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California HR Workshop for California Craft Brewers

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Overview of Topics

- Hiring Issues
- Wage & Hour Issues
 - Overtime
 - Rest Breaks
 - Salary vs. Hourly
 - Interns and Volunteers
- Workers' Compensation
- Health Benefits
- Firing Issues



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HIRING ISSUES



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Legal Objectives of Hiring

- Avoid hiring employees who are likely to be trouble
 - *Walking lawsuits*
- Avoid discrimination claims
 - *Failure to hire claims*
- Avoid negligent hiring claims
 - *By other employees and/or clients*

Use a Comprehensive Employment Application



Key application questions:

- Job history/experience
- Explain gaps in employment
- Termination history
- Background questions
- Eligibility to work questions (education, addresses, references)
- Qualifications for position
- Criminal record
- Applicant signature confirming all true

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Background Checks and Drug Testing

- **Pre Employment Background Checks**

Criminal, driving and background investigations

- Fair Credit Reporting Act (“FCRA”)
- California Investigative Consumer Reporting Agencies Act (“ICRAA”), and
- California Consumer Credit Reporting Agencies Act (“CCRAA”).

- **Drug Testing**

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Required Hiring Forms & Policies

- Create a Comprehensive Hiring Packet of All Required Forms:
 - Form I-9: Employment Eligibility Verification (INS)
 - Form W-4: Employee Withholding
 - Form DE-35: Notice to Employees Regarding Withholding
 - Form DE-4: California Employee Withholding
 - Form DE-2320: For Your Benefit: California's Programs for the Unemployed
 - Form DE 2515: Disability Insurance Pamphlet
 - Form DE 2511: Paid Family Leave Brochure
 - Form DE-34: Report of New Employee(s)
 - Sexual Harassment Information Sheet
 - Notice to Employee: Labor Code sec. 2810.5

Required Hiring Forms & Policies

- Forms can be found online:
 - www.edd.ca.gov (unemployment/disability)
 - www.dfeh.ca.gov (sexual harassment info)
 - www.dir.ca.gov/DLSE (wage notices)
 - www.uscis.gov (I-9 form)

Retention Requirements

- Applications of individuals not hired – retain for 3 years.
- Employee payroll records, records in personnel file, and timesheets – recommended you retain for 4 years after termination. **(Labor Code and B&P Code)**
- I-9 forms – must retain for terminated employees for 3 years from date of hire AND 1 year from date of termination

Avoid Hiring Discrimination Claims

Be Mindful of Protected Categories:

1. Race/Color
2. National Origin
3. Ancestry
4. Sex
5. Sexual Orientation
6. Pregnancy
7. Citizenship Status
8. Marital Status
9. Age
10. Religion
11. Disability
12. Medical Condition
13. Gender Identity & Expression
14. Uniform Service Member, Military & Veteran Status
15. Genetic Information
16. Breastfeeding
17. Religious Dress & Grooming

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Essential Hiring/Handbook Policies

- At-will
- Equal Employment Opportunity
- Anti-Harassment
- Leaves of absence (FMLA, PDL, WC, FEHA, CFRA, ADA)
- Basic Work Rules / Code of Conduct
 - Computer and Phone Privacy
 - Drugs and Alcohol
 - Overtime and Timekeeping, Meal and Rest Periods
- Description of Employee Benefits
- Acknowledgment Form

Wage & Hour Issues

- Timekeeping
- Meal & Rest Periods
- Minimum Wage & Hourly versus Salary
- Overtime Exemptions
- Interns
- Volunteers



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Timekeeping

- All working time **must be** included in hours worked and reflected on time sheet
- Includes all time “suffered or permitted” to work, which includes:
 - Unauthorized working time
 - Training and meeting time
 - Travel time
 - Working lunches; and
 - Work at home

Timekeeping

- All non-exempt employees must keep time records that:
 - Accurately record beginning and end of shift
 - Accurately record beginning and end of meal periods
 - No exceptions
 - Failure to follow timekeeping policy is a disciplinary issue
 - Supervisors should review employee time cards on weekly basis and immediately address issues

Meal Periods

Meal periods must be:

- Taken at the right time
- At least 30 mins in duration for every 5 hrs work
- Uninterrupted
- Off duty (unless valid on duty agreement)
- “Off duty” generally means relieved of all duty and free to leave premises

Rest Periods

- All non-exempt employees must be permitted to take 10 minute break for every 4 hours of work
- Should be taken so far as practicable in the middle of each four hour work period
- Rest periods are on the clock paid time
- May be waived voluntarily – but can't pressure employees to waive

Meal & Rest Periods

Premium due for non-compliance:

“If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.” *(Labor Code § 226.7(b))*

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Overtime Rates

- Must pay time and one-half for:
 - Over 40 hours in a week
 - Over 8 hours in a day
 - First 8 hours on 7th consecutive day in work week
- Double time for:
 - Over 12 hours in a day
 - Over 8 hours on 7th consecutive day in work week

Unauthorized Overtime

- Still required to pay
- Treat as disciplinary issue

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Minimum Wage

- CA State Minimum Wage in 2015
 - \$9.00 per hour
- Effective January 1, 2016
 - ** Minimum wage increases to \$10.00 per hour
- Some city and local ordinances may require a higher minimum wage
- Legislation pending to increase to \$15 hour by 2021

Minimum Wage

The Hidden Costs of Minimum Wage:

- Affects more than just hourly employees
- Also increases the minimum salary amount for exempt employees

Overtime: *Exemptions*

- White Collar exemptions
 - Professional, Executive, Administrative
- Outside sales
- Commission sales
- Motor Carrier
- Highly skilled computer professionals

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Overtime: *Exemptions*

- Exemptions are defined by law
 - Not by agreement, job description or either party's intention
 - Default is non-exempt

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Overtime: *White Collar Exemptions*

Salary Basis Test: Salaried Exemptions:

Must be paid on “salary basis” an amount that is at least twice minimum wage based on a 40-hour week:

- Currently: $\$18 \times 40 \text{ hours} =$
\$720 per week
\$3,120 per month
\$37,440 per year

But . . .

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Overtime: *White Collar Exemptions*

Salary Basis Test:

January 1, 2016:

– \$20 x 40 hours =

\$800 per week

\$3,466 per month

\$41,600 per year

Exempt employees paid the minimum salary will get a \$4,000 raise in January

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Overtime: *White Collar Exemptions*

New Federal Regulations on The Horizon:

DOL has issued proposed revisions to the FLSA regulations that would increase the federal minimum salary requirement from \$455 per week (\$23,660) to \$970 per week (\$50,440)

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Overtime: *White Collar Exemptions*

Salary Basis Test: Salaried Exemptions:

- Weekly salary must be paid without reduction for quantity or quality of work for any week in which any time was worked.
- There are no “part time” salaried employees; the minimum pay requirement is an absolute minimum so long as an employee works once during the week.
- Limited exceptions – full day absence for purely personal reasons

Overtime: *White Collar Exemptions*

Duties Test: *Salaried Exemptions*

- Must perform exempt duties most of the time = more than half their total work time
- Duties differ for each exemption
- Customary/ regular exercise of discretion and independent judgment

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Tip Sharing

- Tip pooling is allowed as long:
 - The tip pooling policy is not used to compensate the owner(s), manager(s), or supervisor(s) of the business, even if these individuals should provide direct table service to a patron or are in the chain of service to a patron.
 - The policy is fair and reasonable.

(Labor Code section 351)

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Wage Orders

- Requirements can be found in the Wage Order
- Breweries are covered by Wage Order 1
- Regulates wages, hours and working conditions in the Manufacturing Industry
- View Wage Orders at: www.dlse.ca.gov
- Post the Wage Order in addition to all other required state and federal postings

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Volunteers

General Rule/Definition:

Work donated without promise, expectation, or contemplation of payment, which is performed for primarily religious, civic, humanitarian, or charitable reasons.

But not all work will be deemed volunteer work even if all of the above elements are satisfied. Context, therefore, is important.

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Non-Employee Volunteers

Individual who has never been an employee performs volunteer services:

- Okay if no contemplation of payment and for *humanitarian, public service or religious reasons.*
- But, where compensation is in form of “in-kind benefits,” i.e., food, clothing, transportation (possibly beer) it is tantamount to providing wages so person is not a volunteer.

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Employee Volunteers

Employees who volunteer during off hours:

- *Must be performed during off hours and cannot be the same kind of work which is performed during regular hours.*
- *Example: an office employee of a charitable organization can volunteer to sit with a sick child or elderly individual during off-duty hours as a charitable act.*

Employee Volunteers

Dept. of Labor Opinion Letter – 1995 WL 1032503:

“You have also asked a general question about whether employees of a for-profit organization may donate their service without compensation for activities such as staffing a booth at a function where the employer displays its goods or services, or working as a guide during an employer's ‘open house.’ **The answer to this question is no.** Employees may not donate their services to their for-profit employers.”

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Volunteers

Take Away:

- Well meaning people who “volunteer” to help at your brewery or at events are considered employees by the DLSE and DOL.
- Pay at least minimum wage to everyone who performs work for your brewery.

What is an intern?

- An intern is essentially an employee!
 - Anyone who is “suffered or permitted to work” is classified as an employee according to the DOL and DLSE
 - Anyone who is “suffered or permitted to work” must be paid
 - Interns are generally found to be “suffered or permitted to work” for for-profit corporations

Unpaid Interns Are Allowed If

All of the six-part test for employers is met.

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Six-Part Test Used by DOL and DLSE

1. The internship is similar to training that would be done in an academic environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees but works under the supervision of existing staff;
4. The employer derives no immediate advantage from the intern, and on occasion its operations may be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and intern understand that the intern is not entitled to wages for time spent in the internship

Workers Compensation: In a Nutshell

- Trade-off between employer and employee
 - Employees get money for injuries or illnesses resulting from their jobs
 - Employers receive protection from lawsuits
 - This is known as Worker's Compensation Exclusivity Defense (we love this)

Exceptions to WC Exclusivity

- Injury/death is legally caused by your willful physical assault
- Death/injury caused by your defective product
- Injury is aggravated by your fraudulent concealment of the injury's existence

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Who is Covered?

- Employers:
 - California state government
 - Public and quasi-public corporations
 - For-profit corporations and partnerships
 - Non-profit corporations and organizations
 - Sole proprietorships
- Employees: ANY person who is in the service of another person or organization **whether lawfully employed or not** (includes illegal immigrants, minors, elected officials, employed by the owner/occupant of a building)

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Who is NOT Covered?

- Self-employed
- Volunteers for public agency or non-profits
- Deputy clerks, sheriffs, or constables who do not receive compensation
- Ski lift operators in recreational activities and uncompensated ski patrol
- Uncompensated participants in sports
- Independent contractors

Independent Contractors

- Consider two key factors:
 - Individual possesses right to control production
 - Individual exercises discretion over manner in which he/she performs services
- Determining independent contractor for WC purposes, court relies on:
 - Individual's substantial investment in capital outlay in business
 - Individual holding his/herself out to be functioning business
 - Right to control factors

Workers Comp Posting Requirements

- Must post informational poster in a location accessible to all employees at each facility
- Give pamphlet to each employee when hired
- Employees who are injured as result of a crime must also give notice for crime victims
- Must post in Spanish if you have Spanish-speaking employees

Healthcare – Affordable Care Act

Employer Mandate

- Requires all employers with 50 or more employees to provide health insurance for full time employees or pay a per month “employee shared responsibility payment” on their federal tax return.

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Healthcare – Affordable Care Act

Employers With Fewer Than 25 Employees:

- ACA includes a new tax credit for all employers that purchase health insurance for their employees.
- Eligibility for tax credit:
 - Fewer than 25 FTE employees
 - Employee's average wages must be under \$50,000
 - Employer must contribute a uniform percentage of at least 50% of healthcare premium cost

Healthcare – Affordable Care Act

- The maximum tax credit is available to employers with 10 or fewer FTE employees and average annual wages of \$25,000 or less.
- Credit then phases out for employers with between 10 to 25 employees and/or with average annual wages between \$25,000 - \$50,000

Credit is limited for a maximum period of two consecutive years.

Termination: Common Red Flags

- Look at risk and the “bigger picture” when making termination decisions:
 - Try to be nice and make it seem like it is not based on the employee’s performance
 - Just blame it on the economy?
 - Rush to judgment

Termination: Common Red Flags

- Layoffs and Reductions in Force (RIF)
- Termination for singular poor performance
- How are others treated?
- Termination based on repeated intermittent leave
- Job not available upon return from leave

Termination:

Anti-Retaliation and Whistleblower Concerns

- California prohibits covered employees from being discharged for reporting:
 - Discriminatory conduct (Gov't Code § 12940(h))
 - Regulatory Violations (Labor Code § 1102.5)

And for engaging in “protected activity”

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Termination: Labor Code Protections

- Labor Code precludes adverse actions/discharge based on a number of factors, including:
 - Refusal to participate in activities that would result in a violation of state or federal law;
 - Disclosing wages;
 - Political activity or affiliation;
 - Disclosure of employer working conditions, other than proprietary, trade secret, or legally-privileged information

Termination: Labor Code § 132a

- Prohibits firing, threatening to fire, or discriminating against an employee for:
 - Stating that he or she plans to file a worker's compensation claim;
 - Filing a worker's compensation claim; or
 - Receiving a worker's compensation award

Discharge Procedures

- Get all the requisite approvals
- Failing to follow approval process creates appearance of impropriety

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Discharge Procedures

- Deliver the message with dignity
 - Most wrongful termination lawsuits are caused by disrespectful treatment
 - Find ways to maintain the employee's dignity (example: provide opportunity to resign)

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Discharge Procedures

- Review the personnel file and documentation supporting discharge decision
- Get final paycheck ready before termination meeting
 - Include all accrued, unused vacation
 - Pay timely
- Prepare termination notice
- Compile all required EDD notices

Termination Meeting: Recommendations

- Someone other than employee's supervisor should conduct meeting to minimize conflict.
- Have at least two people attend the meeting for multiple witnesses.
- Briefly state the issues that led to the discharge decision.
- Be matter-of-fact and not argumentative.
- Provide required termination notices.
- Have employee sign the termination notice
 - Mail notices with a return receipt in situations where employee is absent

Termination Meeting: Recommendations continued

- Give the employee an opportunity to respond
- Deliver the final paycheck
- Discuss any confidentiality agreements that employee may have signed
- Document all matters discussed with employee



Final Questions?

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