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Pay for resident managers can be tricky

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When a person is hired to perform services for an employer, they expect to be paid for the work they do - whether on an hourly, project or other reasonable basis. But what happens when their work involves caring for rental property and they are required to live on the property?

In California, a manager, janitor, housekeeper, or other responsible person must live on the premises of properties with 16 or more units whenever the owner doesn't live on-site. (25 CCR Section 42) This "resident manager" is an around-the-clock worker: He or she may be called upon at any time, day or night, to handle leaky faucets, uncollected garbage, or noisy neighbors.

However, many apartment landlords view it as both unreasonable and exorbitantly costly to expect them to pay that person for every potential working hour. Bursts of active work may be accompanied by long stretches of downtime. Not to mention the fact that some resident managers will not be charged rent for their - often furnished - apartments.

So how should these workers be paid? Should they be compensated for time spent waiting for the next tenant crisis? Should they be charged - or credited - for their apartment units? Are those benefits taxable?

Wages

Resident managers are, in many ways, no different than other workers. They must be paid minimum wage for the work they do and are entitled to liquidated damages for any shortfall in their pay. And just like other workers, they may qualify for overtime pay if their work exceeds eight hours in a day, 40 hours in a week, or seven days in a single work week.

But beyond the basics, certain wage rules are specific to the job of a resident manager. Wage Order 5-02 (K) (Section 11050, subdivision (2) (K)) (Wage Order No. 5), provides as follows: " 'Hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so, and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked."

In the case of *Isner v. Falkerberg* (160 Cal. App. 4th 1393, 1399 (2008)), plaintiffs contended that as resident employees they were entitled to payment "not just for the hours they spent responding to emergencies while on call, but for all the hours they were on call and thus confined to their apartment or the building office so as to remain within audible range of the telephone and alarm."

Citing the case of *Brewer v. Patel* ((1993) 20 Cal.App.4th 1017, 1022; 25 Cal.Rptr.2d 65), the appellate court found that the applicable wage order "mandated a special rule for 'apartment managers and motel clerks who are obligated to reside on the work premises. In that situation, only `that time spent carrying out assigned duties shall be counted as hours worked.'" A later case, *Von Nothdurft v. Steck* ((2014) 227 Cal. App. 4th 524), reached the same conclusion. The appellate court ruled that the owner or management company need only pay the manager for the "time spent carrying out assigned duties."

Rent credit

California Labor Code section 1182.8 provides that "No employer shall be in violation of any provision of any applicable order of the Industrial Welfare Commission

relating to credit or charges for lodging for charging, pursuant to a voluntary written agreement, a resident apartment manager up to two-thirds of the fair market rental value of the apartment supplied to the manager, if no credit for the apartment is used to meet the employer's minimum wage obligation to the manager."

California's Division of Labor Standards Enforcement has determined that meals or lodging may not be credited against the minimum wage without a "voluntary written agreement" between the employer and the employee explicitly referencing that the credits are being applied toward the minimum wage obligation of the employer. The DLSE Enforcement Manual, Section 45.4.5, provides as follows:

Written Agreement Required for Credit Against Minimum Wage: Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee which explicitly references that such credits are being applied toward the minimum wage obligation of the employer. In addition, "Deductions shall not be made for meals not received nor lodging not used."

What is meant by "voluntary written agreement?" A federal district court, relying on the DLSE guidelines, held that in order to be valid, the agreement needed to explicitly state that such credits were being applied toward the minimum wage obligation of the employer. (*Brock v. Carrion, Ltd.*, 332 F. Supp. 2d 1320 (E.D. Cal. 2004))

A later California Court of Appeal decision, however, came to a different conclusion. *Von Nothdurft v. Steck* ((2014) 227 Cal. App. 4th 524) was the first state court case certified for publication that addressed what language must be included to qualify as a "voluntary written agreement" under IWO 5-2001. The plaintiff had argued that her agreement did not satisfy the requirements of IWO 5-2001 because it did not reference the minimum wage or any apartment rent credit.

The appellate court rejected this argument, refusing to follow the DLSE policy applied in *Brock*. Wage Order No. 5, the court said, was not ambiguous: "Wage Order 5 does not define the phrase "voluntary written agreement" as used in subdivision 10(C) or otherwise specify that any particular terms must be included in such an agreement to permit a valid lodging credit - it requires only a "voluntary written agreement between the employer and the employee" without qualification. Under its plain terms, no express reference to a credit toward minimum wage, statement that the employee is entitled to minimum wage for every hour worked, or the precise amount to be credited, need be included as long as the parties understand and agree - as they did here by entering into the management agreement - that lodging is to be credited toward the employee's compensation. Since the wage order's language is clear, we apply it without further interpretation." (*Von Nothdurft*, supra, at pg. 532)

The existence of a voluntary agreement itself was sufficient, the court said. No specific terms were required, nor was there a need for any express reference to a credit toward minimum wage, a statement that the employee was entitled to minimum wage for every hour worked, or the precise amount to be credited. As the only California Court of Appeal decision on this issue, *Von Nothdurft* must be followed by superior courts unless or until another Court of Appeal decision determines otherwise.

Caps on rent and rent credit

Even if a proper written agreement allows for a rent credit, the law places a cap on how much rent credit can be applied toward wages. Under Wage Order No. 5, the "rent credit cap" is the lower of (a) two-thirds of the ordinary rental value of the apartment and (b) the applicable Wage Order number - $903.60 per month for an individual manager; $1,336.50 per month for a couple as of Jan. 1, 2024.

Another variant of resident manager compensation is the situation in which managers are not provided free rent but instead are paid minimum wage or above compensation and are charged rent for their apartment. In this situation, the "rent cap" numbers will follow the same formula as the "rent credit cap" numbers: limited to the lower of (a) two-thirds of the ordinary rental value of the apartment, and (b) the applicable Wage Order number.

Tax implications

When a resident manager is required to live on the premises and is given a free rental unit on the property, the value of that compensation is not subject to federal income tax pursuant to 26 U.S. Code Section 119, which provides as follows: "There shall be excluded from gross income of an employee the value of any meals or lodging |furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if ... (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

Conclusion

Resident managers at apartment properties perform important work. They are expected to respond at a moment's notice to all kinds of problems, both large and small. Their compensation may not always align with the level of responsibility they bear.

Property owners and their counsel should fully understand the legal obligations - from wages to rent credits - owed to resident managers. Those who represent these unsung heroes must also ensure that they are appropriately paid for their work.

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