

Atkinson's Answers

Frequently Asked Questions on Wage & Hour Practices

[Joshua N. Lange](#)

[Steven D. Atkinson](#)

[Atkinson, Anderson, Loya, Ruud & Romo](#)

Wage and hour claims continue to be the most frequently filed claims in California. Employers often ask what they need to be doing to place themselves in the best position to defend against such claims. We have compiled some of the most frequently asked questions in this field of law, below.

Question: *Exactly what type of time records should I be keeping?*

Answer: Employers must keep accurate information of time records showing:

- When the employee begins and ends each work period
- Meal periods
- Split shift intervals
- Total daily **hours worked**
- Dated properly – showing month, day and year

Employers do not have to record meal periods where all operations cease. Employers also do not have to record rest periods.

Question: *How should I maintain time records?*

Answer: Time records must be maintained

- In English
- In ink or other indelible form (i.e., cannot be erased or removed)
- At the place of employment or a central location

You should also ensure the data being saved are the actual time records of employees and can be reproduced in a format that is accurate and easy to read.

Question: *How long do I need to maintain time records?*

Answer: Although the Labor Code Statute of limitations for wage claims is three years, the statute of limitations on unlawful competition claims related to wage and hour claims can extend back four years, so employers should keep time records of all employees for at least four years.

Question: *If I have to record all “hours worked,” what does that mean?*

Answer: This means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. An employee who is subject to an employer's control does not have to be working during that time to be compensated under California law.

Problems for employers arise in situations where employees engage in certain pre- and post-shift activities like donning and doffing uniforms, loading and unloading equipment and tools for the day, setting up and shutting down a work area, and security checks. Issues also arise when employees show up a few minutes early to clock in and drink coffee until their scheduled starting time in order to comply with an attendance policy.

Question: *If an employee alleges my time records do not accurately track all the time they worked, how can they prove it?*

Answer: Sloppy, inaccurate, or inadequate time records will be used against you to form the basis of costly wage and hour class action lawsuits.

California law is clear on this issue. Once an employee submits evidence that he or she was not paid for all hours worked (i.e. through an employee's own testimony or evidence of a company policy or practice), the presumption is the employer did not pay for all the hours worked until it meets the burden of proving otherwise. The fact that the precise amount of time is difficult for an employee to prove because of the employer's inadequate recordkeeping will not be counted against the employee.

Similarly, if meal period records show missed lunches, lunches less than 30 minutes, or lunches that did not begin until after working 5 hours in a shift, the courts presume the employer did not provide them in compliance with California law unless the employer can somehow prove otherwise.

Question: *Can I round employees' time records?*

Answer: For meal periods? No! The California Supreme Court has ruled that rounding meal period times is not allowed. You must record when employees actually begin and end their meal periods.

Rounding time entries for the beginning and ending of shifts is permitted if it "is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.'" See *'s Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907.

Rounding time entries for shift time is very risky because it is easy to screw up. The problem is usually how the rounding policy works in practice such that it underpays employees over a period of time. In fact, just by having a rounding policy exposes you to a costly wage and hour class action lawsuit regardless of whether it is legally compliant.

Question: *What are the best practices for implementing a time rounding policy?*

Answer: For most employers in most circumstances, the best practice is to not do it at all and just pay employees for the actual times they log in and out.

If you insist on maintaining a rounding policy and practice, then you should audit the employees' time records on a highly regular basis (i.e. every pay period) to ensure you are not undercompensating employees in the aggregate over each audited period of time. Don't wait to get sued and have a trial lawyer's expert do it.

Question: *My employees work the same shift schedule and lunch schedule every day so I just pay them off that. Is that okay?*

Answer: We call this a "pay by schedule" policy. We often see this, for example, with the same shift times and lunch times written into a timesheet every day for every employee. It is possible to record time this way, but like rounding, it is very

risky. Courts are often skeptical of the accuracy of such records and view it implausible that all employees begin and end work at the *same exact time* every day.

Also, because you cannot round meal period times, mechanically entering the same 30-minute lunch times on a timesheet will likely be viewed the same as rounding. Unless all operations cease as to all employees, each employee should log their actual beginning and ending times of meal periods to the minute.

Question: *Aren't we talking about trivial amounts of time that are too little to care about?*

Answer: No. This refers to what lawyers call the “*de minimis*” doctrine. The California Supreme Court nullified much of the so-called “*de minimis*” doctrine, except possibly for extreme circumstances such as “split-second absurdities.” You must record and pay for all hours worked. From the point of view of California courts, a “couple minutes here and there” adds up over time in the aggregate as to all employees and should be tracked. Not doing so will expose you to a costly wage and hour class action lawsuit for back wages and significant penalties.

The California Supreme Court has also reasoned that employers should be able to find ways to record “*de minimis*” time due to technological advances not in place in years past and identified the following possible options:

- Smart phones, tablets, or other devices to track time
- Restructure work so that employees do not have to work before or after clocking in and out
- Customize and adapt their own time tracking tools to capture time
- Consider reasonably estimating the time for certain activities that are hard to capture, through internal surveys or time studies

Be careful in requiring employees to track time on applications through their personal cell phones as you may simultaneously be required to reimburse them for a portion of their cell phone costs in doing so as a business expense.

Question: *Other than changing the way I may record time, what else can I do to help protect myself from allegations that employees are not compensated for all hours worked?*

Answer: An “ounce of prevention” can go a long way if and when you get sued or threatened with a lawsuit. Here are some additional considerations:

- Maintain a formal written Off The Clock Work policy expressly prohibiting any work prior to the scheduled starting time and after the scheduled ending time
- If employees are permitted to arrive on premises prior to their scheduled start time, also clarify in the formal policy that doing so is strictly voluntary and the time is exclusively meant for personal activities such as socializing, drinking coffee, eating breakfast, using the restroom, paying bills or playing games on a cell phone, and that employees are even permitted to leave the premises to run an errand or go to 7-11 and return by the starting time.
- Periodically remind employees of these policies *en masse* (i.e. emails, shift meetings)
- Periodically follow up with foremen/supervisors to survey if employees conduct any work prior to or after a shift.

Please feel free to contact the authors or your regular counsel with any questions you might have regarding wage and hour law.

Reprinted with permission from AALRR.