



# Employment LAW BULLETIN

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**Paul V. Simpson, Ronald F. Garrity, Laura E. Innes, Sarah Lucas,  
Marc L. Jacuzzi or Jamie Rudman.**

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## REIMBURSEMENT FOR NECESSARY EXPENSES

Does an employer have to directly reimburse employees for their expenses? Under California's Labor Code Section 2802, employers are legally obligated to indemnify their employees for all "necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." However, the Labor Code does not specify the manner in which employers are supposed to indemnify their employees. In a recent California Appellate case, the court did not rule out the option of paying employees increased compensation in order to reimburse them for their necessary expenses. ([Gattuso v. Harte-Hanke Shoppers, Inc.](#))

In this case, salespersons sought indemnification for expenses incurred using their personal automobiles for work. Their employer argued it had satisfied its obligation under Section 2802 by paying the salespersons a higher base salary and higher commission rates than salespersons that performed sales duties over the phone.

The salespersons argued unsuccessfully that employers were required to either reimburse employees for their actual automobile expenses or by payment of a reasonable per mile rate. The court decided that the employer was not prohibited from indemnifying its employees for their automobile expenses by paying increased compensation, even if other provisions of the law treat the additional compensation as taxable wages.

On a cautionary note, the court also stated that employers would violate Section 2802 if the increased compensation was not enough to indemnify the employees for their actual automobile expenses, taking into consideration the increased taxes the employees would be obligated to pay on the increased compensation.

It is uncertain if this Appellate decision will survive in California. California employers taking advantage of the decision should draft policies and other documentation supporting their practice of increasing base compensation in lieu of direct expense reimbursement, as well as checking with their tax advisors.

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## **TRUCK DRIVERS' MEAL AND REST BREAKS**

Wage Order No. 9 contains the rules governing the hours and days of work, required meal periods and rest breaks, and record keeping requirements for all persons employed in the transportation industry. The wage order also exempts those employees whose hours of service are regulated by the Department of Transportation. According to a recent California Appellate case, this exemption applies only to the overtime provisions of the wage order. ([Cicairos v. Summit Logistics, Inc.](#))

Five truck drivers sued their former employer for violations of Labor Code and wage order provisions relating to meal periods, rest breaks, and the furnishing of itemized wage statements. The court rejected the employer's argument that those provisions did not apply to truck drivers under the motor carrier exemption contained in the wage order, holding that the exemption applies only to claims related to overtime provisions.

The court ultimately found the employer in violation of the meal period, rest break and itemized wage statement provisions of the wage order. The company used a computerized system on its trucks to automatically record various aspects of the truck drivers' activities, such as speed, starts and stops, and driving time, and required the drivers to manually enter other factors that affected their trip time. If a trip was delayed for a non-approved reason, the Company did not pay for the delay time. The company did not include activity codes for meal periods or rest breaks, and meal periods and rest breaks were not included on the list of acceptable reasons for delay. The company could not prove the breaks had been taken since it did not keep records accounting for driver meal and rest periods, and the company could not rely on its assumption that drivers took meal breaks because they were entitled to do so under both a collective bargaining agreement and under the law.

Furthermore, the company was found to have violated Labor Code Section 226(a) and Wage Order No. 9 for failing to provide itemized wage statements to its drivers. The company provided drivers with trip summaries and earning statements, but the summaries and statements did not satisfy its obligation because they did not list the total number of hours worked per day or per pay period and did not state the company's name and address.

There are many technical requirements in wage and hour law. Union employers are not insulated from potential liability. A labor audit might help assess risk and prevent future liability.

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## **Cal-WARN MAKES COMMON SENSE**

California has its own WARN law requiring 60 days advance notice to laid off workers in certain situations. This law is distinct from the federal WARN law. A recent California Appellate Court interpreted the state law to be akin to the federal law in one important aspect.

The case involved Empire Waste, which provides refuse collection, disposal and recycling services. Empire Waste had a contract to provide these services to the City of Santa Rosa, but in September

2002, the City awarded the future contract to a different company, named North Bay. Empire Waste then sold a portion of its business to North Bay. As part of the agreement, Empire Waste "transferred" to North Bay, 41 garbage truck drivers. Shortly after the sale, Empire Waste terminated 20 employees as part of a reduction-in-force. Neither the "transferred" employees nor the laid off employees were given 60 days prior notice of their terminations. An employee on behalf of himself and "similarly situated employees" sued under the California WARN Act.

Under the California WARN Act, 50 employees must be affected to trigger the advance notice obligation. The employee suing claimed that the 41 garbage truck drivers who were "transferred" to the new company were affected. Under the federal law, an employee must experience an "employment loss" to receive the 60 days notice. Although the California law does not specifically contain the "employment loss" language, the Court decided that an employee must actually lose employment in order to be entitled to the 60 days notice. Therefore, the 41 garbage truck drivers were not affected and the lay off was not covered by Cal-WARN since less than 50 employees were involved. (Macisaac v. Waste Management Collection and Recycling, Inc.)

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**HAVE YOU CONDUCTED  
YOUR HARASSMENT  
PREVENTION TRAINING? –  
BETTER LATE THAN NEVER**

The law mandating employers with 50 or more employees to provide at least two (2) hours of supervisory training and education regarding sexual harassment specified that initial training be completed by December 31, 2005. However, if your company let this date slip by, better late than never. If your company conducts the training now, it still may prove useful in defending a later harassment claim, as well as meeting the requirements of the new training law. Please contact Simpson, Garrity & Innes, PC to receive information about its in-house training programs presented by experienced and renowned employment law attorneys. Topics include:

- practical information to guidance regarding sexual harassment legal requirements
- remedies available to victims of sexual harassment
- practical examples to aid in the prevention of harassment, discrimination and retaliation
- other prohibited forms of harassment

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**SIGNIFICANT CHANGES TO  
THE COMPUTER  
PROFESSIONAL  
EXEMPTION  
COMPENSATION  
REQUIREMENTS**

AB 1093, effective January 1, 2006, makes significant changes to the minimum compensation requirements to support a computer professional overtime exemption. A computer professional is exempt from the requirement that an overtime rate of compensation be paid if the job entails primarily high-level functions (see below) and the worker is paid the minimum hourly rate set each year by the California Division of Labor Statistics based on California consumer Price Index data. AB 1093, effectively Jan. 1, 2006, amends the Labor Code Sec. 515.5 exemption criteria to require that employee be paid either the hourly rate or the annualized full-time salary equivalent of the that rate, provided that all the other criteria for exemption are met and that *in each work week the employee receives not less than the minimum specified hourly rate per hour worked*. The hourly rate for 2006 is \$47.81; the annualized equivalent of that rate is \$99,444.80.

Prior to the passage of AB 1093, employers may have used the

Professional Exemption for the computer professional, paying the computer professional the requisite minimum salary for professional exemption (\$28,080.00 per year). The AB 1093 amendments to Labor Code §515.5 now seem to preclude that approach. Rather, to be exempt from overtime, the computer professional must now receive at least \$47.81 per hour for each hour worked in a work week whether paid on the basis of an hourly rate or on the basis of a salary.

Unchanged are the duties requirements for the computer professional exemption, which still include that the employee is:

- Engaged, more than 50 percent of his/her time, in work that is intellectual or creative and that requires the exercise of discretion and independent judgment;
- Primarily engaged (>50% of his/her time) in duties that consist of one or more of the following:
  - Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional application;
  - Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; and
  - Documentation, testing, creation or modification of computer programs related to the design of software or hardware for computers operating systems;
- Highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming and software engineering.

Employers considering computer professionals exempt should carefully consider the new compensation requirements to ensure that the new criteria are met. Exemptions are a complicated and highly technical area of wage and hour law. They are also a popular new focus for plaintiffs' attorneys. If you have any questions about wage and hour law, call one of the attorneys at Simpson, Garrity & Innes.

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