you cannot prevent an employee from going to work for a competitor. You can and should restrict an employee's competition during the term of employment with your company. Certainly seek legal counsel's review of such a document.

Protect trade secrets. Note that the law does enable employers to protect trade secrets. And proprietary information. Thus an employee may go to work for a competitor, but cannot use your protected data. Ensure that all employees with access to your sensitive data sign non-disclosure agreements.

Other states, other rules. Note that not every state's law is as restrictive as California's. Companies in other states should research the laws in their own jurisdiction.



New Guidance on Identifying Full-Time Employees Under PPACA

by Nancy Mullin

The Internal Revenue Service (IRS) recently issued new guidance which addresses the determination of full-time employees for purposes of the Patient Protection and Affordable Care Act's (PPACA) employer shared responsibility mandate. The new guidance provides safe harbors that are available to employers at least through 2014 while the government prepares formal regulations. The plans affected by this guidance will include employer group health plans, whether insured or self-insured, and regardless of whether the plan is grandfathered.

Determining Full-Time Employees for Purposes of Employer Shared Responsibility for Health Care Coverage

The new guidance describes various voluntary safe harbor methods that employers may use (but are not required to use) to identify which employees are treated as full-time employees for purposes of the shared employer responsibility requirements under health care reform.

Employer Shared Responsibility Payments

Beginning in 2014, employers with 50 or more full-time employees may be required to make a "shared responsibility payment" if any of the employer's full-time employees is certified to receive a premium tax credit or cost-sharing reduction payment. This may happen if the employer does not offer full-time employees (and their dependents) the opportunity to enroll in minimum essential health care coverage under an eligible employer-sponsored plan or if the coverage offered does not provide minimum value or is unaffordable to the employee. For purposes of this requirement, a full-time employee is an employee who is employed on average at least 30 hours per week in any given month.

Determining Full-Time Employee Status

Notice 2012-58, which issued the new guidance, describes a number of safe harbors available to employers for determining full-time employee status in the case of ongoing employees and newly-hired variable hour and seasonal employees, including the transition from newly-hired to ongoing employees and a series of examples illustrating how the safe harbors apply. It also permits employers to rely on certain approaches described in previous notices, including the affordability safe harbor which provides that an employer may use an employee's Form W-2 wages to determine the affordability of employer coverage.

While the IRS is not issuing formal regulations at this time, it has issued new safe harbor guidance for 2014, which builds on and in some cases modifies the guidance provided to date. The new safe harbor guidance addresses:

- Safe Harbor for Determining Ongoing Employees' Full-Time Status
- Ongoing Employees — Option to Use an Administrative Period Under the Safe Harbor
- New Employees Who Are Reasonably Expected to Work Full Time
- New Employees: Safe Harbor for Variable-Hour and Seasonal Employees

Use of any of the voluntary safe harbor methods described in the new guidance is not required, but rather is optional for all employers. Employers may rely on the safe harbors at least through the end of 2014.



NATIONAL PAYROLL WEEK 2012

WAS A HUGE SUCCESS! THANK YOU TO ALL WHO PARTICIPATED AND IF YOUR OFFICE TOOK ANY SPECIAL PHOTOS ~ PLEASE MAKE SURE TO SEND THEM TO OUR CHAPTER FOR INCLUSION ON THE WEBSITE!



TAKING THE FPC OR CPP EXAM?

I asked our current Education Coordinator; Debby Sargent (pictured here) to give us her views on taking the FPC and/or CPP exam. Here's her information and tips:



1. How long have you been involved with SDAPA?

This time around – just since May 2012. I have been an off and on member since 2004. Debby is also active in the Denver chapter.

2. Payroll certifications and/or honors?

Debby is a CPP (Certified Payroll Professional)

3. How did you come to teach the CPP/FPC classes?

I earned my Post Master College Teaching Cert in 2004 and my passion is teaching/payroll/HR. Not necessarily in that order. By nature I'm a coach and love to instill inspiration. For 2 years, I served as the sweep for my women's bicycle club. After I earned my CPP, I contacted the powers that be and asked them if I could be the Ed Coordinator.

4. Tell me about your upcoming project of devising a question for the official FPC test. What is the process? How did you come to be asked to participate?

I was asked by the Certification Advisory Board if I would be willing to write test questions for the 2013 CPP/FPC exam. I took a 2 hour training and was given 8 questions to write. My teaching cert prepared me more than anything else, to be able to write test questions. I had to write my questions then submit to my mentor for suggestions – rewrite – submit again to my mentor – when given the approval send to Melenie Lambert in Denver who is part of the Advisory Board. Since I had FPC questions – I presented my questions to my study group who had excellent suggestions – too bad I didn't do that first. I only had to revise 4 questions once before I gained approval to send to Melenie.

The process is: you are assigned Knowledge Subject Areas (KSA'S) and must write "stems" (questions) – if you have calculations you must justify each potential answer with the calculation – you must identify the "key" (answer). All your potential answers must be plausible. I never thought I would write "Except" questions – I had 5. The test is designed to test your knowledge, not your test taking ability or reading ability. The test is not designed to trick you or be used as a "cheap shot".

5. Biggest challenge for the CPP/FPC students?

Commitment – I delayed getting my CPP since 2004 and when I finally decided that I would have no more excuses – I bit the bullet – studied on my own with a 2008 book and passed.

6. In your opinion, what is the best strategy for passing the FPC or CPP certification tests?

Take the tests over and over and over again – anything you get wrong – study. I took all chapter tests 4 times and developed a study guide for all Knowledge Subject Areas (KSA's) and right before I took the test, I took the comprehensive test on the CD in the back of the answer key. I was studying to take a test – the only way to get over the anxiety of test taking was to be so prepared by taking tests that come test day I was ready and armed.

AND FINALLY THE SDAPA BOARD AND ITS MEMBERS WOULD LIKE TO CONGRATULATE THE FOLLOWING PEOPLE ON RECENTLY PASSING THE CPP EXAM

KATHERINE IVKO, CPP

ROBIN LUKIANCZYK, CPP

MICHIYO PARKER, CPP

CONGRATULATIONS!

Cooler Weather!

Fall and winter begs for soups and warm, comfort dishes so please enjoy a couple of delicious varieties you can serve your families with pride:

White Bean and Greens Soup

Serves 4 ~ 5

- 1 bunch kale, very coarsely chopped
- 1/2 bunch chard, very coarsely chopped
- 1 big yellow onion, diced
- 5 cloves garlic, minced
- 2 cans cannellini beans, rinsed and drained (or soak dry beans overnight)
- 5 medium tomatoes, large dice
- 6 cups vegetable stock
- 1/2 teaspoon crushed red chili flakes
- 1 1/2 Tablespoons mixture of dried herbs like thyme, basil , marjoram, oregano - whatever your preferences may be.
- 2 Tablespoons extra virgin olive oil
- 1/4 cup coarsely minced parsley
- Kosher salt and freshly ground pepper to taste



Heat the oil in a large soup pot. Sauté the onion for a few minutes until they begin to soften. Add the garlic and chili flakes and sauté another minute. Stir in the tomatoes, kale, chard and about 2/3 of the beans. Add 5 cups of stock. Bring to a boil and simmer a few minutes. Puree the remaining beans with the last cup of stock in a blender and add to the soup. Simmer another fifteen minutes or until the kale is tender. If you have a hand held immersion blender, you can blend the soup some more to make it thicker. Alternatively, you can add some of the soup to a blender, puree it, and return it to the pot. Season to taste with salt and pepper. Stir in the parsley. Serve.

Nutrition Information per Serving:

Calories: 256
Fat: 7 gm
Saturated Fat: 1 gm
Trans Fat: 0 gm
Cholesterol: 0 mg
Carbohydrate: 42 gm
Fiber: 12 gm
Sugars: 8 gm
Sodium: 466 mg
Protein: 12 gm

QUINOA RISOTTO WITH ARUGULA, ASPARAGUS, AND MUSHROOMS

Serves 3 ~ 4

- 1 Tablespoon olive oil
- 1/2 yellow onion, diced
- 1 large clove garlic, minced
- 1 cup quinoa, rinsed
- 2 1/4 cups vegetable broth
- 2 cups coarsely chopped fresh arugula
- 1 medium carrot, shredded
- 1/2 cup thinly sliced shiitake mushrooms
- 1/2 bunch skinny asparagus, trimmed of the thick ends and sliced into 1" pieces
- 1/4 cup grated parmesan cheese
- 1/2 teaspoon salt
- 1/4 teaspoon freshly ground pepper



Using a large saucepan, heat 2 teaspoons of the oil over medium heat. Sauté the onion until softened, about 4 minutes. Stir in the quinoa and garlic and cook, stirring, for about a minute.

Add the broth and bring to a boil then simmer for about 12 minutes. The grain will be almost tender at this point. Meanwhile, sauté the mushrooms and skinny asparagus pieces in a non-stick skillet using the remaining teaspoon of oil until the mushrooms are almost cooked and the asparagus is crunchy tender. Stir the arugula, carrot, mushrooms, and asparagus into the grain and simmer for another couple minutes. Stir in the cheese and season to taste with salt and pepper.

Nutrition Information per Serving (using low sodium broth and without added salt):

Calories: 367
Fat: 12 gm
Saturated Fat: 3 gm
Trans Fat: 0 gm
Cholesterol: 7 mg
Carbohydrate: 51 gm
Sugars: 5 gm
Fiber: 7 gm
Sodium: 220 mg
Protein: 17 gm

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Featured SDAPA Member Featured SDAPA Member

Tammy Britt, Webmaster:

How long have you been in the payroll field? *23 years.*

What is your favorite aspect of payroll? *Helping employees solve problems. Though time consuming, I enjoy the research involved.*

What do you find to be the biggest payroll challenge? *Lately, it is keeping up with the technical changes that require programming.*

And finally, what is your favorite holiday tradition? *Just before Christmas, getting together with my family to make tamales.*

Thank you!!!

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