

EMPLOYMENT

Wage & Hour Spotlight: Personal Assistants in the Entertainment Industry

Helpful Tips for Avoiding Liability

It is quite common for actors, musicians and others in the entertainment industry to have personal assistants who work crazy hours doing everything imaginable (and sometimes, unimaginable) for their boss. It is also common for these personal assistants to be paid a generous salary and blithely labeled as non-exempt employees who don’t qualify for overtime pay.

This is a big mistake and it can lead to potentially significant wage and hour liability. The following tips will help minimize and possibly eliminate wage and hour liability in personal assistant contracts.

Written Agreement

Make sure you have a written agreement that includes an arbitration provision. Put the assistant’s contract in writing, and include an arbitration provision that is conspicuous and bilateral, and incorporates standard employment arbitration rules (like AAA or JAMS) that satisfy the requirements specified by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

Be Careful About Salary

You cannot avoid wage and hour issues merely by paying a flat salary for 24/7



availability. Assistants are non-exempt employees, meaning that they are entitled to overtime pay (generally, 1.5 times their regular rate for hours worked over eight per day, and double the regular rate for hours worked over twelve per day; see, e.g., Cal. Labor Code § 510; Industrial Welfare Commission (“IWC”) Wage Order No. 17-2001, at 4). Specific overtime rules can vary by industry. See IWC Wage Order No. 11-2001 (Broadcasting Industry) and 12-2001 (Motion Picture Industry). If an employer pays a flat salary (with no overtime) and later is sued for wage and hour violations, the court will consider the large salary to be compensation only for

regular hours worked, making the corresponding overtime rates absurdly high.

Track Time

Have the assistant keep track of his or her hours. To properly calculate wages, you must keep and maintain accurate records of the hours worked. Insist that the assistant provide to the employer or business manager a record of hours worked each week.

Hourly Rate & Discretionary Bonus

Set a reasonable hourly rate, use the employee’s time records to pay proper overtime, and offer discretionary bonuses.

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Instead of risking overtime liability by paying a flat salary, consider the following alternative: (1) set the assistant's base pay at an hourly wage, say \$15 per hour, (2) pay overtime using \$15 as the base hourly rate, (3) inform the assistant that, if performance is satisfactory, you plan to make monthly (or quarterly) discretionary bonus payments to bring the assistant's yearly salary to a desired total amount.

For example, if you want to pay \$100,000 per year and the assistant works 80 hours per week for 52 weeks (40 at regular time, 30 at time and a half, and 10 at double time), the assistant receives approximately \$82,000 in wages, leaving \$18,000 for discretionary bonuses. Although similar to the flat salary for an exempt employee, this structure can limit wage and hour liability.

On Call

Be aware that on-call time might be compensable. Personal assistants are often asked to be available at all hours. Such "on-call time" might be compensable depending on the degree of the employer's control, which is determined based on several factors, including whether the assistant must remain at a certain location, the frequency of calls, whether a quick response is required, whether the assistant can trade responsibilities, whether the assistant can work remotely, and whether the assistant

can engage in personal activities while on-call. See *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal. 4th 833, 841 (2015).

To take an extreme example, consider the Lady Gaga case. See *O'Neill v. Mermaid Touring Inc.*, 968 F. Supp. 2d 572 (SDNY 2013). In that instance, a former personal assistant sued for over \$400,000, representing 13 months of overtime wages. The assistant alleged (among other things) that she was required to sleep in Lady Gaga's bed and had to perform tasks at all hours of the night. There is nothing wrong with wanting attention around the clock, but doing so probably means the time is compensable, and probably at overtime rates.

Although paying on-call time might seem burdensome, an employer can minimize the burden by utilizing the alternative salary structure described above. Even in the "extreme Lady Gaga scenario," paying for 24/7 attention at \$15 per hour comes out to approximately \$212,000 per year, just over half of the claim made by Lady Gaga's assistant, not to mention legal fees. Paying on-call time in the first instance is less burdensome and far less risky than ignoring the issue altogether.

In sum, paying an assistant as a non-exempt employee might be annoying, but it certainly beats an expensive, and potentially embarrassing, wage and hour lawsuit.



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