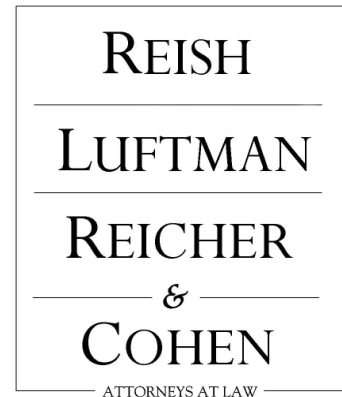


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**Wage and Hour Laws Affecting
California Household Employers**

presented to

Loring Ward

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Mr. Terman served as a Superior Court appointed arbitrator in some 25 cases. His peers selected him as a 2004, 2005, and 2006 California "Super Lawyer" in which some 65,000 California lawyers were polled for each year. Mr. Terman speaks to and writes for client and industry groups on litigation avoidance and management, wage and hour issues, trade secret protection, and avoiding sexual harassment, among other employment law topics. He chaired the California CPA Education Foundation's Employment Practices Conference for four years, is a member of CalCPA's Human Resources Subcommittee of the Statewide MAP Committee, and is on CAMICO's panel of employment defense counsel.

Mr. Terman earned his Juris Doctorate in 1983 from Loyola Law School, where he served on the Law Review. In August 1986, he attended Hasting College of Law as an attorney for jury trial training. He earned his bachelor's degree in 1979 from University of California at Los Angeles.

Please see www.reish.com.

I. BASIC OVERVIEW OF EMPLOYMENT LAWS

- A. At-will Employment
 - 1. Statutory Presumption (Cal. Labor Code § 2922)
 - 2. Employee may be terminated for any reason or no reason; "good cause" is not required
- B. Exceptions to At-will Employment
 - 1. Express Contract — i.e., not to terminate or demote without "good cause." (Cal. Labor Code § 2924 defines cause as "willful breach of duty, habitual neglect of duty, or continued incapacity to perform")
 - a. Written promises
 - (1) Express employment agreement
 - (2) Offer letter and other correspondence
 - (3) Employment handbook, personnel policies, other writings
 - b. Oral promises where no valid at-will acknowledgment is signed; oral assurances that employment will continue unless there is "good cause" to terminate

2. Implied Contract where no valid at-will acknowledgment is signed
 - a. Courts examine “totality of circumstances,” including written and oral statements, and employee handbooks
 - b. Factors may include duration of employment, performance evaluations, employer's practices, promotions, oral statements and written materials. Increasing judicial skepticism
3. Public Policy Exceptions - Examples
 - a. “Adverse action”
 - b. Anti-discrimination statutes — California and Federal law: race, color, sex, pregnancy, nation origin, ancestry, citizenship, marital or registered domestic partner status, religion, age, physical or mental disability, medical condition, or sexual orientation
 - c. Sexual harassment
 - d. Other conduct or action protected by law
 - (1) E.g., cannot discipline or discharge employee for refusing to commit unlawful act, or for complaining to senior management or government about illegal activities (e.g., whistle blower statutes)
 - e. Retaliation for asserting legal right. Examples include:
 - (1) Asserting discrimination or sexual harassment or acting as witness in support of another employee’s claim.
 - (2) Asserting a workers' compensation claim, or acting as witness in support of claim
 - (3) Asserting a claim for unpaid wages such as minimum wage, overtime, accrued vacation
 - (4) Asserting rights under Family and Medical Leave Act, California Family Rights Act (employers with at least 50 employees), **Pregnancy Disability leave** (employers with at least 5 employees)
 - (5) Union organizing or membership
 - (6) Filing for bankruptcy
 - (7) Making bona fide complaint regarding safety or health violation, or hazard

- (8) Missing work to attend school disciplinary meeting or a school activity (if employer has 25 or more employees)
- (9) Jury duty
- (10) Military service

II. HIRING HOUSEHOLD EMPLOYEES

- A. Selection
 1. Job Application
 2. Criteria for selection must be neutral — avoid discrimination claims — Safest factors: credentials, skills, experience
 3. Background checks and References
- B. Immigration Laws <http://uscis.gov/graphics/formsfee/forms/i-9.htm>
- C. Preserve at-will employment
 1. Job application
 2. Employee handbook
 3. Avoid contrary representations in interviews and offer letters
 4. Practical – get employee’s signature on a memo that states that the employer or employee can terminate the employment relationship at any time for any reason and that there is not guaranteed term of employment.
- D. Key personnel policies that should be in agreements and/or written policy:
 1. At-will employment
 2. EEO policy and policy against sexual harassment
 3. **Confidentiality** of household and business information
 4. Vacations and holidays
 5. Duties and schedule
 6. Arbitration agreement
- E. Independent contractor classification (EDD’s view: <http://www.edd.ca.gov/taxrep/de38.pdf>)
- F. Employment Development Department and Tax Issues

- G. Exempt vs. non-exempt employees and overtime pay

III. Wage and Hour Rules for Household Employees

- A. www.dir.ca.gov/IWC/iwc.html
- B. Minimum Wage
 - 1. Currently \$6.75 hour
 - 2. Limited meals and lodging count toward Minimum Wage
- C. Industrial Welfare Commission Wage Order No.15-2001 governs Household Occupations (See Attachment) <http://www.dir.ca.gov/IWC/IWCArticle15.html>
 - 1. “‘Household Occupations’ means all services related to the care of persons or maintenance of a private household or its premises by an employee of a private householder. Said occupations shall include, but not be limited to, the following: butlers, chauffeurs, companions, cooks, day workers, gardeners, graduate nurses, grooms, house cleaners, housekeepers, maids, practical nurses, tutors, valets, and other similar occupations.”
 - 2. The Wage Order generally excludes “**personal attendants**”
 - a. “‘Personal attendant’ includes baby sitters and means any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to **supervise, feed, or dress** a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. The status of "personal attendant" shall apply when no significant amount of work other than the foregoing is required.”
 - b. 20% or more “other work” is significant (e.g., cleaning, cooking, shopping, laundry, errands, etc...).
 - c. Mary Poppins vs. Alice @ Brady Bunch family
 - d. Licensed nurses and other health care workers who regularly give medications, prescriptions, or take temperatures, pulses, or respiratory rates normally will NOT qualify as personal attendants).
 - e. Practical **caution** in using this exclusion
 - f. Documentation ideas:
 - (1) A simple at-will document signed by the personal attendant stating their rate of pay, what their care duties are and that,

while they may occasionally be asked to do other tasks they are never to spend 20% or more of their time doing those other tasks.

- (2) Require the employee to sign a statement along with their time record each week that “My duties this week were supervising, feeding, and/or dressing the children. None [or less] than 20% of my work time this week involved other tasks.”

3. Wage Order Posting Requirement

4. Overtime Rules for **LIVE-INS** who are non-exempt are unique

- a. The overtime pay rules for non-exempt, household occupation employees who LIVE-IN are unique. In summary, they are:

- (1) One and half times hourly rate for: (1) over 9 hours worked in a workday; and (2) the first 9 hours worked on the 6th and 7th workdays in any workweek.

- (2) Two times the hourly rate for over 9 hours worked on 6th and 7th workdays in any workweek.

- b. Specifically, Section 3 of Wage Order 15 states:

“(A) A LIVE-IN employee shall have at least 12 consecutive hours free of duty during each workday of 24 hours, and the total span of hours for a day of work shall be no more than 12 hours, except under the following conditions:

- (1) The employee shall have at least three (3) hours free of duty during the 12 hours span of work. Such off-duty hours need not be consecutive, and the schedule for same shall be set by mutual agreement of employer and employee, provided that

- (2) An employee who is required or permitted to work during scheduled off-duty hours or during the 12 consecutive off-duty hours shall be compensated at the rate of one and one-half (1 ½) times the employee's regular rate of pay for all such hours worked.

(B) No LIVE-IN employee shall be required to work more than five (5) days in any one workweek without a day off of not less than 24 consecutive hours except in an emergency as defined in subsection 2(D), provided that the employee is compensated for time worked in excess of five (5) workdays in any workweek at one and one-half (1 ½) times the employee's regular rate of pay for hours worked up to and including nine (9) hours. Time worked in excess of nine (9) hours on the sixth (6th) and seventh (7th)

workdays shall be compensated at double the employee's regular rate of pay.”

- c. Section 2(D) of Wage Order 15 states: "'Emergency' means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.”

5. Overtime rules for **NON LIVE-INS** who are non-exempt are basically the same as the “daily overtime” rules that apply to most non-union California employees

- a. One and half times hourly rate for:
 - (1) Over 8 hours in a workday;
 - (2) Over 40 hours in a workweek; and
 - (3) The first 8 hours on the seventh day in any workweek.
- b. Two times the hourly rate for:
 - (1) Over 12 hours worked in a workday; and
 - (2) Over 8 hours on the seventh day in a workweek.
- c. No pyramiding of daily overtime and weekly overtime.
- d. Regular rate for calculation of overtime rates is 1/40 of weekly salary.
- e. Make-up Time
 - (1) Encourages employers to let employees work extra in one day to make up for work they missed because of a personal obligation.
 - (2) Excludes up to three hours per day of make- up time from daily overtime pay calculation.
 - (3) Does not eliminate 40 hour overtime threshold.
 - (4) The employee must request the leave in writing and make up time in advance and the employer may grant the request in its discretion.
 - (5) Make-up time must be taken in the same week in which the time was lost.

- (6) The employer cannot solicit employees to make such a request to avoid overtime pay.
- D. Whether or not the household employee is a live-in, Section 3(E) of Wage Order 15 provides that “[a]n employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed 30 and the total hours of employment in any one workday thereof do not exceed six (6).”
- E. Few, If Any, Household Employees Will Be **Exempt** from Overtime Rules
1. Two basic tests must be met for exemption: salary basis and duties
 - a. Salary basis test – the employee must earn a monthly salary equivalent to no less than two times the state minimum wage in a 40 hour full time week. Currently, of \$2,340 per month.
 2. Duties test
 - a. Executive Exemption – the employee must spend more than 50% of his or her time:
 - (1) managing the enterprise or recognized department or subdivision; and
 - (2) directing the work of at least 2 other employees;
 - (3) and exercising the authority to hire or fire other employees or having his or her recommendations as to the advancement and promotion or any other change of status of other employees given particular weight; and
 - (4) customarily and regularly exercising discretion and independent judgment in the work.
 - b. Administrative Exemption -- the employee must spend more than 50% of his or her time:
 - (1) exercising duties and responsibilities that involve the performance of office or non manual work directly related to management policies or general business operations of his employer or his employer’s customers, and
 - (2) exercising discretion and independent judgment; and
 - (3) regularly and directly assisting a proprietor, or an employee employed in a bona fide executive or administrative capacity (as defined above), or

(4) performing under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(5) executing under only general supervision special assignments and tasks

c. Professional Exemption

(1) The employee must be

(a) licensed in California and is primarily engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(b) primarily engaged in an occupation commonly recognized as a learned or artistic profession as defined in the Wage Order; and

(c) customarily and regularly exercising discretion and independent judgment in the performance of the foregoing.

d. Other overtime exemptions (that would not normally apply to household jobs): certain computer software employees, outside sales, inside sales.

F. Record Keeping Duties of the Employer as to Each Employee

1. Full name, home address, occupation and social security number

2. Birth date, if under 18 years, and designation as a minor

3. Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded

4. Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee

5. Total hours worked in the payroll period and applicable rates of pay. (this information shall be made readily available to the employee upon reasonable request.)

6. All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years

G. Paycheck Itemized Statement Duties of the Employer. Labor Code Section 226 requires:

“(a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. The deductions made from payments of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement or a record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.”

“(e) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.”

“(f) A failure by an employer to permit a current or former employee to inspect or copy records within the time set forth in subdivision (c) entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar (\$750) penalty from the employer.”

H. Meal Periods

1. Shifts under 5 hours - no meal period is required.
2. Shifts of more than 5 hours - a non-working (i.e., relieved of all duty) meal period of at least 30 minutes is required. The meal period can be waived by the employee. A writing is not required but it is a good idea.
3. Shifts up to 6 and less than 10 hours - the meal period can be waived by the employee only if it is in writing AND the nature of the work prevents the employee from being relieved from all duty.
4. Shifts exceeding 10 hours up to 12 hours - a second 30 minute non-working meal period is required. The second meal period can be waived by the employee only if the employee did not waive the first meal period. There is no "nature of the work" requirement and no writing requirement. This permits employees working 10 to 12 hour shifts to lawfully take one meal period.
5. Shifts over 12 hours - no waiver of second meal period is permitted.
6. Employee's waivers must be voluntary and not coerced. The employer has discretion whether to consent; so, the employee cannot demand a waiver. Written waivers must state that the agreement can be revoked by the employee at any time.
7. The employee must be paid for all working time for waivers to be effective. 30 minutes relief of all work for each 5 hours worked in a day
8. 1 hour of wage as penalty for not permitting the meal period.
9. Debate in courts now over one vs. four year statute of limitations

I. Breaks – 10 minutes every 4 hours or major fraction thereof (1 hour of wage as penalty for not permitting the meal period.

J. Days of Rest – if the nature of the work requires more than 7 consecutive days of work, the employee must have one day off for each 7 days in a month.

K. Enforcement Issues

1. 3 year statute of limitations in Labor Board Action; **4 year** statue of limitation in civil court action and recovery of attorneys fees.
2. 10% per annum simple interest
3. penalties (e.g., failure to pay overtime and other wages, meal and rest period violations, paystub violations, other Labor Code violations, etc...)