



WORLD CLASS LAW FIRM - WINE COUNTRY LOCATIONS

Agricultural Management Institute AB 1513 Training



Agenda

- General background.
- What is AB 1513?
- How do you comply?
- What are the safe harbor provisions and are they worth exploring?



Questions? Fire Away.



General Background of Piece-Rates & Rest/Recovery Periods



- Employees must be paid for all work, even nonproductive work.
- Authorized rest and recovery “cool-down” periods shall be counted as hours worked for which there shall be no deduction from wages.
- Penalty of one hour of employee’s regular pay for missed rest or recovery period.
- Penalties and backpay for failure to pay employees at least minimum wage for all work.



Historical Evolution

- Federal law allows averaging the workweek pay and hours to show employee paid at least minimum wage for all hours worked. California used to follow this method.
- Recent case law concerning rest breaks for piece-rate workers [*Gonzalvez v. Downtown LA Motors (auto mechanics)*; *Bluford v. Safeway (truck drivers)*] and a change in Labor Commissioner policy **clarified** rest/recovery periods and nonproductive work must be paid separately from piece-rate work.
- Unresolved issue had been how to do this.

New Law – AB 1513

Adds Labor Code 226.2 – says it clarifies



- Rest and recovery periods and other nonproductive time must be paid at a separate hourly rate and reflected separately on wage statement.
- Pay for rest and recovery periods must be at least the **higher** of:
 - Average hourly rate, or
 - Minimum wage.
- Pay for all other nonproductive time can be minimum wage.

Calculating Average Hourly Rate

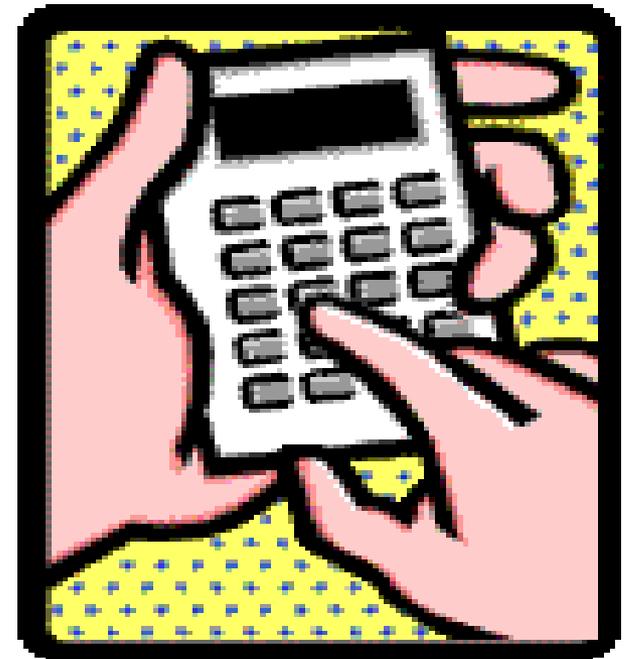
Workweek pay

(exclusive of rest/recovery periods and OT)

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Total hours worked

(exclusive of breaks)



Average Hourly Rate Example: Piece-Rate Compensation Only

- Employee works a five-day, 40-hr workweek
- Has two 10-minute rest periods for a total of 100 minutes (1.67 hrs) of rest periods (40 – 1.67 = 38.33 working hrs)
- Earns \$500 in piece-rate compensation

Average Hourly Rate = $\$500 \div 38.33 = \$13.04/\text{hr}$

- Compensation for rest periods $\$13.04 \times 1.67 \text{ hrs} = \21.78

Total compensation for the workweek = \$500 (piece-rate comp.) + \$21.78 (comp. for rest periods) = **\$521.78**

Average Hourly Rate Example: Minimum Wage Plus Piece-Rate

- Employee works a five-day, 40-hr workweek
- Has two 10-minute rest periods for a total of 100 minutes (1.67 hrs) of rest periods for the workweek ($40 - 1.67 = 38.33$ working hrs)
- Paid minimum wage (\$10/hour) for all hrs worked, including the two 10-minute rest periods, for a total of \$400.
- Also earns a total of \$300 in piece-rate compensation for the workweek
- Total compensation for the week is \$700, but total compensation for week excluding rest breaks is \$683.30 (38.33 working hrs x \$10/hr = \$383.30 + \$300)

Average Hourly Rate = $\$683.30 \div 38.33 = \17.83

- **BUT:** \$10/hr of this time is already calculated into and paid in the employee's minimum wage of \$10/hr for all hrs worked, so the *additional* amount owed for rest periods under this example is \$7.83/hr

Total compensation for the workweek = \$400 (minimum wages for all hrs worked) + \$300 (piece-rate comp) + ($\$7.83 \times 1.67$ hours = \$13.08) (additional amount over minimum wage required to pay correct average hourly rate for rest periods) = **\$713.08**

Average Hourly Rate Example: Piece-Rate Plus Overtime

- Employee works a six-day, 47-hr workweek (7 hrs OT)
- Has two 10-minute rest periods for a total of 120 minutes (2.00 hrs) of rest periods for the workweek (47 – 2.00 = 45 working hrs)
- Paid a total of \$800 in piece-rate compensation for the workweek (not including compensation for the rest and recovery periods or premium pay for OT)

Average Hourly Rate = $\$800 \div 45 = \$17.78/\text{hr}$

- Pay for rest/recovery breaks is $\$17.78 \times 2.0 \text{ hrs} = \35.56

The overtime premium is:

$\$800$ (piece-rate comp) + $\$35.56$ (rest/recovery pay) = $\$835.56 \div 47 \text{ hrs} =$
 $\$17.78/\text{hr}$ (regular rate of pay) $\times .5 = \$8.89$ (premium pay due for OT hrs) $\times 7 \text{ hrs}$
(OT hrs) = $\$62.23$

Total compensation for the workweek = $\$800$ (piece-rate comp) + $\$35.56$ (rest pay) + $\$62.23$ (premium pay for OT hours) = **$\$897.79$**

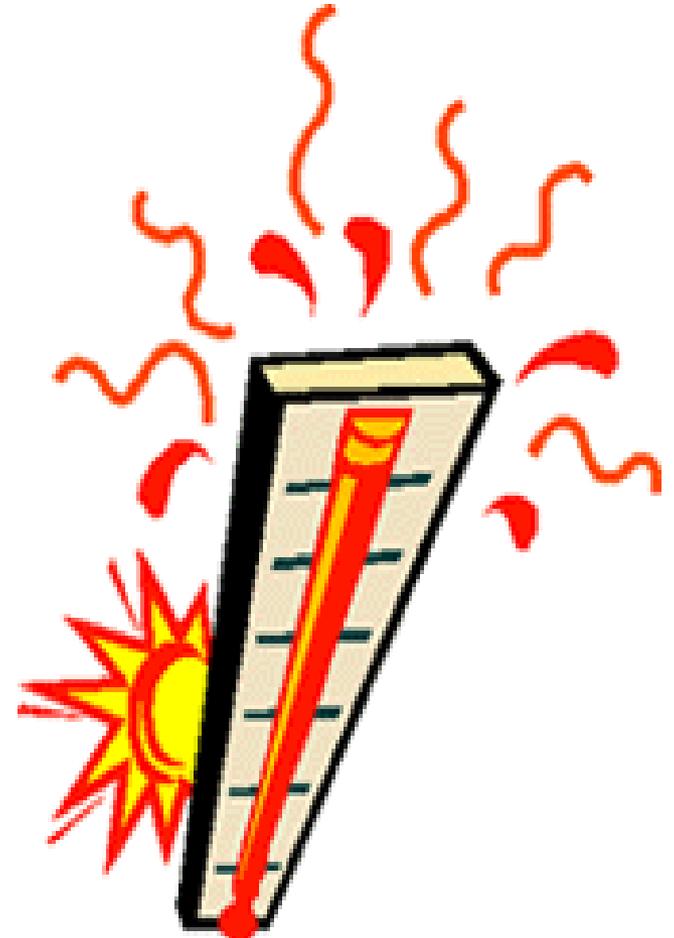
Tracking Rest Break Time?



- The Labor Commissioner has determined that employers do not have to track actual minutes taken for rest breaks.
- As long as employer has “authorized and permitted” rest breaks in accordance with the law, “compensable” breaks are limited to those legally required.
 - Shifts up to 10 hrs = 20 min (two 10-min)
 - Shifts 10-14 hrs = 30 min (three 10-min)

Tracking Recovery Break Time?

- More complicated.
- Employers do not have to track and record time for recovery breaks, but must compensate for time “afforded” an employee to prevent heat illness.
- Unresolved Issue: What is “afforded” time?



Tracking Nonproductive Time?

- Employer can track nonproductive time through either:
 - Actual records, or
 - Reasonable estimates.
- If reasonable estimates prove incorrect, the employer will be responsible for paying the correct amount, but not associated penalties.
- Unresolved Issue: What is nonproductive time?



What is Nonproductive Time?

- “[T]ime under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.”
- No clear definition of “activity” or “directly related.”
- Typical Examples: Attending meetings, reading technical bulletins, waiting for work.



Two Piece-Rate Safe Harbors

1. Nonproductive Work Pay. If pay at least minimum wage for all hours worked in addition to piece-rate compensation, then no separate “nonproductive” payment is required to be paid or shown on wage statement.

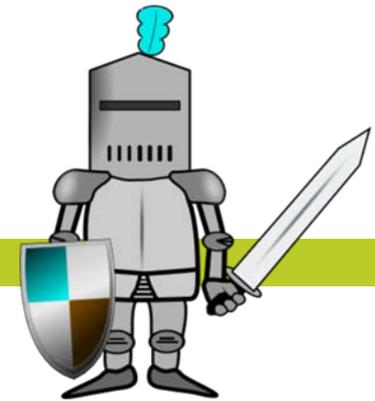
***But** still must pay rest/recovery breaks separately as previously discussed.*

2. Affirmative Defense. Cure past defects.



Safe Harbor™

Affirmative Defense



Employer can claim affirmative defense if:

1. By no later than December 15, 2016, it makes payments to piece-rate employees for uncompensated time for rest/recovery breaks and nonproductive time from July 1, 2012 to December 31, 2015;
2. Provides notice to the Department of Industrial Relations before July 1, 2016 that it is making payments; and
3. Provides new detailed statements to all employees showing how compensation calculated.

Affirmative Defense Related to Former Employees

- ❑ Employer must use due diligence to locate and pay former employees; and
- ❑ Deposit money owed to un-located employees with Labor Commissioner along with the lesser of 0.5% of amount or \$2,500 as an administrative fee.



How to Determine Amount to Pay?



- ❑ Pay actual sums due plus 10% annual interest; **or**
- ❑ Pay 4% of employee's gross earnings for each pay period in which any work was performed on a piece-rate basis, less any amount already paid for rest/recovery breaks and nonproductive time, if any.
 - ❑ Credit for previous payments is capped at 1% of gross wages.

No Payments to Employees Who Signed Release of Claims



No payments are required for time periods for which:

- Employees who prior to August 1, 2015 entered into a valid release of claims for rest/recovery periods and nonproductive time; and
- A release of claims for rest/recovery periods and nonproductive time was executed with a settlement agreement filed with a court prior to October 1, 2015 and later approved by the court.

Affirmative Defense Not Available to Everyone



Affirmative Defense is not available to:

- New Car Dealers;
- Any employer who did not permit and authorize rest and recovery breaks during time period;
- Any employer with pending case with certain type of wage theft;
- Any employer who has pending litigation against them since March 1, 2014 concerning these claims; and
- Any employer who had a final judgment entered against them prior to January 1, 2016 concerning these claims.

What Notice Must Be Given to Labor Commissioner?

- Labor Commissioner has created a form for employers to use if taking advantage of the affirmative defense.
- You can find it here:
<https://www.dir.ca.gov/pieceratebackpayelection/piecerate.asp>
- A copy of the online submission form is attached to the materials as Exhibit A.

To Do List



- ❑ Pay for rest and recovery breaks at employee's average hourly rate (not less than minimum wage).
- ❑ Pay for other nonproductive time separately at minimum wage or the average hourly rate.
- ❑ Update Labor Code 2810.5 Wage Notice to Employee with rate paid for nonproductive time.
- ❑ Make sure itemized wage statements have line items for nonproductive work time and break periods with the applicable rates, in compliance with Labor Code 226.2.
- ❑ Decide if Affirmative Defense is available and prudent.

QUESTIONS?



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PRACTICE AREAS
Labor & Employment, Litigation, Real
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BIOGRAPHY

Jennifer Douglas Phillips is a senior associate primarily in the firm's labor and employment department. She has been a lawyer for 20 years and has worked for both large and small firms. She has extensive experience in all manner of employment issues including wage and hour, discrimination, reasonable accommodation, leaves of absence, and implementing state and federal regulations. She often analyzes legal risks associated with hiring, disciplining and firing in order to counsel clients with these employment decisions. Although counseling is the key to DP&F's employment practice, Jennifer is a trained and experienced litigator who protects her clients' interests when litigation becomes necessary.



About The Firm

Dickenson, Peatman & Fogarty provides a level of representation ordinarily associated with legal practices in major metropolitan centers. Our attorneys are routinely recognized in legal rankings and surveys as some of the best in their fields, and the firm is involved regularly with matters of local and national import. For over forty years DP&F lawyers have practiced law with the “get to know you” culture that has engendered significant client loyalty.

Rooted in the wine regions of Napa and Sonoma, DP&F provides full service legal representation to all manner of businesses and individuals throughout California, the United States and abroad. The Firm’s major practice areas include alcohol beverage law, business and corporate dealings, land use matters, labor and employment, civil litigation, intellectual property, real property transactions, as well as estate planning and probate. With offices in the major wine valleys of Napa and Sonoma, the firm is intimately familiar with, and has extensive experience, in both the wine and hospitality industries.

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THANK YOU!