

Are Employers Liable for Unknown Overtime? It Depends



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California's overtime rules are very specific that employers shall be responsible for overtime compensation and define "hours worked" as "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."

A question arises, however, when an employee works overtime without notifying the employer. Specifically, what does the statutory language, "suffered or permitted to work" mean? In *Forrester v. Roth's I.G.A. Foodliner, Inc.* (9th Cir. 1981) 646 F.2d 413 ([link](#)), the court clarified this, explaining that "where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of §207" (29 U.S. Code 207 - [link](#)).

This would imply that if the employer does not know of the overtime, it is not responsible. This, however, is only the case where the employee fails to notify the employer *and* the employer does not have knowledge through some other means. It almost requires a situation where the employee attempts to trap the employer into paying overtime by secretly working overtime.

An employer cannot avoid responsibility for overtime by turning its back on overtime work or failing to keep appropriate records. In those situations, a court will find the employer responsible.

Most recently, in May 2014, the California Court of Appeal in *Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 171 Cal.Rptr.3d 874 ([link](#)) was faced with this question where the employer had an employee sign documents acknowledging the employer's policy confirming overtime, which included provisions that an employee should always obtain pre-approval before working any overtime. The employer also had an established time-keeping system and a similar policy that employees were not allowed to work off-the-clock. In the *Jong* case, the employee testified that he did not know whether anyone in management knew he was working off-the-clock. The *Jong* court found that the written policies combined with the lack of knowledge was enough to absolve the employer. Interestingly, there were two other employees in the *Jong* case that testified their management did know about their off-the-clock work and the court found those claims could proceed to trial.

The ruling in *Jong* puts an exclamation point on the importance of having written policies prohibiting off-the-clock work and requiring employees to record all hours worked. This case also further explains how any knowledge on behalf of the employer of overtime work, regardless of whether or not approved or in violation of written policy, can make an employer liable for overtime pay.