## 2017 WAGE AND HOUR UPDATE FOR AGRICULTURAL EMPLOYERS

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THE INFORMATION CONTAINED IN THIS PRESENTATION IS ONLY INTENDED TO PROVIDE YOU WITH A GENERAL UNDERSTANDING OF LABOR AND EMPLOYMENT LAW AND SOME OF THE CURRENT LEGAL CHALLENGES FACING EMPLOYERS IN AGRICULTURAL INDUSTRY. THE INFORMATION CONTAINED IN THIS PRESENTATION IS NOT TO BE CONSTRUED AS LEGAL ADVICE AND IS NOT MEANT TO BE A SUBSTITUTE FOR LEGAL ADVICE. YOU SHOULD CONSULT WITH QUALIFIED LEGAL COUNSEL FOR ADVICE FOR ANY PARTICULAR SITUATION.

## Minimum Wage

- California minimum wage: $\$ 10.50$ per hour on Jan. 1, 2017, $\$ 11.00$ per hour on January 1, 2018, and then \$1-per-year increases through 2022. Businesses with fewer than 25 employees would have an extra year to comply, delaying their workers receiving a $\$ 15$ hourly wage until 2023
- Federal minimum wage is $\$ 7.25$ per hour since July $24,2009$.
- All California employees must receive minimum wage for all hours worked in each day, whether they are paid on a piece rate, salary, or commission basis.
- For employees on piece rate or other non-hourly compensation method, the employer must be sure that minimum wage is paid for all hours worked.
- This is a critical difference between California law and federal law. Under federal law, the employer complies with minimum wage if the employee averages minimum wage or more across each pay period. California law prohibits averaging over any period of time to satisfy the minimum wage obligation.
- Remember compensable time issues! "Suffer or permit" / subject to control.
- Rest and Recovery Periods (including heat stress)
$\square$ Must pay an average hourly rate determined by dividing the total compensation for the workweek by the total hours worked during the workweek, exclusive of rest and recovery periods. This rate must be at least minimum wage.
- Non-Productive Time (time not directly related to production)
$\square$ Must be paid at least minimum wage
$\square$ Or promised rate (if higher)


## Non-Productive Time

- The amount of other nonproductive time may be determined either through actual records or the employer's reasonable estimates, whether for a group of employees or for a particular employee, of other nonproductive time worked during the pay period.
$\square$ Can you see the risks?
- An employer who is found to have made a good faith error in determining the total or estimated amount of other nonproductive time worked during the pay period remains liable for the payment of compensation for all hours worked in other nonproductive time, but shall not be liable for statutory civil penalties or liquidated damages based solely on that error, provided that:
$\square$ The check stub was complete and accurate
$\square$ The employees made minimum wage for each day in the pay period.
- Employers who pay a base hourly rate that is at least minimum wage are in compliance with regard to non-productive time.


## Piece Rate Calculations: Minimum Wage

- Example 1: Piece rate employee works 10 hours per day, six days in a week. Employee takes two rest periods per day, and earns $\$ 1200.00$ for the week.
$\square$ Total rest time $=10 \mathrm{~min} \times 2$ rest periods $\times 6$ days $=120$ minutes $=2$ hours
$\square$ Productive time $=60$ hours -2 hours $=58$ hours
$\square$ "Productive rate" $=\$ 1200 / 58$ hours $=\$ 20.69$ per hour. Remember that this calculation must exceed minimum wage, or you must make up the shortfall.
$\square$ Rest break hourly compensation $=2$ hours $\times \$ 20.69$ per hour $=\$ 41.38$.
$\square$ Total Weekly Compensation $=\$ 1200.00+\$ 41.38=$ \$1241.38
- When employees work at more than one rate of pay employers must use a weighted average to determine the regular rate.
$\square$ First, determine weekly pre-overtime compensation by applying the applicable rate of pay to all hours worked at each rate, including overtime hours.
$\square$ Then, divide the total weekly pre-overtime compensation by the total number of hours worked (including overtime hours). This calculation produces the regular rate of pay.
- The employee is entitled to the total pre-overtime compensation, plus an additional one half of the regular rate of pay for time and a half hours, and an additional full regular rate for all double time hours.


## Plece Rate Calculations: Overtime

- Example: Employee works six days per week, 10 hours per day, but works three hours overtime (three 11 hour days). 3 rest breaks are taken on the 11 hour days, and 2 are taken on the 10 hour days. Total hours worked $=63$. Employee earns $\$ 1000$ piece rate compensation.
$\square$ Total rest time $=(10 \min \times 2$ rest periods $\times 3$ days $)+(10 \min \times 3$ rest periods $\times 3$ days) $=150$ minutes $=2.5$ hours.
$\square$ "Productive rate" (regular rate of pay) $=\$ 1000 / 60.5$ hours $=\$ 16.53$ per hour.
$\square$ Rest break hourly compensation $=2.5$ hours $\times \$ 16.53$ per hour $=\$ 41.33$. Total wages before overtime $=\$ 1041.33$.
$\square$ This calculation has already incorporated base wages. You can turn this into a weighted average calculation if there is other hourly work by using the rate for that work for the total wages before overtime. Just apply the base rate for that hourly work and add to the pre-overtime compensation before determining regular rate of pay.
- Overtime premium wage $=.5 \times \$ 16.53$ per hour $\times 3$ overtime hours $=\$ 24.80$. Remember - the breaks were paid at an hourly rate that is equal to the regular rate of pay!
- Total Compensation due: $\$ 1041.33+\$ 24.80=\$ 1066.13$.


## AB 1513 Solutions

- Base hourly (at least minimum wage) plus piece rate incentive
$\square$ Advantage: No non-productive time concerns
- Eliminates recordkeeping problem and dispute over what is included in the rateAdvantage: Ability to avoid cost increase from AB 1513
- Tiered incentive
$\square$ Advantage: Always hourly, no NPT or rest break concerns
$\square$ Simplicity on recordkeeping and check stubs
$\square$ Effective incentive
$\square$ Daily can create overtime complications
$\square$ Growing interest
- Pure piece rate
$\square$ Too high of a risk
$\square$ Increases labor costs
$\square$ It its what they want to attack
- Have you thought about other positions (truck drivers)?
- Employer obligation for meal and rest breaks.
$\square$ NOTIFY: Notifiy employees of their right respect to meal and breaks.
$\square$ Written policy (don't forget the 5 hour rule and second meal!)
$\square$ Posting
$\square$ Tailgate
$\square$ PROVIDE: Provide a real opportunity to take it.
$\square$ Consider workload
$\square$ Scheduling - MANAGE PRODUCTION.
$\square$ Relief procedure in writing?
$\square$ NOT INTERFERE: Do not interfere with their ability to take it.
$\square$ Resist temptation.
$\square$ On-duty meal agreements are a tool, but not a solution.
- THERE IS NO VIOLATION IF AN EMPLOYEE FREELY AND VOLUNTARILY CHOOSES TO SKIP, DELAY, OR SHORTEN A MEAL OR REST BREAK!
- CLASS CERTIFICATION IS DIFFICULT WHERE WE FOCUS ON THE WHY!


## Meal Breaks

- Meal Breaks: Basic requirement:
$\square$ "Provide" (Authorize and permit under Wage Order 14) at least a thirty (30) minute duty free meal after no more than five (5) hours of work.
$\square$ If six (6) hours will complete the day of work, then the meal period may be waived by the employee.
$\square$ Meal periods may be unpaid if they are at least thirty (30) minutes long and if the employee is relieved of all duty and is free to leave the premises.
$\square$ If employees must remain on the premises to eat, then the employer must provide a suitable place for them to eat. If employees are not free to leave during the meal period, it is an on-duty meal period.
$\square$ The employer satisfies its obligation by notifying employees of the right to take the meal break, providing a reasonable opportunity for them to do so, and by not interfering with the ability to take the meal. WAIVERS ARE RISKY!.
- Meal periods must be recorded. The record must have the time of day when each employee started and ended a meal period.


## OVERTIME

AB 1066 removes the exemption for agricultural employees regarding hours, meal breaks, and other working conditions. Most importantly, the bill creates a schedule that phases in overtime requirements for agricultural workers over the course of 4 years, from 2019 to 2022. This phase in is extended an additional 3 years for completion, 2025, for employers who employ 25 or fewer employees.

For employers who employ 25 or more employees, the phase-in will begin January 1, 2019.

Employers with less than 25 employees, the phase-in will begin January 1, 2022. By 2025, all employers will be expected to be compliant with Labor Code section 510.

## OVERTIME PHASE IN SUMMARY

## EMPLOYERS WITH 25 OR MORE EMPLOYEES

| January 1, 2019 | 9 and $1 / 2$ hour <br> workday | 55 hour workweek |
| :--- | :--- | :--- |
| January 1, 2020 | 9 hour workday | 50 hour workweek |
| January 1, 2021 | 8 and $1 / 2$ hour | 45 hour workweek |
| workday |  |  |$\quad 40$ hour workweek

## EMPLOYERS WITH 25 OR LESS EMPLOYEES

January 1, 2022
January 1, 2023
January 1, 2024
January 1, 2025 (Labor
Code 510 Compliant)

9 and $1 / 2$ hour workday
9 hour workday
8 and $1 / 2$ hour workday
8 hour workday

55 hour workweek
50 hour workweek
45 hour workweek
40 hour workweek

- Irrigator Exemption: Does it survive?
$\square$ In the end, no, unless revived by the IWC.
$\square$ The law is not clear - creature of the Wage Order.
$\square$ Can you manage the risk?
$\square$ With penalties, conservative approach is best.
- One day's rest in seven exemption.
$\square$ Does it survive? In the end, no.
$\square$ Can they waive it? California Supreme Court to Decide
$\square$ Manage for the future, now.
- "The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7)."
- DO NOT FORGET THE INCREASE IN EXEMPT SALARY REQUIREMENTS (KEEP ANY EYE ON THE FEDERAL REGULATIONS!)

| WAGE RATE | 26 EMPLOYEES OR MORE | 25 EMPLOYEES OR LESS | MINIMUM EXEMPT SALARY |
| :---: | :---: | :---: | :---: |
| \$10.50 Per Hour | January 1, 2017 | January 1, 2018 | $\begin{aligned} & \$ 43,680 / \mathrm{YR} \\ & * \$ 47,476 \text { (FEDERAL MINIMUM) } \end{aligned}$ |
| \$11.00 Per Hour | January 1, 2018 | January 1, 2019 | $\begin{aligned} & \$ 45,760 / \mathrm{yr} \\ & \text { *\$47,476 (FEDERAL MINIMUM) } \end{aligned}$ |
| \$12.00 Per Hour | January 1, 2019 | January 1, 2020 | \$49,920 /yr |
| \$13.00 Per Hour | January 1, 2020 | January 1, 2021 | \$54,080 /yr |
| \$14.00 Per Hour | January 1, 2021 | January 1, 2022 | \$58,240 /yr |
| \$15.00 Per Hour | January 1, 2022 | January, 2023 | \$62,400 /yr |

## Field to Field Travel

- It is very common for employees to finish one field, and then move to another field during the work day. This is one of the riskiest practices in agriculture.
- Compensable time: The time spent traveling must be compensated, accounted for in minimum wage calculations, and counted toward overtime. Remember, for piece rate workers this is nonproductive time that needs to be paid.
- Expense Reimbursement: If workers are not provided transportation, vehicle expenses (IRS Mileage rate) must be paid.
- Workers Compensation: If workers must move from place to place in the workday, and are not provided transportation, then workers' compensation will cover the travel to and from work, and will cover any accidents.
$\square$ Embracing transportation will protect you from the most catastrophic consequences.
- MSPA: By requiring people to move, but not providing transportation are we expanding exposure by "causing transportation to be used?"


## Miscellaneous Updates

- Fair Pay Act now prohibits wage disparity based on race or ethnicity.
- Policies requiring employees or applicants to present a driver's license are unlawful unless the policy is uniformly applied and based on a legitimate business purpose.
- NEW I-9 FORM ISSUED NOVEMBER 2016.
- EMPLOYERS MAY STILL MAINTAIN ZERO TOLERANCE POLICIES ON MARIJUANA!
$\square$ Written policy critical.
- Employers with 25 or more employees must give employees notice of the right to leave for domestic violence, sexual assault, and stalking victims.
- By March 1, 2017, all single user toilet facilities must be labeled "all gender" toilet facilities.
- Sexual harassment policies must be in writing. New regulations are very specific on what an employer must do in response to a harassment complaint.


## Miscellaneous Updates

- Workers' compensation reports and documentation do not replace the interactive process under disability discrimination law. You must separately attempt to accommodate.
- Telling employees not to discuss an investigation violates the National Labor Relations Act.
- Many confidentiality policies may violate the NLRA.
- Arbitration agreements upheld - make sure you have class action waivers.


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