

10 Things Employers Do to Get Sued

Presented By:



Protecting the Bottom Line and Creating Peace of Mind for Business Owners

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About Us

OmegaComp HR supports the gaming industry by reducing employee related exposures and improving OSHA & Labor Law compliance, while providing expert guidance with employee-related matters. Whether your goal is to reduce costs, protect your business, or improve compliance, our team is here to help. Here are just a few examples of ways we support the gaming industry:

- Assisting with HR compliance (hiring/terminations, wage & hour, handbooks, Cal/OSHA, ACA, harassment free environment, etc.) and creating HR structure/policies to ensure the firm's long term sustainability.
- Reducing labor hours/costs spent on non-revenue generating tasks.
- Protecting the business/executive leadership – CA employers are fraught with ever-changing laws, regulations & oversight entities such as: DIR, Labor Commissioner, EDD, Cal/OSHA, EEOC, DFEH, etc.
- Providing expert training and real time updates as labor laws and employee administrative laws change– a checks and balances system, which is delivered by a team of experts who never call in sick.
- Leveraging expertise and technology to support improved timekeeping and wage and hour compliance.

Disclaimer

OmegaComp HR is committed to providing up-to-date, useful information to allow employers and human resources professionals to react to rapidly changing case law, statutes, and regulations that control the California workplace. California employment law, however, is always evolving: Yesterday's standard practice may become today's prohibition. While topics presented within the following pages offer means of trying to stay current, such materials are not intended to, and cannot, substitute for legal advice. An individual employer's employment questions require an individual employment lawyer's response. OmegaComp HR hopes that, in order to answer specific employment questions, you will seek qualified employment advice. The materials presented by consultants from OmegaComp HR contained in this booklet are not intended as legal advice. While OmegaComp HR hopes that these materials and conversations provide you with a useful context to make employment decisions, OmegaComp HR reminds all users of these materials that specific legal questions require a very specific analysis. None of the materials distributed are intended as legal advice.

10 Things Employers Do to Get Sued

10. Make everyone an independent contractor
9. Require employees to work through lunch and fail to record meal periods properly
8. Pay everyone a salary/fail to confirm duties test
7. Complete background checks for new employees by doing an internet search of their name
6. Have a "Use it or Lose it" vacation policy
5. Let everyone work whatever schedule they want to
4. Keeping it too simple – have a 1 page handbook from 1987
3. Hold your employee's final paycheck
2. Don't spend time training managers about labor laws
1. Fail to address employee performance problems early

Which Laws Apply to Your Organization?

- 
- A blue-tinted image of a gavel, used as a background for the list of laws.
- Title VII
 - OSHA
 - EDD
 - PDL
 - PFL
 - EEOC
 - DOL
 - Exempt, IRS
 - Homeland Security
 - 1099
 - 941
 - 5500
 - Wage Order
 - At-Will
 - W4
 - DE4
 - I9
 - FMLA
 - IIPP
 - SDS
 - HRA
 - HSA
 - FSA
 - FEHA...and more

Employment Law – Be Proactive

Successful companies are not a result of accidents or luck, but rather an analysis of situations, preparation and proper execution of plans.

The activities that focus on human resources management can provide a direct contribution to a company's performance. This contribution can impact your company's bottom line as much as a quality product or excellent service.

Just ask any company that has written a check for attorney's fees, settlements, or court-ordered damages for failure to comply.

It pays to plan ahead and it costs less!

Terminology

Employee	Independent Contractor
Hire	Engage/Contract With
Work	Perform Services
Supervisor	Liaison/Contract
Supervisor/Train/Orient	Inform/Manage/Coordinate on Scope of Work
Performance Review	Quality Check
Schedule	Coordinate
Monitor/Record Time Worked	Bill/Invoice for Services Performed
Salary/Wages/Pay Rate	Contract/Service Fees
Violate Policy	Breach Contract
Discipline/Write Up	Address/Discuss Breach
Fire/Terminate	End contract for Breach

10. Avoid Employment Law and Tax Hassles by Making Everyone an Independent Contractor

Independent Contractor status is determined primarily by the degree of control the worker has over the manner and means of performing the work.

- Who supplies the instruments, tools, and place of work
- Whether the work performed is part of the regular business of the hiring firm
- Whether the person performing services is engaged in a distinct occupational business

Consequences for Misclassifying

- Significant tax, wage and benefits liabilities, as well as massive fines that may be imposed by state and federal agencies
- Expands the penalties for misclassifying workers as “independent contractors”
- Fines: \$5,000 - \$15,000 for each violation
- Fines for repeat violations, \$10,000 - \$25,000
- Website Notification required for violators stating they have committed a serious violation of the law and give workers (and plaintiff attorneys) information about filing claims
- Independent Contractor Enforcement up 300%
- Audits done industry by industry and spot audits



9. To Increase Productivity, Let Employees Work through Lunch Breaks

Meal & Rest Period

- Non-exempt employees generally are entitled to a 30 minute meal period for every work day of more than five hours
- Meal Period: required for 5 or more hours of work (before end of 5th hour). If 6 hours concludes the shift, employee may waive meal period
- 2nd meal period at 10 hours may be waived if 1st was taken
- Non-exempt employees are also entitled to a 10-minute rest period for every 4 hours of work of major portion thereof (2 hours)

Rest Period – 10 minutes

- Employees may not leave the property on their rest period
- Ideally, breaks should be taken in the middle of the shift
- If employees cannot take their break for some reason, they need to let their supervisor know

Hours Worked	Number of Rest Breaks
0 – 3.5	0
3.5 – 6	1
6.0 – 10	2
10.0 – 14.0	3

8. Pay Everyone a Salary

Who wants to deal with timecards and calculating overtime pay? If all employees agree to work for a straight salary, regardless of the hours they work, what's wrong with that?

Under both state and federal law, certain employees are exempt from overtime requirements and can be paid a straight salary no matter how many hours a week they work.

Employees who don't qualify for an exemption are entitled to overtime pay and can't agree to forego overtime pay in exchange for receiving a salary.

An exempt employee normally is a high-level executive, administrative, or professional employee.

Titles are irrelevant to the determination of whether an employee is exempt or non-exempt. Be sure to review the minimum salary and duties test with an attorney if considering making an employee exempt.

Impermissible Deductions From Salary

- **Quality or quantity of work** — Do not make deductions from an exempt employee's salary for variations in the quantity or quality of work performed.
- **Unavailability of work** — Do not make deductions when work is unavailable because of the operational requirements of the business if exempt employees are ready, willing, and able to work. For example, if July 4th falls on a Tuesday and the business shuts down for that day and the balance of the week, exempt employees who worked on Monday of that week are entitled to a full week's pay. If there is no work at all during the week, there is no obligation to pay. Employers should give reasonable advance notice of any shutdowns.
- **Disciplinary reasons** — Deductions of less than a full week from an exempt employee's salary for disciplinary reasons, are not allowed in California.
- **Jury duty, witness duty or military duty** — Deductions cannot be made from an exempt employee's salary for periods of less than a full work week. If the exempt employee doesn't perform any work within the week, you can deduct from his/her salary for the week.

7. Not Following “Best” Hiring Practices

- Background checks/credit checks/testing/references
- What you can and can't ask applicants, including social media reviews, etc.
- Conduct an appropriate job analysis
- Say what you mean and mean what you say
- Who is the “ideal” or “most qualified” candidate?
- Listen more than you speak
- Appropriate documentation/onboarding

At-Will Employment

Your biggest liability is who you hire! Wrongful termination is a common lawsuit for private employers. What does “at-will” really mean? Why can't I fire anyone at anytime?

- Under CA law the employment relationship is presumed to be at-will, meaning either party can terminate the employment relationship with or without a reason.
- Managers should be trained to avoid creating oral contracts for permanent employment during interviewing or performance reviews. “We rarely fire people around here.”



6. Establish a “Use-It-or-Lose-It” Vacation or PTO Policy

- Use-it-or-lose-it vacation policies are illegal in California.
- Vacation is a vested benefit that can't be taken away once it is earned. Acceptable alternatives to use-it-or-lose-it policies are reasonable caps and cash-out policies.
- Disputes over vacation pay often stem from poorly drafted vacation policies. It is not uncommon for a policy to say something such as, “Employees are eligible for one week of vacation after a year of employment.” Although the employer may mean no vacation is earned until after a year of work, in a legal dispute the policy probably would be interpreted to mean the employee accrues vacation during the entire first year and is eligible to take that vacation during the second year.



An employee who terminates during the first year would be entitled to a proportional amount of one week's vacation.



5. Let Everyone Work Four 10-Hour Days or, Better Yet, Whatever Schedule They Want

Even an employee who agrees in writing to this type of schedule is generally entitled to file a claim against the employer and receive back overtime with interest.

Alternative Work Weeks – must go through election process with employees, secret ballot vote, as well as meet other qualifications.

- Time & A Half = Over 8 hours in a day, over 40 in a workweek or first 8 hours on the 7th consecutive day in a workweek
- Double-Time = Over 12 hours in a work day or over 8 hours on the 7th consecutive day.
- Don't Forget - Comp time is illegal in CA for private employers!



4. Keeping it Too Simple

Keep our one page employee handbook from 1987.

- Certain laws must be reflected in your handbook: PDL, FMLA, EEO, Harassment, etc.
- “Old” policies lead to inconsistent application – if it doesn’t apply then take it out! Update yearly.
- Until 2002, Nordstrom’s handbook was one page and said “do the right thing” – now their handbook is 67 pages.
- Include applicable policies, but be realistic. One client had a handbook that was 227 pages – no one is going to read that!
- It needs to read simply, no legal ease, and be reasonable.



3. Hold Your Employee's Final Paycheck Until They Turns in Their Cell Phone, Laptop and Uniform. After All, They Agreed in Writing to Return Them.

- Failing to provide a final paycheck within the legal time limits can be a costly and time consuming mistake.
- Final paycheck deadlines depend on whether the employee was terminated, laid off, quit without notice, or quit with at least 72 hours notice.
- A terminated employee is entitled to all final wages, including unused vacation, at the time of termination.
- Consequences for violation = waiting time penalties. The penalty is a continuation of the employee's wages on a day-to-day basis until the final paycheck is ready, to a maximum of 30 days.

72 Hour Rule

- An employee who quits with less than 72 hours notice must receive a final paycheck no later than 72 hours after notice is given.
- An employee who quits with more than 72 hours notice is entitled to a final paycheck on the last day of work.



2. Don't Waste Time Training Front-Line Managers about Labor Laws. After All, the Company Pays HR People to Handle Any Problems that Arise.

- All supervisors and managers are agents of the organization 24 hours a day.
- **Tip:** You don't know what you don't know. Protect your business by ensuring managers receive ongoing HR training.

Basic Employment Law Compliance Training Topics

- Preventing and Responding to Harassment, Discrimination, and Retaliation
- Wage and Hour Requirements
- Legal and Effective Hiring, Discipline, and Termination Practices
- Workplace Safety Obligations
- Accommodating Disabilities and Leaves of Absence
- Employee Privacy Rights
- The Importance of Appropriate Documentation – Worse, the Dangers of Bad Documentation
- Involve HR early!



1. Failing to Address Employee Performance Problems Early and Failing to Document Counseling.

If discipline is appropriate:

- A timely response is essential
- Address and document performance problems, behavioral problems, policy violations
- Be consistent in your discipline of employees (no selective enforcement of policies)
- Clearly explain (in writing) the consequences of continued performance or behavioral problems or policy violations
- Select an appropriate level of discipline (verbal warning, record of conversation, written warning, suspension, demotion/transfer, termination)

Remember: Unrecorded performance deficiencies do not exist if you can't prove it

What Should Supervisors Document?

- Performance and attendance issues
- Performance evaluations and counseling
- Discussions/requests for accommodations or leaves
- Inquiries/investigations into misconduct and/or policy violations
- Disciplinary actions
- Terminations
- Facts & acts – not opinions, example: 3 customer complaints about Jane received on...
- Confirming email to employee – include "If I've missed anything from our conversation, please let me know."
- Record of conversation or counseling notice

Questions?

**We are Happy to Help.
Call a Business Solutions Advisor Today!**

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