

BARSAMIAN & MOODY

A Professional Corporation
Attorneys at Law

1141 W. Shaw Avenue, Suite 104
Fresno, CA 93711-3704

E-Mail: laborlaw@theemployerslawfirm.com

Tel: (559) 248-2360
Fax: (559) 248-2370

Toll Free: (888) 322-2573

TO: Agricultural Industry

FROM: Barsamian & Moody

RE: AB 1513/Labor Code 226.2 – Safe Harbor Compliance

DATE: June 6, 2016

Labor Code section (“LC §”) 226.2, recently created by AB 1513, went into effect on January 1, 2016. LC § 226.2 requires employers to compensate employees, who are paid on a piece-rate basis, separately for time spent on rest and recovery periods and “other nonproductive time.” “Other nonproductive time” is defined as time spent under the employer’s control, not including rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis. As of January 1, 2016, employers must comply with the new law as explained below. (LC § 226.2.) Employers have a limited opportunity to take advantage of a Safe Harbor Rule and must notify the Department of Industrial Relations no later than July 1, 2016 of their intention to use the Safe Harbor Rule.

RATE OF COMPENSATION

Rest and Recovery Periods

The rate used to compensate employees for rest and recovery periods must be the higher of the applicable minimum wage or the average hourly rate for the piece-rate activity for the workweek. The “average hourly rate” is determined by dividing the total compensation for the workweek by the total hours worked during the workweek. However, the “total compensation” does not include any amounts for rest and recovery periods or overtime premiums, and the “total hours worked” does not include time spent on rest and recovery periods. (LC § 226.2 (a)(3)(A)(i).) “Total hours worked” also does not include time during the pay period when an employee was compensated by something other than piece-rate.

Employers who pay an hourly rate of at least the applicable minimum wage for all hours worked, in addition to any piece rate compensation, must still pay the “average hourly rate” described above for all rest and recovery periods taken while earning the piece rate.

Employers who pay on a semimonthly basis must pay at least the applicable minimum wage for the rest and recovery periods along with other wages for the payroll period during which the rest and recovery periods occurred. However, any additional amounts

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necessary to meet the “average hourly rate” can be paid on the payday for the next regular payroll period. (LC § 226.2 (a)(3)(B).)

Other Nonproductive Time

Other nonproductive time must be compensated at no less than the applicable minimum wage. (LC § 226.2 (a)(4).)

The amount of other nonproductive time may be determined either by calculating the actual amount of nonproductive time or by the employer’s reasonable estimates. A good faith estimate by the employer that results in an error in determining the total amount of nonproductive time will not result in liability for penalties or liquidated damages based on the error, but the employer must still make up any underpayment of compensation due and issue accurate itemized wage statements. (LC § 226.2 (a)(5) and (6).)

ITEMIZED WAGE STATEMENT REQUIREMENTS

Rest and Recovery Periods

Employers must separately state on an employee’s itemized wage statement the total amount of compensable time for rest and recovery periods, the rate of compensation, and the gross wages paid during the pay period. (LC § 226.2 (a)(2)(A).)

Other Nonproductive Time

Employers must also separately state on the itemized wage statement the total amount of compensable time, the rate of compensation, and the gross wages paid during the pay period for other nonproductive time. However, employers who pay an hourly rate of at least the applicable minimum wage for all hours worked, in addition to any piece rate compensation, do not need to separately state time, rate or wages paid for other nonproductive time on the itemized wage statement. (LC § 226.2 (a)(2)(B).)

SAFE HARBOR RULE

Affirmative Defense

Employers have an opportunity to take advantage of a Safe Harbor Rule for past uncompensated non-productive time and rest and recovery periods. The Safe Harbor Rule will provide employers with an affirmative defense to any claim brought in regards to uncompensated nonproductive time or rest and recovery periods for piece-rate workers prior to January 1, 2016. This will allow employers to have a defense to any claim for recovery of wages, liquidated damages, statutory penalties, civil penalties including waiting time penalties under Section 203, liquidated damages under Section 1194.2, premium pay under Section 226.7, and actual or liquidated damages under Section 226 for an employer’s failure to compensate rest and recovery periods and other nonproductive time for piece-rate workers prior to January 1, 2016.

Retroactive Payment

The Safe Harbor Rule requires employers to either compensate employees for the actual amount of uncompensated nonproductive time and rest and recovery periods, or

pay each employee 4% of the gross wages they earned from piece-rate work, from July 1, 2012 to December 31, 2015. If an employer has previously compensated piece-rate employees for nonproductive time and/or rest and recovery periods, they may be able to reduce the total payment down to 3% of the employee's gross wages earned from July 1, 2012 to December 31, 2015. **Final payment to all employees must be completed no later than December 15, 2016.**

Written Notice to DIR

In order to take advantage of the Safe Harbor Rule, employers must provide written notice to the Director of the Department of Industrial Relations **no later than July 1, 2016**, of their intention to make payments to their current and former employees for past uncompensated nonproductive time and rest and recovery periods.

Due Diligence

Employers must use due diligence to locate former employees who have relocated, including the use of people locator services. For former employees that cannot be located, the employer must make the required payments to the Labor Commissioner pursuant to LC § 96.7 along with an additional administrative fee equal to 0.5% of the aggregate payments made, but not to exceed \$2,500.00. (LC § 226.2 (b)(4) and (d)(1).)

Written Statement Included with Payment

Employers must include with the payments made under the Safe Harbor Rule a written statement to each employee stating: 1) that the payment is made pursuant to Labor Code Section 226.2; 2) whether the amount of the payment was calculated based on actual undercompensated time or 4% of gross wages; 3) a spreadsheet showing, for each pay period, the undercompensated time and applicable rates of pay, or the gross wages paid and any amounts already paid for piece-rate rest periods and nonproductive time; and 4) the calculations used to determine the amount of the total payment. (LC § 226.2 (b)(5).)

We strongly encourage all employers who have piece-rate employees to take advantage of the Safe Harbor Rule and avoid the potential for costly litigation. The Department of Industrial Relations is creating an online webpage where all employers who have taken advantage of the Safe Harbor Rule will be listed. Employers who are not on the list are likely to become prime targets for advocacy groups and plaintiff's attorneys seeking to enforce the new law.