

The Clock Is Ticking...

July 1, 2016 Piece-Rate Safe Harbor Election Deadline Looms

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Piece-Rate Compensation



- AB 1513 - Labor Code § 226.2

Labor Code § 226.2 Requirements

- Pay for all hours worked
- Pay rest periods and recovery periods at Labor Code § 226.2 formula
- Track and pay at least minimum wage for "other nonproductive time"
- List rest and recovery period time, and other nonproductive time on Itemized Wage Statement



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Options Going Forward

- Eliminate any piece-rate or production bonus — Pay hourly rate of pay only
- Hybrid — Pay lower hourly rate of pay for all hours worked with bonus
- Piece-rate — Pay piece-rate and track and pay for all other nonproductive time

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What If We Paid Piece-Rate Employees Improperly?

- Statute does not contain provision stating that is declarative of existing law...
- Issues as to what was required by law prior to 1/1/16 may be subject to ongoing disputes and litigation...

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What If We Paid Piece-Rate Employees Improperly?

- **Good News?** There is a limited safe harbor provision providing an affirmative defense to certain claims
- But Safe Harbor closes on July 1, 2016



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The Bad News...

The names of employers who have made this election will be posted on the DIR's website until March 31, 2017.

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Safe Harbor Provision

Safe Harbor Provision only covers liability based on:

- Failure to separately compensate employees for rest breaks; and
- Failure to separately compensate for "other non-productive time"



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Safe Harbor Provision *Continued*

What **Is Covered** by Safe Harbor Provision? (For claims arising between July 1, 2012 – December 31, 2015)

- Affirmative Defense Covers Liability Based on These Theories:

- Unpaid Wages
- Civil Penalties (*i.e.* PAGA, Labor Code § 226.3)
- Statutory Penalties (*i.e.* Labor Code § 558, Labor Code § 226(e))
- Waiting-Time Penalties under Labor Code § 203
- Interest
- Any Other Damages or Liquidated Damages

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Safe Harbor Provision *Continued*

What **IS NOT** Covered by Safe Harbor Provision?

- Any claim or lawsuit filed **BEFORE** March 1, 2014
- Any allegation that the employer failed to comply with Labor Code § 226.2 from January 1, 2016 to the present
- Any lawsuit alleging employer failed to provide Meal or Rest Breaks to Piece-Rate Employees

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Requirements

- ① 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.
- ② Payments must be made to employees as soon as "reasonably feasible" and must be completed by December 15, 2016.
- ③ Detailed statements provided to employees explaining how the amount owed was determined, and which calculation method was used.
- ④ Employer must use due diligence to locate former employees, and must make payment to DIR for those not located.

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Safe Harbor Payment Options

- Employers have the option of using either of the following calculations:
 - Pay the actual sums due with accrued interest ("actual sum option")
 - Pay an amount equal to four percent (4%) of 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 or other non-productive time ("4 percent option")

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Previously Settled Claims

- Payments are not required for any time period for which:
 - An employee has, prior to August 1, 2015, entered into a valid release of claims not otherwise banned by the Labor Code or other law for compensation for rest and recovery periods and other nonproductive time
 - A release of claims covered by Labor Code Section 226.2 was executed in connection with a settlement agreement filed with the court prior to October 1, 2015

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Notice to DIR

- Inform DIR that employer elects to make payments to current and former employees
- Must include legal name and address of employer
- Must be mailed or delivered to:
 - Director of Industrial Relations, Attn: Piece-Rate Section
- Alternatively, online form available at:
www.dir.ca.gov/pieceratebackpayelection/piecerate.asp.

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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 _____, 2016, [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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Statement to Employees

Employer to provide to each employee or former employee receiving payment an accurate written statement containing the following information:

- That payment has been made pursuant to Section 226.2
- Which method of calculation was used
- The calculations that were made to determine the total payment

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Statement to Employees

If using "actual records" option, provide a statement, spreadsheet, listing, or similar document that states for each pay period:

- the total hours of rest and recovery periods,
- other non-productive time,
- rates of pay, and
- gross wages paid.

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Statement to Employees

If using "4% option," provide a statement, spreadsheet, listing, or similar document that states for each pay period from July 1, 2012 to December 31, 2015 in which work was performed on a piece-rate basis:

- Gross wages of employee and any amounts already paid to employee, separate from piece-rate compensation, for rest and recovery period and other nonproductive time (including pay periods in which work was not performed on a piece-rate basis, *if applicable*).

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Good Faith Error Defense

An employer who makes a reasonable and good faith effort to make payments and provide accurate statements, but through good faith error fails to make payment to one or more employees or fails to provide accurate statement, shall not lose affirmative defense if:

- Within 30 days of discovery or notice of error, makes payment to employee plus interest due to delay and provides accurate statement regarding the payment

Burden of proof is on employer to prove good faith error

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Former Employee Search

- The employer shall use due diligence, including, but not limited to the use of people locator services
- For former employees not located, payment goes to the Labor Commissioner
 - Must include an additional administrative fee equal to one-half of one percent of the aggregate payments made, or \$2,500, whichever is less
 - Must include a statement (both printed and electronic form) identifying each employee not located, amount paid to employee, and last known address and social security number of employee

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Conclusion

- Participation in the safe harbor is optional
 - Employers who participate obtain an affirmative defense to certain claims in litigation
 - Employers with potential liability must weigh the pros and cons of electing the safe harbor
 - If electing to participate, employer must notify DIR on or before Friday, July 1, 2016
 - Complete required payments to employees before December 15, 2016.

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Thank You

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Question & Answer Session