

More on Pyramiding of Overtime & Related Payroll Issues

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I often get questioned by business owners, operators, & even the attorneys & accountants who service them, about some really esoteric payroll issues. For example, there's [pyramiding of overtime](#), which has become a real SEO driver for me. There's also these earlier posts: [here](#), [here](#) & [here](#).

Recently, I received some questions about pyramiding, payroll & overtime (OT) scenarios in 3 states: California, Colorado, Nevada & Kansas. Below are those questions & my answers.

For the sake of argument, we'll assume that each state mandates that the OT rate is time & one-half of the of average hourly rate per hour during the 7 day week. This discussion is illustrative of the subtle variances in minimum wage & overtime laws among states, & just how these variances can get a business into trouble if it doesn't account for those variations. For example, states have different labels for breaks like rest period, meal period, rest break, meal break, lunch, dinner, & other breaks can be either paid or unpaid depending on the jurisdiction too. Moreover, some states provide for OT for any hours worked beyond 8 in a day, while some states only provide for OT when working more than 40 hours in a week. California provides for double time pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of 8 on the 7th consecutive day of work in a workweek.

The below query is from a company representative in Kansas dealing with unionized employees.

I've got what I believe to be a pyramiding problem and I'd like to know your thoughts.

The employees are under a CBA (collective bargaining agreement) and have specific language about when they get overtime. One section of the CBA says they receive overtime for work outside of their normal shift and double time for working more than 14 continuous. These employees are on a 12 hour rotating shift, so there are some weeks when they work more than 40 hours in a week and they get overtime for those hours, to comply with FLSA not CBA. Well the company is not very good at succession planning and we find ourselves in situations where the employees are working a lot of overtime. What the employees are doing and have been from what they tell me forever, or at least since 2003 when they unionized, is moving the more than 40 hours worked to other days in the week besides the last for various reasons including, vacation, sick, already working overtime. Basically any

reason that would prevent them from coding the greater than 40 on the last day, they move to another day. The CBA does not have a no pyramiding clause, but is specific about when the employee gets overtime.

I have begun denying the moved overtime hours and using the CBA as my reason. When this is grieved and or goes to arbitration what are my chances?

Here's my response:

You've probably got a few good points in your favor. However, before I go into greater detail, it's critical to know, did you give the union & your employees advance notice of your intentions? If yes, then you've probably got a 75% chance of winning at arbitration. If not, your chances go down to 50% at best. Advance notice is key. Even if it's something you've said verbally over the phone or in text messages. To make your argument stronger, you should consider doing a comparative analysis of collective bargaining language & other states' laws regarding overtime.

Also, yes, this OT method is in fact pyramiding of OT.

California

Overtime Rules: Consecutive 7 days worked, Daily > 8 hrs, Weekly > 40 hours

Process order: we test the rules in the order listed above.

Case 1 – California

- Day 1 9 hrs
- Day 2 8 hrs
- Day 3 8 hrs
- Day 4 8 hrs
- Day 5 8 hrs total 41hrs

Result: Day 1 = 1 hr OT using daily O/T rule, & no weekly OT due to non-pyramid. 40 hrs regular, 1 hour ot

Case 2 – California

- Day 1 8 hrs
- Day 2 8 hrs
- Day 3 8 hrs
- Day 4 8 hrs
- Day 5 9 hrs total 41 hrs

Result: Day 5 = 1 hr OT using daily OT rule, & no weekly overtime. Both daily and weekly return the same result. 40 hrs regular, 1 hour ot

Case 3 – California

- Day 1 8 hrs
- Day 2 6 hrs
- Day 3 8 hrs
- Day 4 7 hrs
- Day 5 4 hrs
- Day 6 5 hrs
- Day 7 6 hrs total 44 hrs

Result: Day 7 = 6 hrs overtime based on consecutive 7 day overtime rule. There were no OT hours using the greater than 8 rule. Because of non-pyramiding 6 hours is subtracted from the total 44 hours, and the result is less than 40, so there is no weekly OT. 38 hrs regular pay, 6 hours ot pay.

Also, in CA an employer can deduct a 30-minute unpaid “meal period.” If the employee works more than 10 hours in a day gets a 2nd unpaid 30-minute “meal period.”

Generally, unless an exception exists under the statute (for example, a collective bargaining agreement with certain conditions) or with permission, employers must provide nonexempt employees who work at least 5 hours in a day with a meal period at least 30 minutes long, which may be unpaid. If the employee’s total work period does not exceed six hours, the employee and employer can waive the meal period through mutual consent. An employer must provide a second meal period at least 30 minutes long if an employee works more than ten hours per day, but the employer and employee can waive the second meal period by mutual consent if the first meal period is not waived and if the total hours worked is no more than 12 hours. (Cal. Lab. Code § 512.)

A healthcare worker may waive one of their two meal periods if the person works a shift of over eight hours in a workday. The waiver must be voluntary, written, and signed by both the employer and employee. The employee may revoke the waiver by providing at least a day’s notice to the employer. (Cal. Lab. Code § 516; IWC Wage Order No. 4 § 11.)

Nevada

OT Rules: On a daily basis if more than 8 hours worked in 24 hr period; on a weekly basis if more than 40 hours worked.

Case 1 – Nevada

- Day 1 2 PM – 8 PM shift 1 6 hrs
- Day 1 10 PM – 3 AM shift 2 5 hrs 11 daily total hrs
- Day 2 4 PM – 9 PM shift 1 5 hrs
- Day 2 10 PM – 2 AM shift 2 4 hrs 9 daily total hrs

Result: Day 1 = 3 hrs ot due to daily rule, Day 2 = 1 hr OT due to daily rule. Days 1 & 2 = 0 hrs ot due to the last 24 hours worked.

For reviewing hours worked, I looked at clock-out times and the 24 hours that precede the clock-out time. When computing daily OT it's assumed that the hours assigned as ot are the trailing hours of the measurement. For example, if an employee works 11 hours in a day, the last 3 hours are OT, not the first 3 hours, because time is treated as sequential.

1. On the first clock-out on day 1 at 8pm, the total hours worked in a 24 hour cycle is 6
2. On the second clock-out on day 1 at 3am, the total hours worked in a 24-hour cycle is 11
3. Because the last 3 of the 11 hours was already flagged at OT hours, there remain only 8 hours for the 24-hour test and therefore there is no additional ot
4. On the third clock-out on day 2 at 9pm, the total hours in 24 are 10
5. Because the middle 3 hours of the 10 hours was already flagged as ot, there remain only 7 hours for the 24-hour test and therefore there is no additional ot
6. On the fourth clock-out on day 2 at 2pm, the total hours in 24 are 10
7. Because 3 of the 10 hours are already considered ot, the remaining 7 fail the 24 hour test and therefore there is no additional ot

Nevada law regarding breaks/lunches permits employers to deduct 30 minutes of unpaid break for more than 8 hours in a day. Note that a "rest period" (10 minutes or less must be a paid break), but not the 30-minute "meal period." See below:

608.019. Periods for meals and rest

1. An employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour. No period of less than 30 minutes interrupts a continuous period of work for the purposes of this subsection.
2. Every employer shall authorize and permit all his or her employees to take rest periods, which, insofar as practicable, shall be in the middle of each work period. The duration of the rest periods shall be based on the total hours worked daily at the rate of 10 minutes for each 4 hours or major fraction thereof. Rest periods need not be authorized however for employees whose total daily work time is less than 3 and one-half hours. Authorized rest period shall be counted as hours worked, for which there shall be no deduction from wages.
3. This section does not apply to:
 - (a) Situations where only one person is employed at a particular place of employment.
 - (b) Employees included within the provisions of a collective bargaining agreement.

So, in the above scenarios, assuming there's no deductions for breaks:

Day 1 = 3 hrs OT due to daily rule, day 2 = 1 hr OT due to daily rule

Days 1 & 2 = 0 hrs OT due to the last 24 hours worked.

Nevada also permits no OT payments if the employer and employee agree that the employee will work a scheduled ten hours per day for four calendar days within any scheduled workweek, referred to as “4 10s” (NRS 608.018(1) and (2).)

The Office of the **Nevada** Labor Commissioner has taken the position that if an employee fails to work one of the scheduled ten-hour shifts, the employer is not obligated to pay daily **overtime** for the other days worked in the 4 10s schedule that week if the failure is either:

- A result of the employee’s decision for reasons within the employee’s control.
- Beneficial to the employee.

(See Office of the Nevada Labor Commissioner’s July 25, 2013 Advisory Opinion.)

Colorado

Overtime Rules: weekly > 40; daily > 12; & 12 consecutive hours. Processed in that order. <https://www.colorado.gov/pacific/cdle/overtime>

Employees shall be paid time and one-half of the regular rate of pay for any work in excess of: (1) forty hours per workweek, (2) twelve hours per workday, or (3) twelve consecutive hours without regard to the starting and ending time of the workday (excluding duty free “meal periods”), whichever calculation results in the greater payment of wages.

Case 1 – Colorado

- Day 1 2 PM – 8 PM shift 1 6 hrs
- Day 1 10 PM – 3 AM shift 2 5 hrs 11 daily total hrs
- Day 2 4 PM – 9 PM shift 1 5 hrs
- Day 2 10 PM – 2 AM shift 2 4 hrs 9 daily total hrs

Since Colorado has no OT requirement for more than 8-hours in a workday, it means the extended breaks negates any OT on the 2nd shifts. It’s sort of an anomaly compared to other states.

Case 2 – Colorado

- Day 1 12 PM – 1 AM 13 hrs
- Day 2 1:30 AM – 4:30 AM 4 hrs, 17 consecutive hours worked.

Result: Day 1 = 1 hour of OT, Day 2 = 4 hours of OT, for 5 total OT hours, all based upon > 12 consecutive hours worked.

More from my site

- [Pyramiding of Overtime Revisited](#)
- [Response to Reader's Query Regarding Pyramiding of Overtime](#)
- [Another Question From A Reader Regarding Pyramiding of Overtime](#)
- [Seminar From A Friend of Mine-Inside the Law Firm of the Future](#)
- [Some Thoughts on Making an Offer to Settle a Case](#)
- ["Pyramiding" of Overtime](#)



