

Wage Claim Procedures and DLSE Berman Hearings (CA)

A Practical Guidance® Practice Note by David L. Cheng, FordHarrison LLP



David L. Cheng
FordHarrison LLP

This practice note provides readers with a detailed description of the wage claim process with the California Labor Commissioner's Office, also called the Division of Labor Standards Enforcement (DLSE). The administrative hearing procedure with the DLSE, known as a *Berman* hearing, is designed to provide employees with an informal and cost-effective means to resolve their wage disputes.

This note addresses how an employee initiates an administrative wage claim; how the DLSE processes such claims; how claims are resolved, heard, and adjudicated; and the parties' rights afterward. Specifically, this note covers the following key topics:

- Overview and Key Functions of the DLSE
- Advantages and Disadvantages to Filing a DLSE Wage Claim
- Initiating a DLSE Wage Claim
- DLSE Responses after Filing
- The Settlement Conference
- The Administrative Complaint and Notice of Hearing
- The Wage Claim Hearing
- Order, Decision, or Award (ODA)
- Appealing the ODA

For more information on wage and hour law in California, see [Wage and Hour \(CA\)](#). For California-specific wage and hour policies, see California column of [Wage and Hour State](#)

[Expert Forms Chart](#). For links to California official wage and hour forms, see [Wage and Hour Official Forms \(CA\)](#).

For more information on defending against federal wage and hour investigations and claims, see [Wage and Hour Claims and Investigations Resource Kit](#). For a comparison of federal and California wage and hour laws, see [Wage and Hour Laws Comparison Chart \(CA and Federal\)](#).

Overview and Key Functions of the DLSE

California undoubtedly maintains one of the strictest wage and hour laws in the country, including mandates for paid sick leave, daily overtime, meal and rest breaks, and a broad definition of what the state considers compensable work time. Multiple methods exist for employees to seek recovery of their unpaid wages. In addition to enforcement through a civil lawsuit, an employee may also recover their wages through an administrative hearing process called a *Berman* hearing. Cal. Lab. Code § 98.

Named after Howard Berman, the member of the California State Assembly who sponsored a bill creating the process in 1976, *Berman* hearings offer both employers and employees a way to quickly resolve their wage disputes without the costs and risks of a civil lawsuit. *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1128 (2013); *Post v. Palo/Haklar & Associates*, 23 Cal. 4th 943, 947 (2000).

Berman hearings are formally administered through the DLSE, a division within California's Department of Industrial Relations whose mission is to investigate and enforce California's wage and hour standards. See Cal. Lab. Code § 98(a); see also [Labor Commissioner's Office: About Us](#). Those standards derive from a complicated set of laws and regulations, mainly found within the California Labor

Code (a body of statutes generally governing employee/labor relations in California) and the Industrial Welfare Commission's (IWC) wage orders (a set of regulations providing minimum employee standards for specific industries or occupations). See generally Cal. Lab. Code §§ 200 through 3122.4. [IWC wage orders](#). Notably, while the California Labor Code generally applies to all employers in California, application of the IWC wage orders are entirely dependent on the type of business or occupations of the employer. See [IWC Order Classifications](#)

Units within the DLSE

The following units and their functions are within the DLSE:

- [Wage Claim Adjudication Unit](#). This unit investigates and adjudicates wage claims under the *Berman* hearing process. The unit is responsible for overseeing, investigating, and adjudicating claims brought by workers for unpaid wages, including the nonpayment of wages, overtime, or vacation pay.
- [Public Works Unit](#). This unit investigates and enforces California's prevailing wage standards as applied to public works construction projects. In addition to enforcement and administration of the state's prevailing wage law (see Cal. Lab. Code §§ 1720-1743), the unit also provides education to workers, contractors, and awarding bodies regarding the same.
- [Retaliation Complaint Investigations Unit](#). This unit investigates complaints alleging unlawful retaliation against employees asserting their rights under California wage and hour laws. This includes more than 45 labor laws that specifically prohibit discrimination and retaliation, including Equal Pay Act violations.
- [Bureau of Field Enforcement](#). This bureau enforces compliance with the state's labor laws through field investigations and inspections, specifically addressing statutes covering workers' compensation insurance coverage, child labor, cash pay, unlicensed contractors, the IWC wage orders, and group claims (and criminal investigations) involving minimum wage and overtime claims.
- [Licensing and Registration Unit](#). This unit administers licensing and registration regulations for a number of industries, including agriculture, entertainment, construction, child labor, garment, janitorial services, sheltered workshops, foreign labor contractors, and car washing.
- **Legal Unit**. This unit pursues civil enforcement of California's wage and hour laws at the trial and appellate levels.
- **Judgment Enforcement Unit**. This unit assists workers in collecting unpaid wages.

On average, approximately 30,000 workers file DLSE wage claims each year with the DLSE, or roughly 1 out of every 600 workers, statewide. California Legislative Analyst's Office, [The 2020-21 Budget: Improving the State's unpaid Wage Claim Process](#) (hereinafter LAO DLSE Wage Claim Report).

Advantages and Disadvantages to Filing a DLSE Wage Claim

As previously noted, there are two principal options for an employee to resolve any wage disputes with their employer. The first option is to seek relief through an ordinary civil action—either in court or in arbitration. The second option is through the *Berman* hearing process. Generally, the *Berman* hearing process offers several benefits to employees not featured in a court/arbitral forum.

Perhaps most importantly, the *Berman* hearing process offers employees an accessible, informal, and affordable mechanism for laypersons to seek resolution of their wage and hour claims. The parties incur little to no expenses when initiating a DLSE wage claim or having it heard. Additionally, hearings are conducted before a Deputy Labor Commissioner, where both the employee and employer may appear and present their dispute without the need of an attorney. 8 Cal. Code Regs. §§ 13502, 13506.

Unlike civil hearings, *Berman* hearings are not governed by the technical rules of evidence, and the hearing officer may simply rely on “the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” 8 Cal. Code Regs. § 13502.

Likewise, hearings officers, unlike judges and arbitrators, are further authorized to assist the parties in cross-examining witnesses, and to explain the issues and any terms not understood by the parties. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#). If required, an interpreter may be provided. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#); see Cal. Lab. Code § 105.

Second, the *Berman* hearing process offers appellate procedures that discourages unmeritorious appeals, including allowing a prevailing party, in certain circumstances, to recover the other party's costs and attorney's fees. Cal. Lab. Code § 98.2(c). Comparatively, though, employees have more advantages than employers on appeal. These advantages are further explained below.

Despite the pro-employee procedures, maintaining a DLSE wage claim has its disadvantages—the most significant of which is delay. Although state law requires the DLSE to hear a DLSE wage claim within 120 days of the claim being filed, the average claim took almost 540.9 days in 2018. See Cal. Lab. Code § 98(a); CalMatters, [When employers steal wages from workers](#).

The DLSE has attributed the delays due to efforts to review claims more thoroughly, as well as new laws that expanded the DLSE’s authority, making some cases more complex. California Legislative Analyst’s Office, [The 2020–21 Budget: Improving the State’s unpaid Wage Claim Process](#). As of 2021, the average delay is now 334 days. See [When employers steal wages from workers](#). The COVID-19 era has not helped; to this author’s knowledge, one DLSE office provided a three- to five-year estimate for a DLSE wage claim to be heard after filing.

Even so, the *Berman* hearing process remains a simple and viable alternative to filing a lawsuit in court or arbitration. In 2020, workers recovered approximately \$55 million, and, between 2017 and 2020, recovered \$221 million—far more than other states. CalMatters, [When employers steal wages from workers](#).

Initiating a DLSE Wage Claim

An employee alleging nonpayment of wages or other compensation by their employer begins the *Berman* hearing process by filing an [Initial Report or Claim form](#) with a local office of the DLSE, along with other forms if the employee’s claims involved varying work schedules, meal or rest period violations, commission pay, or vacation wages. The DLSE offers instructions on initiating a DLSE wage claim [here](#) and [here](#).

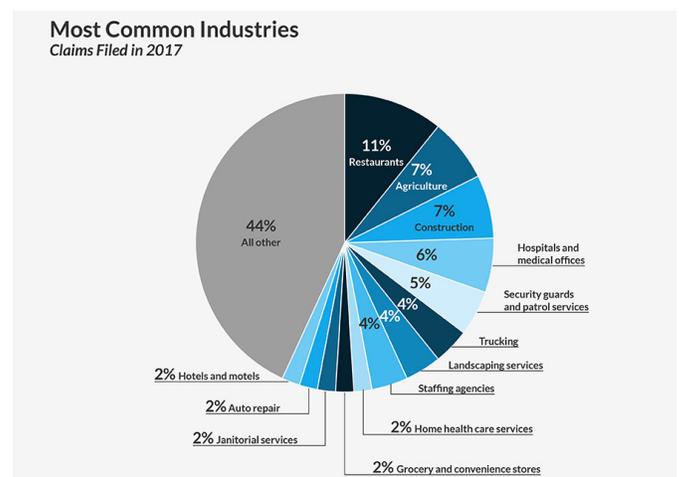
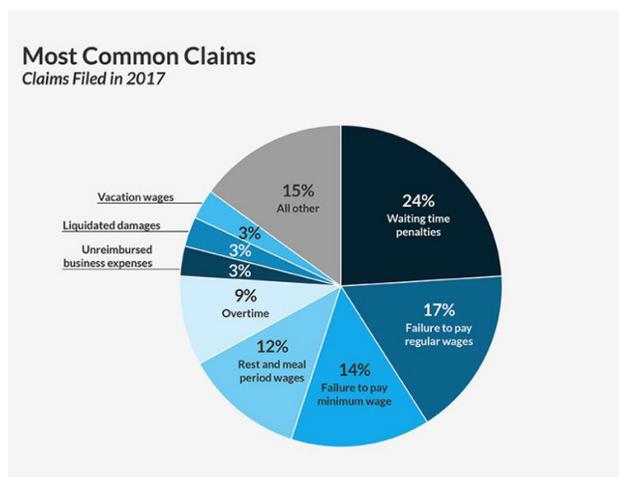
Workers may submit the forms in person, by mail, by email, or online. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [How to File a Wage Claim](#).

The DLSE strongly recommends that claimant include information and documents about the employer, other responsible parties, the worker’s hours and pay, and an estimate of the wages their employer owes them. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [How to File a Wage Claim: File Your Wage Claim](#); see also Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [How to File a Wage Claim: Required Documentation](#).

Examples of supporting documentation include:

- Time records kept by the employee of the hours and dates worked
 - Current employees have the legal ability to request inspection of their time records. See, e.g., 8 Cal. Code Regs. § 11010, subd. 7.
- Paychecks and paystubs showing the wage paid
 - Current and former employees may request inspection or a copy of their paystubs. See Cal. Lab. Code § 226(b).
- Dishonored (or “bounced”) paycheck(s)
 - By state law, an employer hiring a nonexempt, nonunion employee must provide that employee, at the time of a hire, a form notice of employment information indicating the employee’s rate of pay, overtime rate of pay, pay frequency, and compensation method. See Cal. Lab. Code § 2810.5. As most employers have newly hired employees sign the form, an employee may later request a copy of the form. See Cal. Lab. Code § 432.
- Any forms showing basic information of the employee’s employment relationship

Instructions and forms are also available in different languages, and the DLSE offers employees assistance in helping them file a claim. Below is a table showing the most common DLSE wage claims, along with the most common industries sued through the *Berman* hearing process, as of 2017. California Legislative Analyst’s Office, [The 2020–21 Budget: Improving the State’s unpaid Wage Claim Process](#). For a snapshot of the most common industries sued for claims in 2021, see [When employers steal wages from workers](#).

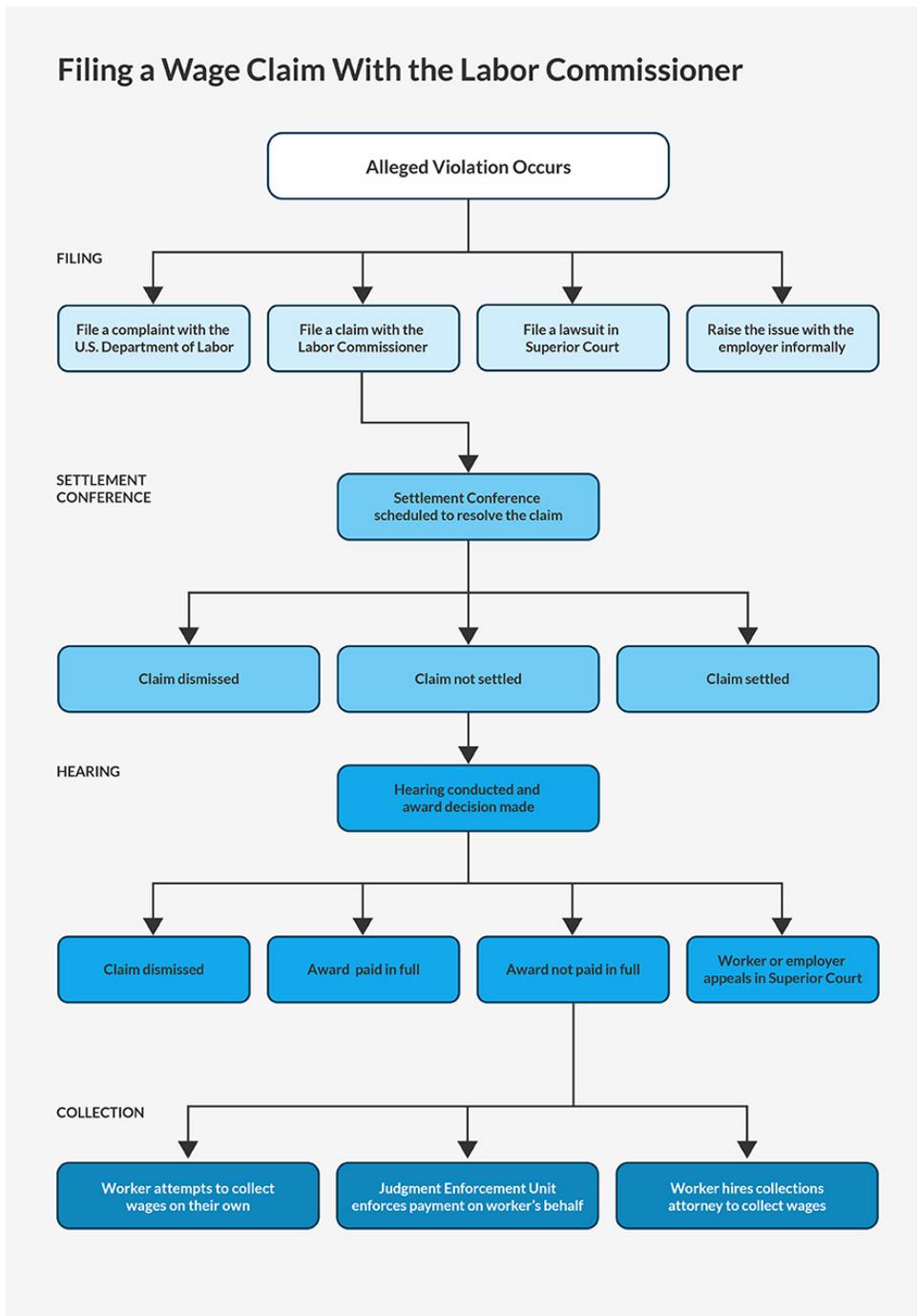


Most wage claims allege a combination of the above wage and hour violations. Generally, the deadline for filing a DLSE wage claim is the same as if it were filed in court. For most wage and hour claims, the following deadlines apply:

- Within one year for penalties regarding a bounced check or failing to provide access to, or a copy of, payroll or personnel records
- Within two years for an oral promise to pay more than minimum wage
- Within three years for violations of minimum wage, overtime, meal/rest break violations, sick leave, illegal deductions from pay, or unpaid reimbursements
- Within four years for a written contract

Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, How to File a Wage Claim. Under recent legal precedent, the filing of the Initial Report or Claim form tolls the statute of limitations. *Seviour-Iloff v. LaPaille*, 80 Cal. App. 5th 427 (2022).

For easy reference, below is a process map showing the typical handling of a DLSE wage claim:



DLSE Responses after Filing

Once a worker files a claim, by statute, the DLSE assigns the wage claim to a Deputy Labor Commissioner, who investigates the claim and decides one of three possible options:

- Referral to a conference, where the DLSE will attempt informal resolution
- Referral to a formal hearing, where the claim is heard and decided by a hearing officer
- Dismissal of the claim

See Cal. Lab. Code § 98(a); Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#).

Overall, approximately one-third of DLSE wage claims have been dismissed, often because the employee did not attend the conference or the parties' settled informally. California Legislative Analyst's Office, [The 2020-21 Budget: Improving the State's unpaid Wage Claim Process](#).

The Settlement Conference

In almost all cases, the assigned Deputy Labor Commissioner opts to schedule a conference, the purpose of which is to determine if the claim can be resolved without going to a hearing to resolve. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [How to File a Wage Claim: Your Settlement Conference](#).

Accordingly, the DLSE sends both parties by mail a "Notice of Claim Filed and Conference," which describes the claim, provides the date, time, and place of the conference, and directs both parties to attend. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#).

The employee's attendance is critical—while an employer's failure to attend the conference results in the DLSE scheduling a hearing, absent good cause, an employee's failure to attend results in dismissal of the wage claim. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [How to File a Wage Claim: Your Settlement Conference](#).

Parties attending the conference should bear in mind that the conference is conducted informally, that the parties will not be under oath, and that neither side will be required to prove their case at the conference. While bringing witnesses is not required, the parties should be prepared to discuss the claim with the Deputy Labor Commissioner, including presenting any evidence supporting the parties' claims or defenses. Given the nature of the conference, both parties have the right to speak privately with the Deputy Labor

Commissioner. While engaging an attorney is not necessary, it is often recommended in cases involving complex facts, multiple witnesses, or when the claims allege conduct over a prolonged time.

Assuming a resolution is reached, the Deputy Labor Commissioner may facilitate memorializing the settlement using form settlement agreements sponsored by the DLSE's local office. Employers, however, should keep in mind that such form agreements are limited, both as to the scope of the release as well as the terms governing confidentiality and tax treatment of the settlement.

Depending on the arguments and evidence raised during the conference, the Deputy Labor Commissioner will determine how the claim proceeds. Usually, if the case is not resolved, the wage claim is either referred to a hearing or the matter is dismissed. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#).

The Administrative Complaint and Notice of Hearing

If resolution is not reached at the conference, the DLSE subsequently schedules a formal hearing, where the claim is heard, evidence is presented, and testimony is provided under oath. To that end, the DLSE will send a notice of the hearing—setting the date, time, and place of the hearing—along with a formal copy of the employee's complaint, by mail or by personal service. See Cal. Lab. Code § 98(b).

After receipt of the complaint, the employer has the option, but is not required, to file an answer with the DLSE. See Cal. Lab. Code § 98(c). The answer must be submitted within 10 days after service of the complaint, and may be on a [form pleading](#) offered by the DLSE. Often, employers may also submit a verified position statement setting forth any facts showing why the complaint is inaccurate or incomplete, or other facts on which the employer will rely to support its defenses. See Cal. Lab. Code § 98(c). Submission of a formal position statement is strongly recommended if the employer intends on presenting legal arguments, or complex factual arguments, in support of their defenses.

Despite this, the scheduling of a hearing is quite often delayed, sometimes leading to a hearing being scheduled three to five years after the complaint's filing. It has also been this author's experience that notice of the hearing's date and time often does not go out to the parties until one to two months prior to the hearing. Because of this, along with the strong likelihood that the DLSE may not reschedule the hearing once it is set, it is often recommended that all

parties preserve any relevant documents or information in their possession, with the expectation that a hearing may not be scheduled promptly. The DLSE will not change the date, time, or place of the hearing except upon a showing of extraordinary circumstances. The decision to grant a request is within the sole discretion of the hearing office and senior Deputy Labor Commissioner and is rare. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#).

Parties should also be prepared to coordinate with their witnesses so that attendance may occur on short notice. An employer seeking to introduce business records at the hearing should be prepared to bring a witness explaining how such records were prepared.

Likewise, given the informal setting of the proceeding, the *Berman* hearing process does not offer a formal discovery process, where documents and information may be formally requested and exchanged between the parties. As a result, any party desiring another party to bring relevant documents or records, or a witness to attend the hearing, must apply to the DLSE for the issuance of subpoenas for records production or witness attendance. See Cal. Lab. Code § 92.

Per the DLSE's policies, applications for the issuance of subpoenas should be made at least 15 business days prior to the date of the hearing. Subpoena applications may be found [here](#) (last accessed Aug. 1, 2022). A party may alternatively arrange for a witness to appear voluntarily at the hearing, without the issuance of a subpoena.

Any application for the issuance of subpoenas must state the reasons why the requested documents, records, or witnesses are relevant or necessary, and costs incurred in the service of the subpoena must be paid by the party requesting the subpoena. If the DLSE possesses any relevant documents from the parties, it may also be possible to obtain such records through a public records request. Instructions on how to submit a request to the DLSE may be found [here](#).

Before the COVID-19 pandemic, both parties were expected to bring their witnesses and three copies of any documentary evidence to the hearing. However, since the pandemic, the DLSE has now allowed the parties to appear remotely. As a result, the DLSE now requires that parties submit to the DLSE, as soon as possible or at least two weeks prior to the hearing, an appearance sheet identifying the names and contact information of any individuals appearing, and any documentary evidence a party wishes to use at the hearing.

As before, attendance of both parties is critical. An employee failing to appear at the hearing, absent good cause, will have their complaint dismissed. While an employer failing to appear would not result in default, the hearing would

nevertheless move forward in their absence. See Cal. Lab. Code § 98(f).

The Wage Claim Hearing

At the hearing, the claim is heard before a hearing officer assigned from the DLSE, and is recorded. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#). By law, hearings are to be conducted informally. See Cal. Lab. Code § 98(a). To this author's experience, on average, hearings are between one to two hours, but may last an entire day.

As a result of the informality of the hearing, there are no established rules of evidence or procedure to follow during a hearing. Given the informality, motion practice is not permitted. Instead, the hearing officer may simply rely on "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs," 8 Cal. Code Regs. § 13502, and may even assist the parties by explaining the issues and terms not understood by the parties, or through cross-examining witnesses. Dept. of Indus. Rel., Div. of Lab. Stds. Enforcement, [Policies and Procedures for Wage Claim Processing](#).

Other things that are within the hearing officer's sole authority and discretion include:

- Determining which witnesses may testify
- Determining the order in which persons will testify, cross-examine, and give rebuttal
- Determining whether to accept and consider testimony and documents offered by the parties or witnesses
- Taking official notice of well-established matters of common knowledge and/or public records –and–
- Determining whether the parties would agree to certain stipulations that may be entered into the record

Even so, each party and their witnesses would testify under oath. Each party has the following rights at the hearing:

- To be represented by an attorney or other party of their choosing
 - To present evidence
 - To testify in their own behalf
 - To have their own witnesses testify
 - To cross-examine the opposing party and witnesses
 - To explain evidence offered in support of their position and to rebut evidence offered in opposition –and–
 - To have an interpreter present, if necessary
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Order, Decision, or Award (ODA)

Following the hearing, the hearing officer will consider the evidence presented during the hearing and issue a decision, also known as an Order, Decision, or Award (ODA), containing a summary of the hearing and reasons for the decision. See Cal. Lab. Code § 98.1. By law, the hearing officer must issue the ODA within 15 days after the hearing is concluded (see Cal. Lab. Code § 98.1), although, in this author's experience, delays in the ODA's issuance are typical. The hearing officer generally serves notice of the ODA on all parties by first-class mail.

Upon receiving the decision, a party generally has 15 days to decide whether to appeal the decision. By law, parties normally have 10 days after service of the ODA to appeal. See Cal. Lab. Code § 98.2. However, because the DLSE typically serves notice of the ODA by mail, the deadline to appeal is typically extended by an additional 5 days (and 10 days if served out-of-state). See Cal. Lab. Code § 98.2; see also Cal. Code Civ. Proc. § 1013.

For the employer, failure to timely appeal the ODA would result in the ODA being submitted to an appropriate county superior court clerk so that the ODA be converted into a judgment. See Cal. Lab. Code § 98.2(d), (e). In lieu of a judgment being entered, the DLSE typically offers employers resolution by paying the ODA in full. See Cal. Lab. Code § 98.2(e).

Absent an appeal, or a failure by an employer to pay the amount in full, the DLSE allows the ODA to be converted to a judgment, and may also file a certificate of lien on real property with the county recorder / clerk's office. See Cal. Lab. Code § 98.2(g). State law also gives the DLSE the authority to prosecute actions for the collection of any entered judgments. See Cal. Lab. Code §§ 96.8, 98.2(f), 98.3.

Appealing the ODA

In lieu of abiding by the ODA, either party may appeal the ODA. Perfecting an appeal must be accomplished by filing a notice of appeal to a state superior court (generally, in the same county in which the ODA was issued). See Cal. Lab. Code § 98.2. A template Notice of Appeal may be accessed [here](#) (last accessed Aug. 1, 2022).

In addition to filing a notice of appeal with the applicable state superior court, the appealing party must also serve a copy of the appeal on the DLSE. See Cal. Lab. Code § 98.2(a). An appeal of the ODA affords both parties to have the dispute heard by a state superior court judge de novo—meaning, the appeal is conducted and heard as if the prior DLSE hearing, and the issued ODA, never occurred. See Cal. Lab. Code § 98.2(a). It is not clear that an appeal would require the de novo proceeding to be adjudicated as a bench or jury trial, although it is this author's experience that appeals are tried de novo before the judge.

As previously noted, the appellate process offers significant advantages for employees. First, an employee who is financially unable to afford counsel in appeal proceedings and whom the DLSE believes has claims which are valid and enforceable may request that the DLSE represent their interests on appeal. See Cal. Lab. Code §§ 98.3(a), 98.4(a).

Second, the law imposes on an appealing employer the additional obligation of posting an undertaking in the amount of the ODA, which must be posted with the reviewing state superior court on or before the deadline to file a notice of appeal. See Cal. Lab. Code § 98.2(b).

Third, while the law imposes on the prevailing party in an appeal the right to recover reasonable attorney's fees and costs, an employer would only be considered a prevailing party if the reviewing court awards nothing to the employee. See Cal. Lab. Code § 98.2(c).

While the *Berman* hearing process presents both advantages and disadvantages, the process remains a viable and cost-affordable option for employees to adjudicate their wage disputes with employers.

David L. Cheng, Partner, FordHarrison LLP

David handles a broad range of employment law matters focused primarily on defending clients against wage and hour claims, as well as claims of discrimination, retaliation, FMLA, wrongful termination, defamation, and harassment.

David also focuses his practice on complex business disputes and class action cases, with a special focus on wage and hour class and collective actions brought under the Fair Labor Standards Act and California law, as well as under California's Private Attorneys General Act. David has successfully handled all aspects of litigation, from initial investigation to trial in both individual and class action matters. He is experienced litigating in both state and federal court, as well as private arbitration.

David regularly counsels employers on hiring practices, background checks, terminations, workplace investigations, reductions in work force issues, and litigation avoidance practices. David also provides guidance to employers regarding negotiation of separation agreements, drafting employment handbooks, policies, and procedures, and various issues related to wage and hour compliance. David focuses his practice on proactive assistance to clients, in order to avoid actionable conduct relating to employment issues in the future and in line with his clients' business needs and goals.

Prior to joining FordHarrison, David was an attorney at a plaintiff-side law firm that represented individuals both in labor and employment law and consumer-related disputes, which provides him with great insight into the potential challenges that companies often face in litigation.

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