



Misclassified Worker – Exempt or Independent Contractor Fact Sheet

In California, all workers are presumed to be hourly, non-exempt employees unless the employer can prove otherwise. The requirements to get over this hurdle are extensive, so it is imperative employers ensure that exempt employees and independent contractors are properly classified. Regardless of whether an employer misclassifies a worker by mistake, by negligence, or intentionally, the consequences can be costly and far reaching. This Fact Sheet focuses on the consequences of misclassifying an employee as “exempt” instead of “non-exempt” and also misclassifying a worker as an independent contractor.

The Department of Industrial Relations is the state agency responsible for enforcing these requirements. As the department interprets it, misclassifying workers results in depriving an employee of certain protections under the IWC “[wage orders](#)”. An incorrect exempt status or independent contractor classification denies the worker not only of the right to overtime compensation, but also any of the other protections afforded to non-exempt employees by such orders. In addition to protections under the workers’ compensation rules and from the Employment Development Department (EDD), such as unemployment insurance, state disability insurance, and paid family leave, protections found in the wage orders that would apply to non-exempt employees include:

- Overtime Premium
- Reporting Time Pay
- Meal Period Requirement
- Rest Period Requirement
- Recordkeeping requirements under the IWC Orders
- Requirement that employer furnish uniforms and equipment
- Requirement that meals and lodging amounts be limited
- Minimum Wage

The California Labor Code requires employers to maintain accurate time records of employees, so without proper timekeeping, an employer has no defense as to the proper payment of wages and

will be on the hook for violations related to paystub requirements, as well as to the proper timing of payment.

Consequences

Failure to properly classify a worker as non-exempt or as an employee exposes the employer to a worker filing a wage & hour charge or lawsuit against the employer to recover any unpaid wages. The agencies have made it clear that if there is an improper classification of a worker, they will work in unison to rectify the problem and penalize the employer. For example, the EDD may inform the Labor Commissioner of the discrepancy.

An example of unpaid wages workers can claim they are owed in a wage/hour charge or lawsuit may be:

- Overtime – Any time worked in excess of 8 hours in a day, more than 40 hours in a week, or more than 6 days in a workweek.
- Double-time- Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight on the seventh consecutive day of work in a workweek.
- Compensation for any missed meal and rest breaks. Employers owe **one hour's pay** for any meal or rest break that is insufficient – a maximum of 2 hours of penalty pay at the employee's regular rate of pay per day.

In addition, an employer who failed to classify a worker correctly can also be in violation for the following:

- Failure to carry worker's comp insurance
- Failure to deduct proper taxes and withholdings such as UI, PDF, SDI
- Interest and damages
- Damages under federal law violations
- Attorneys' fees

How to Classify Workers Correctly

Follow guidance found in our [Exempt Analysis Work Sheets](#) to analyze if your worker is eligible to be classified as exempt. Similarly, follow guidance on our [Independent Contractor Fact Sheet](#) to identify if your worker can meet the eligibility to be an independent contractor.

Duties shift and work responsibilities fluctuate throughout a worker's employment cycle. It is a good idea to audit your worker's job status often to ensure you are not inadvertently misclassifying them and paying a hefty price later.

Corrections or Adjustments

If you find there has been an error or your worker is better suited with a different classification, CEA recommends you communicate these findings and next steps with your company's attorney. Your conversation will be privileged and confidential as you adjust and transition your worker to the proper classification.

Possible Penalties

Labor Code Citation	Legal Requirement	Penalty
203	When an employer intentionally fails to pay wages to an employee when those wages are due – including missed meal/rest break penalties, overtime, etc.	Equivalent of one days' wages for up to 30 days
226.3, 226(a) and (e)	Payment with inadequate wage statement	The greater of all actual damages or \$50 for the initial pay period in which violation occurs and \$100 per employee for each violation in subsequent pay period, not to exceed an aggregate penalty of \$4000 +awards, costs, atty fees
226.4, 226, 226.3	No itemized pay statement, failure to keep records	\$250 per violation, \$1000 for subsequent violations Failure to comply \$50 or actual damages Failure to provide \$750
226.8(c)	Misclassification of independent contractor	\$10,000 or more than \$25,000
210	Failure to pay on payday 201.3, 204, 204b, 204.1, 204.2, 205, 205.5, 1197.5	\$100/employee to employees; \$200 subsequent violations + 25% of amount unlawfully withheld 12 1/2% payable to state fund
248.5	Failing to provide mandatory paid sick leave	Employee entitled to the dollar amount equivalent of paid sick days withheld multiplied by three, or \$250, whichever is greater, but not to exceed an aggregate penalty of \$4,000.
1197.1	Minimum wage and OT	Section 203 penalties and intentional violations

		<p>\$100/underpaid employee for each pay period + unpaid wages</p> <p>Subsequent violations for same offense</p> <p>\$250/employee/pay period</p>
3700.5	Failure to have workers' compensation for worker (IC or EE)	<p>Failing to have workers' compensation coverage is a criminal offense.</p> <p>Misdemeanor punishable by either a fine of not less than \$10,000 or imprisonment in the county jail for up to one year, or both. Additionally, the state issues penalties of up to \$100,000 against illegally uninsured employers.</p>