PROTECTING EMPLOYEE & CONSUMER RIGHTS

Keep accurate time records at work to protect your rights

ATTY. CONRADO JOE SAYAS

ONE of the most important aspects of a wage claim is how employees can prove that their employer owes them additional compensation for hours worked. If an employee is claiming unpaid overtime or that he or she never takes a meal break but works during lunch, it is useful for the employee to have kept accurate time records during the work period.

Although the law does not require employers to use time clocks, the law does require employers to keep accurate records. These records should be in ink or other indelible form that show when non-exempt employees begin and end each work period. The records must show the actual hours worked by the employee. Work schedules posted in advance cannot be used to compute the employee's work hours.

Employers may ask employees to handwrite or type out their time on a timesheet/log-in sheet, or "punch in" and "punch out" on a time clock (ranging from the mechanical to the biometric). Whatever the method, the employer must ensure that the information is accurate. A legible printed copy of the recorded time must be provided when requested by the employee. Should any time-keeping device fail to work, the employer has the burden of proving the number of hours worked

There are three concerns that may arise in connection with time-keeping records: Rounding practices, erroneous time clock punches, and non-distinction of work and meal and rest periods.

Rounding Off. Employees should record their exact starting and stopping times; however, in computing time worked, an employer may "round off" an employee's starting and stopping times to the nearest five minutes or nearest one-tenth of one-quarter of an hour. For example, if the employee came in at 8:21, the employer may round the time off to 8:30. Rounding off is allowed only if this practice averages out over a period of time and does not result in a failure to compensate the employee for all time actually worked.

Erroneous Time Clock Punches. These may occur when employees come in early to or leave late from work and punch in and out accordingly. The employer may disregard the early or late clock punching and need not pay for them only if the employee did not do any work during those periods. For example, if the employee clocked in at 8:15 instead of the regular starting time of 8:30, but then spent the extra 15 minutes at the break room having coffee and chatting with other employees, then the employee need be paid for the extra 15 minutes of coming in early. However, if the employee came in at 8:15 and started working right away, the 15 minutes should be paid.

Even though employers may disregard early punch ins or late punch outs, employers do have the obligation to maintain accurate records. Therefore, employers have the right to prohibit employees from habitually punching in early or punching out late. And since it may be difficult for employers to prove that the employee was not working early or working late, the employer can rigidly enforce its timekeeping policies. If erroneous early or late punching is discovered, employers may correct the records by obtaining a brief statement or notation from the employee voluntarily acknowledging the error and that no work was performed before or after the employee's regular hours. This correction should be kept with the timecard.

Work Period versus Meal & Rest Periods. Accurate timekeeping records must show the actual hours worked by non-exempt employees. Mandatory 10-minute rest periods for every 3 ½ hours worked do not have to be recorded. The mandatory 30-minute meal period for every 5 hours of work does not have to be recorded only if the business closes during a meal period. However, meal periods during which business operations do not cease must be recorded. Employers must also keep records of sleep periods for employees who are on a 24-hour shift if the sleep period is not paid by the employer.

Good time-keeping records can make or break an employee's claim. If the employee feels that the employer is not keeping proper time, the employee may keep a personal diary of his or her hours worked. If an employee is uncertain as to he or she is paid correctly based on the employer's time records, it would be wise for the employee to discuss the matter with a knowledgeable employment attorney.

***

C. Joe Sayas, Jr., Esq. is an experienced trial attorney who has successfully obtained significant results, including several million dollar recoveries for consumers against insurance companies and big business. He is a member of the Million Dollar-Advocates Forum—a prestigious group of trial lawyers whose membership is limited to those who have demonstrated exceptional skill, experience and excellence in advocacy. He has been featured in the cover of Los Angeles Daily Journal's Verdicts and Settlements for his professional accomplishments and recipient of numerous awards from community and media organizations. His litigation practice concentrates in the following areas: serious personal injuries, wrongful death, insurance claims, unfair business practices, wage and hour (overtime) litigation. You can visit his website at www.joesayaslaw.com or contact his office by telephone at (818) 291-0088.

(Advertising Supplement)

BARRISTER'S CORNER

Tax consequences of divorce on non custodian parents

ATTY. KENNETH URSUA REYES

CONSIDER the common divorce scenario where the divorce judgment provides primary custody of the children to one spouse while the other spouse only gets visitation. The parties begin to file separate tax returns. What are the tax consequences of the non custodial parents with regards to claiming the children in his or her return?

A non custodial parents can no longer file as head of household, even if the non custodial parent is allowed to claim the children as dependents under the divorce judgment because this requires that the parent have custody of the children at least 6 months of the year. Non custodial parents also can no longer claim the earned income tax credit. However, the non custodial parent can claim the child tax credit

In the absence of a provision in the judgment which states otherwise, the parent with primary custody of the children is ordinarily entitled to claim the children as dependents for tax purposes. If a qualifying child is claimed as a dependent by both parents and the parents do not file a joint return, the child is normally treated as the qualifying IRC § 152(c)(4)(B)(i)

However, the Code allows the dependency exemption and child tax credit to be shifted to the non-custodial parent when a child receives over one-half of the child's support during the calendar year from the child's parents who are either (i) divorced, (ii) legally separated, (iii) separated under a written separation agreement, or (iv) living apart at all times during the last six months of the calendar year. The child must be in the custody of one or both of the child's parents for more than one-half of the calendar year. IRC § 152(e) (1)(A) & (B)

To shift the exemption and child tax credit to the noncustodial parent, the custodial parent must release or waive his or her claim to the exemption for the year by executing IRS Form 8332. IRC § 152(e)(2). The custodial parent can waive this right to claim the children as dependents and let the non custodial parent claim them by executing IRS Form 8332 and filing it with his or her return.

Certain Tax Court cases held that the waiver is effective even if the Form 8332 was not filled out in detail. In Bramante (T.C. Memo 2003-228), the custodial parent and agreed to waive her right to exemptions on Form 8332. The custodial parent realized that as her income increased, the value of the exemptions increased. The custodial parent discovered that her Social Security number was missing on the form and that the noncustodial parent, had dated the form in his handwriting. The tax court still upheld the waiver as effective despite the missing details from Form 8332.

In Boltinghouse, the IRS argued that missing details in the separation agreement defeated the waiver (T.C. Memo 2003-134). In this case, the parties executed a separation agreement allowing the non custodial parent to claim one of his children, but the non custodial parent did not file a Form 8332. As a result, the court had to decide whether the agreement conformed in substance to Form 8332. The IRS contended that the agreement was not in substance a Form 8332 because it did not reflect the years the exemptions were to be waived and it did not provide Social Security numbers for the parents. Although the IRS pointed to some cases in which the Tax Court had rejected waivers that were ambiguous as to the applicable years, the Tax Court said that it was clear that this agreement applied to the years the parents began filing separate returns. As in Bramante, lack of Social Security numbers was not considered a serious defect by the Tax Court.

The custodial parent can waive the dependent exemption each year or for a number of years. The non custodial parent should file form 8332 with his or her tax return in order to be entitled to the exemption. To avoid any confusion and tax issues with the IRS, the parties should attempt to agree or resolve in court the issue of who will claim the dependency exemption of the children as part of the divorce judgment. Parties should seek the assistance of an experienced attorney to weed through complex family law issues.

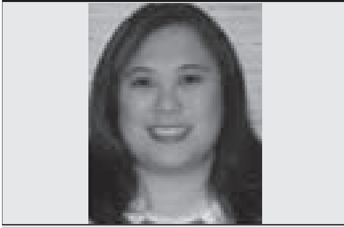
***

Atty. Kenneth Ursua Reyes was President of the Philippine American Bar Association. He is a member of both the Family law section and Immigration law section of the Los Angeles County Bar Association. He has extensive CPA experience prior to law practice. LAW OFFICES OF KENNETH REYES, P.C. is located at 3699 Wilshire Blvd., Suite 700, Los Angeles, CA, 90010. Tel. (213) 388-1611 or e-mail kureyeslaw@aol.com. Visit website Kenreyeslaw.com.

(Advertising Supplement)

The best kept secret: the L-1 intra-company transferee visa

PROBLEM SOLVED



PIA MARIE DYQUIANGCO, ESQ.

WITH the rise in unemployment, the processing of PERM applications being delayed, the continued retrogression of EB-3 priority dates, and the potential of your H-1B application not being randomly selected for filing, the L-1 non immigrant visa may be the solution for qualifying foreign nationals who wish to come to the United States to work.

The Intra-company transferee: L-1 visas are for intra-company transferees. An intra-company transferee is a person who worked for a company abroad in an executive, managerial, or "specialized- knowledge" capacity for at least one continuous year within the three years prior to coming to the U.S. and is coming to the U.S. to work for a related (parent, subsidiary, affiliate, or branch) company in one of those three types of positions. A foreign business owner may seek to file an L-1 visa for themselves if they are opening a new office in the United States. This new office serves as a subsidiary, affiliate or branch of their already existing business abroad. The maximum stay is seven years for managers and executives and five years for specialized-knowledge employees.

Executive v. Manager v. Specialized Knowledge: The Executive or Manager transferees qualify for the L-1A visa while those applicants with Specialized Knowledge qualify for the L-1B visa. The distinctions among each are clearly set forth in their definition and the description of their daily duties. The clear distinction between an "Executive" and a "Manager" is that an Executive receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization and may direct policies and goals of the organization, while a Manager serves in a supervisory capacity and reports to executives. Specialized knowledge refers to knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests or its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The L-1 Visa Advantage: An US as an L-1 and, at the same time, lawfully seek to become a permanent resident of the USA. The filing for permanent residency status (green-card) can commence following the L-1 extension, after the initial first year in L-1 status and business operation. Executives and managers needn't go through the PERM process in order to apply for lawful permanent residence; specialized knowledge professionals, however, require PERM.

Spouses on an L-2 visa are allowed to work: The Spouse and Children of the L-1 visa holder may come to the United States under an L-2 non immigrant visa. But unlike H-4 visa holders, they are allowed to obtain an employment authorization card. Employment authorization may be granted for the period of admission or status not to exceed two years.

So why are more people not applying for the L-1 Intra-company Transferee visa? The L-1 non immigrant visa is often driven by the corporate documents submitted to prove that there is a bona fide foreign company that has established a subsidiary, affiliate or branch in the United States. There has to be proof of a relationship between the organization abroad and in the US. Finally, the transferee's position in the company abroad has to meet the definition of "Executive, Manager or Specialized Knowledge." USCIS has been known to respond with a request for evidence for specific corporate documents from both the US Company and the Foreign Company. These specific requirements and complexity may hinder qualified people or companies to apply for the L-1 non immigrant visa. It may prove to be time consuming as far as what documents are needed, but it is not impossible to be approved.

An experienced immigration attorney makes a difference: There are a lot of perks in being a beneficiary of an L-1 intra-company transferee non immigrant visa. This is why you need an experienced and knowledgeable immigration attorney to assist you through this process. The Lawyers of Wilner and O'Reilly have successfully assisted and continue to assist clients and employers in applying for an L-1 Intra-company Transferee visa. Our dedicated attorneys are ready to assist you whether you are the foreign national seeking to be transferred to a U.S. subsidiary or whether you are the employer wishing to transfer employees from abroad. We have three convenient locations: Cerritos, Irvine and Riverside. Call us at (562)207-6789 for a free consultation.

***

Pia Marie Dyquiangco is an Associate Attorney in the Business and Transactional Division of Wilner & O'Reilly, APLC. Ms. Dyquiangco is admitted to practice in the State Bar of California.

(Advertising Supplement)

To: Restaurant/Health Workers
All Underpaid Workers

From: Bander Law Firm, LLP

Re: Get the Thousands of $$$$$ You Deserve
For Your Hardwork

California Law Entitles You to Overtime/
Minimum Wages/Interest/$$$Penalties

Immigration Status
DOES NOT MATTER.

FREE CONSULTATION ON WAGES/HR CLAIMS
IMMIGRATION, PERSONAL INJURY

----NO RECOVERY, NO FEE----

Bander Law Firm, LLP
Email: info@banderlaw.com

DOWNTOWN OFFICE:
1055 W. 7th Street, Suite 1950,
Los Angeles, CA 90017
Tel: (213) 873-4333
Fax: (213) 873-4334

SAN GABRIEL OFFICE:
1045 E. Valley Blvd., STE A215
San Gabriel, CA 91776
Tel: (626) 571-1188
Fax: (626) 571-8089

For more information, please visit our website:
www.banderlaw.com