Piece-Rate Compliance Workshop

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Agenda

- History of Piece-Rate Compensation in CA
- Case Law Developments Impacting PRC
- Potential Exposure in the Rear View Mirror
- Potential Exposure Looking Ahead
- Piece-Rate Compensation Examples
- July 1 – Minimum Wage Increases
Compensable Time

• “Hours worked” are made up of the time an employee is subject to the control of an employer and includes all the time the employee is permitted to work (whether or not the employee is required to do so) (Industrial Wage Commission (IWC) Wage Order 14, § 2(G))

• “Minimum Wage” must be paid for all “hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise. (Wage Order 14, § 4(B))

• “Regular Rate of Pay” total compensation divided by straight time hours for the pay period.
“Wages” includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. (Labor Code § 200)
Piece-Rate Compensation

• Piece Rate or “Piece Work”. “Work paid for according to the number of units turned out.”

• A piece rate must be based upon an ascertainable figure paid for completing a particular task or making a particular piece of goods.
  – Examples: boxes, cartons, bins picked; miles driven, deliveries made, broccoli heads wrapped, etc.

• A piece rate plan of compensation may include a group of employees who share in the wage earned for completing the task or making the product.
Pure Piece-Rate Comp Plan

- Employee or group paid solely by number of units produced (units x rate = pay)

Example: Pure piece rate @ $1.00/box
- 120 boxes picked in 10 hours = $12.00/hour
- 100 boxes picked in 10 hours = $10.00/hour
- 80 boxes picked in 10 hours = $8.00/hour
Before the minimum-wage (MW) laws, employers could compensate employees by paying for each piece produced, with no minimum pay guarantee based on hours worked.

Under MW laws, an employer must compensate an employee at no less than MW for all hours worked.

An employee not producing enough pieces to make MW for all hours worked must still be paid at no less than MW.
Federal Law

• Under the federal Fair Labor Standards Act, an employer may average an employee’s piece-rate (PR) earnings over all hours worked by the employee in a workweek to determine whether MW is met

• PR earnings in excess of those needed to cover MW for piece-producing time (PPT) may be applied to cover the MW owed for non-piece-producing time (non-PPT)

• “Regular hourly rate is total pieces times rate plus "sums paid for waiting time or other hours worked…" FLSA: 29 CFR 778.111
• California DLSE – multiple 1990s opinion letters and 1998 DLSE Manual allowed a pure piece rate formula:

“Group piece work rates: A group rate for piece workers is an acceptable method of computing pay. In this method the total number of pieces produced by the group is divided by the number of persons in the group and each is paid accordingly. The regular rate for each worker is determined by dividing the pay received by the number of hours worked. The regular rate cannot be less than the minimum wage.”
DLSE Expands Definition of Hours Worked

- 2002: DLSE acting chief counsel opined that CA law does not allow averaging for transport workers required to ride home “off the clock”;
- 2002 DLSE Manual 47.7.1: 2002: DLSE Manual states an employee must be paid at least MW for hours worked during which the employer’s directions preclude the employee from earning PR compensation
  - “piece rate workers required to attend meetings are not able to earn compensation at piece rate, the employer [is] required to pay…at least the minimum wage…”
Armenta v. Osmose
(Court of Appeal (2005))

- Hourly pay system compensated drivers only for “productive time,” meaning time spent performing work for clients, and did not compensate for “non-productive” time, including mandatory travel in company vehicles, time spent completing paperwork, and time spent maintaining company equipment.
- Employees claim minimum wage violation.
- Defendant employer attempts to apply higher than minimum wage ($24/hr. under CBA) compensation to cover "non-productive“ time.
- Court: Federal regulations which allows averaging of all hours in work week to compute minimum wage obligations is not acceptable under California law – must be full payment for all hours worked
  - Note: Armenta is not a piece-rate case
Cardenas v. McLane Food Services  
(Federal Court)

- Truck drivers who were paid on a piece-rate basis and who claimed their employer failed to compensate them for time spent each day waiting for customers and performing pre- and post-shift duties such as conducting vehicle inspections and safety checks and picking up keys and manifests.

- The employer argued that it paid the truck drivers substantially more than the minimum wage for all their working hours and that Armenta should not apply because that case did not involve a piece-rate compensation system.

- Court: “a piece-rate formula that does not compensate directly for all time worked does not comply with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all hours worked.”
• Drivers paid per mile and separate hourly rate for loading and unloading – no separate payment for inspection time or first hour wait time at pick up dock.

• Court: “CA law does not allow an employer to ‘build in’ time for non-driving tasks into a piece-rate compensation system … [E]mployees must be directly compensated for all time worked.” Citing: Armenta and 2002 DLSE Manual Sect. 47.7.1 & opinion letter.
• Auto service techs paid PR for repairing vehicles
• PR earnings covered all of their hours worked, including time spent waiting for vehicles to repair and doing other tasks at their employer’s direction
• Court: Techs should have been paid, in addition to their PR earnings, at least MW for their non-repair work time
• Court did not rule on “mandatory rest breaks”
• California Supreme Court denies review
Bluford v. Safeway Stores, (May 2013)

- Truck drivers claimed their CBA’s PR compensation system did not compensate them for rest periods
- Court: A piece-rate compensation formula that does not compensate separately for rest periods does not comply with CA MW law
- Court did not distinguish between rest periods taken at employer’s direction and those taken at employee’s discretion
  - Exceeds DLSE position that MW is due where employer’s directions preclude the employee from earning PR compensation
- California Supreme Court denied review
Labor Commissioner applies Average PR to Break Periods (March 2014)

Labor Commissioner goes beyond Bluford. Two bases for her opinion:

1. The rest-period section in the IWC orders states that authorized rest-period time shall be counted as hours worked for which there shall be **no deduction from wages**. Paying an employee for rest-period time at less than the employee's average piece-rate earning rate would result in a deduction from the employee’s wages—i.e., the employee would be paid less than he would have had he worked through the rest period.

2. Brinker held that an employer **may not discourage** employees from taking a meal period. *Ergo*, an employer may not discourage them from taking rest periods. Paying employees while working on a piece-rate basis less than their average piece-rate earnings for authorized rest periods would discourage them from taking those rest periods, as they would suffer an economic loss by taking them.
Where are we now?

- CA Supreme Court denied employers’ requests for review in both *Gonzalez* and *Bluford*
- The Superior Court in every county must follow these cases
- Another District Court of Appeal could come up with a contrary result, forcing the Supreme Court to reconcile
- Bottom line:
  1. *Separate compensation at no less than MW (or contracted hourly rate) is due for a PR employee’s non-PPT regardless of the amount of the employee’s PR earnings.*
  2. *Labor Commissioner’s interpretation introduced uncertainty. It is now unclear whether authorized break periods for PR employee must be paid at no less than MW (or contracted hourly rate) or at the Average PR.* There are good arguments on both sides!
  3. Anyone who did not separately pay non-PPT and rest breaks has potential exposure going back 4 years!
The Long and Expensive Tail

• Employees could be entitled to back pay going back 4 years.
• California Labor Code Private Attorney General Act of 2004 ("PAGA") provides employees who claim they have been withheld wages a private right of action to sue for civil penalties of up to $200 per employee, per pay period, for 1 year.
• Labor Code § 226.6 (penalties relating to itemized wage and deduction statements);
• “Waiting time” penalties (up to 30 days wages) for late payment of final wages, plus penalties of $100-200 for each failure to pay each employee plus 25% of the amount unlawfully withheld. (Labor Code § 210)
• Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of $250 per employee per violation in an initial citation and one thousand dollars $1,000 per employee for each violation in a subsequent citation. (Labor Code § 226.3)
• Attorneys fees and costs
Trouble Ahead, Trouble Behind…

- Gonzalez and Bluford pose significant time-monitoring and time-recordkeeping problems for employers using traditional PR comp plans.
- How do you identify and accurately record non-PPT to ensure it is properly compensated and that you have records sufficient to prove it was compensated fully and correctly?
  - You must do so to avoid or defend against claims for non-payment or underpayment of wages.
What is non-PPT, anyway?

- While Gonzalez and Bluford did not touch on all of these, any on-the-clock time an employee is not producing pieces should be counted as non-PPT:
  - Traveling between work sites
  - Attending meetings (e.g., safety meetings)
  - Attending job training
  - Doing warm-up calisthenics
  - Donning and doffing personal protective equipment or protective clothing
What is non-PPT, anyway?

- Waiting for the arrival of bins, boxes or other containers in which harvested crops are placed
- Waiting for the repair or replacement of equipment necessary to produce pieces
- Waiting for weather or other environmental conditions to change so that piece-production work can start or resume
- Waiting for a bin, bucket or box to be counted
- Walking between a work station and rest area
- Taking rest periods under an IWC order
- Taking cool-down breaks under Cal/OSHA’s Heat Illness Prevention standard
So what may a PR employer do?

- **Traditional PR**
  - Separately track PPT and non-PPT, and authorized rest breaks
  - Check that the employee’s PR earnings yield at least MW for all PPT on that workday
    - If they don’t, pay the difference so the employee’s wages cover the MW due for that PPT
  - In addition, pay the employee at least MW for all non-PPT
  - Consider risk of paying only MW for break period (as opposed to Average PR)
  - Premium rates for hours worked over 10 in a workday or on the 7th consecutive workday worked in a workweek
How about estimating non-PPT?

- Not recommended
- An itemized wage statement must show all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee (Labor Code § 226(a))
- An employer must keep accurate information of total hours worked in the payroll period and applicable rates of pay (IWC orders, § 7(A)(5))
How about estimating non-PPT?

• Thus an employer must keep and report to an employee an accurate record of the total hours worked by the employee in each payroll period at each applicable rate of pay.

• So it’s arguable an employer may not (over)estimate and pay at least MW for non-PPT.
  – Rather: Non-PPT must be accurately recorded.

• But even if non-PPT were to be consistently overestimated and overpaid, an employer would have no records to prove that all non-PPT was counted and separately compensated.
  – Solid records of non-PPT and separate payment for it show compliance.
Hourly Wage + Production Bonus

- Pay an hourly wage of at least MW for each hour worked, plus an incentive bonus
- The per-piece rate under this approach is less than what the employer paid under a traditional PR plan
  - Because the employee’s base pay is being guaranteed on an hourly basis, the price paid for each unit is less than under a traditional PR plan
  - But bonuses can be set to produce a similar result
HW+PB Example 1

- Under a traditional PR plan, Employee A works 10 hours, earning $120 for filling 120 boxes at $1 per box.

- Under a minimum HW+PB, Employee A is paid $9/hour for each hour worked, no matter what he is doing, plus an additional 25¢ for each box filled.
HW+PB Example 1

• Total earnings for the day are just shy of $120
  – 10 hours x $9/hour = $90
  – 120 boxes x 25¢ per box = $30.00
  – $90 + $30.00 = $120.00
HW+PB Example 1: a problem

- Under the PB offered in this very simple example and factoring in the guaranteed HW, slower employees earn at a higher per-piece rate than faster employees.
  - Grossing $120.00 for producing 120 boxes ($90 + $30.00), Employee A earns at a rate of $1 per box ($120.00 ÷ 120 boxes)
  - Grossing $112.50 for producing 90 boxes ($90 + $22.50), Employee B earns at a rate of $1.25 per box ($112.50 ÷ 90 boxes)
HW+PB Example 1: a problem

- Faster workers would view that result as unfair and cause them to grumble, protest or quit.
- To avoid that result, consider:
  - Paying a bonus only to those employees whose production exceeds a specified minimum number of units per hour.
  - Setting production tiers, with higher per-unit bonus pay for each higher tier.
You determine an employee must produce 10 boxes an hour to cover his employment cost (including producing at least a small profit for you)

Producing only 10 boxes per hour means no bonus pay

- But the employee can keep his job because he is meeting your minimum production standard

You determine the fastest employee can safely and satisfactorily produce 20 boxes per hour
You then set this compensation plan:

– An employee is paid $9 an hour while on the clock
– In addition, an employee is paid a bonus based on the employee’s total hours worked in a workday as follows:

• 10 or fewer boxes per hour: No bonus
• First Tier: 11 – 15 boxes per hour: $2.00 per box for the 11th – 15th boxes on average per hour
• Second Tier: More than 15 boxes per hour: $2.20 per box over the 15th box on average per hour
HW+PB Example 2

- In 10 hours worked, an employee who produces
  - 100 boxes is paid $90 (90¢/box)
  - 120 boxes is paid $130 ($90 + $40 First Tier bonus) ($1.08/box)
    - $2.00 x 2 First Tier boxes for each of the 10 hours = $40
  - 180 boxes is paid $256 ($90 + $100 First Tier bonus + $66 Second Tier Bonus ($1.42/box)
    - $2 x 5 First Tier boxes for each of the 10 hours = $100
    - $2.20 x 3 Second Tier boxes for each of the 10 hours = $66
HW+PB Benefits*

- No need to monitor, record and separately compensate for non-PPT
- Eliminates claims for unpaid non-PPT
- Employees earn MW (or some higher promised amount) for every hour worked, regardless of whether they’re producing pieces, preparing to work, traveling from one field to another, or doing some other non-piece-producing task
- Does not necessarily solve the Average Piece Rate for Rest Breaks dilemma.

*Always check with experienced employment & labor counsel.
Hourly Production Incentive

• Pay an hourly wage of at least MW for each hour worked, and make incremental increases in the hourly wage when employees reach production targets for the day.
• You then set this compensation plan:
  – An employee is paid $10 an hour while on the clock
  – An employee’s hourly rate increases based on production targets as follows:
    • 100 or fewer boxes per day: No Hourly Increase
    • First Tier: 101 – 120 boxes per day: Additional $.50 per hour
    • Second Tier: 121 – 130 boxes per hour: Additional $.75 per hour
    • Third Tier: 131 or more boxes per hour: Additional $1.00 per hour
Hourly Production Incentive Example, Continued

- In 10 hours worked, an employee who produces
  - 100 boxes is paid $100 (10.00 per hour)
  - 120 boxes is paid $105.00 ($10.50 per hour, for First Tier bonus)
  - 130 boxes is paid $107.50 ($10.75 per hour)
  - 140 boxes is paid $110.00 ($11.00 per hour)
Hourly Production Incentive Benefits

• No need to monitor, record and separately compensate for non-PPT
• Eliminates claims for unpaid non-PPT
• Employees earn MW (or some higher promised amount) for every hour worked, regardless of whether they’re producing pieces, preparing to work, traveling from one field to another, or doing some other non-piece-producing task
• *If done properly*, no need to compensate not-PPT and Break Periods differently*

*Always check with experienced employment & labor counsel.*
Minimum Wage Increase

• July 1, 2014, MW goes up to $9.00/hr.
• Might be the ideal time to change your compensation structure
Thank you for being a great audience!

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