

Morgan Lewis

C O U N S E L O R S A T L A W



*Top Ten Ways to Avoid
Wage and Hour Trouble*

September 13, 2005

Palo Alto

Rebecca Eisen

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September 15, 2005

San Francisco

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Brendan G. Dolan

Overtime Pay and Tech Workers: Lawsuits and Investigations

“Computer Sciences, which provides such services as systems integration, consulting and application outsourcing, has been sued on two occasions for allegedly failing to pay tech support employees overtime wages they deserved. In one case, it agreed to a \$24 million settlement that covers some 30,000 workers – nearly 40 percent of the company’s staff – according to an attorney representing plaintiffs in the suit. The company has declined to comment on either suit.... Lawyers say more such action may be on the way. **“We’ve had calls from people at some other major IT companies regarding their (overtime) exemption status, and we’re looking into this,”** said Todd Jackson, a plaintiffs’ attorney working on the Computer Sciences case.”

See “More Overtime Tussles for Tech Companies,” May 17, 2005, <http://www.news.com>

Overtime Pay and Tech Workers: Lawsuits and Investigations

- ◆ The following example illustrates that quality plaintiffs' firms are pursuing wage and hour class actions:

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

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Overtime Pay and Tech Workers: Lawsuits and Investigations

Overtime Pay Lawsuits and Tech Support Workers

Lieff Cabraser Heimann & Bernstein, LLP, is a national law firm at the forefront of litigation across America against major corporations for failing to pay workers overtime compensation, including to tech workers. We have filed numerous lawsuits on behalf of computer maintenance, technical and help desk staff, systems and network administrators, systems analysts and other IT and computer support professionals deprived of overtime pay.

Attorney Contact For IT Workers

Current and former tech works who wish to report in confidence their work experiences and submit a complaint welcome to contact a lawyer at Lieff Cabraser by [clicking here](#). There is no charge or obligation for our review of your claim.

A background image showing several office workers in a professional setting, some on the phone, with a warm, golden-brown color overlay.

HYPOTHETICAL

- ◆ A network administrator in the HRIS department at Acme Company is earning a salary of \$105,000 per year. In order to get her assigned work done, she works through lunch, takes no breaks during the day and works 10 to 14 hours a day.
- ◆ Three years later, she is fired and sues Acme for failing to provide meal and rest breaks and for overtime.
- ◆ Can she win her case, and, if so, how are her damages calculated?



Exempt vs. Non Exempt

- ◆ Is she properly classified as “exempt” from overtime?
- ◆ Does the exemption also apply to meal and rest breaks?

Possible Exemptions

“White Collar”

◆ Three Tests

- ✦ Salary
- ✦ Duties
- ✦ Judgment and Discretion

◆ Three Exemptions

- ✦ Executive / Managerial
- ✦ Professional
 - Computer professional
 - Artistic / learned
- ✦ Administrative



Possible Exemptions

◆ Sales Exemptions

- Outside
- Inside

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Meal Periods

- ◆ If she is non-exempt (or exempt under the inside sales exemption) she must be “provided” a meal break of not less than 30 minutes, once she has worked beyond five hours.
 - ⌞ Example: If she starts at 8:00 a.m. and works past 1:00 p.m., meal break must be provided.
 - ⌞ However, if the daily work period is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.
 - ⌞ When the meal break must be taken is currently unclear.
 - ⌞ Requirement to provide a second meal period if work exceeds ten hours.



Rest Breaks

- ◆ If non-exempt, 10-minute paid breaks must be allowed in the first and second four hour blocks of work
- ◆ Standard is lower
- ◆ No requirement that employer keep time records showing rest breaks



Breaks

- ◆ What if the company tells employees to take their breaks, but they don't?
- ◆ Does the employer only have the obligation to make breaks available?
- ◆ Can an employee choose to work through lunch and leave ½ hour early at the end of the day?
- ◆ Can an employee choose to take a lunch break early or late?
- ◆ New regulations coming ...

HYPOTHETICAL

◆ What is the remedy?

▹ On the overtime claim

- Unpaid overtime
 - Time and a half up to 12 hours
 - Double time after 12 hours
 - No fluctuating workweek in California (except for piece rate or commissioned employees)
- Attorneys' fees
- Interest
- Waiting time penalties (?)



HYPOTHETICAL

- ↖ On the claim for failure to allow meal and rest breaks
 - 1 hour of pay per day; or
 - 1 hour for each missed break or meal

HYPOTHETICAL

- ◆ What is the statute of limitations?
 - 4 years? (B&PC § 17208)
 - 3 years (CCP § 338)
 - 1 year on a penalty (CCP § 340)
 - Is the 1 hour recovery for meal and rest breaks a wage or a penalty?
(*DLSE Precedent Decision issued June 20, 2005*)
 - Tomlinson v. Indy mac
 - Current Trial & Appellate Court schism



Issues of Proof

- ◆ How do you prove how many hours the employee worked?
 - Burden on employer
 - Possible sources of data
 - Emails
 - Phone records
 - Computer login records
 - Co-workers
 - Badge swipes

Federal vs. State Law

- ◆ Does it make a difference if the systems administrator works outside of California?
 - ✦ Gap is closing, but . . .
 - ✦ Federal law remains substantially different from California law
 - Lower salary basis
 - \$100,000 exemption
 - “retail” concept/207i
 - Only some “judgment and discretion” needed
 - 2/3 year statute
 - Liquidated damages
 - Fluctuating workweek
 - “Primary duty” v “primarily engaged in”
 - No meal break penalties
 - Opt-in class
 - ✦ Other states may have their own laws



Solutions

- ◆ Detect and correct
 - Audit
 - Pay verification
 - Hot Lines / Complaint mechanism
 - Document review
 - Handbook
 - Time records
 - Performance evaluation forms
 - Job descriptions



Solutions

- ◆ If you decide that employees are misclassified, what do you do?



Risk Assessment

- ◆ How many employees would be affected?
- ◆ What bonuses or other “exempt” benefits would be lost?
- ◆ How much overtime do they really work?
- ◆ Are there any changed circumstances or planned actions to take into account?
- ◆ What about “back pay”?
- ◆ Can you get a release?

EXEMPT OR NON-EXEMPT

- ◆ Software engineers
 - Computer-related professional?
- ◆ IT personnel
- ◆ Executive assistants
- ◆ Commissioned employees
- ◆ Trainers
- ◆ Production workers
- ◆ Bookkeepers/entry level accountants

HYPOTHETICAL

- ◆ What if an exempt level employee wants to take ½ a day off for a doctor's appointment?
 - Can you pay her only for the ½ day worked?
 - Can you "charge" her sick, vacation, or PTO bank for "4 hours"?
 - What if she checks messages while out?
- ◆ Conley v. PG&E



HYPOTHETICAL

- ◆ If an otherwise exempt employee wants to work part-time, and you agree to pay her \$25 hour for every hour she works ...
 - If she works 4 hours one day and 12 hours the next, how much is she entitled to be paid?

A background image showing several office workers in a professional setting. One woman in the foreground is talking on a mobile phone. The image is overlaid with a semi-transparent gold gradient.

LESSON ONE

Properly Classify Employees

- ◆ Properly classify non-exempt employees as non-exempt

LESSON TWO

Properly Pay Non-Exempt Employees

- ◆ Record and pay for all minutes and hours of work between the first and last work activity of the day (except bona fide meal periods).
 - Problem Areas:
 - Logging into computer programs or preparing a work area before the shift
 - Changing into work clothes or putting on protective equipment
 - Travel between work locations
 - Cornn v. United Parcel Service
- ◆ Require certification of time records.

A background image showing several office workers in a professional setting. One woman in the foreground is talking on a mobile phone. The image is semi-transparent and serves as a backdrop for the title.

LESSON THREE

Properly Pay Non-Exempt Employees

- ◆ Except in very limited circumstances, count as “hours worked” any meal periods of less than 30 minutes in duration or which are interrupted by work, and in California (and maybe other states) record that the meal breaks were provided.

LESSON FOUR

Properly Calculate Overtime for Non-Exempt Employees

- ◆ Include all remuneration (except that which the law allows you to exclude) in the regular rate of pay before calculating regular and overtime rates.
 - For example:
 - Shift differentials
 - Cash payouts from cafeteria benefit plans
 - Call back pay
 - Non-discretionary bonuses
 - Some forms of profit- or gain-sharing
 - Supplemental compensation
 - Deferred compensation

LESSON FIVE

Do Not Dock the Pay of Exempt Employees

- ◆ An employer normally cannot dock the pay of exempt employees for partial day absences.
 - ▮ Leave Bank Exception (DLSE Internal Memo vs. Conley case)
- ◆ When negative leave balances exist in pay banks (vacation, PTO), be careful in any attempt to recoup such payments from exempt employees.
- ◆ No recouping for lost or damaged equipment.
- ◆ Careful in offsetting for any “business” losses.
- ◆ Review components of profit-based bonus plans.

LESSON SIX

Vacation Caps

- ◆ Make sure you comply with California law, if you make changes to your vacation policy, including imposing vacation caps.
 - ⌞ Is 9 months notice required before instituting new policy (DLSE Opinion Letter, withdrawn May 31, 2005); or
 - ⌞ Only “reasonable notice” (90 days).
 - ⌞ What is the right “cap”? Twice, 1.75, 1.5, 1?

LESSON SEVEN

Final Paycheck

- ◆ When are they due?
 - ✦ Resignation
 - ✦ Termination
 - ✦ AB 1093: Direct Deposit O.K.
- ◆ What do they include?
 - ✦ All wages through termination
 - ✦ Unused vacation
- ◆ Can you make deductions for amounts owed by the employee?
 - ✦ Amounts borrowed by the employee
 - ✦ Excess vacation used
 - ✦ Amounts stolen by the employee
 - ✦ Amounts overpaid to the employee in error



LESSON EIGHT

Job Descriptions

- ◆ What is their purpose?
- ◆ Wage and Hour vs. ADA issues



LESSON NINE

- ◆ Are your independent contractors really independent contractors?



LESSON TEN

Audits and Training

- ◆ Conduct periodic, preventative compliance audits to assure correct classification.
- ◆ Document compliance activities to substantiate a good faith defense.
- ◆ Regularly train managers, payroll and HR employees (including those in local offices/ branches/facilities) to know and comply with wage and hour laws, and to keep a record of all such activities.
- ◆ Work with Counsel / Retain Attorney-Client Privilege

General Concerns as a Result of Hurricane Katrina

- ◆ Leave of Absence requests
 - ◆ Cashing out of PTO/Vacation
 - ◆ WARN Act
 - ◆ Benefit Plan issues (401K loans)
 - ◆ Insurance policies
- <http://www.morganlewis.com/pubs/Katrina.pdf>



Q&A

For additional information, please contact us.
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About Morgan Lewis

- ◆ **Ranked #1 “go to” firm** for Labor and Employment by *Corporate Counsel* magazine's annual survey of the Fortune 250, “Who Represents America's Biggest Companies” (2005)
- ◆ **Our legal experience** combined with industry acumen, has proven to be invaluable in helping clients successfully negotiate the myriad federal, state and local laws that govern the workplace.
- ◆ **Our attorneys are leaders** in the field of labor and employment law. They include a former Chair of the Labor and Employment Section of the American Bar Association, Fellows in the College of Labor and Employment Lawyers, and partners who are recognized for professional excellence in *Best Lawyers in America*.
- ◆ **Breadth of Services**
 - ✦ Employment Counseling and Litigation
 - ✦ Wage and Hour Counseling and Litigation
 - ✦ Employee Benefits & Executive Compensation

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- Avoidance Strategies
- Jury Trials
- Class Actions
- Alternative Dispute Resolution

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- ERISA Litigation
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