# Wage Theft

## How Can California Combat It?

Intentionally withholding wages from employees is a crime, and rightfully so. The term "wage theft" has emerged in recent years to describe this act. This straightforward term, however, is being stretched now to include not only intentional wage violations, but also good faith disputes, misunderstandings of California's complex labor laws, conflicting advice offered by the State Labor Commissioner's Office, or violations resulting from changing interpretations of the law. Labor advocates and publications about workplace issues are conflating legitimate differences of opinion or misunderstandings into the separate and serious category of criminal behavior. The audience is left with the inaccurate perception that a large number of California businesses are intentionally defrauding their workers. This is not the case.

### HOW IS WAGE THEFT DEFINED?

The California Department of Industrial Relations (DIR) describes the following as "wage theft":

- Being paid less than minimum wage per hour;
- Not receiving agreed upon wages (including overtime, commission, piece rate, regular wages);
- Not accruing or not allowed to use paid sick leave;
- Not being paid promised vacations or bonuses;
- Not being paid split shift premiums;
- Not receiving final wages in a timely manner;
- Unauthorized deductions from your pay
- Not being allowed to take meal breaks, rest breaks, and/or preventative cool-down breaks;
- Owners or managers taking tips;
- Failing to be reimbursed for business expenses;
- Bounced paychecks
- Not receiving reporting time pay;
- Failure to provide timely access to personnel files and payroll records.

Other unofficial parties, such as the Economic Policy Institute (EPI), cite examples such as failing to pay tipped workers the difference between tips and minimum wage or misclassifying employees as independent contractors.

Journalists and advocates use the examples developed by DIR — as outlined above — to define wage theft unconditionally, but never clarify whether the employer has *knowingly or intentionally* committed these acts, which is an essential feature of a criminal act. Therefore, these examples of wage theft can be overbroad and misleading when applied to the many circumstances when an employer makes a good faith mistake or is not familiar with the evolution of workplace wage and hour laws.

Bad actors — an employer who intentionally violates the law or withholds wages as leverage over an employee — must be penalized. But when we see sweeping reports of employees who have experienced wage theft or total dollars of wage theft committed, those statistics should be examined carefully if they conflate wage theft crimes with mistakes and misunderstandings that are resolved subsequently.

### WHAT WAGE THEFT IS NOT

Intentionally failing to pay employees or providing them with required meal breaks is illegal and should be punished. But those criminal acts are categorically different from a non-English-speaking small business owner who is trying to decipher one of the 109 exemptions in AB 5 or who mistakenly does not go back and recalculate the overtime regular rate of compensation to include a bonus given to employees at the end of the year while doing their payroll by hand.

Not only are California labor laws complex; their

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interpretations are ever-changing. Further, many of the laws leave room for discretion where an employer may genuinely believe they are adhering to the law, but an employee disagrees. Considering the following examples:

• **Reimbursement**: Labor Code Section 2802 provides that an employer must reimburse all "necessary expenditures or losses" incurred by the employee, which includes all "reasonable costs." A business owner would have to wade through case law to know what "reasonable costs" means, with some courts disagreeing with one another. When the COVID-19 pandemic emerged and many employees transitioned to working at home, interpreting the statute became even more difficult. Must the employer now reimburse the employee's home internet? Heating or air conditioning costs? Part of the mortgage? There was no guidance to follow, so the employer had to make their best good-faith guess, with which some employees disagreed and filed claims.

• **Worker Classification**: In 2018, the California Supreme Court dramatically changed the test for classifying workers as independent contractors. This new test is the ABC test. Later, the court decision was held to apply retroactively, meaning an employer was responsible for following the test years before they even knew it existed. The decision was codified in AB 5 and AB 2257, which now contain a combined 109 exemptions. Some, such as the business-to-business exemption, are complex and require discretion in interpretation. A small business owner is required to weigh *12 factors* to figure out whether the business-to-business exemption applies. If a worker disagrees with the business owner, they could owe astronomical penalties for overtime, meal/rest break violations, wage statement violations, sick leave violations, and penalties under the Private Attorneys General Act (PAGA).

• **Salaried Employee versus Hourly Employee**: California has 17 Industrial Wage Orders with which employers must comply. The salaried employee exemptions listed in the Wage Orders are exceptionally vague, such as a requirement that an exempt (salaried) employee is one "who customarily and regularly exercises discretion and independent judgment." Unlike the test under federal law, in California an employee must spend at least 50.1% of their time engaged in exempt duties each pay period, or an employer can be liable for overtime payments and meal and rest break payments under the Labor Code. An employee can even claim that one pay period they were exempt and the other they were not. Similar to the reimbursement and worker classification examples above, the employer is making their best, reasonable estimation as to whether their employees spend more than 50% of their time performing qualifying activities. Under the definition above, any disagreement by the employee on the percentage of time spent on exempt duties may result in the employer being held liable for wage theft.

• **Meal and Rest Breaks**: California has strict rules regarding when employees must take meal and rest breaks. Many employers have lawful policies instructing workers to take their breaks by the required times. Yet the employers may face claims of denied meal or rest breaks. The claim often comes in the form of a PAGA lawsuit filed by one employee, who has the power to allege missed breaks for every single other employee without proof that the missed break ever happened.

Although *Brinker Restaurant Corp. v. Superior Ct.*, 53 Cal. 4th 1004 (2012) technically held that employers need not "police" employees to ensure they take their breaks on time, in reality, that is not the case. This is because time records showing an employee had a late or short meal break create a presumption that the employer violated the law and denied a meal break, meaning the employer is required to prove that the employee did so voluntarily. *Donahue v. AMN Services, LLC*, 11 Cal. 5th 58 (2021). Therefore, it is nearly impossible for the employer to prove otherwise, especially in a class action or PAGA lawsuit.

• **Reporting Time Pay**: Before 2019, the Labor Commissioner and California employers believed that reporting time pay was owed to an employee only if the employee physically reported to work and was sent home early. Under these circumstances, the employer would pay the employee for half of their shift, up to four hours. In 2019, the California Court of Appeals issued an opinion in *Ward v. Tilly's*, 31 Cal. App. 5th 1167 (2019), that significantly changed the interpretation of the reporting time pay requirement. To the surprise of many, the court held that employees who made a single phone call two hours before their shift to ask whether they were required to come in to work and were told not to come in should have been paid reporting time pay. The court refused to address whether its interpretation was retroactive, and the California Supreme Court denied review, leaving employers exposed to liability. *Ward* demonstrates how drastically California labor law can change in an instant and how a small business with no general counsel or human resources department could easily miss these kinds of decisions.

• **Personnel and Time Records**: Labor Code Sections 226 and 1198.5 require employers to provide personnel records and time records to employees if requested. These requests usually are submitted together. Each statute has a different strict

timeframe within which the records must be provided. It is easy to see a small business owner not being aware of the different requirements under each of these separate laws buried in the Labor Code. By the above definition, even accidently providing these records one day late would be considered "wage theft."

AB 1003 (Lorena Gonzalez; D-San Diego) (2021) is a good example of the importance of distinguishing between employers who know they are violating the law and those who do not. The bill as introduced originally would have made any failure to pay wages a felony, regardless of intent. The California Chamber of Commerce and others strongly opposed the original bill based on the reasons above: that the law ultimately would punish honest employers doing their best to comply with the nation's most complex, ever-changing set of labor laws. The Assembly Public Safety Committee agreed and forced amendments to clarify the law would apply only to those who intentionally violated the law.

As explained in the Assembly Public Safety Committee analysis of AB 1003:

"The committee amendments would also narrow the conduct that would qualify as wage theft under the bill. Rather than defining wage theft as any violation of law that results in the loss of wages, benefits, or other compensation, the conduct would instead be limited to instances of deprivation of wages, benefits, or other compensation by fraudulent or other unlawful means, where the employer has knowledge that they are legally obligated to pay them to the employee. This amendment is aimed at trying to focus the bill's attention on the bad actors who are truly attempting to steal from their employees, as identified in the EPI's report, as opposed to employers who make a genuine mistake about owed wages, or employers who have a good-faith belief that they owe less than what the employee claims to be owed."

## SOLUTIONS TO ADDRESS WAGE THEFT

There is no question that California must dedicate resources to stopping true, intentional instances of wage theft, ensuring that workers receive owed wages in a timely manner, and making it easier for businesses to understand and comply with the law so that they are not making mistakes or exposed to liability for a reasonable interpretation of a statute.

One of the most important ways to prevent wage theft is to ensure that employees have access to justice through the Labor Commissioner's office. In 2015, the CalChamber partnered with labor groups to enact SB 588, which provided the Labor Commissioner with unprecedented tools and authority to address wage theft. Specifically, SB 588 allows the Labor Commissioner to engage in the following actions against bad actor employers:

- Labor Commissioner can place a lien on any of the employer's property in California to satisfy wages owed to an employee – the lien lasts for up to 10 years;
- Requires an employer to post a surety bond if they haven't paid a final judgment within 10 days;
- Allows the Labor Commissioner to issue a stop order if any employer operates without a bond;
- Allows the Labor Commissioner to impose successor liability for unpaid wages, so that an employer cannot shut down and reopen as a different company to avoid liability;
- Creates joint and several liability for listed employers;
- Imposes personal liability for managing agents of employers.

Staffing shortages, however, are hampering DIR's ability to utilize these resources effectively and to timely adjudicate wage claims. According to a report last year by *CalMatters*, the division is presently failing to meet statutory deadlines. Instead of the 135-day statutory timeline within which wage claims are supposed to be adjudicated, some employees are facing wait times of several years. The delay is attributed largely to a 30% staffing vacancy rate.

California must examine the cause of these vacancies and deploy strategies to remedy the problem. It is critical, however, that the solution *not* be to shift more enforcement to the private plaintiffs bar. Abuses of PAGA demonstrate that attorney fees and high settlements are prioritized over fair adjudication of claims in private litigation.

Another solution is to ensure that all employers have access to guidance regarding application of labor laws. For example, the DIR website is available only in English. Few resources are available in Spanish and most of the Spanish resources are contained just in a lengthy "index" that is not organized by topic like the rest of the website. No online resources are available in other languages commonly spoken in California, such as Chinese, Tagalog or Vietnamese. Translating DIR's website in full into more languages, and providing better outreach from the agency, would help both small business owners and employees understand how to apply California law.

## CALCHAMBER PERSPECTIVE

It is important that the term "wage theft" be used accurately to describe bad actors who are intentionally violating the law. Otherwise, unintended consequences of any related legislation or regulatory action are likely to unfairly punish honest

employers, especially small businesses that are simply trying to decipher California's complex, lengthy, and ever-changing labor laws.

The CalChamber supports combatting wage theft by ensuring that the Labor Commissioner is able to timely adjudicate wage claims and increasing understanding about labor laws, such as through increased translation of online resources for both workers and employers.

Staff Contact
**Ashley Hoffman**
Policy Advocate

*ashley.hoffman@calchamber.com*
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