

**2009 New Year's Resolution:  
Sign a Manager's Agreement**  
by Dale S. Alberstone, Esq.

While I do not mean to be presumptuous, but as counsel for the AOA, my New Year's resolution for AOA members is the same as it has been for each of the preceding nine years: *Prepare and sign a written employment agreement with each of your resident managers*. Because I can think of no resolution more important than that one, I propose it again for 2009.

**Overview of the Law**

Readers of this column know from my past articles that the regulations of the California Industrial Welfare Commission (IWC) may impose severe sanctions on an owner who does not have a signed employment agreement with his or her manager. Based on numerous telephone calls I receive from AOA members each year, it marvels me as to how many owners still neglect having their managers sign written agreements.

Throughout 2009, the minimum wage for all employees in the State of California, including resident managers, is \$8.00 per hour. The allowable rental offset against wages, as discussed hereafter, is \$451.89 per month for a single manager, and \$668.46 per month where a couple are both employed. The maximum allowable rent which may be charged to a manager whose residence in the apartment complex is a required condition of employment is \$451.89 per month for a single manager and to \$668.46 per month where a couple is employed.

**The General Rule**

All resident managers are governed by so-called minimum wage and hour laws which require that they be paid at least \$8.00 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 \$12.00 for each excess hour.

**Minimum Wage Offsets**

There are limited exceptions to the general rule that a manager must actually be paid wages for the hours he or she works. The exceptions involve a reduction in the compensation owed in exchange for the owner providing free or reduced rent living quarters to the manager. Much of the remainder of this article will explain those exceptions, but **bear in mind that none of the exceptions applies unless a properly drafted employment agreement is signed by both the manager and the owner or the owner's management company.**

**16 Units or More**

If an apartment building consists of 16 rental units or more, the owner is required to have a "responsible person" residing on the premises. Usually that person is a manager, but he or she could also be a caretaker or resident janitor. Unless an exception applies, the owner must compensate the individual in accordance with the minimum wage general rule set forth above.

**Exception No. 1:**

***Wage Reduction:*** An owner may reduce the wages owed by the lesser of (1) two thirds the ordinary rental value of the unit or (2) \$459.81 per month if one manager is employed, or \$668.46 per month if a couple is employed, such as a husband and wife management team. An owner may not offset more than \$459.81 per month or \$668.46 per month, respectively, from the manager's minimum wages even though the rental value of the apartment unit might be substantially more.

***Maximum Rent:*** The maximum rent that an owner may charge a manager for a unit is actually a corollary to Exception No. 1 rather than part of the actual exception. But because the two are so similar, I discuss it here.

No matter how much of the minimum wage the owner pays the manager of a 16 or more unit building (even if the owner pays the full minimum wage), the owner may not charge the manager(s) more than \$451.89 or \$668.46 per month, respectively, for the manager's unit. The reason for these restrictions is that the IWC has decided 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 owner is limited as to the amount that he can charge the manager for the unit.

Typically, an owner will offer the manager a reduction in his or her monthly rent in exchange for managerial services. While a rent reduction is proper, the maximum rent (as stated above) which may be charged for the manager's unit (or used to offset the minimum wage) is the lesser of \$451.89 a month or two-thirds the ordinary rental value of the unit being lived in. For example, if the rental value for the unit is \$1500 per month, and the manager is employed to work 60 hours each month, he is entitled to receive \$28.11 a month from the owner. This is computed as follows: 60 hours at \$8.00 per hour = \$480, which is the minimum wage due. A rent reduction of \$451.89 is proper as the lesser of \$451.89 and two-thirds the ordinary rental value of the unit (which would be \$1000). Deducting \$451.89 from \$480 leaves a balance due of \$28.11 per month.

The law is similar where a couple is employed to manage the complex. In that case, the maximum rent which may be charged for the unit (or set off from the wage) is the lesser of \$668.46 per month and two-thirds the rental value of the unit. Thus, if the ordinary rental value of the unit is \$1500 per month and the husband and wife managers collectively work 60 hours a month, the owner need not pay the couple any wages. This is determined as follows: 60 hours at \$8.00 per hour = \$480, which is the minimum wage due. A wage reduction therefrom of up to \$668.46 is proper as the lesser of \$668.46 and two-thirds the value of the unit.

**Exception No. 2:** There is a second exception to the general rule. I call it the “check exchange” exception. Under the Labor Code an owner may charge up to two-thirds of the ordinary rental value of the unit without regard to the \$451.89 and \$668.46 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 (\$8.00 per hour for all hours worked) by one check and the manager must pay the owner an amount not exceeding two-thirds the rental value by a separate check. Under this exception, the owner is not permitted to offset the minimum wage by the rent due from the manager. The theory is that payments for labor are absolutely required regardless of whether the manager pays the agreed rent.

### **Under 16 Units**

If the apartment building has fewer than 16 units, and the manager's employment agreement is properly prepared so that the manager is not required to live on the premises as a condition of his employment, then the \$451.89 and \$668.46 rent limitations discussed previously are not applicable. In such an event, the owner may charge the manager any amount for the unit, provided that the owner 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 \$1500 and the manager works 60 hours a month, the owner may charge \$1500 as rent provided that he also pays the manager \$480 for services rendered during the month.

However, if the manager is required to live in the “under 16 unit” building as a condition of employment, then the \$451.89 and \$668.46 wage and rent limitations discussed in the previous section do apply just as though the building contained 16 or more units.

### **The \$2,774 Manager**

Managers who receive a salary of at least \$2,774 per month are not regulated by the wage and hour laws if (but only if) the manager is required to exercise discretion and independent judgment in performing his duties and meet other specified criteria as promulgated by the IWC. Such highly compensated managers (who usually reside in very large apartment complexes) are excluded from the protection of the basic wage laws. In practice, the \$2,774 manager exception rarely applies.

### **“On-Call” Claims**

After being terminated, disgruntled managers often seek compensation from their former employer under a theory that since 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 2008, the California Court of Appeal disposed of that contention in Isner v. Falkerberg (160 Cal.App. 4<sup>th</sup> 1393), by holding that the owner or management company need only to pay the manager for the “time spent carrying out assigned duties.” Thus, hours spent sleeping, cooking, eating, talking on the telephone, 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 to exhibit a vacant unit to a prospective tenant.

### **Raising a Manager’s Rent**

### **In A Rent Controlled Building**

A discussion of the rules and limitations concerning rental increases of apartment managers residing in rent controlled units is beyond the scope of this month's article. Owners wishing information on that topic may review the "Resident Managers as Tenants" publication which may be found at the web site: [WWW.LACITY.ORG/LAHD](http://WWW.LACITY.ORG/LAHD). Click on "Forms and Publications" under "Resources" toward the bottom of the page. Then click on "Rent Stabilization Ordinance Publications" under "Publications" at the bottom of the page. Then scroll down to "Bulletins on Rent Stabilization Topics" and click on "Resident Managers as Tenants."

### **Recommendations**

California's labor laws are exacting. The failure of an owner to comply will expose him or her to tens of thousands of dollars as back compensation to the manager, as well as substantial civil penalties and potential criminal sanctions. In order to stay within the bounds of the various laws, I recommend the following:

- 1) **Sign an Employment Agreement:** It is absolutely essential that every owner has a written signed employment contract with each resident manager. The specific provisions to include in the contract are highly technical, but the general requirements concerning the wage and hour laws are contained in this article.
- 2) **Review Your Existing Agreement:** If you already have an employment agreement, review it for consistency with the wage and hour laws for 2009. Many existing agreements need to be modified.
- 3) **Post Manager's Name and Address:** Post the name and the address of the manager in charge of the apartment building. Also post the hours and days that the manager will be available for assistance if the manager has a fixed work schedule.
- 4) **Keep Records:** Keep accurate records of all matters pertaining to the hiring, hours worked and firing of all managers.
- 5) **Management Certification:** Require the manager to record all hours that he or she works during any given month. Also 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 that the manager worked. That is the key to deterring an angry manager from later claiming that he/she worked more time than they actually did. (Such claims could expose the owner to a demand of over \$50,000 per year at \$8.00 per hour. The figure would be even higher if overtime pay were taken into account.) The law requires the owner/management company to maintain time records. It is important to do so.
- 6) **Obtain A Copy of Minimum Wage Order MW-2007.** The current wage and hour regulations for apartment managers can be obtained by calling the Department of Industrial Relations at 415-703-5070. Ask for MW-2007. (MW-2007 contains the laws for 2009. For a copy of the complete wage and hour publications affecting resident managers, ask for: "Public Housekeeping Industry

Order No. 5-2001, effective July 1, 2003, as amended.” The regulations may also be found on the Internet Website of [WWW.DIR.CA.GOV/IWC](http://WWW.DIR.CA.GOV/IWC). Click on “IWC Wage Orders” and then on “MW-2007” for the short version, or “#5-2001” for the full version.

### **Conclusion**

The key to complying with the wage and hour laws when employing a manager is that the owner obtains a signed written employment agreement and monthly certifications setting forth the number of hours that the manager worked. By doing so, an owner can avoid thousands of dollars of potential liability to the manager under the new wage regulations. Better still, the contract will deter litigation. The manager’s attorney is not likely to sue if he does not expect to win the case in any substantial way.

A handy “cut out” summary of the relevant wage and hour laws pertaining to resident managers appears on the next page of this magazine.

Have a healthy and prosperous New Year!

*Dale Alberstone is a prominent litigation and transactional real estate attorney who has specialized in real property law for the past 32 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 Mardindale-Hubbell, which is a registered certification of Reed Elsevier Properties, Inc. 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.*

*The foregoing discussion is intended as a general overview of the law and may not apply to the reader’s particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.*

*Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.*

**“CUT OUT” SUMMARY**

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**ALBERSTONE & ALBERSTONE**  
**DALE S. ALBERSTONE**  
**1801 Avenue of the Stars, Suite 600, Los Angeles, CA 90067**  
**TELEPHONE: (310) 277-7300      FAX: (310) 277-7307**

**Apartment Managers: Wage and Hour Laws**  
**(January 2009 - December 2009)**

1. **General Rules:**

- A. Minimum wage compensation for a manager is \$8.00 per hour for each hour worked.
- B. Overtime: Overtime of 1½ times hourly rate (\$12.00) must be paid if more than 8 hours per day, 40 hours per week, or 6 consecutive days.
- C. If the Manager is not required to live at the property of an under 16 unit building, but the Manager chooses to live there, then any rent may be charged.
- D. If the Manager is required to live at the property, regardless of the number of units, the rent paid by the Manager may not exceed the monthly sum of \$451.89 for a single manager, or \$668.46 for a couple.
- E. If no rent is charged, the manager’s wages may be offset by up to 2/3rds the ordinary rental value, but no more than \$451.89 (1 manager) or \$668.46 (couple) per month.

2. **Qualifications to General Rules:**

- A. **Under 16 Units:** If less than 16 units and the manager is not required to live at the property, then manager can be charged any rent, even if greater than \$451.89 or \$668.46. But full hourly minimum wage must be paid to manager without offset if full rent is charged. Dollar-for-dollar wage reduction in payment of minimum wage not exceeding \$451.89 or \$668.46 (up to 2/3rds the unit’s value) if partial rent reduction.
- B. **16 Units Or More:**

**Exception No. 1: “Offset of Wages”:** Manager’s wages may be reduced by the lesser of (1) 2/3rds the unit’s rental value, or (2) \$451.89 per month (1 manager) or \$668.46 per month (couple) if no rent is paid. Dollar-for-dollar wages reduction if only a partial rent reduction. Manager’s wages may not be offset by more than \$451.89 or \$668.46 even though the apartment might be worth significantly more.

**Exception No. 2: “Check Exchange”:** Manager may pay up to 2/3rds the value of the unit as rent (without regard to \$451.89 and \$668.46 limitations) provided that separate checks are exchanged for the Manager’s payment of rent and Owner’s payment of wages. Thus, the Owner must pay Manager the full minimum wage (\$8.00 for all hours worked) and the Manager must pay Owner an amount not exceeding 2/3rds the rental value by separate checks.

- C. **“\$2,774 Manager”:** The exemption from wage laws for highly compensated managers receiving a salary of \$2,774 per month is generally inapplicable because other conditions also apply. It is best not to rely on this exemption.

3. **Recommendations:**

- A. **Sign a Contract:** **No offsets to the minimum wage are allowed unless Manager signs a contract with Owner providing for such offsets!**
- B. **Update all Contracts:** Review and update all contracts to be consistent with law.
- C. **Management Certification:** Require Manager to record all hours worked, initial and deliver such report to Owner.
- D. **Posting:** Post Manager’s name and address in conspicuous place at the building.
- E. **Record Keeping:** Keep accurate records of all matters concerning hiring, hours worked and firing of Managers.

NOTE: As used herein, “Owner” includes a management company employer.