

Management Alert



Governor Signs Burdensome Piece Rate Legislation

By Kerry Friedrichs and David Kadue

On October 10, 2015, the Governor signed AB 1513, which, effective January 1, 2016, will add Section 226.2 to the Labor Code. Section 226.2 will make it even more difficult for California employers to pay employees on a piece-rate basis for any part of their work. First, Section 226.2 will require employers to pay piece-rate employees for rest and recovery periods (and all periods of “other nonproductive time”) separately from, and in addition to, their piece-rate pay. Second, Section 226.2 will make wage statement compliance for piece-rate employers even more complex and burdensome. As Section 226.2 does not contain a collective bargaining exemption, the new law will apply even to employers of unionized employees.

Separate Pay for Rest and Recovery Periods and “Other Non-productive Time”

Section 226.2 not only will require separate pay for rest and recovery periods, but will mandate a method to compute that rate: employers will have to pay a rate calculated on a workweek-by-workweek basis, by using a specific formula that will present a challenge for many payroll systems. Specifically, Section 226.2 will require that employers pay employees for rest and recovery periods and “other nonproductive time” in the following manner:

- *Rest and recovery periods.* Employers must pay piece-rate employees for rest and recovery periods at an hourly rate that is determined by dividing the employee’s total compensation for the workweek (excluding compensation for rest and recovery periods and overtime premiums) by the total hours worked during the workweek (not including rest and recovery periods).

The bill allows certain employers some additional time to program their payroll systems to comply with the “average hourly rate” requirement, provided that they retroactively pay employees the required amount. Until April 30, 2016, certain large, newly acquired, and publicly-traded employers can pay employees the applicable minimum wage for rest and recovery periods, provided that they begin paying employees based on the specified rate by April 30, 2016 and retroactively pay all affected employees the difference between minimum wage and the required average hourly rate (plus interest) by that date. All other employers must modify their payroll systems to comply with the new requirements by January 1, 2016.

- *Other nonproductive time.* Employers must pay piece-rate employees for “other non-productive” time (time when an employee is under the employer’s control, but is not engaged in activity directly related to the piece-rate activity) at a rate that is no less than the minimum wage. If an employer pays employees a base hourly rate for all hours worked in addition to piece-rate wages, then the employer need not pay amounts in addition to this hourly rate for the “other non-productive time.”

Additional Wage Statement Requirements

Section 226.2 will also mandate additional categories of information that must appear on a piece-rate employee's itemized wage statement. The bill will require that wage statements for employees paid on a piece-rate basis contain the total hours of compensable rest and recovery periods, the rate of pay for those periods, and the gross wages paid for those periods during the pay period. If employers do not pay a base hourly rate for all hours worked (in addition to piece-rate wages), then the employer must also list the total hours of other non-productive time, the rate of compensation for such time, and the gross wages paid for such time during the pay period.

"Safe Harbor" for Past Violations

Section 226.2 will permit employers to assert a limited "safe harbor" affirmative defense against claims for wages, damages, and penalties for the non-payment for rest and recovery periods and other nonproductive time. To come within this safe harbor, the employer must pay for all previously uncompensated rest and recovery periods and other nonproductive time, plus interest, for the period from July 1, 2012 through December 31, 2015. An employer seeking this safe harbor must also give written notice of its intent to do so to the Department of Industrial Relations by no later than July 1, 2016, and must make the back payments (to current and former employees) by December 15, 2016.

Immediate Action Required

Section 226.2 will require immediate action on the part of employers that pay employees on a piece-rate basis. As most employers must comply with the new requirements by January 1, 2016, and compliance likely requires significant modification to payroll systems and wage statements, employers should now begin evaluating how to implement the necessary changes. Employers should also begin considering whether to take advantage of the safe harbor provision.

[Kerry Friedrichs](#) is senior counsel in Seyfarth's San Francisco office and [David Kadue](#) is a partner in the firm's Los Angeles - Century City office. If you would like further information, please contact your Seyfarth attorney, or Kerry Friedrichs at kfriedrichs@seyfarth.com, or David Kadue at dkadue@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | October 14, 2015

©2015 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.