New Resident Manager Laws For 2018 – by Dale Alberstone, Esq.

Hello everybody. Most everyone hopes that 2018 will bring about a strong economy, an end to high taxes, world peace, and other important things like that.

As the legal writer for the Apartment Owners Association, my hope and 2018 New Year's Resolution wish for AOA members is more modest, but nonetheless extremely important. In fact, it is the same Resolution I have proposed to members for the past 17 years: ***Prepare and sign a written employment agreement with each of your resident managers.***

Failure to comply with the new 2018 statewide wage, hour and rent limitation laws can be financially devastating as it is commonplace for lawyers representing resident managers to sue for, or at least threaten, damages ranging from $150,000.00 to $250,000.00 for unpaid wages, penalties, attorneys' fees and other related amounts.

In light of claims such as those, not to mention complaints managers themselves may file with the California State Labor Commissioner, it is important that AOA members understand the applicable labor regulations and sign written agreements with their managers consistent with law so as to avoid liability.

**Overview of the Law**

For 2018, the California statewide minimum wage is $11.00/hour for employers with 26 or more employees. It is $10.50 per hour for employers with less than 26 employees. Certain cities, such as San Francisco, Oakland, Berkeley, Santa Monica, Emeryville, Santa Clara, San Diego and Cupertino, among others, have even higher minimum wages for employers with less than 26 employees.

For example, the minimum wage for resident managers in the City of Los Angeles, if the employer employs 26 or more individuals, will be $12.00 per hour through June 2018, and then increase to $13.25/hour on July 1, 2018. If the Los Angeles employer employs less than 26 persons, then the minimum wage will remain at $10.50/hour through June and then increase to $12.00/hr. on July 1, 2018. (If a city has a wage requirement higher than California's minimum wage, employers must comply with the city's more onerous ordinance.)

Also, throughout 2018, the maximum allowable rent reduction that can be credited against wages owed is $593.05 per month for a single manager and $877.26 per month where a couple is employed if the employer has less than 26 employees.

Further, the maximum rent in 2018 which can be charged to a manager whose residence in the apartment complex is required as a condition of employment is $593.05 per month for a single manager and $877.26 per month for a couple if the employer has less than 26 employees.

Also bear in mind: **A resident manager is an employee, not an independent contractor**, **of the owner or management company who hired him.**

The remainder of this article will assume that the employer has less than 26 employees. If the employer has 26 or more, legal counsel should be sought to discuss the applicable laws because they are different and technical.

**The IWC**

The California Industrial Welfare Commission (IWC), as well as the State Legislature, promulgates wage and hour laws for resident managers. The IWC allows substantial sanctions against an employer who does not pay the manager the proper minimum wage. **Of those, one of the most oppressive penalties is that if the owner or management company does not obtain the manager's signature on a properly drafted agreement, the reduced or free rent the owner or management company gave the manager may not be credited (*i.e.*, offset) against the wages the manager otherwise earned during the Statute of Limitations periods of the preceding three or four years.** That means that the employer will then have to write a check to the manager for what may amount to tens of thousands of dollars for back wages, plus penalties. Insurance will not cover that obligation.

**The 2018 GENERAL RULES**

Here are the two California statewide general rules for 2018:

**Rule No. 1: Payment of Minimum Wage**: Virtually all resident managers are governed by so-called minimum wage and hour laws which require that they be paid at least $10.50 per hour for each hour worked. Managers who work more than 40 hours per week, 8 hours per day, or more than 6 consecutive days, are entitled to receive "time and one-half" at $15.75 for each excess hour. Double time payment may also be required in some circumstances. As noted previously, certain cities (and counties) impose a higher minimum wage.

**Rule No. 2: Maximum Rent that May Be Charged:** During 2018, if one or more managers are required to live at the property as a condition of employment, their rent may not exceed $593.05 or $877.26 per month, depending whether one manager or a couple is hired.

Much of the remainder of this article will explain the exceptions and qualifications to the two General Rules under California law. **However, bear in mind that the exceptions and qualifications will not apply unless a properly drafted employment agreement is signed by both the manager and the owner or the owner's management company**.

Preprinted form agreements are not recommended because they usually do not comply with all of California laws let alone the fact that they probably do not comply with local city ordinances.

**Exception to Having to Pay Minimum Wage**:

There is an exception under California law to the general rule that a manager must actually be paid wages for the hours he or she works. The exception involves a reduction in the compensation owed in exchange for the employer providing free or reduced rent for the manager's living quarters.

An owner may reduce the payment of the monthly wages owed by the lesser of (1) two thirds the ordinary rental value of the unit, and (2) $593.05 per month if one manager is employed, or $877.26 per month if a couple is employed, such as a husband and wife management team.

Stated in a slightly different manner, an owner may not credit more than $593.05 per month (1 manager) or $877.26 per month (couple), to the payment of the manager's minimum wages even though the rental reduction of the apartment unit might be substantially more.

Here is an example: If the rental value for the unit is $1,800 per month but the manager is not charged any rent and the manager works 60 hours each month, under California law he is entitled to receive $36.95 per month from the employer. This is computed as follows: 60 hours at $10.50 per hour = $630.00, which is the minimum wage due. A rent reduction lodging credit of $593.05 is proper as the lesser of $593.05 and two-thirds the ordinary rental value of the unit (which would be $1,200). Crediting $593.05 to the $630.00 leaves a balance due of $36.95 per month.

California law is similar where a couple is employed to manage the building. In that case, the maximum wage offset is the lesser of $877.26 per month and two-thirds the rental value of the unit. Thus, if the ordinary rental value of the unit is $1,800 per month (but no rent is paid) and the husband and wife managers collectively work 60 hours a month, the employer need not pay the couple any wages. This is determined as follows: 60 hours at $10.50 per hour = $630.00, which is the minimum wage due. A wage reduction therefrom of up to $877.26 is proper as the lesser of $877.26 and two-thirds the value of the unit.

**Bear in mind that the above credit to the Minimum Wage exception does not apply unless a legally sound agreement is voluntarily signed by the manager.**

**Compensation For "On-Call" Hours,**

**Waiting Time and Stand-By Time**

After being terminated, disgruntled managers sometimes seek compensation from their former employer under a contention that because they were available 24 hours a day on an "On-Call" basis, they should receive compensation for all of that time, even though they were not actually performing services throughout the period.

In 2014 (as well as in earlier cases), the California Court of Appeal rejected that argument in *Von Nothdurft v. Steck* (227 C.A.4th 524) by holding that the owner or management company need only pay the manager for the "time spent carrying out assigned duties." Thus, hours spent sleeping, cooking, eating, talking with friends on the telephone, reading, watching television, playing computer games and engaging in other personal activities are not compensable even though the manager may be "waiting" for a repairman to arrive or sitting around all day during "open house" hours to exhibit a vacant unit to prospective tenants.

Accordingly, an owner or management company does not need to pay a resident manager who is required to live on site for "on call," "stand by" or "waiting" time if the manager is not actively

working. However, the time the manager spends, for example, overseeing the repairman or actually showing a vacancy to potential applicants is compensable because the manager is actually carrying out an assigned duty.

**Maximum Rent Qualifications 16 Units Or More**

If an apartment building consists of 16 rental units or more, the owner is required to have a "responsible person" reside on the premises who has "charge of the apartment house." "Having charge of the apartment house" is the only duty imposed by California law.

Usually the "responsible person" is a manager, but he or she could also be a caretaker, janitor, school teacher, newspaper delivery man or any other responsible individual. Regardless of the title given, that person benefits from the same wage, hour and rent laws applicable to a manager. (For purposes of this article, I will refer to all such "responsible persons" as "managers.")

The maximum rent that a landlord may charge a required resident manager for his apartment in a 16 or more unit building is limited by law. No matter how much of the minimum wage the owner pays the manager (even if the owner pays the full minimum wage), ***the rent may not exceed $593.05 (1 manager) or $877.26 (a couple) per month*** for the manager's unit. (It is my opinion that there is a legal, but highly technical way to avoid those monetary limitations on a 16 or more unit building. While I am uncomfortable publishing them, I am willing to discuss them privately with AOA members, management companies and attorneys.)

The reason for the rent caps is that the IWC has determined that if a manager is required to live at the premises, he or she has given up some personal freedom. In exchange for this confinement, the landlord is limited as to the amount of rent that he can charge the manager for the unit.

Typically, a landlord will offer the manager a reduction in his or her monthly rent in exchange for managerial services. While a rent reduction is proper under California law, the maximum monthly rent which may be charged for the manager's unit who must live on site still remains $593.05 (1 manager) or $877.26 (couple), or two-thirds the ordinary rental value of the unit if two-thirds the value is less than $593.05 or $877.26 respectively.

There is one recognized exception to the "Maximum Rent" limitation for a 16 or more unit building. I call it the "Check Exchange" exception.

**Check Exchange Exception:** Under the Labor Code an employer may charge up to two-thirds of the ordinary rental value of the unit without regard to the $593.05 and $877.26 limitations provided that separate checks for the minimum wage payment and the rent are exchanged between the owner and the manager.

In order to take advantage of this exception, the owner must pay the manager the full minimum wage (presently $10.50 per hour under California law for all hours worked) by one check and the manager must pay the landlord rent in an amount up to but not exceeding two-thirds the ordinary

rental value by a separate check. The theory is that payments for labor are absolutely required regardless of whether the manager pays the rent due.

**Under 16 Units**

If the apartment building has under 16 units and the manager's employment agreement is properly drafted so that the manager is not required to live on the premises as a condition of his employment, then the $593.05 and $877.26 maximum rent limitations discussed previously are not applicable. In such an event, the employer may charge the manager the full amount for the unit, provided that the employer separately pays to the manager the full minimum wage which the manager earns based on the number of hours worked.

For example, if the value of the unit is $1,800 and the manager (who happens to live on site but may move and still retain his job) works 50 hours a month, the owner may charge the full $1,800 as rent provided that he also pays the manager $525 for services rendered during the month.

On the other hand, if the manager is required to live in the "under 16 unit" building as a condition of employment, then the $593.05 and $877.26 rent limitations discussed previously do apply just as though the building contained 16 or more units.

**Raising a Manager's Rent in a Rent Controlled Building**

There are a multitude of rules and limitations concerning rental increases of apartment managers residing in rent controlled units. Owners having rent controlled buildings in Los Angeles and who wish specific information on that topic may review the City's "Resident Managers as Tenants" publication. That promulgation may be found at the following website: http://hcidla.lacity.org/resident-managers-tenants". The publication was last revised in 2007, but remains applicable as of the present.

Attorneys reading this article will find a further discussion of raising a manager's rent in *1300 N. Curson Investors v. Drumea*. AOA members who are not lawyers should confer with legal counsel about the *Curson* case.

**Penalties For Not Complying With Wage Laws**

The Labor Code provides that an employer (including an apartment owner and management company) may be liable for liquidated damages to the resident manager in an amount equal to the unpaid minimum wages if the employer was not acting in good faith or did not have reasonable grounds for believing that he/she was not in violation of the minimum wage law. **Thus, the effect of the liquidated damages assessment will be that the employer will owe the manager double the unpaid wages.** (Labor Code Section 1194.2.)

Numerous other penalties may apply to unpaid wages. Suffice it to say that AOA members do not want to have to defend against them.

**Class Action Lawsuits By Resident Managers?**

Not only may a resident manager sue his employer on his own behalf to recover unpaid wages and penalties, he may also sue on behalf of all the other managers who his employer has hired for other buildings. Although that is not technically a class action, it is similar in nature.

Thus, if an investor owns five apartment buildings in which each has a resident manager, or a management company employs twenty managers in differently owned buildings, a resident manager in any one of the tenements who claims unpaid wages against the employer can expand the scope of his lawsuit against his employer so as to include claims on behalf of all the managers residing in all the employer's other properties.

Once such a lawsuit is filed (commonly known as "PAGA"), the resident manager who filed the lawsuit cannot then settle on his own behalf with the employer and then simply dismiss the claims that he filed on behalf of the other managers. Such a dismissal is disallowed absent the court's approval. In other words, the court, as well as the California Attorney General, want to ensure that the rights of all the other resident managers are not compromised by the plaintiff resident manager's selfish desire to abandon the case once he alone is paid what is owed.

For a fuller discussion of a PAGA lawsuit, please read the article I published in the October 2017 issue of AOA's monthly magazine.

**Cell Phone Usage**

Owners and management companies who require the resident manager to use his personal cell phone in the performance of his duties are required to reimburse the manager a "reasonable percentage" of the manager's cell phone bill. If the employer does not require the manager to use a personal cell phone, then no reimbursement is required. For a full discussion of the cell phone reimbursement law and what may constitute a "reasonable" percentage for reimbursement, please see my column in the October 2014 issue of AOA Magazine.

**Sick Leave**

California 's sick leave law applies to every employee in the State of California who works more than 30 hours per year (repeat: 30 hours per year, not 30 hours per month). That calculates to about 8-2/3 paid sick days per year for a full time employee resident manager.

However, the amount of paid sick leave may be reduced to as little as 3 days or 24 hours per year, but only if the manager signs a written agreement containing the proper legalese for that reduction. That verbiage is technical and should be drafted by seasoned counsel.

Additionally, some cities have enacted their own sick leave law which is more onerous than the California statewide law. For example, in Los Angeles, a resident manager is allowed as many as 48 hours of sick leave which, if not used, will be rolled over to the following year, for a total of 96 hours of sick leave. With a properly drafted employment agreement, those 96 hours can be reduced to and capped at 72 hours.

Santa Monica allows 32 hours of sick leave which, if not used, roll over to the next year and automatically get capped at 40 hours for that second year.

Where local municipalities have their own sick leave laws, various aspects of those laws need to be included in the employment contract.

**Recommendations**

California's labor laws are exacting. The failure of owners or management companies to comply may expose them to $100,000 to $200,000 for back pay to their managers, including substantial civil penalties, liquidated damages, statutory interest, attorney's fees and court costs. In order to comply with the various laws, I recommend the following:

1) **Sign an Employment Contract**: It is absolutely essential that every owner and management company who employs a resident manager enter into a written employment agreement which is voluntarily signed by both the employee and employer. The legalese to include in the contract is technical, but the general requirements concerning the wage and hour laws of California are contained in this article.

Although just about any written agreement is better than no agreement, preprinted form agreements usually will not comply with all of the applicable California statutes, statewide Wage Orders and local City ordinances. It is best that each employer have their agreement drafted by an experienced attorney practicing in this field of law.

2) **Review Your Existing Agreement**: If you already have an employment agreement, review it for consistency with the wage and hour laws for 2018 as I have discussed them. Most existing agreements will need to be modified. Also, be certain they address cell phone usage and the requirement for paid sick leave.

3) **Keep Time Sheets**: Keep time records signed by the manager documenting the days and hours he or she works. Remember, resident managers are employees, not independent contractors.

4) **Management Certification:** Require the manager to sum up all the hours that the manager worked during each month. Then require the manager to submit a written certification to the owner at the beginning of each following month setting forth the total number of hours worked the preceding month. That is the key to deterring disgruntled managers from later claiming that they worked more time than they actually did.

The law requires the employer to maintain daily time records for his manager. It is important to do so. But it is also important (from the standpoint of having me or any other attorney defend an owner or management company in Court or at a Labor Commissioner Hearing) to have the manager certify the total number of hours he/she worked each month of employment.

5) **Obtain and Review a Copy of Minimum Wage Order No. 5-2001 and MW-2017:** The current wage and hour regulations for apartment managers can be obtained by calling the

California Department of Industrial Relations at 844-522-6734. For a copy of the complete wage and hour publications affecting resident managers, ask for: "Public Housekeeping Order No. 5" (also known as IWC Order 5-2001) as well as "MW-2017." MW-2017 is a short version of Order No. 5, but omits some of the longer version's important provisions. The long version may be found online at www.dir.ca.gov/iwc. Once there, click on "View or download wage orders." The abbreviated version can be reviewed by Googling "MW-2017."

**Concluding Remarks**

The key to complying with the 2018 wage and hour laws when employing a manager is for the owner or management company to obtain a voluntarily signed, properly drafted written employment contract and thereafter receive from the employee monthly certifications setting forth the total number of hours that he/she worked. By doing so, the employer may avoid thousands of dollars of liability to the manager. Better still, the contract and certifications may deter litigation altogether. The manager's attorney is not likely to sue if he does not expect to win the case in any substantial way.

A concise "Cut Out Summary" of California's 2018 resident manager wage, hour and rent laws immediately follows this article.

Have a healthy and prosperous New Year!

*Dale Alberstone is a prominent litigation and transactional real estate attorney who has specialized in real property and resident manager law for the past 40 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.*

*Mr. Alberstone has been awarded an AV rating from Martindale-Hubbell. An AV rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.*



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