

Piece-Rate Boot Camp: How to Comply with California's New Piece-Rate Law



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Scott Dauscher is a Partner in the Cerritos office and is the Chair of the firm's Class Action Defense Group. Mr. Dauscher has extensive experience with class action lawsuits, particularly class actions involving claims for unpaid overtime, off-the-clock work, misclassification, and meal & rest periods. Mr. Dauscher has defended employers in dozens of class action lawsuits in various industries including construction, transportation, manufacturing, food processing, restaurant, retail, assisted living and skilled nursing, property management, and temporary staffing. Mr. Dauscher is one of just a handful of lawyers in California who has litigated a wage and hour class action through trial. As Chair of the Class Action Defense Group, Mr. Dauscher manages the firm's extensive class action practice and its team of experienced class action defense attorneys.

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Paul Fleck is the practice group leader of the Private Labor and Employment Practice Group. Mr. Fleck represents management exclusively in all aspects of employment litigation including defending claims for wage and hour violations, wrongful termination, discrimination, sexual harassment, and leave of absence violations. Mr. Fleck regularly represents employers in matters brought by the federal Department of Labor and Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing and Division of Labor Standards Enforcement.

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Amber Healy is a litigator with extensive experience litigating class actions and complex business matters in state and federal courts throughout California. Her practice focuses on the defense of employers and management in class action, multi-plaintiff and single-plaintiff lawsuits. She has particular expertise in the area of wage and hour class actions alleging claims for off-the-clock work, unpaid wages, unpaid overtime, and missed meal and rest periods. Ms. Healy has litigated novel issues in both class actions and representative actions brought under California Labor Code's Private Attorneys General Act before the Ninth Circuit Court of Appeals and the California Court of Appeal.



Piece Rate Compensation Requirements and Safe Harbor

California Legislature passed Assembly Bill 1513 (“AB 1513”) significantly altering the piece-rate pay system requirements for California employers. Going forward, AB 1513 alters how California employers must pay employees on a piece-rate basis, including new rate formulas for rest and recovery periods, and additional information requirements that must be communicated to employees on itemized wage statements. Looking back, AB 1513 affords employers who may have underpaid piece-rate employees or not paid employees for certain non-productive time a safe harbor to cure such deficiencies.

What is Piece-Rate?

A piece-rate system pays employees a set amount for each unit of work completed, as opposed to a fixed hourly rate of pay.

The California Labor Commissioner defines piece-rate as “[w]ork that is paid for according to the number of units turned out. A ‘piece rate’ must be based on an ascertainable figure paid for completing a particular task or making a particular piece of goods. Examples of piece rate plans include the following:

Automobile mechanics paid on a ‘book rate’ (that is, a brake job, one hour and fifty minutes, tune-up, one hour, etc.) usually based upon a pre-set standard.

Nurses paid on the basis of the number of procedures performed.

Carpet layer paid by the yard of carpet laid.

Technician paid by the number of telephones installed.

Factory worker paid by the number of widgets completed.

Carpenter paid by the linear foot on a framing job.

Truck driver paid by the number of loads hauled.”
[\(http://www.dir.ca.gov/dlse/Glossary.asp?Button1=P\)](http://www.dir.ca.gov/dlse/Glossary.asp?Button1=P)

In addition, the Labor Commissioner website states “Piece rate or piecework is defined as work paid for according to a set rate per unit. Webster’s Collegiate Dictionary.”
[\(https://www.dir.ca.gov/dlse/Wages.pdf\)](https://www.dir.ca.gov/dlse/Wages.pdf)

And the Division of Labor Standards Enforcement Manual defines Piece Rate or “Piece Work” as “Work paid for according to the number of units turned out.” (AMERICAN HERITAGE DICTIONARY definition.)

Finally, 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.” (DLSE Enforcement Manual Section 2.5.3)

Background

On March 6, 2013, the California Court of Appeal held that piece-rate employees must be paid at least the minimum hourly wage for the “non-productive” time that they are required to wait between their piece-rate paid jobs in addition to the piece-rate pay. (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36.) Shortly thereafter, the Court of Appeal decided that rest breaks must also be separately compensated in a piece-rate system. (*Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864.) As a result of these decisions, California employers are not permitted to demonstrate compliance with California’s minimum wage simply by averaging total compensation over the total number of hours worked in the pay period.

Compensation for Rest and Recovery Periods

AB 1513 specifies that employers utilizing a piece-rate system must separately compensate the employee for rest and recovery periods.

The rate for the rest and recovery periods must be paid at the **higher** of either:

- 1) The “average hourly rate formula” determined by dividing the total compensation for the workweek excluding compensation for rest periods, recovery periods, or overtime compensation, by the total hours worked during the workweek **excluding time for rest and recovery periods**; or
- 2) The applicable minimum wage whether *local*, state or federal.

Thus, employers must calculate the average hourly rate for each pay period and compare it to the applicable minimum wage to determine whether the average hourly rate is higher than the minimum wage. Employers must also pay close attention to local minimum wages, as the Legislature specified such minimum wages in the above criteria.

Example 1 (no non-productive time worked):

Company pays driver \$58.00 per trip to the harbor. Driver averages two trips per day. Driver works six hours per day driving. Driver works five days.

Total compensation is \$580 for the week.

Hours worked is 6 hours x 5 days = 30 hours of work.

Driver was entitled to 10 minutes rest per day.

Excluding five 10 rest periods, hours of work = 29.17 hours

Average Hourly Rate Formula = \$580/29.17 = \$19.88 per hour.

10 minutes divided by 60 minutes * \$19.88 = \$3.31 pay per 10 minute rest break.

Total extra compensation due for rest breaks = 5 * \$3.31 = \$16.55. (Note, if Driver works one minute over six in a day, he is entitled to two ten minute rest breaks...)

Example 2 (no non-productive time worked; minimum wage not met under average hourly rate formula):

Same driver as above, but a strike at the port slows the driver's work down. As a result, the Driver only completes one trip per day, but the task still takes the Driver six hours.

Average Hourly Rate Formula = $\$290/29.17 = \9.94 per hour.

Minimum wage is \$10.00 per hour (effective January 1, 2016!).

Driver was entitled to 10 minutes rest per day.

$1/6 * \$10.00$ per hour = $\$1.67$ per 10 minute rest break.

Total extra compensation due for rest breaks = $\$8.35$.

Example 3 (non-productive time worked):

Same driver as above, but Driver works five hours per day driving (productive time), and one hour completing paperwork (non-productive time). Driver works five days and completes 10 trips. Non-productive time is paid at \$10.00 per hour.

Total compensation is: \$580 for the piece work, and \$50 for the non-productive time, totaling \$630.

Hours worked is 6 hours x 5 days = 30 hours of work.

Driver was entitled to 10 minutes rest per day.

Excluding five 10 rest periods, hours of work = 29.17 hours

Average Hourly Rate Formula = $\$630/29.17 = \21.60 per hour.

10 minutes divided by 60 minutes * $\$21.60 = \3.60 pay per 10 minute rest break.

Total extra compensation due for rest breaks = $5 * \$3.60 = \18.00 .

The above formula applies to employees paid on a weekly (or bi-weekly) basis. For employees paid on a semimonthly basis (e.g. twice a month on the 15th and end of the month), employees must be compensated "at least..the applicable minimum wage rate" for rest and recovery periods along with the other wages due during the payroll period in which the rest and recovery periods occurred. Then, if, after calculating the average hourly rate based on the average hourly formula above, the employee is owed additional amounts because the average hourly rate is higher than the applicable minimum wage, the difference between the two amounts shall be paid on the next payday.

Example 4 (semi-monthly paid employee, no non-productive time):

Company pays plumber \$50 per unclogged toilet if the customer does not call back within a week to redo the work. During the first half of January, Plumber successfully unclogs 60 toilets (30 in the first workweek; 25 in the second workweek; and 5 in the first day of the third workweek). Plumber works 5.5 hours per day.

Since Company cannot determine if any callbacks occurred by the time it pays Plumber in the first payroll period, Company pays Plumber for 11 rest breaks at \$1.67 per rest break. Once Company calculates the piece-rate due to Plumber, additional pay is due.

Plumber's compensation for workweek one is \$1,500.

Average Hourly Rate Formula for week one is $\$1,500 / 5.33$ hours worked (5.5 hours minus 10 minutes) $\times 5$ days = \$56.29 per hour.

$$1 / 6 * \$56.29 = \$9.38 \text{ per rest break.}$$

Company owes Plumber $\$9.38 - \$1.67 = \$7.71$ per rest break in week one, payable at the next payday.

For workweek 2, Plumber's compensation is \$1,250.

$\$1,250 / 5.33$ hours worked $\times 5$ days = \$46.90 per hour.

$$1/6 * \$46.90 = \$7.81 \text{ per rest break in week two.}$$

Company owes Plumber $\$7.81 - \$1.67 = \$6.14$ per rest break in week two, payable at the next payday.

Company must also pay for the last day of the pay period (falling in week three) once the week three results are known, which also must be paid by the next payday.

Alternatively, an employer may comply with the law by paying for all hours worked at an hourly rate of at least the minimum wage, in addition to paying piece-rate compensation, and not be required to use the above formula.

Compensation for Other Non-Productive Time

The new law requires that employees must be paid separately for "other non-productive time." The statute defines "other nonproductive time" as "time 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."

Depending on the nature of the business, "other non-productive" time may include time spent attending meetings, waiting for work, standby time, and for drivers, time spent conducting pre-and/or post-drive inspections.

Time spent conducting “other non-productive” work must be compensated at an hourly rate that is no less than the applicable minimum wage.

Again, if the employer already pays an hourly rate of at least the applicable minimum wage for all hours worked, that will be “deemed in compliance” with the compensation required for other non-productive time.

The amount of time spent on other non-productive work may be determined either through “actual records or the employer’s reasonable estimates” on either an employee-by-employee basis or a group basis.

If an employer makes a “good faith error” in determining “the total or estimated amount of non-productive time” it is liable for the wages owed for the nonproductive time, but cannot be held liable for any “statutory civil penalties...including, but not limited to penalties under Labor Code Section 226.3, or liquidated damages” provided that certain requirements are satisfied.

Recovery Periods

Labor Code Section 226.7 provides:

- “recovery period” means a cool down period afforded an employee to prevent heat illness.
- An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

Additional Wage Statement Requirements

In addition to the nine wage statement requirements set forth in *Labor Code* section 226(a), the new law requires that wage statements issued to piece-rate employees separately list the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for rest and recovery periods during the pay period. The wage statement must also separately list the total hours of other non-productive time, the rate of compensation, and the gross wages paid for the other non-productive time during the pay period. A checklist of all required itemized wage statement elements for piece-rate paying employers is included below.

Itemized Wage Statement (Pay Stub) Requirements

Labor Code Section 226 Requirements

- a. Gross wages earned
- b. Total hours worked by each employee, unless the employee is an exempt salaried employee

- c. The number of piece-rate units earned and applicable piece rate if the employee is paid on a piece-rate basis
- d. Deductions
- e. Net wages earned
- f. Inclusive dates of the period for which the employee is being paid
- g. Employee's name and either the last four digits of their social security number or employee identification number
- h. Name and address of the legal entity that is the employer
- i. 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 Section 246 requirement: Available Sick Leave (or by separate writing provided on payday).

Labor Code Section 226.2 elements for piece-rate paid employees:

- (A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period.
- (B) Except for employers paying compensation for other nonproductive time at an hourly rate more than minimum wage for each hour worked: the total hours of other nonproductive time, the rate of compensation, and the gross wages paid for that time during the pay period.

Paying Overtime to Piece-Rate Employees

According to the Labor Commissioner/DLSE:

For employees paid by the piece or commission, either of the following methods may be used to determine the regular rate of pay for purposes of computing overtime:

- The piece or commission rate is used as the regular rate and you are paid one and one-half this rate for production during the first four overtime hours in a workday, and double time for all hours worked beyond 12 in a workday; or
- Divide your total earnings for the workweek, including earnings during overtime hours, by the total hours worked during the workweek, including the overtime hours. For each overtime hour worked you are entitled to an additional one-half the regular rate for hours requiring time and one-half, and to the full rate for hours requiring double time.

A group rate for piece workers is an acceptable method for computing the regular rate of pay. In using this method, the total number of pieces produced by the group is divided by the number of people in the group, with each person being 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. (http://www.dir.ca.gov/dlse/faq_overtime.htm)

Example:

Involving Piece Rates Calculated On Total Hours Worked:

	M	T	W	T	F	Total
Hours Worked.....		10	9	7	6	42
Total piecework earning for the 42 hours						\$420.00
Regular rate = \$420 divided by 42.....						\$ 10.00
Hours for which time and one-half is due = 5						
Premium for overtime hours = \$10.00 divided by 2 = \$5.00 x 5.....						\$ 25.00
Total earnings due:						
Straight time.....						\$420.00
Overtime						\$ 25.00
Total						\$445.00

Safe Harbor to Correct Improper Compensation to Piece-Rate Employees

The law provides “safe harbor” to any employer who fails to compensate or under-compensates employees for rest and recovery periods or other non-productive time if they timely and properly correct the error.

The safe harbor provision is intended to bar employee claims seeking recovery of unpaid wages, liquidated damages, statutory penalties, and civil penalties based on a failure to properly compensate an employee for rest and recovery periods or other non-productive time.

The safe harbor provides an employer an affirmative defense to any claim for “recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties” based solely on the employer’s failure to timely pay the employee for rest and recovery periods and other non-productive time for any time period prior to December 15, 2015. This safe harbor only applies if, by December 15, 2016, the employer does all of the following:

- Makes payment to each of its employees for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time for the time period from July 1, 2012 to December 31, 2015, using either of the following calculations:

- o Pay the actual sums due with accrued interest;
 - o Pay employees an amount equal to four percent (4%) of their gross earnings for each pay period that the employee conducted work on a piece-rate basis from July 1, 2012 to December 31, 2015, less any amounts already paid to the employee for rest and recovery periods and other non-productive time during the same pay period at issue. The credit taken cannot exceed one percent (1%) of the employee's gross earnings during the pay period at issue.
- The employer must notify the Department of Industrial Relations ("DIR") by July 1, 2016, that it has elected to make such payments to its current and former employers. The names of employers who have made this election will be posted on the DIR's website until March 31, 2017.
 - Payments to employees must be made as soon as "reasonably feasible" but must be completed by December 15, 2016.
 - Detailed statements regarding the payments must be provided to employees, including, a statement as to how the amount was determined, and which calculation method was used (actual sums versus 4% gross earnings) and providing a list or spreadsheet that lists each pay period that is included in the payment, the total hours of rest and recovery periods and other non-productive time of the employee, the rates of compensation for that time, and the gross wages paid for each pay period.

The safe harbor provision does not apply to claims that employees were not advised of their right to take rest or recovery periods, or that such periods were not made available or were discouraged. The safe harbor also does not apply to claims asserted for non-compensation or under-compensation of rest or recovery periods and other non-productive time if those claims were asserted in a lawsuit prior to March 1, 2014, or a lawsuit filed prior to March 1, 2014 in which the employee sought to add a claim related to rest and recovery periods or other nonproductive time prior to July 1, 2015. It also, likewise, does not apply to any claims that accrue after January 1, 2016.

The safe harbor contains a sunset provision such that if it is not re-enacted by January 1, 2021, it will be repealed.

Frequently Asked Questions

Is there a carve-out for collective bargaining agreements?

How does the affirmative defense from the safe harbor apply to work performed prior to July 1, 2012?

Why are claims for failure to provide paid rest or recovery periods or pay for other nonproductive time filed prior to March 1, 2014 not covered by the safe harbor?

What does the exclusion of "claims for unpaid wages, damages and penalties that accrue after January 1, 2016" mean?

Sample Letter to be Provided to DIR
EMPLOYER LETTERHEAD

[Date]

Director of Industrial Relations
Attn: Piece-Rate Section, 226.2 Election Notice
1515 Clay Street, 17th Floor
Oakland, California 94612

Re: Notification of Election to Make Payments to current and former employees pursuant to Labor Code Section 226.2

Dear Ladies/Gentlemen:

Please be advised that on _____, 2015, [Legal Name of Employer], is electing to make payments to its current and former employees in accordance with the requirements of California *Labor Code* Section 226.2.

Sincerely,

[Employer representative]
[Legal Name of Employer]

[Employer Address]

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