

## “Get Your Check!”

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It occurred to me the other day that it had been some time since I heard the phrase “Get your check” or its equivalent, “Get your time!” Both phrases have long been different ways of saying, “You’re fired!”

Well, they are perhaps a little anachronistic. They evoke pictures of the worker slinking toward the pay window, being counted out the last few dollars of his pay by a sallow underling in suspenders and a green eyeshade, and walking nobly off into the distance wondering how his fifteen kids will be fed in coming weeks. Not quite the right graphic for our upbeat, automatic deposit present.

And apparently, quite a few modern businesses feel the same. Just as I’ve noticed that the old phrases have died, I’ve also noticed that several businesses that should know better are paying terminated employees and voluntary quits their termination pay pretty much when they feel like it, usually on the employees’ regular payday.

Sorry, folks. It ain’t legal now, it hasn’t been for much longer than I can remember, and you might find yourself paying a premium to your departed employees if you’re enamored with running your business this way.

For once in employment law, the rules are simple, straightforward, understandable, and without significant exception. If you discharge an employee, “the wages earned and unpaid at the time of discharge are due and payable immediately.” What does “discharge” mean? It has all the expected meanings, including a lay off without any specified return date. Under certain circumstances, it can also mean the sale of your business; if you’re planning to sell your business, this is one of the issues for your attorney to consider.

What are “earned and unpaid” wages? Wages earned up to the moment of discharge, including any overtime. Add in earned vacation pay, payable pro rata; if an employee is entitled to two weeks’ vacation a year and has worked six months on the day of discharge, he’s owed a week’s vacation pay. Also add personal days off, if the benefit amounts to vacation pay in fact. Sick leave isn’t included, assuming that it’s payable only when the employee is sick and off work— but if it’s nothing more in fact than a personal days off benefit, you might have a problem. Holiday pay? Nope, future holidays haven’t been “earned” yet.

What about commissions? First, the important thing to remember is that the employer is not off the hook for commissions merely because the employee is fired. Payment can only be deferred. The rule is that if the amount of the commission cannot be determined until some event occurs in the future, it’s paid at that time and not at termination. (Naturally, any commissions that *can* be determined at the time of termination are paid then.) So, for example, if the commission is

earned when goods are delivered in the future, or the customer later pays for a product, that becomes the time that the terminated employee must be paid. Note that this may be earlier than the time the employee would be paid if he were still employed. For example, the typical business arrangement is that commissions, once earned, are paid on a regular payday; but for terminated employees, the law requires that commissions be paid as soon as the amount is earned.

And what does *immediately* mean? Just what it says. If you haven't arranged for a termination check to give the employee at the moment of firing, write a hand check, with a handwritten statement of deductions, and pay the employee before he walks out the door. "Immediately" means at least the same day, and once he's out the door it may be complicated to meet this rule.

Voluntary quits are a little different. In the usual case, the departing employee must be paid in 72 hours, unless he has given at least 72 hours' oral or written notice. If he has given 72 hours' notice, "the employee is entitled to his wages at the time of quitting." This, of course, is a nice way of saying "have his check ready for him to pick up when he leaves."

There's one other wrinkle with voluntary quits. As the statute states, "an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting." So, in this one case only, "the check is in the mail" is a defense— at least if it was mailed within 72 hours. But if the employee made no such request, the check must be made available for the employee at the workplace within 72 hours. And even if a mail request is on file, it does not apply in the case of discharges— only quits.

So what happens if you mess up? For example, what happens if you don't make the check available to the discharged or quitting employee until, say, the regular payday? Waiting time penalties, of course. The basic rule is that "if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits [per the above rules], the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days." So, for example, if the employee is fired on June 1, but is not paid his wages until June 15, he's entitled to full wages for the period from June 2 up to payment on June 15.

There's something more. It can be irritating to have to pay up to an "extra" month's wages to a former employee who you thought you were done with, but it's hardly life threatening to your business. On the other hand, if your termination policy isn't in sync with California law— if you are not paying employees their termination wages when the law has long required it— you're getting into the area where a good plaintiff's attorney is going to start thinking a class action might be in order. And that can be very expensive indeed. Better to learn the meaning of the phrase "Get Your Check" now, and follow it carefully.