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# **Do-it-Yourself Recovery of Unpaid Wages**

How to Represent Yourself Before  
the California Labor  
Commissioner

A Publication of:

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# **Do-it-Yourself Recovery of Unpaid Wages**

**How to represent Yourself Before the California Labor Commissioner**

**This packet provides only general information about wage claims and a step-by-step explanation of the process to recover wages before the California Labor Commissioner. If you need more specific advice about your claim, you should consult an attorney.**

**This packet was updated in 2004. The Labor Commissioner procedures or the law itself may have changed since that date. These changes may affect your claim. For up-to-date information, consult an attorney.**

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**How to Represent Yourself Before the California Labor Commissioner**

**TABLE OF CONTENTS**

<b><u>INTRODUCTION</u></b> _____	4
<b><u>WHAT DO I DO FIRST?</u></b>	
I.    Calculating a claim _____	4
II.   Demand payment before filing a claim _____	6
III.  Filing a wage claim _____	7
<b><u>FILING A WAGE CLAIM</u></b>	
STEP 1: Can you file with the Labor Commissioner? _____	9
STEP 2: Filing the Claim _____	12
STEP 3: What Happens After I File the Claim Form? _____	14
STEP 4: Pre-Hearing Conference with You and Your Employer _____	16
STEP 5: Changing the Complaint Between the Conference and the Hearing _____	20
STEP 6: Notice of Hearing _____	21
STEP 7: Preparing for the Hearing _____	21
STEP 8: The Hearing _____	26
STEP 9: Decision of the Labor Commissioner _____	35
STEP 10: Appealing the Labor Commissioner’s Decision _____	36
STEP 11: Collecting your Judgment _____	37
STEP 12: Paying Income Taxes _____	37

# INTRODUCTION

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This packet provides information to workers who are trying to collect unpaid wages from their employers. If you are not sure whether you were paid correctly, you should first look at the “**Wage and Hour Fact Sheets**” that have been published by the Unemployment and Wage Claims Project (you will find a complete list of available fact sheets in the appendix). These fact sheets should help you determine whether or not you are owed wages and, if so, how much you can recover. If you do not have the fact sheet that addresses your claim, please call the Coordinator of Direct Services at (415) 864-8848 ext 263 for additional assistance. The fact sheets can also be accessed online at <http://www.las-elc.org/factshtinvent.html>.

If you determine that you have not been paid correctly, you are ready to take action against your employer (this action may include filing a formal claim). This packet describes the different steps you should go through to collect those unpaid wages.

## WHAT DO I DO FIRST?

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### I. CALCULATING A CLAIM

**If you have already calculated your wages, continue to “DEMAND PAYMENT BEFORE FILING A CLAIM,” below.**

#### **A. How do I figure out exactly what I am owed?**

All wage claims are different. Although this packet cannot provide you with precise instructions on calculating the exact amount of your claim, the information contained in the Wage and Hour Fact Sheet that applies to your type of claim (list of fact sheets in the Appendix) should help you figure out how much you are owed. For most wage claims, the best way to calculate your claim is to follow the five steps below:

- 1) Check the time limits that apply to your claim

There are time limits that apply to every claim for unpaid wages. See “Time Limits,” below, to determine whether your claim for wages is still valid and how far back you can go to claim wages.

- 2) Estimate the number of hours you worked

Do your best to fill out a calendar with all of the hours you worked during the time you are claiming. Include all the hours you worked, even if you were paid. Remember, you only have to do this to the best of your ability.

Your records and your memory do not have to be perfect, but you should try to be as accurate as possible to convince the Labor Commissioner you are telling the truth.

- 3) Identify your regular rate of pay and/or your overtime rate (if applicable)

After you have a good idea what hours you worked, identify how much you should have been paid for those hours. To do this, you normally have to figure out your “regular rate of pay.” For most workers, the regular rate of pay is simply their hourly wage. If there is no agreement on how much you should be paid, your regular rate is the minimum wage at the time you performed the work (See “Minimum Wage” fact sheet for more information). If you work on salary, commission or piece rate, you will have to calculate your hourly wage (See “Overtime” fact sheet for more information on calculating your regular rate if you work on salary).

If you are claiming overtime pay, you should calculate your overtime rate of pay (which can be either 1.5 or 2 times your regular rate of pay, depending on the hours you worked). For more information, see “Overtime” fact sheet.

- 4) Multiply the hours you worked times the legal rate of pay

Calculate the wages you should have been paid by multiplying the number of hours you worked times your regular rate of pay and/or your overtime rate. This total gives you the amount you legally should have been paid.

- 5) Subtract the wages you actually received

After you have calculated what you *should* have been paid, subtract the amount you *actually* received. The amount you actually received is listed on your pay stubs. If you do not have a pay stub, you can find out how much you were paid from your employer’s records, which you have the right to see. The difference between what you should have been paid and what you were actually paid equals the wages you should claim.

The Labor Commissioner will often ask you to submit a **worksheet** with your claim showing how you calculated the money you are owed. Try your best to complete this worksheet as accurately as you can.

This method of calculation is different for reimbursements, deductions from pay, commissions, bonuses and certain other wage claims that are not directly related to your hours of work.

If your claim is more simple, for example if your employer simply withheld or made mistakes on one or two paychecks, you can calculate your claim based only on the amount that you think should have been included in those paychecks (you do not have to complete a calendar of all of the hours you have ever worked for your employer).

## II. DEMAND PAYMENT BEFORE FILING A CLAIM

If you have already sent a demand letter, continue to “**FILING A WAGE CLAIM,**” below

Once you have determined that you are owed wages, it is normally best to try and recover them without filing a claim against your employer. The best way to demand your wages is to send your employer a **demand letter**, which is a simple letter explaining that you are owed money and what you want to collect. Before you send any letter to your employer, **make a copy of the signed letter for your records.**

### A. Why send a demand letter?

The demand letter is useful for a number of reasons: (1) You can avoid the trouble of filing a claim or a lawsuit if your employer gets the letter, realizes that you were paid incorrectly and pays you the money you are owed. (2) If you still work for your employer, the letter gives you some protection against *retaliation*. Since it is illegal for your employer to fire you or take other action against you for demanding your legally protected wages, the demand letter is your proof that you asked for those wages. (3) If you no longer work for the company, the demand letter will help your case for “waiting time penalties” by showing that your employer continued to avoid payment of your final wages even after you asked for the money. (See “Getting Your Final Paycheck” fact sheet for more information about waiting time penalties.)

### B. What should I say in my demand letter?

Your demand should notify your employer that you are requesting unpaid wages. Although the letter does not need to be detailed, it should include your best estimate of the amount of money you are owed, the type(s) of wages you are claiming, and instructions for payment.

### Sample demand letters

The appendix to this packet contains two sample demand letters that you can use to help write your own demand letter. The first sample is for workers who no longer work for their employers and includes a demand for waiting time penalties. The second sample is for workers who are still employed with the company that owes them wages.

### III. FILING A WAGE CLAIM

If your employer refuses to pay your wages, even after you have sent a demand letter, you can take legal action against your employer to collect those unpaid wages. You can take legal action in either of two (2) ways:

- (1) You can file a lawsuit in court (see below for more information about the proper court for your claim), or
- (2) You can file a claim with the Labor Commissioner (the process is described in detail throughout this packet).

#### A. Who exactly is the Labor Commissioner?

The California Labor Commissioner's office, officially called the Division of Labor Standards Enforcement (DLSE), is the California government agency that has the authority to investigate and enforce California's wage laws to ensure that workers are paid according to the law. The Labor Commissioner has two separate branches that handle different kinds of wage claims. Complaints about a problem that involves a large number of workers should go to the Labor Commissioner's **Bureau of Field Enforcement**. Individual claims should be filed at one of the Labor Commissioner's **Wage Claims Offices**.

The Labor Commissioner has set up the Wage Claims Offices to receive worker complaints and attempt to resolve those complaints through an investigation and/or a hearing. (See appendix for a complete listing of Northern California Labor Commissioner offices).

#### ***Note regarding workers without papers***

All workers have the right to be paid for their work. People who work without papers ("undocumented workers") are covered by all of California's wage laws. The Labor Commissioner will accept claims filed by undocumented workers and should not ask you about your immigration status. If the Labor Commissioner finds out that you do not have papers, it is not supposed to report this information to immigration. For more information about the Labor Commissioner's policy for undocumented workers, go to the Labor Commissioner's website at: <http://www.dir.ca.gov/dlse/DLSE-Feature.htm>.

#### B. How do I choose whether to go to court or to the Labor Commissioner?

If your wage claim is for less than \$5000, you can choose to go to either Small Claims Court or the Labor Commissioner. The Labor Commissioner's process may take a little longer than Small Claims Court. On the other hand, the Labor Commissioner's office, which is staffed by people who have expertise in wage claims, may be more likely to understand your claim than a

Small Claims Court Judge. For example, a small claims court judge may not know that workers who lose their jobs are often entitled to waiting time penalties as well as interest on unpaid wages, but the Labor Commissioner is very aware of this law. Also, you can bring a lawyer or another representative with you if you go to the Labor Commissioner. Lawyers are not allowed in Small Claims Court.

The following chart explains the main differences between the Labor Commissioner and small claims and can be used to help you decide where to file your claim:

<b>DLSE</b>	<b>SMALL CLAIMS COURT</b>
Specializes in handling wage claims and more likely to understand less-common laws	Judges may not have particular expertise handling wage claims
May bring advocate or lawyer to assist in process	No lawyers permitted
No maximum amount of claim	Claim must be <i>no more than</i> \$5,000 (you can choose to file in Superior Court for larger claims)
Approximately 6-8 months to complete process	Approximately 1-2 months to complete process

If your claim is for *more* than \$5000, you can still choose to file a lawsuit or go to the Labor Commissioner. However, if you choose to file a lawsuit, you have to file in a larger state court, known as Superior Court. Because the Labor Commissioner's process is simpler than court, larger claims are usually easier to pursue at the Labor Commissioner, with or without a lawyer. If you choose to go to court, it is often best to have a lawyer on your side who understands all of the court's procedures. You will normally have to pay that lawyer.

Although it may be helpful to retain a lawyer to help you at the Labor Commissioner, the Labor Commissioner's process is designed to allow workers to bring claims on their own.

This packet is designed to help workers who do not or cannot hire a lawyer to assist them with their claims at the Labor Commissioner.

# FILING WAGE CLAIMS WITH THE LABOR COMMISSIONER: FROM INITIAL CLAIM TO HEARING

The remainder of this packet describes the process you will go through if you choose to pursue your wage claim before the Labor Commissioner. It provides explanations and examples that should help you decide how much to claim and whether to settle a claim before the process is over. If you decide not to settle your claim (usually for less than you think you are owed), this packet discusses how to present your case at a formal hearing to recover wages. The timeline on the previous page gives you an idea how long each step in the process is likely to take.

## **STEP 1: CAN YOU FILE WITH THE LABOR COMMISSIONER?**

### **A. Are there limits on the *type* or *amount* of wages I can recover through the Labor Commissioner?**

**Yes.** The Labor Commissioner handles only certain **types** of wage claims, and the Labor Commissioner will only accept wages that were earned within certain **time limits**.

#### **1. What types of claims does the Labor Commissioner accept?**

The most common claims that the Labor Commissioner will investigate and enforce involve workers who are asking for the following types of wages:

- a. Minimum wage
- b. Hourly wages
- c. Overtime wages
- d. Piece rate wages
- e. Commissions
- f. Deductions from pay
- g. Reimbursement of expenses
- h. Bonuses
- i. Vacation pay
- j. Severance pay (in some cases)
- k. Waiting time penalties
- l. Penalties for bounced checks
- m. Pay for not receiving breaks
- n. Pay for not receiving meal periods
- o. Liquidated damages (in garment worker cases only)

If you have a claim for any of these types of wages, review the Wage and Hour Fact Sheet that applies to your claim before filing with the Labor Commissioner (you will find a complete list of available fact sheets in the appendix).

## **2. Why might the Labor Commissioner not accept my claim?**

By law, the Labor Commissioner cannot investigate or enforce wage laws for certain types of workers. However, those exceptions are limited. As mentioned above, the Labor Commissioner does accept claims from workers who do not have papers; undocumented workers have the same right to file for wages. Review the information below carefully to determine whether or not the exception really applies to you. If you're still not sure whether your claim will be accepted, you should file your claim and argue that you do not fit into one of the exceptions.

### **a. Independent contractors**

Employers often choose to hire “independent contractors” rather than “employees.” The Labor Commissioner does not have the authority to handle a claim from a worker who is properly classified as an independent contractor. However, employees are often “misclassified” as contractors by employers who illegally try to avoid certain legal obligations, such as the payment of taxes or other benefits to their workers. If your employer generally had the “right to control” your work, you are probably not an independent contractor and you can bring a claim for wages. However, for more information on whether or not you have been properly classified, see the “Independent Contractor or Employee: How You Should be Classified” fact sheet.

If you believe you were an employee, not an independent contractor, the Labor Commissioner should give you the chance to argue that you were actually an employee even if your employer thought you were a contractor. If you are a true independent contractor, your claim for unpaid wages must be filed in court (either Small Claims Court or Superior Court).

### **b. Union members**

If you are a member of a union, you are likely to be covered by a Collective Bargaining Agreement (CBA) that defines the terms and conditions of your employment. If your employer violates that agreement, you normally have to file a grievance with your union rather than go to the Labor Commissioner. However, the Labor Commissioner will accept claims from union workers if the CBA clearly defines the wages that should have been paid and that right is also available to non-union workers (for example, if your CBA clearly gives you the right to overtime after eight hours/day or 40 hours/week, this right is the same as non-union workers and you can probably claim

these wages through the Labor Commissioner). If, on the other hand, the Labor Commissioner will need to interpret the agreement, you will probably be turned away and told to file a grievance with your union instead of a wage claim.

### c. Government Employees

Most California wage laws do not apply to public employees (people who work for the state, county or city). Public employees include workers who are employed directly by the government and those who work for employers that are affiliated with a state or local government (e.g. a county hospital or public school district). Even if a particular law does apply to a public employee, the Labor Commissioner may choose not to accept claims filed against the government employer under that law. If you are a public employee, you should consult your union (if you have one) or file a claim with the United States Department of Labor under federal law or in state court if you are covered by state law.

## 3. Time Limits

### Do I have to file my claim within a certain amount of time?

You can only claim back wages for a certain amount of time. The specific time limit that applies to you will depend on what kind of wages you are trying to collect. These time limits are calculated back from the day you file a claim for wages with the Labor Commissioner or court. The following information should guide you as to how far back you can go to collect unpaid wages:

- a. If your claim is for **minimum wage, overtime, illegal deductions** from pay, or **unpaid reimbursements** your claim can go back up to **three years** from the date you file with the Labor Commissioner or court.
- b. If your claim is based on an **oral promise** that you will be paid more than minimum wage, your claim can go back up to **two years** from the date you file with the Labor Commissioner or court. Since you can claim minimum wage for up to three years (see above), you can extend your promised wage claim to three years, but only ask for the minimum wage instead of the higher rate for that extra year.
- c. If your claim is based on a **written contract**, your claim can go back up to **four years** from the date you file with the Labor Commissioner.
- d. If your claim is for **waiting time penalties**, the time limit depends on the type of wages that were not paid at the time of discharge or

quit. The time limits described in numbers a, b and c, above, describe the types of wages that can be owed and be the basis for penalties. The same time limits apply to the penalties as to wages themselves.

If you try to recover wages that were earned beyond these time limits, the Labor Commissioner will not accept the claim because it is beyond the “Statute of Limitations.”

## **STEP 2: FILING THE CLAIM**

**If you have already filed your claim, continue to step 3.**

Once you know that you can file your wage claim with the Labor Commissioner, you can do this yourself by submitting an **“Initial Report or Claim”** form.

### **A. What is the “Initial Report or Claim” form?**

The claim form is the document that starts the legal process to recover your wages through the Labor Commissioner. The form is available from the Labor Commissioner’s office in both English and Spanish. (See Appendix for a complete list of the addresses of Northern California Labor Commissioner offices).

### **B. Special instructions on completing the claim form**

The claim form is not a complicated document, but it does ask for some information that you may not understand or you may not have. The main thing to remember is to fill in all the information to the best of your ability. For example, if you don’t remember precise dates when you worked, just write down your best estimate (e.g., month and year only). Some sections of the form may not apply to you, in which case you can just write “N/A” (not applicable) in the space provided. The sample form on the next page provides specific explanations of some form sections that might be unclear to you. You can always ask the Labor Commissioner for help if you have questions about the form.

- 1) Name and Address of Business: You will need to have the exact address of your employer or former employer so the Labor Commissioner can send your employer all the necessary paperwork for the claim.
- 2) Interpreter needed: If you are more comfortable in a language other than English, check "yes" and also write the name of your first language so that the Labor Commissioner can arrange interpreter services for your case.
- 3) Rate of Pay: You should fill in the amount you expected to be paid for your work (look at old pay stubs or just write down the amount your employer promised). If you never agreed on a specific pay rate, fill in the applicable minimum wage. If your pay changed during your employment and you are collecting wages based on both rates, explain which dates apply to which rates of pay.
- 4) Total Hours Worked: This question is not asking for the hours you are claiming were unpaid. The Labor Commissioner just wants to know how many hours you normally worked in a normal day and/or week.
- 5) Were you Paid at the Time of Discharge? If you were given your final paycheck on time, but it was not complete, check "no" for this question so you can claim waiting time penalties (Labor Code §203) for the wages your employer didn't pay.
- 6) Did you keep a record of hours worked? This question is asking whether you have records that show the hours you claim to have worked for your employer. These records can include your personal calendar or journal, but also include records from your employer such as time cards or schedules.
- 7) Brief Explanation of Issues: This section asks you to describe the wages you were not paid. The easiest way to use this section is to simply list the different types of wages and/or penalties you think you are owed. You can attach an additional sheet if you do not have enough space.
- 8) Amount Claimed: If you are asking for waiting time penalties, do not add the penalties into the wages you are claiming. You should, however, ask for the penalties in the "Brief Explanation of Issues" section.
- 9) Driver's license: The Labor Commissioner will still process your claim even if you do not provide a Driver's License number. If you do not have a license or do not want to give the number, write in "N/A"
- 10) Social Security Number: The Labor Commissioner will still process your claim even if you do not provide a Social Security number. If you do not have a Social Security Number or do not want to give the number, write in "N/A"

### C. Where do I file the initial claim form?

First of all, before you file the form, make a copy for your records. Then, file the form at the Labor Commissioner's office *in the county that you worked, not the county that you live* (See Appendix for a complete list of Northern California Labor Commissioner offices). You do not need an appointment to file the form; simply hand it to the employee behind the counter. Remember to ask the counter person for a "date-stamped" copy of the completed form. If you are not given a copy, simply make a note of the date you turned it in and the name of the person who accepted the form (if you know). You can also mail the completed form to the Labor Commissioner.

*Note regarding limited English speakers:*

The Labor Commissioner should have translators for common non-English languages at the front desk to help limited English speakers. However, we recommend that if English is not a worker's first language, s/he should try to bring along a friend to interpret. The worker (or a friend) should also tell the Labor Commissioner that s/he will need an interpreter present at the pre-hearing conference and the hearing. If you have problems getting an interpreter or if the interpreter does not do a good job, please call (415) 593-0066.

## **STEP 3: WHAT HAPPENS AFTER I FILE THE CLAIM FORM?**

**If you have already received your Notice of Claim and Conference, continue to step 4.**

After you file your initial wage claim form, the Labor Commissioner will probably try to resolve your claim between you and your employer without a formal hearing. The Labor Commissioner normally will begin by sending a "**Notice of Claim and Conference**" to both you and your employer. The notice tells your employer that you have filed a claim and sets a date for a **Pre-Hearing Conference**. Mark that conference date on your calendar and plan to attend. If you absolutely cannot attend the conference, call the Deputy Labor Commissioner listed on the bottom of the notice to ask for a postponement (also known as a "continuance"). You do not have the automatic right to reschedule the conference, so the Deputy will probably require a very good reason to change the date. (For more information about the conference itself, see **Step 4** below.)

Sometimes the Labor Commissioner will choose not to hold a conference. If that happens, you and your employer will receive a "**Notice of Claim Filed.**" Your employer will then be required to either send your money or explain precisely why you are not owed wages. If your employer sends an answer (instead of the

money), the Labor Commissioner might ask you to respond in writing to the employer's answer.

Even if you have been sent a notice of conference, your employer still has the opportunity to respond or simply pay the claim. If your employer does send a response, a copy should be forwarded to you.

In a limited number of cases, the Labor Commissioner may decide to take no further action on a claim before holding a conference because the claim is not the type of claim the Labor Commissioner handles (see "What types of claims does the Labor Commissioner accept?" above, for more information).

**NOTE:** If your employer sends a check for less than the full amount of your claim, this will be considered an "offer of settlement." You will have to decide whether the amount is enough to satisfy you. If it is not, notify the Labor Commissioner that you intend to proceed with your claim.

This situation often will arise if you no longer work for your employer and your employer sent a check for the actual wages due, but did not include "waiting time penalties" (under Labor Code section 203). If penalties are not indicated on your Notice of Claim and Conference, but you intend to try and collect them, you should inform the Labor Commissioner that you will drop the claim for actual wages (since you got a settlement check for those), but that you will continue to proceed with the "penalties" portion of the claim.

If your employer pays your "undisputed wages" -- these are wages that both sides agree should have been paid -- you will normally be able to cash this check and continue with your claim for any wages your employer refuses to pay. However, if your employer also offers you some or all of the disputed wages -- additional wages that it thinks it should not have to pay -- you will risk giving up ("waiving") all of your claims by accepting the check. The risk that you will waive your claims is higher if the check includes a notation such as "payment in full" or if your employer makes you sign something saying that you accept the check as a full and final payment of all wages owed.

If you are concerned about waving certain rights by cashing a check sent by your employer, contact either the Deputy Labor Commissioner assigned to your case or call the Unemployment and Wage Claims Project at (415) 864-8070.

## **STEP 4: PRE-HEARING CONFERENCE WITH YOU AND YOUR EMPLOYER**

**If you have already had your conference and signed your complaint, continue to step 5**

### **A. What is the pre-hearing conference?**

The Labor Commissioner holds a pre-hearing conference for almost every claim to try and encourage you and your employer to settle the case rather than go to a formal hearing. At that conference the Labor Commissioner also will determine if the case should continue or be dismissed. Precisely because the Labor Commission can decide to throw your case out at this stage, you must prepare your best case to ensure that your claim will continue.

**DO NOT BE LATE:** If you are more than 15 minutes late, the Labor Commissioner can dismiss your case. The overwhelming majority of cases that are dismissed will not be rescheduled, so be sure to arrive on time for your conference. The authors of this publication recommend that you arrive at least 30 minutes early to be safe.

The conference is normally held in the office of a **Deputy Labor Commissioner**. The Deputy is an employee of the Labor Commissioner's office, not a judge. This means the deputy has the authority to persuade you to settle, but cannot make a final decision in your case to order your employer to pay. You can find the name and phone number of the deputy for your case on the bottom of your "**Notice of Claim and Conference.**"

#### *Note regarding limited English speakers:*

The Labor Commissioner should have translators for common non-English languages to help limited English speakers at the conference. If a worker needs an interpreter for your conference, s/he (or a friend) should contact the Labor Commissioner as soon as s/he receives the Notice to ask for an interpreter. If you have problems with an interpreter or the Labor Commissioner does not provide an interpreter for you, please call (415) 593-0066.

The authors of this publication strongly encourage workers to bring their own translators. Bringing a friend or family member who speaks English will allow you to assess the ability of the interpreter hired by the DLSE, and provide you with an opportunity to object if the interpreter is not translating correctly.

## **B. Am I required to attend the conference?**

**YES, you must go to the conference.** If you do not attend, your claim will almost certainly be dismissed.

## **C. Is my employer required to attend the conference?**

**NO.** Your employer is not required to attend, but may well show up to challenge the claim and/or offer you a settlement.

## **D. How should I prepare for the conference?**

To prepare for the conference, make sure you can recite all the important facts of your claim. Be ready to answer questions about your job such as how much you worked, what kind of work you performed and which specific hours or days you were not paid for. Feel free to ask a friend to listen to your story to make sure you are explaining yourself clearly.

**TIP:** You may also want to write an outline of all the important points in your claim so that you can remember all of the details. See “Make an outline of important points” and “What do I need to prove at the hearing?” below, for information on making an outline.

You should also take the time to gather any “evidence” you might need. Evidence usually includes pay stubs and any other documents from your employer that relate to your claim (e.g., time cards, time records or employee handbooks). If you do not have those records before the conference, send a short letter to your employer to request copies of those records. (Keep a copy of this letter for your records.) If you think you are missing important documents, be ready to explain to the Labor Commissioner what those documents are and where you might find them. For example, if you think you should show the Labor Commissioner your employer’s policy manual but you can’t find your copy, you might be able to get a copy by asking one of your co-workers.

You also should bring a *list* of possible witnesses to the conference and explain what those witnesses will say that is relevant to your claim.

Finally, you should be ready to show the Labor Commissioner how you calculated your claim for wages.

## **E. What should I expect at the conference?**

At the conference you will be asked to present the facts of your case and show any supporting evidence you have. The conference itself is rather informal, but it can become contentious.

At the conference, the Deputy normally will do the following: (1) Assess your claim and get your employer's side of the story, (2) attempt to settle the claim, and (3) draft the official **complaint** if the case does not settle.

### **1. The Deputy will assess your claim and get your employer's side of the story**

The Deputy usually begins the conference by asking you and (if present) your employer about the details of your claim. After gathering all of the basic information (e.g., names, addresses, dates of employment and pay rates), the Deputy will ask you to explain your claims and find out what your employer has to say about each and every claim.

Your employer is required to bring your time records to the conference. Therefore, you should be prepared to explain those time records if they contain information that will hurt your claim.

**IMPORTANT:** If the Deputy thinks your claim is too complicated or if s/he thinks it is not the kind of case that the Labor Commissioner should take, the *Deputy has the right to dismiss your claim.* (See "Why might the Labor Commissioner not accept my claim?" above, for the cases the Labor Commissioner can and cannot take.) Therefore, you should prepare for the conference and gather evidence and a witness list so you can convince the Deputy that you have a good case.

### **2. The Deputy will attempt to settle your claim**

The main purpose of the pre-hearing conference is to get the two parties (you and your employer) to settle your claim without taking it to a formal hearing. If your employer is present at the conference, the Deputy will try to persuade each side to come to an agreement to dismiss the claim in exchange for a certain amount of money.

The Deputy is more likely to try to persuade your employer to offer a good settlement if s/he is convinced that your story is true and you have a good chance of winning if the case goes to a formal hearing. Therefore, it is crucial that you adequately prepare and clearly present the facts and all of your arguments so that the deputy believes you.

**When considering an offer of settlement, you should ask yourself the following three questions:**

#### **a. Whose decision is it whether or not to settle?**

Although the Deputy may try to persuade you to settle for less than you are comfortable, **the final decision is yours** and you have the right to turn down any offer of settlement, even one that the Deputy tells you is "fair."

## **b. How do I decide whether to settle or go to hearing?**

If you decide to accept a settlement offer, you normally will be accepting a guaranteed smaller payment to avoid the risk of going to hearing and losing all or part of your claim. You should decide if the smaller payment that will be "in your hand" is better than a six-month process that may or may not lead to full recovery and more money. You also should consider whether you think your employer will ultimately pay the judgment if you win. If you think it will be difficult to collect the money from a judgment, you may want to consider a quick settlement. You should also consider the following:

- How strong is your case?
- Do you have documents to support your case?
- Do you have witnesses who will back your story?
- Will the employer have documents that will hurt you or co-workers who will testify against you?

If you are interested only in obtaining your wages, the fact that your employer also may have to pay **penalties** may be a strong bargaining point for you. You can, for example, offer to settle for the amount of back wages, and that you'll give up some or even all of the penalties that the Labor Commissioner would award you if you win.

**SETTLEMENTS ARE TAXABLE:** Remember that any money your receive as part of a settlement is taxable income. Even if your employer does not take deductions out of the settlement check, you will be responsible for the taxes when you file your tax return the following year. Waiting time penalties also are taxable income and you are required to report this income even if there are no deductions taken out and even if your employer refuses or forgets to give you a 1099 form or a W-2.

## **c. How do I decide what my "bottom line" is?**

You should think about settlement before the conference and decide how low you would be willing to go to drop the claim. Figuring out your bottom line is often a good idea because it can help you decide what your first offer of settlement should be, if you decide to make an offer. Second, you will be less likely to be persuaded to take a bad settlement if you decide beforehand exactly how low you will go.

However, always remember that new facts and evidence might come to light during the conference that may make you decide to change your settlement offers and your bottom line (either up or down).

### 3. The Deputy will write the official Complaint

If your claim does not settle, or if your employer does not show up to the conference, the Deputy will conclude the conference by writing the official *complaint* (assuming the claim was not dismissed). The complaint precisely defines the wages you claim to be owed. To draft the complaint, the Deputy should have reviewed your initial claim form, looked at any evidence you may have, and asked you questions to get a better idea of the exact time/wages you are claiming.

You normally will be asked to sign the complaint at the end of the conference, but the Deputy may wait a week or so to give you another chance to settle the case. If you subsequently are unable to settle the case, you should inform the Deputy that you could not reach a settlement with your employer. The Deputy will then send you the complaint in the mail for your signature. If you do not receive the complaint in the mail, the Deputy may send you a letter with the reasons why a complaint has not been drafted.

## **STEP 5: CHANGING THE COMPLAINT BETWEEN THE CONFERENCE AND THE HEARING**

Even after you sign the complaint, if your complaint has mistakes or if the Deputy convinced you to ask for less than you thought you were owed, you can contact the Deputy to change the amount you are demanding. This is known as “**amending**” the complaint.

### **F. How do I amend my complaint?**

To properly amend your complaint, send a letter to the Deputy describing the changes you want to make. Make a copy of this letter for your records. The Deputy should either send a new complaint for your signature or call you to discuss the changes. After the deputy changes the complaint, s/he should send a copy to your employer.

### **G. When can I amend my complaint?**

You can amend your complaint any time before the hearing, but you should try and **do it as quickly as possible to avoid delays** in your case. A delay might occur because the Deputy needs to provide **notice** to your employer that you are requesting a change; your employer might complain and ask for a delay of the hearing if it does not find out about the proposed changes until shortly before the hearing.

## **STEP 6: IF YOUR CASE IS NOT DISMISSED OR SETTLED, YOU WILL RECEIVE A “NOTICE OF HEARING”**

**If you have already received the Notice of Hearing and will be attending the hearing, continue to step 7.**

If your case is not dismissed or settled, the Labor Commissioner will send a “**Notice of Hearing**” to you and to your employer. You should receive this notice five to six weeks before your hearing. The notice will include the date, time and place of the hearing and the name of the **Hearing Officer** who will hear your case. **You must attend your hearing, so make sure you will be available at that time.**

**DO NOT BE LATE:** If you are more than 15 minutes late, the Labor Commissioner can dismiss your case. The overwhelming majority of cases that are dismissed will not be rescheduled, so be sure to arrive on time for your hearing. The authors of this publication recommend that you arrive at least 30 minutes early to avoid having your case dismissed.

### **A. What if I cannot be at the hearing on the date shown?**

If you cannot attend the hearing, you will normally need a very good reason (such as illness or emergency) to reschedule. To do so contact the Hearing Officer immediately to request a continuance and be prepared to present evidence of your illness or emergency. Even then, the Hearing Officer still may deny your request to reschedule the hearing.

## **STEP 7: PREPARING FOR THE HEARING**

*Note regarding limited English speakers:*

The Labor Commissioner should have interpreters for common non-English languages to help limited English speakers at the hearing. If a worker needs an interpreter for the hearing, s/he (or a friend) should contact the Labor Commissioner as soon as s/he receives the “Notice of Hearing” to make sure an interpreter will be at the hearing. If you have problems with an interpreter or the Labor Commissioner does not provide an interpreter for you, please call (415) 593-0066.

The authors of this publication strongly encourage workers to bring their own translators. Bringing a friend or family member who speaks English will allow you to assess the ability of the interpreter hired by the DLSE, and provide you with an opportunity to object if the interpreter is not translating correctly.

A wage claim hearing is similar to an informal court trial. Your job at the hearing is to convince a Hearing Officer, who knows nothing about your employer or your work, that you have the right to be paid wages from a previous time.

To prepare for your hearing, you should (A) make an outline of important points, (B) gather witnesses and evidence, and (C) rehearse your presentation.

### **A. Make an outline of important points**

Prepare an outline of your case to help you organize your thoughts and clearly present the important information about your claim. Your outline should include basic information about your job (e.g., how long you worked there, what you did, how much you were paid), but the bulk of the outline should focus on the “issues” in your case.

Each claim for wages has different issues, such as: “were you misclassified as an independent contractor?” “Did your employer illegally deduct money from your wages?” “Is your claim for commissions and not hourly wages?” You should organize your outline by the issues. For example, if you are filing an overtime claim, you will probably have to provide answers to the following three “issues” or questions:

- (1) what was your rate of pay? (in case your employer does not agree with your pay rate),
- (2) how many hours did you work during the time period(s) covered by your claim? and
- (3) which hours were not paid according to the law? (See “Overtime” fact sheet for more information).

If your employer is claiming you were “exempt” from overtime, this is a separate issue in your case and you will need to present information to show you are the type of worker who is not exempt from getting overtime pay (See “Exemptions from Overtime” fact sheet for more information).

This packet does not outline each issue that might arise in your case. In most cases, however, you will have to prove that:

- (1) You had a wage agreement and/or the law requires that you should be paid a certain way,
- (2) You did work according to the agreement and/or the law, and
- (3) You were not paid correctly according to the agreement and/or the law.

See “What do I need to prove at the hearing?,” below, for more information on what to include in your outline and how to use your outline to prove your case.

### **B. Gather Evidence and Witnesses**

You can't win a hearing without evidence. The "evidence" in your case might include documents and/or witnesses. Sometimes the only evidence you have is your own truthful testimony. Although it is possible to win based only on your own testimony, the Hearing Officer will probably want documentary proof of the precise wages you were paid. S/he also may want to hear supporting testimony from witnesses.

## 1. Documents

Depending on your case, the types of documents you should bring include:

- a. **Pay stubs.** Pay stubs will show your rate of pay and also will show how much you actually received. Your employer must give you a pay stub with each and every paycheck.
- b. **Any written record of the hours you worked.** Documents showing your work hours can include time records from your employer, your personal calendar, or receipts from when you clocked-in/out.
- c. **Other documents from your employer that support your story.** Other relevant documents can include handbooks, letters that you and/or other workers received, or any other written materials that describe your employer's policies. For example, your employer may have specific written policies about how much you should be paid, how much vacation time you are entitled to, or how much severance pay you should have received, if any.

You should be prepared to talk about anything in your documents, including things that might hurt your claim. If a document has a lot of information that supports your employer's side of the story, consider leaving it out of your case. However, your employer might bring that document and you should still be prepared to address anything in the document that might hurt your case.

Make **three copies** of all documents and other evidence you are going to use to support your claim (one for the Hearing Officer, one for you to keep, and one for your employer). The Hearing Officer can make copies for you at the hearing, but you should try to do it yourself beforehand to save time for the Hearing Officer.

<b>How to get documents held by your employer</b>
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a live witness because your employer will not have the right to ask your witness questions at the hearing. If your witness is important to your case, it is normally better if s/he comes in person to the hearing.

### **How to get a subpoena for a witness**

If you have a very important witness who is not willing to testify, you can ask the Labor Commissioner to issue a **subpoena**. A subpoena orders the witness to appear at the hearing and testify about what he or she knows. Generally, it is only a good idea to request a subpoena if the information is really important because a witness who is unwilling to testify will probably not be a great witness for you. There may be a risk that s/he may be upset that you have forced her to attend the hearing and attempt to harm your case.

You also can get a subpoena to help a witness who is afraid of retaliation by your employer. The subpoena *forces* the witness to testify, so your employer can't assume that he or she is testifying because of dislike for the company.

You must request the witness subpoena from the Labor Commissioner at least **fifteen (15) business days** before your hearing. To get a subpoena, you need to go to the Labor Commissioner's office and fill out a "Request for Subpoena" form.

Once you have received the witness subpoena, you will need to find someone else to "serve" it on the witness. The Labor Commissioner will send you instructions on serving the subpoena when you get the subpoena itself.

### **C. Rehearse your testimony and practice with witnesses**

If you rehearse your testimony out loud before the hearing, your story will be clearer to Hearing Officer listening to your claim.

Rehearse your testimony by reviewing the outline you have made (see above) and retelling your story in chronological order, focusing on the issues that are the subject of your claim.

### **D. Prepare to argue against the employer's defenses**

The final thing to do in preparing for your case is to try and figure out what your employer is going to say. Sometimes this is difficult because you have not heard anything from your employer. However, sometimes you will have seen letters from your employer or listened to your employer at the conference to have some idea what s/he will say against you. Keep in mind,

however, that your employer is not bound by what s/he says at the conference and may change his/her story at the hearing.

Employers will typically challenge the number of hours you are claiming, so be prepared to explain why the employer's explanation of hours is not correct. Try to do this with documents (for example if you have timecards or if you kept your own calendar of hours worked), as well as with your testimony. In general, the more detailed your testimony the better – it is your job to convince the Labor Commissioner you worked long hours and the best way to do this is to describe, in as much detail as you can, how much work you were doing, where you were doing the work, when you normally started each task and how long each task took.

In overtime cases, an employer may try to claim you are “exempt” and you may have to testify in details about your job duties to show you are “non-exempt.” (See “Exemptions from Overtime” fact sheet for more information).

There are many other defenses and claims an employer might make, depending on the particular facts of your claim. Try to anticipate what the employer will say and think about both testimony and documents.

## **STEP 8: THE HEARING**

**If you have already had your hearing, continue to step 9.**

### **A. General comments about the hearing**

The hearing is designed so that claimants can go through the process without a lawyer. However, you are allowed to bring a representative with you if you want. Your representative does not have to be a lawyer.

The hearing will take place in a small room with a conference table in the middle, or in a room that is set up like a court with one table for you (and your representative) and one table for your employer (and your employer's representative).

A **Hearing Officer** will listen to and decide your case. Hearing Officers are not judges, but employees of the Labor Commissioner with legal training. The Hearing Officer on your case will be a different person than the Deputy from your pre-hearing conference.

### **B. You must attend the hearing**

First of all, you have to attend the hearing and be ready to testify. If you do not show up, your case will be dismissed.

If your employer does not attend the hearing, you do not win automatically. The Hearing Officer will still hold the hearing, listen to your story and might ask you (and your witnesses) questions. You have an advantage if your employer does not show up because the Hearing Officer will decide the case based only on your evidence. To make sure you put on the strongest case possible, you should still present your case as if your employer was going to testify against you.

### **C. What do I need to prove at my hearing?**

You are the plaintiff at this hearing. Because you are the plaintiff, *you have the burden to show that you are owed wages* (legally, this is called the “**burden of proof**”). This means that you must show that it is more likely than not that you were not paid correctly. Your employer is not required to prove that it does not owe you wages.

In most cases, you will need to prove the following information to the Hearing Officer:

1. **Agreement or Law:** You must prove that you and your employer had an agreement (a “contract”) for a certain wage. You can do this through testimony (e.g., “when I was hired my employer told me I would make \$8 per hour and this is what all the other salespeople made”), but it is always better to have documents (e.g., a contract or pay stubs that show your rate of pay).

If your claim does not involve a specific agreement, it should be based on a written law (a “statute”). For example, if you have a claim for minimum wage or overtime, your case is based on written laws contained in the “Labor Code” and “Wage Orders” and you do not have to show an agreement or contract with your employer.

2. **Services rendered:** You will have to show that you performed your end of the deal with your employer. You can testify to the number of hours you worked to earn your wages, but again, documents (e.g., calendars) or witnesses (e.g., co-workers) are usually better evidence than your own testimony standing alone.
3. **Pay not issued properly:** After you show that you did the work, you will then have to show that you were not paid properly under the agreement you had with your employer or the law that applies to your work. Items that help prove that you were not paid properly include: copies of cancelled checks (or any record of payments made by cash); records (such as bank records) showing that you were paid on a regular schedule and that you deposited your pay into your bank

immediately after being paid; records of bounced checks (and any fines you incurred due to the bounced checks).

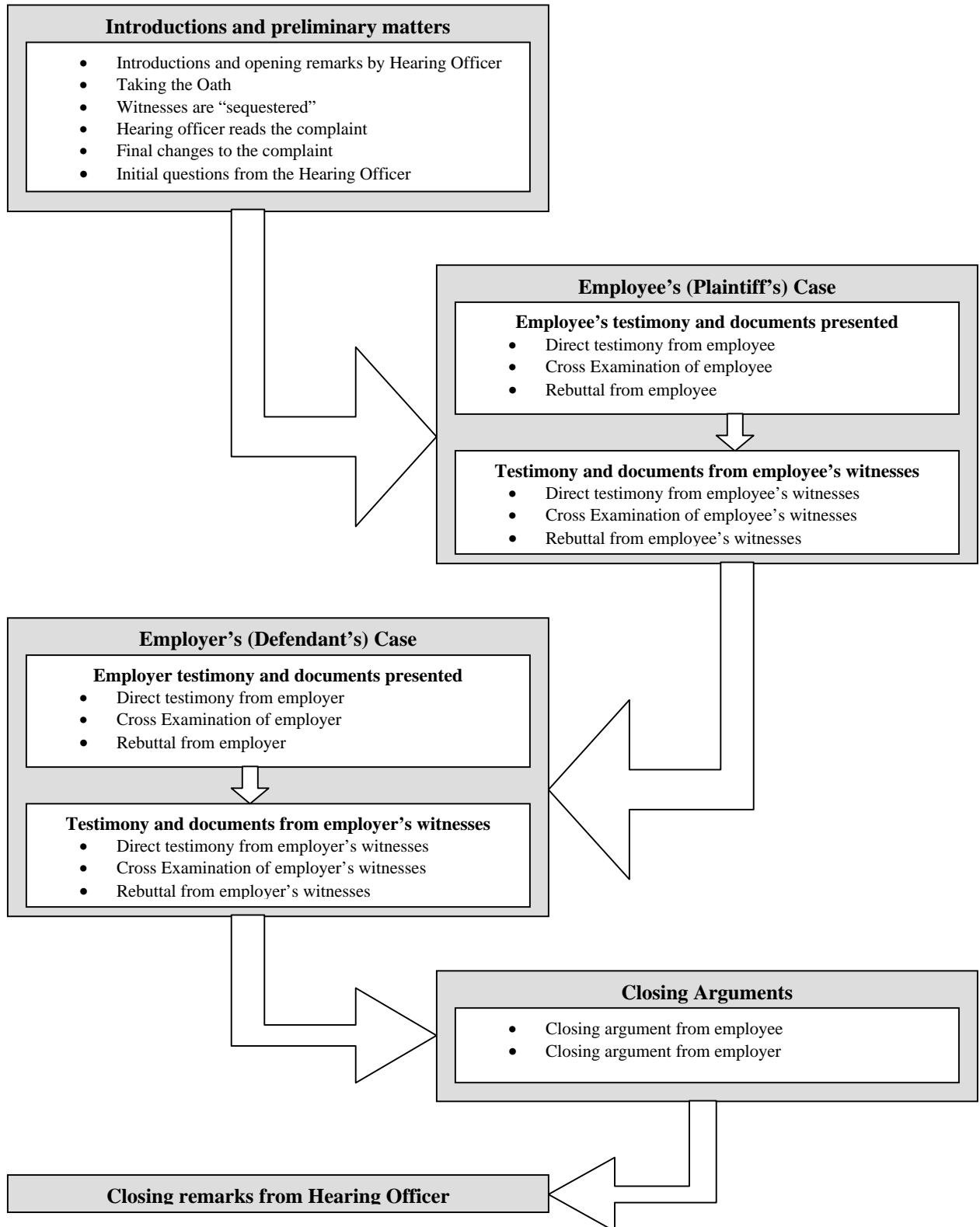
4. **If you are seeking penalties:** If you no longer work for your employer and you are asking for “waiting time penalties” (See “Getting your Final Paycheck” fact sheet), you will have to prove that your employer knew you were owed money when you left. To do that, you might have to show that you called your employer, wrote a letter, or that your employer admitted it owed you money but refused to pay.

The “burden of proof” should not affect how you present your case. It is possible to win a hearing with nothing but your own truthful testimony, but it is always best to have witnesses and other evidence. The most important thing is to be well prepared to present your case in a clear and organized fashion. If you follow the advice in this packet, it will maximize your chance of convincing the Labor Commissioner that your story is the truth.

**Continue to next page...**

## D. Hearing Description

Although all hearings are somewhat different (often depending on the Hearing Officer and the issues involved), this diagram outlines the basic procedure of a wage claim hearing:



## **Hearing description continued...**

The description that follows should give you a general idea as to how your hearing will go:

### **1. Opening Remarks by the Hearing Officer**

Before the hearing “officially” begins, the Hearing Officer will make some initial remarks about the hearing itself and the process the parties will be going through. S/he will introduce the parties, call the case number, and tell you that the hearing will be tape-recorded.

### **2. Taking the Oath**

The testimony you give at the hearing will be under oath. The Hearing Officer will ask you, your employer, and any witnesses in the room to raise your right hands and swear to tell the truth. The oath is taken very seriously; lying in a hearing is considered perjury, a criminal offense.

### **3. Witnesses will be told to wait outside the hearing room**

Before any information is presented, the Hearing Officer normally will “sequester” any supporting witnesses (for both sides). The witnesses are told to wait outside the hearing room so that their testimony will not be influenced by the testimony of the parties or other witnesses.

Sometimes, the Labor Commissioner may forget to ask the witnesses to wait outside. If they are the employer’s witnesses, be sure to ask the Labor Commissioner to ask the witnesses to wait outside.

### **4. Reading the complaint into the record / final changes to the complaint**

You should have received a copy of the final complaint with your “Notice of Hearing.” The Hearing Officer will read the complaint so that everything you are asking for is recorded on tape. Then, the Hearing Officer will ask you if the complaint is correct. This is your last chance to change anything on the complaint. If you only need to change a date or something simple (such as your job title), there should be no problem. However, if you want to increase the amount of the claim, your employer will probably object and your hearing may be postponed. (Then again, your employer may not object to the change because s/he might be forced to come back on another day.)

## 5. Initial questions from the Hearing Officer

After reading the complaint, the Hearing Officer will ask you some initial questions about your job. The questions are usually basic, such as when you worked, what your job duties were, how much you were paid, what your schedule was like, and whether your employer kept a record of your hours. If you do not understand any of the questions, be sure to ask the Hearing Officer to explain.

The Hearing Officer will then ask the same questions of your employer to see if there is agreement on the basic issues in the case before moving on to the parts of the claim that you do not agree about.

## 6. More detailed questions from the Hearing Officer

The officer will usually follow his or her preliminary questions with a set of more detailed questions about the issues listed on your complaint. These questions will focus on the evidence you have to prove your wage case. The nature of these questions will depend on your specific claim. Generally, the officer will ask you to testify about the agreement you had for wages, what kinds of services you performed to earn those wages, hours you were not paid for, whether you asked to be paid, how often you asked, and what was your employer's response. Since the questions will depend on the specifics of your case, this packet cannot tell you exactly what will be asked. However, the information in the Wage and Hour Fact Sheets should give you a good idea what types of things may be asked about for different types of claims.

If you do not understand any of the Hearing Officer's questions, be sure to ask the Hearing Officer to explain. Don't answer a question you do not fully understand; you might give information that is not true and will hurt your case.

### B. How to present your testimony

Your testimony is usually the most important thing to present at the hearing. If the Hearing Officer is going to decide in your favor, s/he must believe your story. You must do your best to be a believable witness.

The three most important things to remember when presenting your testimony are:

- 1) Tell the **truth**
- 2) Make sure your story is **consistent**
- 3) Provide as much **detail** as possible

If you are *consistent* (not changing your story or saying things that conflict with one another) and *detailed* (providing as much specific, relevant information as you can), the Hearing Officer will be much more likely to believe your version of the events rather than your employer's version because your testimony shows that you really know what you are talking about.

After the Hearing Officer asks you questions, you will have the opportunity to present any other information that might help you in your case. If you think that the Hearing Officer may have skipped some important information, this is the time to present it.

**TIP:** Bring an outline or list of the most important facts in your case so you can figure out if the Hearing Officer missed some vital information. See "Make an outline of important points" and "What do I need to prove at the hearing?," above for information on making an outline.

If your employer objects to information you present, you should defend your actions by telling the Hearing Officer why the information is important and directly relates to the issues in the case.

## **E. Cross-examination**

*Cross-examination* is the term that refers to questions that are asked of witnesses by an opposing party. After you or your witnesses testify, your employer will be allowed to ask you or your witnesses questions that try to undermine your story. Later on, after your employer or your employer's witnesses testify, you will be allowed to ask your employer questions to undermine your employer's story.

The best way to prepare for cross-examination by your employer is to try to think of any problems your case might have. Then, when your employer asks about these potential problem areas, you will be prepared to answer the questions because you have anticipated what you will be asked about. Remember, almost every case has problems; if you are able to think about these problems and anticipate your employer's arguments, you will have a much better chance of responding to, explaining away any differences or questions raised by the employer's defense, and winning.

When you answer your employer's questions, you should only answer the specific question you are asked. Try not to volunteer information, unless you are very confident that the information will help you.

When it is your turn to cross examine your employer or your employer's witnesses, ask questions that make it look as if your employer is either not

credible or is presenting evidence that doesn't make any sense. For example, if you have a document that proves your employer is lying about a particular point, ask your employer how he can explain the conflict between his testimony and the document. If he does not have a good explanation, the Hearing Officer may suspect that the rest of the employer's testimony is not truthful. It is often helpful to use "**leading**" questions to pin down your employer. Leading questions ask only for a yes or no answer and often limit your employer's ability to say things that might hurt you. For example, you can ask your employer, "Isn't it true that your company did not keep records of my time when I worked there?"

## **G. Witness testimony and declarations**

After you present your testimony and answer your employer's questions, your witnesses, if you have any, will have the chance to testify for you.

### **1. How to present witness testimony**

You will have the opportunity to ask questions of your witnesses. When doing so, let each witness tell his/her story. Do not ask "leading" questions at this point (unlike cross-examination above) because your employer can object to those questions. In other words, try to avoid questions such as "isn't it true that you saw me working 12 hours every day, five days every week." A better way to present this information is through questions such as "When you were working with me, what time did you see me normally come in every day?" "How often did you see me start at this time?" "How many days per week did you see me work?" "Did you see me do this every week?"

### **2. Declarations**

If you have prepared declarations from witnesses who cannot be at the hearing, you can present them to the Hearing Officer (with copies for your employer) after your presentation. You should explain to the Hearing Officer why the declaration is important to your case (e.g., "the declaration confirms the hours that I worked").

## **H. Documents and Other Evidence**

If you are going to give a document to the Hearing Officer as evidence, you will need to identify what the document is and where it came from (e.g., "This is a copy of the final paycheck I received from my employer in the mail and you can see that it is dated 36 days after I was fired.")

You can "submit" documents at any time while you are testifying, but it is best to introduce a particular document when you mention it in your testimony. For

example, if you testify, “When I was hired I was given an employee handbook that said I would be paid \$12 per hour,” this is the best time to say “I have a copy of the handbook and would like to have the handbook admitted as evidence.”

## **I. Objections**

There will be times during your hearing when your employer might try to present information that is irrelevant, unreliable, or duplicative. Also, your employer might try to ask you or your witness questions (on cross-examination) that are irrelevant because the answer will make no difference to the case. If these things happen, you have the right to “object” to your employer’s behavior; the Hearing Officer can then decide to stop your employer acting in a way that s/he thinks is inappropriate or against the law.

To object to your employer’s questions, you simply need to turn to the Hearing Officer and explain why you do not think you should have to answer the question. (Refer to the appendix for a complete list and description of the objections you may be able to use in your hearing and examples of when to use those objections.) If the Hearing Officer thinks you are right, you will not have to answer the question.

If your employer objects to information you present, you may need to defend your actions by telling the Hearing Officer why the information is important and directly relates to the issues in the case.

## **J. Finish up by summarizing your claim**

The Hearing Officer may allow you to make a closing statement before concluding the hearing. If you feel that all of the information was clearly presented in the hearing, and that you sufficiently addressed all of the arguments made by your employer, you may want to decide to “rest” your case and decline to make a formal closing statement. If the facts are clear, the Hearing Officer might prefer that you do this to save time. If you choose this option, simply tell the Hearing Officer that you would like to rely on all the evidence and testimony “in the record.”

If, on the other hand, you would like to “tie up any loose ends” in your case, you should make a final statement that is a brief and does not contain any information that is not directly relevant to your claim. For example, you should not use this time to bring up new issues such as how you were treated as an employee, unless that treatment was directly related to your claim for wages.

Your final statement should be a brief chronological summation of all the facts you have presented in your case, all the relevant testimony that was given,

and any documents that were submitted. You should conclude by explaining why those facts, testimony and documents ultimately prove your case. If you prepared an outline, go over just the main points that you proved to support your case.

### **K. Closing remarks from the Hearing Officer**

After all of the testimony and evidence has been presented, the Hearing Officer may ask some additional questions to clarify any confusion. S/he will then tell you when you should expect a decision and explain your appeal rights in case you or your employer disagrees with the decision (see **step 10** below for information about the appeal).

## **STEP 9: THE DECISION OF THE LABOR COMMISSIONER**

**If you have already received your decision, continue to step 10.**

If the Hearing Officer is convinced you are telling the truth and the law supports your truthful story, you will win. If the Hearing Officer decides you have not put forth enough evidence to counter your employer's version of the story, your employer will win.

The Hearing Officer is supposed to make a decision within fifteen (15) days after the hearing. It often takes longer, particularly if the Hearing Officer has a large number of cases to decide. If the decision has not come after a month, you should call the Labor Commissioner's office and ask when you can expect to receive the decision. You should have your case number and the name of the Hearing Officer available to speed up this process. You can also write a short letter politely asking the Hearing Officer to issue the decision as soon as possible.

When you receive the decision (also known as the "**Order, Decision or Award of the State Labor Commissioner**" or **ODA**), the first page of the decision will tell you how much you have been awarded if you won your case or whether you lost. The other pages, known as the "**Findings of Facts and Conclusions of Law of the Labor Commissioner,**" give an overview of your claim and explain why the Hearing Officer made the decision that s/he did.

## **STEP 10: EITHER SIDE MAY APPEAL THE HEARING OFFICER'S DECISION**

**If your appeal deadline has already passed and neither party appealed the case, continue to step 11.**

The decision in your case does not become final until after the deadline to appeal. After you and your employer receive the decision, you each have 10 days from the date you receive the decision (or 15 days from the date of mailing) to file an appeal. If neither side files an appeal within that time, the decision is final and becomes as enforceable as any other court judgment.

If either side does appeal the decision, the Labor Commissioner will not hear the case again. Instead, your case will be filed in the local state Superior Court. The Superior Court will hear the case without looking at the decision of the Labor Commissioner. You and your employer will have to present your evidence and testimony all over again.

### **A. If you win but your employer appeals**

If your employer appeals the decision, the Labor Commissioner should send you a **Notice of Appeal**. You should also receive a **“Request for Attorney Representation”** form and a form titled **“Claimant’s Financial Statement Status.”** You need to fill out both of these forms if you want to request free representation from the Labor Commissioner. The first form simply says that you do not oppose the decision, and that you need a lawyer to represent you on appeal. The second form, the **“Claimant’s Financial Statement Status”** asks you about your current income and expenses to determine whether you qualify for free representation. If you qualify under the Labor Commissioner’s income guidelines, one of the Labor Commissioner’s lawyers will represent you on appeal without cost.

### **C. If you do not win or if you win less than you want, but you want to appeal**

If you do not win your case or only recover part of what you think you are owed, but you truly feel you can win on appeal (because some evidence was overlooked or you made specific mistakes at the hearing that you can fix later), and you are willing to take the time, you should consider going ahead and appealing the decision.

Remember, however, that you only have ten days after you receive the decision, so you will need to decide quickly. **Importantly, if you decide to appeal, there is a risk you will have to pay for your employer’s attorney if you do not win at least some money at the appeal**

◆ **Do I need an attorney to appeal the decision?**

Although not required, it is best to have an attorney if you are filing an appeal (especially if your case is for a significant amount of money). However, your employer will also need to have an attorney, and he or she may choose to pay you a settlement rather than put the time and expense into the appeal.

## **STEP 11: COLLECTING YOUR JUDGMENT**

If you win your case, and your employer does not appeal within the time limits noted above, your judgment becomes final and can be enforced like any other court judgment. Your employer should pay the judgment voluntarily. If your employer still refuses to pay, you can either ask the Labor Commissioner to enforce the judgment (this can take a long time because the Labor Commissioner turns the case over to the state tax collector) or you can try to enforce it yourself. (For more information, contact the Unemployment and Wage Claims Project and ask for a free copy of the packet entitled “Collecting your Judgment: A Step-by-Step Approach.”) Although you might be able to collect the judgment after only sending a demand letter to your employer, you may also have to file many court documents, such as liens on property and bank accounts, and spend a lot of time trying to collect your money. If you have to pay to enforce the judgment, you may be able to make your employer pay back the extra expenses you had to spend.

## **STEP 12: PAYING INCOME TAXES**

If you are at this step, this means you have collected the money you were owed. Congratulations! The final point to remember is that any money you receive from your claim, whether you get it through a settlement or judgment, is taxable income. Even if your employer does not make the correct deductions (also called “withholdings”), you have to pay taxes. You pay taxes on both the wage and penalty portion of your award even if your employer refuses or forgets to give you a 1099 form or a W-2. This packet is not intended to give tax advice, and you should speak with a tax professional about how to report your winnings or settlement.

**APPENDIX TABLE OF CONTENTS**

- A. LIST OF WAGE AND HOUR FACT SHEETS**
- B. SAMPLE DEMAND LETTER -- IF YOU ARE STILL EMPLOYED**
- C. SAMPLE DEMAND LETTER -- IF YOU NO LONGER WORK FOR YOUR EMPLOYER**
- D. ADDRESSES AND PHONE NUMBERS FOR NORTHERN CALIFORNIA LABOR COMMISSIONER OFFICES**
- E. SAMPLE DECLARATION**
- F. TABLE OF FREQUENTLY USED OBJECTIONS**

## **APPENDIX A: LIST OF WAGE AND HOUR FACT SHEETS**

- 1) Independent Contractor or Employee: How You Should be Classified
- 2) Employment Rights of Undocumented Workers: Know your Rights
- 3) Claims for Unpaid Wages: Filing with the Labor Commissioner
- 4) California Wage and Hour Law: An Overview
- 5) Getting your Final Paycheck: Your Legal Rights
- 6) Minimum Wage: Your Legal Rights
- 7) Overtime Pay: Your Legal Rights
- 8) Exemptions from Overtime: Your Legal Rights
- 9) Rest Breaks and Meal Breaks: Your Legal Rights
- 10) Deductions from Pay: Your Legal Rights
- 11) Vacation and Sick Pay: Your Legal Rights
- 12) Tips and Tip Pooling: Your Legal Rights
- 13) Changes in Pay: Your Legal Rights
- 14) Pays Days / Late Pay / Bounced Checks: Your Legal Rights
- 15) Severance Pay: Your Legal Rights
- 16) Uniforms, Tools and Equipment: Your Legal Rights
- 17) “Comp” Time: Your Legal Rights
- 18) Alternative Workweeks: Your Legal Rights
- 19) Reimbursements of Expenses: Your Legal Rights

### **To obtain a free copy of one or more fact sheets:**

- 1) Log onto [www.las-elc.org](http://www.las-elc.org) and follow the links to “Fact Sheets,”

Or

- 2) Call the Coordinator of Legal Services at (415) 864-8848 ext. 263 and leave a message with your name, address and a list of the fact sheets you would like to see.

**APPENDIX B:**

**SAMPLE DEMAND LETTER – IF STILL WORKING FOR COMPANY**

Susan Smith  
ABC Corporation  
425 W. 13<sup>th</sup> Street  
San Francisco, CA 94103

June 29, 2004

**RE: Unpaid Wages**

Dear Ms. Smith:

As, you know, I have been working for your company as an administrative assistant since June 9, 1999. It has come to my attention that I should have been receiving overtime pay for my work at Acme. According to my calculations, I should have been paid a total of \$**[amount of claim]** in overtime wages for my last two years of work.

I am willing to resolve this matter informally through immediate payment of \$**[total amount of demand]**. If I do not receive these wages within two weeks of the date of this letter, I will file a claim with the California Labor Commissioner or in state court seeking all the damages allowed by law.

I am also aware of my rights under Labor Code §98.7, which protects me from retaliation for requesting my unpaid wages. If your company takes any action against me, including any form of discipline or discharge, for asserting my right to be paid my wages I will have the right to file another claim with the Labor Commissioner or in court based on unlawful retaliation.

If you have any questions about the contents of this letter, I can be contacted at home at (415) 555-6666.

Sincerely,

Wilma Worker

**APPENDIX C: SAMPLE DEMAND LETTER – IF NO LONGER EMPLOYED**

Susan Smith  
ABC Corporation  
425 W. 13<sup>th</sup> Street  
San Francisco, CA 94103

June 29, 2004

**RE: Final Pay / Waiting Time Penalties**

Dear Ms. Smith:

As, you know, I worked for your company as an administrative assistant from June 9, 1999 until I **[was terminated/resigned with \_\_\_ days notice]** on June 12, 2004. On the day I **[was fired/quit]**, I was still owed wages for the period April 20, 2003 to June 12, 2004 in addition to reimbursements for company expenses. According to my calculations, I am still owed a total of **[\$[amount of claim]** in unpaid wages, overtime and reimbursements. According to the California Labor Code, I should have received my wages, in full, on **[the day of termination/ date 72 hours after notice if you quit and gave less than 72 hours notice]**.

Your failure to promptly pay my final wages has exposed Acme Company to liability for waiting time penalties. Specifically, Labor Code §203 gives employees the right to recover one day of wages for each and every day their final wages remain unpaid, up to a maximum of thirty (30) days. Because I should have been paid, in full, on **[the day of termination/ date 72 hours after notice if you quit and gave less than 72 hours notice]**, I am entitled to receive **[# of days owed]** in waiting time penalties, or **[\$[amount of penalties]** (based on an average daily wage of **[\$[amount of daily wage]**).

I am willing to resolve this matter informally. Please sent a check in the amount of **[\$[total amount of demand]** to me at the following address:

Wilma Worker  
470 Mystic Drive  
Oakland, CA 94720

If I do not receive full payment of my wages and penalties within two weeks of the date of this letter, I will file a claim with the California Labor Commissioner or in state court seeking all the damages allowed by law (including waiting time penalties and interest).

If you have any questions about the contents of this letter, I can be contacted at (415) 555-6666.

Sincerely,

Wilma Worker

**APPENDIX D: ADDRESSES AND PHONE NUMBERS FOR NORTHERN CALIFORNIA LABOR COMMISSIONER OFFICES**

Department of Industrial Relations  
Division of Labor Standards Enforcement  
1515 Clay Street, Suite 801  
Oakland, CA 94612-1499  
(510) 622-3273

Department of Industrial Relations  
Division of Labor Standards Enforcement  
770 East Shaw Avenue, Suite 227  
Fresno, CA 93704  
(559) 244-5340

Department of Industrial Relations  
Division of Labor Standards Enforcement  
455 Golden Gate Ave., 8<sup>th</sup> Floor East  
San Francisco, CA 94102  
(415) 703-5300

Department of Industrial Relations  
Division of Labor Standards Enforcement  
1204 "E" Street,  
Marysville, CA 95901  
(916) 323-4920

Department of Industrial Relations  
Division of Labor Standards Enforcement  
100 Paseo de San Antonio, Room 120  
San Jose, CA 95113  
(408) 277-9651

Department of Industrial Relations  
Division of Labor Standards Enforcement  
2115 Akard Avenue, Room 17  
Redding, CA 96001  
(916) 323-4920

Department of Industrial Relations  
Division of Labor Standards Enforcement  
50 "D" Street, Suite 360  
Santa Rosa, CA 95404  
(707) 576-2362

Department of Industrial Relations  
Division of Labor Standards Enforcement  
1870 North Main Street, Suite B  
Salinas, CA 93906  
(415) 557-7878

Department of Industrial Relations  
Division of Labor Standards Enforcement  
31 E. Channel Street, Room 317  
Stockton, CA 95202  
(209) 948-7770

Department of Industrial Relations  
Division of Labor Standards Enforcement  
2424 Arden Way, Suite 360  
Sacramento, CA 95825  
(916) 323-4920

Department of Industrial Relations  
Division of Labor Standards Enforcement  
619 Second Street, Room 109  
Eureka, CA 95501  
(707) 445-9067



## **APPENDIX E: SAMPLE DECLARATION**

I, COLIN COWORKER, declare as follows:

2. I was employed at ABC Corporation as a janitor from April 1998 until March 31, 2004;
3. I first met Wilma Worker in 1999 when she started working for ABC Corporation as an administrative assistant to Susan Smith, the CEO of ABC Corporation;
4. As a Janitor, I always worked from 5:00 p.m. until approximately 11p.m. I always worked six days per week. My only day off was on Sunday;
5. From the first time I met Wilma Worker, which was two days after she was hired, until I quit my job in March 2001, I routinely saw Wilma worker at the Acme Company offices performing work until long after 8:00 p.m.;
6. Except when she was on vacation or sick, Wilma Worker was at the Acme Company offices every day when I would arrive for my shift at 5:00p.m.;
7. Wilma Worker normally worked until at least 10:00 p.m. every night that I saw her at Acme Company;
8. I know that Wilma Worker was there until at least 10:00p.m. each night because she would be working in her office when I came to vacuum the floor. I routinely vacuumed the floor at or after 10:00 p.m.;
9. Sometimes Wilma would work until 11:00 or later and she would drive me to my house in her car after we had both finished working;
10. I cannot remember more than 10 days during the time Wilma Worker and I worked together at Acme that we did not see each other after 5:00p.m. until approximately 10:00p.m.;
11. I often asked Wilma Worker why she worked so many hours and she would always tell me that Susan Smith gave her a lot work to complete every day and she could not normally finish her work before 9:00 p.m.

I declare under the penalty of perjury and the laws of the state of California that the foregoing is true and correct to the best of my knowledge and belief. Signed on the 21<sup>st</sup> day of August 2004 in San Francisco, California.

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Colin Coworker

**APPENDIX F: TABLE OF FREQUENTLY USED OBJECTIONS**

Type of Objection	When to use this objection	Examples of when the objection can be used
“Irrelevant”	If your employer asks you about something that makes no difference in the case or tries to testify about something that makes no difference in the case, that point is irrelevant and the hearing officer should not pay any attention to it.	If your case was only about whether or not you received your final paycheck, it would be irrelevant if your employer talks about or asks you about an absence from work six months earlier. It is also irrelevant to mention or ask about immigration status.
“Hearsay”	<p>If your employer tries to prove something is true by quoting something that was said by another person who is not a witness in the case, this is known as hearsay.</p> <p><u>NOTE:</u> Although hearsay evidence is allowed, you can still object if the information will really hurt your case and point out to the Hearing Officer that s/he should not pay much attention to the information because it is hearsay and therefore unreliable.</p>	If your employer tries to prove you didn’t work overtime by saying “I know she didn’t work more than eight hours a day because her coworker Jimmy told me that he always left work after her. So there is no way she ever worked after 5pm,” the statement by Jimmy would be hearsay and should not be given much weight because it was said by someone who is not testifying and being used to try and prove you didn’t work overtime.
“Asked and Answered”	If your employer keeps asking you the same question and you have already answered it, you do not have to answer it again.	Sometimes, an employer might try to make his point even stronger by forcing you to answer the same question more than once if he thinks the information will really help his case. You do not have to answer the same question more than once.
“Compound”	A compound question is a single question that asks you to give more than one answer	If your employer asks you “Isn’t it true that you worked only 7 hours and took a 3 hour lunch on August 1 <sup>st</sup> ,” the answer of “no” could be referring to either the hours of work or the alleged break
<b>CONTINUED ON</b>		

<b>NEXT PAGE...</b>		period.
<b>Type of Objection</b>	<b>When to use this objection</b>	<b>Examples of when the objection can be used</b>
“Calls for Speculation”	A question that calls for speculation is a question that cannot be answered without making a guess about something the person answering doesn’t really know about.	If your employer asks you “what do your coworkers think about the quality of your work,” this asks for a speculative answer because you cannot really testify about what your coworkers thought.