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## **Los Angeles Daily Journal Budget Crisis Hits California Wage Claims Process**

By H. Ann Liroff

Recently, the two-step process for handling wage claims in California has been eviscerated thanks to the state's budget crisis and cutbacks to the its Division of Labor Standards Enforcement.

Under the direction of the California Labor Commissioner, the DLSE has long been designated as the administrative agency to handle employee wage claims. Those claims can arise from the numerous rules in the California Labor Code regarding the timing for the payment of earned wages at an employee's termination and during the course of employment. In most complaints reaching the DLSE, employees allege that they were not paid their termination pay at the time of their departure under Labor Code Section 201. They may also allege that the termination pay did not include accrued vacation at the proper rate as per Labor Code Section 227.3. Additionally, employees can allege that they were not paid for accumulated overtime, as well as for rest or meal breaks in violation of Labor Code Sections 510 and 512.

Over the years, the DLSE has developed a fairly consistent two-step process to handle the basic filing, conference, hearing and appeal procedures for employee-filed claims. This process is spelled out in the DLSE's Policies and Procedures for Wage Claim Processing Manual. According to its terms, if an Informal Conference under Labor Code Section 98.3 is to be held, a notice of claim is then sent to both parties with a detailed description of the allegations. Although both parties are required to bring to the informal conference all documents that they have regarding the claim and its possible defenses, no testimony is taken under oath. The Deputy Labor Commissioner, after consulting with both parties and reviewing the documents, will then generally assess if a claim can be presented cogently and if the case can be settled. If a settlement is possible, the Deputy Commissioner will record an agreement at the conference with an official DLSE agreement form, and provide for a dismissal of the claim at the time the settlement is paid. In instances where the employer does not attend the informal conference or where settlement cannot be achieved, the case is forwarded on to a formal or "Berman" hearing under Labor Code Section 98(a).

Although anyone can file a wage claim, the Deputy Commissioner will usually determine during the informal conference if the division has jurisdiction over their grievances. The division does not have jurisdiction over [bona fide] independent contractors or the wage claims of union members who are part of collective bargaining agreements. The division also has only limited jurisdiction over public agencies employing federal, state, county or municipal workers. If the employee is an independent contractor, the complaint will be dismissed and the employee has an option to file a private action.

Over the past few decades, the informal hearing process was created as a screening device, because as a practical matter the DLSE receives far too many complaints each year to set each of them for a formal Berman hearing. This is particularly true in instances when the complainant cannot accurately document his or her claim or when the claim is outside the DLSE's jurisdiction. As a result, the informal conferences save the DLSE time and resources. That's because the investigative process undertaken by Deputy Labor Commissioners weeds out many meritless claims and can help to settle up to 75 percent of the complaints. Settlements at the informal conference stage frequently occur when the complaint is for a fairly insignificant sum and the employer is willing to settle in order to resolve the matter. Only those cases which are hopelessly deadlocked or those involving multiple complainants were routinely forwarded to a Hearing Officer for a formal Berman hearing.

During California's recent fiscal crisis, a number of Deputy Labor Commissioner positions have been left vacant as a result of attrition and elimination. So, rather than focusing limited resources and attention on scheduling informal conferences, the DLSE may be taking a more dramatic approach. In fact, the DLSE has begun automatically setting all complaints for formal Berman hearings, citing the

lack of resources as justification for its failure to engage in proper investigations. The formal process is considerably more expensive for both the employers and the DLSE; and in many instances, forces hearings on cases that could be either dismissed or settled at informal conferences.

During Berman hearings, witnesses are required to testify under oath or by subpoena. The proceedings are recorded and each party has the right to be represented by counsel, present evidence, testify and cross-examine the opposing witnesses. Translators are provided, if needed, by the DLSE.

The hearing officer has the authority and discretion to conduct the hearing, explain issues to the parties, set the order of the witnesses and question parties or witnesses. These proceedings take considerably longer than the informal conferences and they include subpoenaed documents and records, as well as sworn witness testimony. Hearing officers can also award penalties for willful failure to pay the charging party of up to 30 days at the employee's daily rate. Nor is the hearing officer bound by the formal rules of evidence. Decisions are usually filed within 15 days of the hearing.

Automatic referral to formal hearings can present serious challenges for employers, who must subpoena witnesses and verify documents at considerable cost in time and expense. Moreover, although both parties can appeal a DLSE decision, an employee can appeal an adverse ruling to Superior Court for a [de novo] hearing without posting a bond. Yet, an employer who loses a Berman hearing must file a cash bond to cover the amount of the claim before their appeal can be processed. As a result, there is significant pressure on the employer to present the best case possible at the hearing to avoid posting a bond at appeal. Further, DLSE may provide the employee an attorney without charge for an appeal filed by the employer, while employers must cover their own appellate expenses.

As a result of this shift in policy at the DLSE, employers are less likely to get an administrative opportunity to settle their wage claims prior to a formal administrative hearing. Absent these informal conferences, employees have little incentive to settle wage claims and face the added risk of awards for penalty wages. The mere presence of the Deputy Commissioner at the informal conference serves as an incentive to employers and employees alike to work towards a compromise settlement. Without this process, the number of formal hearings and the wait time for a scheduled date will increase exponentially.

In the past, informal conferences were scheduled within two to three months of the filing of claims. And, the DLSE usually allowed no more than three hours per hearing. In general, that was enough time for the Deputy Commissioner to assess jurisdiction, the merits of the claim and the likelihood of settlement. If informal conferences become extinct, then jurisdiction will have to be determined at the outset of a formal hearing and there is no real opportunity to engage in mediated negotiations with a neutral. This will only lengthen Berman hearing proceedings and increase their expense.

Previously, Berman hearings were reserved for more complex claims, such as those with multiple claimants or those that could not be mediated. Now, this is less likely when the employee has nothing to lose and everything to gain by taking the longer, more time-consuming route. Unfortunately, these developments will only make it harder for employers to do business in California.

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