

CALIFORNIA EMPLOYERS WILL BE FACING NEW “BREAK WARS” IN THE NEW YEAR

Publication
Jan 4, 2016

Although meal periods have occupied central stage in class action litigation over the past decade in California, rest-period litigation will soon join the “break wars.” A new law that just took effect on January 1, 2016 specifically addresses the way workers paid by a piece rate, or on a “piece-rate basis,” should be paid for their rest or recovery periods.

This new law – also known as AB1513 – will dramatically change the way such employees are compensated for time spent on rest and recovery periods, and also clarifies how such workers should be compensated for other nonproductive time.

A Long Time Ago, In A State Not At All Far Away...

In order to put this new legislation in context, some background regarding California’s minimum wage law would be helpful. Before the onslaught of lawsuits challenging how pay is structured, minimum wage compliance in California was fairly straightforward.

First and foremost, employees are generally entitled to take a “paid” rest period of ten minutes “net rest” for every four hours of work or “major fraction” of four hours – or more than two hours beyond four hours. While newer regulations now exist that permit additional break rights for those working in the sun, most understood these break rules and believed them to be easy to understand and apply.

The Wage Orders, which regulate working conditions of certain industries and specified occupations, generally

Related People



John K. Skousen

Senior Counsel

214.220.8305

Service Focus

Wage and Hour

require that each employee be paid “not less” than the state minimum wage “for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.” (Title 8 Calif. Code Regs., section 11040 (4) (Minimum Wages))

All compensation, except certain categories such as vacation pay, overtime, and other premiums, was totaled up and divided by all hours worked. If the effective “regular” hourly rate was at least equal to the applicable minimum wage, even if this required averaging overpaid with underpaid hours, employees generally had difficulty bringing a successful minimum wage claim.

Additionally, as long as the minimum wage was satisfied under this simple test, employers were free to pay additional sums on terms and conditions agreed upon by the parties. Averaging, generally permitted under federal law, was not questioned.

“I Have A Bad Feeling About This”

This all began to change in late 2005 when plaintiffs’ lawyers challenged “averaging” pay schemes by arguing that the law requires payment of at least the applicable minimum wage for every hour worked within a work week. However, it wasn’t directly intuitive that “all hours worked” meant “every hour worked,” or every minute of every hour, when employees were paid by a method other than an hourly rate of pay.

Employers expected that employees would share in the slow periods if they could reap more than enough during the productive periods, especially where, on average, the workers’ total earnings exceeded the minimum wage. By distinguishing between productive and nonproductive work, and how productive work was compensated, plaintiffs’ lawyers succeeded in convincing the state court that nonproductive time required separate compensation at least at the applicable minimum wage. This was true even for highly compensated employees.

Such a result was possible, in part, because the cases involved only hourly rates of pay. Meanwhile, employer attorneys had relied largely on federal case law that permitted averaging piece-rate compensation at the lowest level of the worker food chain: agricultural workers.

However, this novel approach against averaging seemed confusing for a number of reasons. First, California had generally permitted employees to be paid their wages in a variety of ways, “whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.” (Labor Code section 200(a))

Second, the very nature of some work is productive during some periods and nonproductive in other periods. This resulted in attempts by employers to create pay systems with higher pay rates for productive work that made up for anticipated slow periods when little or no pay was earned. Employers were astonished when workers earning over \$60,000 per year on piece-rate or other incentive-based pay systems that took nonproductive periods into account started succeeding in collecting additional allegedly unpaid minimum wages for nonproductive periods.

Third, the definition of productive versus nonproductive time, which could be specified clearly in an agreement, was not so clear to courts unfamiliar with pay schemes in various industries. For example, if an employee was paid by miles driven on the odometer, would stopping for gasoline require separate payment? If not, what about a traffic jam, delay at the loading dock, or other impediment?

Witness The Power Of A Fully Operational Legal Theory

A federal court deciding California law in a non-binding decision analyzed just such a situation. The court focused on inspection time before and after deliveries and ruled that this activity was not part of the piece-rate pay scheme. Therefore, the work required separate payment even if the agreement between the parties specified otherwise, and even when industry practice had assimilated such inspection time into piece rates.

In another lawsuit involving the automobile repair industry, a state court ruled that automobile mechanics paid on a “flag-rate” basis according to standardized completion times had to be paid separately for waiting time between jobs. This was despite the fact that the piece-rate agreement which specified otherwise followed decades-old industry practice, and despite the fact that such employees could earn wages far above the minimum wage for productive periods after averaging.

Unfortunately for employers, state courts started following federal courts in their analysis of California law on this issue.

Although many of the rulings went against common sense, they gained traction, and the courts established new standards requiring separate payment for nonproductive pay. Worse still, the distinctions between productive and nonproductive time could be easily obscured by clever plaintiffs' trial lawyers.

Employers Struggle To Adopt New Pay Systems...

When appeals made by employers were not successful, it became necessary for businesses to rethink how employees could be paid for productive work under incentive-based or piece-rate systems to minimize the impact of the law.

Although employers with piece-rate compensation plans had a clear mandate, those with compensation plans paying commissions or productivity bonuses were left somewhat in the dark.

The law regarding how far these principles should extend is still unsettled, so employers should consult legal counsel with regard to any compensation plan containing incentive-based provisions to make sure that all elements can withstand creative challenges by plaintiffs' lawyers.

...And To Account For Nonproductive Time

Because the line between productive and nonproductive time can be blurry, employers have struggled both in defining these two categories of compensation and in effectively training managers and employees to properly account for this time. The consequences of these difficulties can directly impact an employer's ability to comply with California law requiring separate compensation for nonproductive activity, at least for piece-rate employees.

It also hampers an employer's ability to accurately record the compensation on pay statements. Remember, California law generally requires that all elements of compensation be separately accounted for and summarized on a pay statement provided with an employee's wages. An employer's failure to properly itemize the elements of an employee's compensation required by law could give rise to penalties, lawsuits under the Private Attorneys General Act, and other adverse consequences.

Courts Provide Further Guidance (From A Certain Point Of View)

The early court decisions addressing an employer's obligation to compensate separately for nonproductive time without the forbidden wage averaging did not address, or

expressly declined to address, whether rest or recovery periods for employees not paid by the hour were a category of nonproductive time that has to be separately compensated.

Historically, rest periods had been viewed as time provided for an employee to rest so that the employee could become even more productive to the employer. The time was considered part of clock hours but not necessarily paid separately, especially if the employee was already receiving an hourly wage or a substantial piece rate.

However, by May 2013, in the wake of the earlier automobile repair industry decision, another state court ruled that an employer of truck drivers paid by piece rate had to compensate the drivers separately for their rest periods at least at the minimum wage level.

Recovery periods as another form of rest-period time are a more recent development. California law now provides all employees working outdoors in temperatures exceeding 80 degrees Fahrenheit with the opportunity to take an uninterrupted cool-down period of at least five minutes to avoid overheating. Employees should be permitted to access designated shaded areas and drinking water at any time to avoid heat illness. There is no limit to the number of recovery periods an employee can request each qualifying day. Cool-down periods are counted as hours worked, and because this time is paid like rest-period time, the actual recovery time should be recorded.

There are few, if any, cases addressing them specifically. Other states outside California had been grappling with the issue of whether employees paid by piece rate had to be paid separately for their rest breaks.

One such state was Washington, where employers rely heavily on piece-rate workers to harvest vast quantities of fruit. Employee advocates worked zealously in Washington to protect workers from alleged abuse merely by not being paid enough for their rest breaks even if minimum wage standards had been satisfied.

Everything Is Proceeding As Worker Advocates Have Foreseen – It's No Longer Merely About Minimum Wage Which brings us to the present day. The California legislature, well aware of alleged claims resulting from the court decisions described above, introduced legislation in

early 2015 addressing compensation for rest periods and other nonproductive time. AB1513 is not the name of a new Star Wars droid, but instead the legislation effective January 1, 2016 with which you will need to familiarize yourself.

As reflected by a recent report from the Assembly Committee on Labor and Employment, this new law is intended to codify the requirement embedded in the case law that rest breaks, recovery periods, and other nonproductive time be separately compensated. In explaining the law's prospective pay requirements for rest periods, the report states:

"Employers will be required to pay an average hourly rate that takes into account all earnings, with no reduction in pay during the mandated breaks. This rate will ensure that workers are not facing a disincentive in the form of lower average hourly pay if they take necessary breaks for their health and well-being."

What Does AB1513 Require?

Although some provisions of the law are too complex to summarize fully here, AB1513 requires, among other things, that employees paid on a piece-rate basis be compensated separately for their rest or recovery period time at the greater of (A) the average hourly compensation rate determined by dividing the total compensation for the workweek, except compensation for rest or recovery periods and any overtime, by the total hours worked other than for rest or recovery periods; or (B) the applicable minimum wage.

At step (B), the "applicable minimum wage" is defined as the "highest of the federal, state, or local minimum wage that is applicable to the employment." In California, the state minimum wage just increased to \$10.00 per hour effective January 1, and at least ten cities and one county in the state have also increased rates as of the new year (see summary [here](#)).

Because the federal minimum wage is typically lower than state rates, the rate generally will either be the state minimum wage, the local living wage (if applicable), the tool wage if the employee must furnish his or her own hand tools (twice the state minimum wage), or any applicable contract rate, whichever is highest. For example, if the employee's pay agreement provides for payment of at least \$22.00 per

hour, then that rate (higher than all other rates) would be the applicable rate at step (B).

This Is The Three-Step Compliance Plan You've Been Looking For

In order to comply with the new law, it will be necessary for affected employers to take at least three steps towards compliance. First, you should determine for each pay period how many legally required rest breaks to which an employee is entitled, plus any applicable recovery period time that may apply, as follows:

Hours Worked	Rest Periods Per Day
3.5 and up to 6 hrs	1 rest period (10 minu
More than 6 hrs and up to 10 hrs	2 rest periods (20 mir
More than 10 hrs and up to 14 hrs	3 rest periods (30 mi
More than 14 hrs and up to 18 hrs	4 rest periods (40 mi
More than 18 hrs and up to 22 hrs	5 rest periods (50 mir
More than 22 hrs and up to 24 hrs	6 rest periods (60 mi

Second, you should then add up the total number of legally required rest periods for each day of the week, as follows:

Day	Sun	Mon	Tues	Wed	Th
Work hours	0	3	5	15	9
Rest periods	0	0	1	4	2
Recovery periods	0	0	0	0	0

Total legally required rest periods for the week:

$$10 \times 10 \text{ minutes} = 100 \text{ minutes} / 60 = 1.67 \text{ hrs}$$

Third, you should then calculate the amount of compensation due for rest periods by applying the two-step formula discussed above.

Because of the difficulty of the new calculations, the law offers a partial grace period that applies to employers who pay on a semi-monthly basis. For employers who pay on a semi-monthly basis, employees still must be paid for their rest and recovery periods at the applicable minimum wage along with their other wages due for the semi-monthly pay period. Any additional amounts due under step (A) of the formula must be paid "no later than the payday for the next regular payroll period." Because pay systems can be complex, you should seek legal counsel in determining how to comply with the law in this regard.

The law also distinguishes between rest and recovery period time and “other nonproductive time,” which needs only be paid at the applicable minimum wage. “Other nonproductive time” is defined as time under the control of the employer, other than rest and recovery periods, that is not “directly related” to piece-rate basis activity.

For piece-rate employees, whose activity is not specifically defined, this 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. This seems to be an acknowledgment by legislators that determining exactly the amount of nonproductive time worked each pay period could be difficult, therefore permitting you to use reasonable estimates in certain circumstances.

When such time needs to be ascertained, supervisors should closely monitor time records each week to make sure that nonproductive time is being accounted for. On the other hand, the law notes that “other nonproductive time” need not be accounted for in pay plans providing for a base hourly rate for all hours worked at the applicable minimum wage in addition to any piece-rate compensation.

Additionally, AB1513 will require you to include more information on pay statements. You must now include the total hours of compensable rest and recovery periods, the rate of compensation for such periods, and the gross wages paid for such periods during the pay period. Further, with the exception of employees paid at the applicable minimum wage for all hours worked in addition to any piece rate (for whom nonproductive time need not be reported), you must also include the total hours of other nonproductive time, the rate of compensation for such periods, and the gross wages paid for such periods during the pay period.

“It’s A Trap!” – Beware Of The Safe Harbor, Employers

The new law also offers a special safe harbor provision for certain qualifying employers, but the pathway to protection is so fraught with peril that it may not be worthwhile to explore. There are numerous conditions required in order to qualify, and you must make public disclosure of your election, just to name two.

Also, while certain employers may indeed obtain relief from penalties, such employers will nonetheless have to pay all

back wages to affected employees retroactively from July 2, 2012 through December 31, 2015 in order to qualify. They would do so using either the new rest-recovery period pay rate plus interest – something never before required in California – or an alternative formula. The optional formula would be based on 4% of gross earnings, with a potential offset up to 1% for amounts paid separately from piece-rate compensation during this period.

While this relief provision may provide genuine solace to some employers, the retroactive impact of the law on those willing or able to succumb to the ordeal still seems harsh. This is especially true when considering that the new formula for paying piece-rate workers on rest-recovery periods has never been the law in California.

Other employers, including new automobile dealerships (already overwrought and oppressed by class litigation involving service technicians), are excluded altogether from any of these safe harbor provisions, but nonetheless are required to comply with the new formula prospectively.

In any event, employers should seek legal counsel regarding the special safe harbor provisions before counting on any of them to be used as protection.

The Circle Is Complete: What Employers Must Do

It is unclear whether AB1513's provisions will lead to further extensions of the law, or whether it will be limited largely to piece-rate workers, however those are ultimately defined. Clearly, the law will extend to employers who pay an hourly rate for all hours worked in addition to the piece-rate compensation. But again, piece-rate compensation is not expressly defined.

Also not defined is whether the new statute will spur additional litigation or legislation addressing rest-recovery period compensation involving other methods of incentive pay. There have already been isolated attempts by courts, and frequent attempts by plaintiffs' attorneys filing lawsuits, to suggest a broader application. If anything, additional remedial measures should be put in place by the legislature, or adopted by the courts, to limit the potentially catastrophic effect of a widespread application of these regulations to industries and occupations where such protections are unnecessary.

At the very least, employers who employ workers with any kind of piece-rate system, in whole or in part, should immediately contact their legal counsel. The clock has already started ticking for you to seek guidance regarding steps going forward, whether to consider modifying current pay plans to comply with AB1513, or to take steps to avoid its application altogether, or to avail yourself of one of the safe harbor provisions.

For more information, contact the author at JSkousen@fisherphillips.com or 949.798.2164.