Wage and Hour Basics

Presented by:

Seth Mehrten, Esq.
BARSAMIAN & MOODY PC
1141 West Shaw Avenue, Suite 104
Fresno, California 93711
TEL: (559) 248-2360
FAX: (559) 248-2370
EMAIL: *SMehrten@theemployerslawfirm.com*

"The Employers' Law Firm" SM
www.TheEmployersLawFirm.com

First meal period: 11:00 a.m. - 11:30 a.m.

Note! One common pitfall is forgetting to move the meal period to start earlier in the day.

Step 2: Determine the net rest time:

Employees are entitled to 10-minutes of net rest time for each four hours of work (or major fraction thereof). Here, the total daily work time is 10 hours so the employees are entitled to 20 minutes of net rest time because 10 hours divided by four hours equals two 4-hour periods with 2 hours left over (which is not a major fraction of four hours because it is not over two hours). Thus, 20 minutes of net rest time is owed.

Step 3: Schedule rest periods in the middle of each work period:

Start time (clock in):	6:00 a.m.	
First rest period:	8:30 a.m. (10 minutes)	← First work period (5 hours)
Start of first meal period (clock out):	11:00 a.m.	
	(30-minute meal period)	
End of first meal period (clock in):	11:30 a.m.	
Second rest period:	2:00 p.m. (10 minutes)	← Second work period (5 hours)
Stop time (clock out):	4:30 p.m.	

Question No. 4

Harry Helper and the supervisor arrive at the work site 30 minutes before the rest of the crew to set up the water, make sure there are enough boxes, and to get things ready for the crew's workday.

How should the employer schedule the meal and rest periods?

Crew Schedule:

Start time (clock in):	6:00 a.m.	
First rest period:	8:30 a.m. (10 minutes)	← First work period (5 hours)
Start of first meal period (clock out):	11:00 a.m.	
	(30-minute meal period)	
End of first meal period (clock in):	11:30 a.m.	
Second rest period:	2:00 p.m. (10 minutes)	← Second work period (5 hours)
Stop time (clock out):	4:30 p.m.	

[*This space intentionally left blank.*]

Start time (clock in):	7:30 a.m.	
First rest period:	10:00 a.m. (10 minutes)	← First work period (5 hours)
Start of first meal period (clock out):	12:30 p.m.	
	(30-minute meal period)	
End of first meal period (clock in):	1:00 p.m.	
Second rest period:	2:15 p.m. (10 minutes)	← Second work period (2.5 hours)
Start of second meal period (clock out):	3:30 p.m.	
	(30-minute meal period)	
End of second meal period (clock in):	4:00 p.m.	
Third rest period:	5:30 p.m. (10 minutes)	← Third work period (3 hours)
Stop time (clock out):	7:00 p.m.	

In many cases, and given that 10.5 hours will conclude the workday, employees will not want to take a second meal period for a third brief work period. Instead, many employees would rather just finish the workday. In this situation, employees may opt to waive the second meal period. In such a case, employers will want to have written evidence that employees voluntarily chose to waive the second meal period. Here is what the workday might look like if the employees opted to waive the second meal period:

Start time (clock in):	7:30 a.m.	
1st rest period:	10:00 a.m. (15 minutes)	← First work period (5 hours)
Start of 1st meal period (clock out):	12:30 p.m.	
	(30-minute meal period)	
End of 1st meal period (clock in):	1:00 p.m.	
2nd rest period:	3:45 p.m. (15 minutes)	← Second work period (5.5 hours)
Stop time (clock out):	6:30 p.m.	

A few things are important to note here: First, the second meal period may only be waived if employees work no more than 12 hours. Second, company policy should be that there must be a unanimous decision among the crew to skip the second meal period. If even one worker wants the meal period, then all must take it, and the supervisor must not involve himself or herself in the crew's decision.

Question No. 3

After the summer time change, the employer moves the start time to 6:00 a.m. because of earlier daylight, with a stopping time of 4:30 p.m.

What time should the crew take their meal and rest periods?

Step 1: Schedule the first meal period after no more than five hours of work:

Start time: 6:00 a.m.

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with **Barsamian & Moody at (559) 248-2360** for individual responses to questions or concerns regarding any given situation.

TABLE OF

Contents

Question No. 2

What if the crew works 10.5 hours (10 hours, 30 minutes)? What time should the crew take their meal and rest periods?

Step 1: Schedule the first meal period after no more than five hours of work:

Start time: 7:30 a.m.

First meal period: 12:30 p.m. - 1:00 p.m.

Step 2: Determine the net rest time:

Here, the employees would be entitled to 30 minutes of net rest period time because 10.5 hours divided by 4 hours equals two 4-hour periods with 2.5 hours left over. In this scenario, 2.5 hours is over 2 hours so an additional 10 minutes of rest time will be owed.

Step 3: Schedule rest periods in the middle of each work period:

If the crew works 10.5 hours, then a second meal period must be provided. However, if the second meal period is scheduled near the end of the second work period, then it will leave a short third work period at the end of the shift. Here is an example of what this might look like:

Start time (clock in):	7:30 a.m.	
First rest period:	10:00 a.m. (10 minutes)	← First work period (5 hours)
Start of first meal period (clock out):	12:30 p.m.	
	(30-minute meal period)	
End of first meal period (clock in):	1:00 p.m.	
Second rest period:	3:30 p.m. (10 minutes)	← Second work period (5 hours)
Start of second meal period (clock out):	6:00 p.m.	
	(30-minute meal period)	
End of second meal period (clock in):	6:30 p.m.	
Third rest period:	6:45 p.m. (10 minutes)	← Third work period (30 minutes)
Stop time (clock out):	7:00 p.m.	

If employees want their second meal period, then it makes little sense to have a second meal period followed by only 30 minutes of work. This is especially true considering at least ten minutes of this work period will be spent resting. In this situation, employers are free to adjust the meal periods to begin earlier to avoid creating unreasonably short work periods. For example, one option would be to schedule the second meal period as follows:

[*This space intentionally left blank.*]

APPENDIX B

Meal and Rest Period Scheduling

Question No. 1

William Worker is a field laborer who works in a harvest crew. The crew starts work at 7:30 a.m., and finishes the shift at 6:00 p.m.

What time should William take his meal and rest periods?

Step 1: Schedule the first meal period after no more than five hours of work:

Start time: 7:30 a.m.
First meal period: 12:30 p.m. - 1:00 p.m.

Step 2: Determine the net rest time:

Employees are entitled to 10-minutes of net rest time for each four hours of work (or major fraction thereof). A major fraction of four hours is anything over two hours. For example, if the total daily work time is 10 hours, then the employee would be entitled to 20 minutes of net rest time because 10 hours divided by four hours equals two 4-hour periods and 2 hours left over (which is not a major fraction of four hours because it is not over two hours). Thus, 20 minutes of net rest time is owed.

Step 3: Schedule rest periods in the middle of each work period:

Start time (clock in):	7:30 a.m.	
First rest period:	10:00 a.m. (10 minutes)	← First work period (5 hours)
Start of first meal period (clock out):	12:30 p.m.	
	(30-minute meal period)	
End of first meal period (clock in):	1:00 p.m.	
Second rest period:	3:30 p.m. (10 minutes)	← Second work period (5 hours)
Stop time (clock out):	6:00 p.m.	

Steps to Calculate William's Gross Weekly Compensation			
Total piece-rate compensation:			
=	**$**	**675.00**	Total piece-rate compensation (not including compensation for rest and recovery periods) (and, not including compensation for non-productive time).
Total non-productive time compensation:			
		10 hours	Total non-productive hours worked during the workweek.
×	$	16.00	Hourly rate for non-productive time.
=	**$**	**160.00**	
Total rest and recovery period compensation:			
	$	835.00	Note: This figure is calculated by adding the total piece-rate compensation ($675) and total non-productive time compensation ($160).
÷		58 hours	Total hours worked during the workweek (60 hours), less net rest and recovery time (2 hours).
=	$	14.40	The employee's "average hourly rate" for purposes of compensating rest and recovery time. Note: In this example, William's average hourly rate will be equal to his "regular rate of pay" for purposes of calculating overtime because William did not receive any additional compensation during this workweek.
×		2 hours	Total net rest time owed during the workweek.
=	**$**	**28.80**	
The overtime premium compensation for this employee is:			
		20 hours	Total overtime hours worked during the workweek.
×	$	7.20	The overtime premium rate for purposes of calculating the employee's overtime compensation. Note: This figure is equal to half (0.5) of the employee's regular rate of pay ($14.40).
=	**$**	**144.00**	
Total gross compensation for the workweek:			
	$	675.00	Total piece-rate compensation
+	$	160.00	Total non-productive time compensation
+	$	28.80	Total rest and recovery period time compensation
+	$	144.00	Total overtime premium compensation
=	**$**	**1,007.80**	

APPENDIX A

Gross Piece-rate Compensation

In this exercise, assume the following about William Worker:

- William Worker, a packer in a packinghouse, is paid overtime according to Wage Order 8 or 13, which requires overtime for all hours worked in excess of 8 hours in a workday and 40 in a workweek.
- William is paid $16 per hour for other non-productive time.
- XYZ Packing, William's employer reasonably estimates that William spends 1.5 hours per day engaged in non-productive time (which covers 30 minutes per day in trainings; 15 minutes per day in miscellaneous activities such as meeting with supervisors and filling out paperwork; and 45 minutes for down-time where the line is not running, e.g., when the line is being serviced or cleaned). If ever an employee spends more than 1.5 hours engaged in non-productive work, that time is recorded. For example, on Wednesday, William spent 2.5 hours engaged in non-productive work.
- During the workweek in question, William worked the following hours:

Day	Total Hours Worked	Straight Time	Overtime	NPT	Piece-rate Earnings	Net Rest Time Owed
Mon	10 hours	8	2	1.5	$100	20 mins
Tues	10 hours	8	2	1.5	$125	20 mins
Wed	10 hours	8	2	2.5	$75	20 mins
Thurs	10 hours	8	2	1.5	$150	20 mins
Fri	10 hours	8	2	1.5	$100	20 mins
Sat	10 hours	-	10	1.5	$125	20 mins
Sun	No Work	-	-	-	-	-
Totals:	60 hours	40 hours	20 hours	10 hours	$675	2 hours

SECTION I

Introduction

Purpose

California employers face the most complex and onerous wage and hour laws in the country. This is particularly true for agricultural employers because they face an additional layer of laws and regulations that are often counterintuitive and are anything but common sense. Further compounding the challenges that agricultural employers face is the reality that many practitioners and service providers are simply not designed to support employers in agricultural industries. First and foremost then, this text is intended to help agricultural employers identify areas where they might need more help structuring and implementing their wage and hour policies and practices.

Secondly, these materials are intended to help agricultural employers understand the core concepts of California's wage and hour laws. Complying with wage and hour laws is not like navigating a minefield, but like building an interconnected house of cards. Failure to understand these bedrock concepts can result in your wage and hour practices being built atop a foundation that is just waiting to collapse.

Federal versus California law

California employers must comply with federal, state, and in some cases, local (county or city) wage and hour laws. In many areas, the laws are consistent. However, where the laws conflict, employers must always apply the law that is more favorable to the employee and most restrictive as to the employer. Generally, this means that employers must apply California law. In any event, this text primarily focuses on the laws that California employers must comply with whether federal, state, or local.

Private agreements and waiver

Generally, employees cannot agree to waive the protections of wage and hour laws. Accordingly, employers cannot use private agreements or employment contracts to circumvent wage and hour laws. The one exception to this rule, and it is limited exception at best, is that in certain areas, employers and unions can use collective bargaining agreements to waive the protections of certain wage and hour laws. However, the use of the collective bargaining process to modify wage and hour requirements is outside the scope of this text. If you face this situation, please give us a call to discuss it.

SECTION II

Minimum Wage

The "basic" requirement

All California employees must receive at least minimum wage for all hours worked in each day, regardless of whether they are paid on a piece rate, salary, or commission basis.

Federal minimum wage

The federal minimum wage is $7.25 per hour. However, federal law expressly authorizes states and localities to enact minimum wage standards that are higher than the federal minimum wage, and requires employers to comply with the higher standard. California has long maintained a minimum wage that is higher than the federal minimum wage. Therefore, California employers need to pay attention to the state minimum wage rate.

California's minimum wage

Beginning on January 1, 2017, California's minimum wage began a series of increases intended to raise the state minimum wage to $15.00. As is discussed in more depth below, the schedule of increases depends on the number of employees that an employer has during any given pay period. Effective January 1, 2020, the state minimum wage for employers with 25 or fewer employees is $12.00 per hour, and $13.00 per hour for employers with 26 or more employees. All California employers who pay employees the minimum hourly wage must ensure that they have adjusted their payroll systems accordingly.

The schedule for California minimum wage rates is shown in Figure 1.

Increase in minimum salary for exempt employees

The increase in the minimum hourly wage also has implications for exempt salaried employees. To be classified as exempt, employees must meet both the "duties test" and the "salary test."

The duties test is met by ensuring that employees are primarily engaged in performing exempt duties. This means that the employee must perform exempt duties at least 50% of the time.

The salary test has two factors: First, the employer must pay the employee a set salary, not an hourly wage, and the salary must not be subject to fluctuation based upon the quantity or quality of the employee's work. Second, the salary must be at least two times the minimum hourly wage for full-time (40 hours per week) work. Thus, the minimum wage increases mean that the minimum salary for exempt employees will also increase. Figure 2 shows the schedule of increases for employers with 25 or fewer employees, and Figure 3 shows the schedule for employers with 26 or more employees. It is important to note that while Figures 2

Figure 1. California Minimum Wage Rate Chart

Date	For Employers with 25 or Fewer Employees	For Employers with 26 or More Employees
Jan-01, 2020	$12.00/hour	$13.00/hour
Jan-01, 2021	$13.00/hour	$14.00/hour
Jan-01, 2022	$14.00/hour	$15.00/hour
Jan-01, 2023	$15.00/hour	$15.00/hour

SECTION X

Employee Bond Law

The basic requirements

California Labor Code section 400 et seq. make up the California Employee Bond Law, which provides a mechanism for employers to protect themselves against losses caused by employees. Under these provisions, an employer may require a cash bond from the employee if property of an equivalent value is entrusted to the employee or if the employer regularly advances goods, wares, or merchandise for sale to the employee for which the employee will reimburse the employer at periodic intervals. Such a bond must be limited to cover the value of the property advanced during the period prior to reimbursement.

Cash received as a bond must be deposited in a savings account and may only be withdrawn with signatures of both the employer and the employee. The cash deposit must be accompanied by a written agreement setting forth the terms and conditions under which the bond is given.

Any money put up as a bond is not subject to any judgment except in an action between the employer or employee and must be returned to the employee with interest when the employee returns the property entrusted to him by the employer and is only subject to deductions necessary to balance accounts between employer and employee. Any funds put up by an employee or applicant as a bond may not be used for any purpose other than to settle accounts between the employer and the employee or for return to the employee, and are held in trust for those purposes and may not be mingled with the property of the employer. The employer and employee may not waive this requirement by contract.

Any property put up by the employee as part of the contract of employment will be deemed to be a bond and will be subject to these rules, regardless of whether the property is put up on a note, loan, or investment and regardless of the wording of the agreement.

The DLSE takes the position that this law sets up a procedure by which both employee and employer are protected in the event that either owes a debt to the other and becomes insolvent. The employer must still take action in court to demonstrate that it is entitled to all or a portion of the bond posted.

SECTION IX

Tools & Equipment

The basic requirements

When tools or equipment are required by the employer or are necessary to the performance of a job, the employer must provide and maintain the tools and equipment. However, employers may require employees who earn at least **two times the minimum wage** to provide and maintain hand tools and equipment that are customarily required by the trade or craft. This does not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board, which the employer must supply.

Generally, employers must provide tools to employees working in **unskilled** positions that require tools. A failure to provide the necessary tools exposes the employer to liability based on the value of the tools. However, employees who work in a trade or craft, such as mechanics, can provide their own tools, as long as they earn twice the minimum wage.

The language of the Wage Orders provides that ". . . an employee whose wages are at least two times the minimum wage . . . may be required to provide . . . tools customarily required by the trade or craft." It does not say that employees who are required to provide their own tools must be paid twice the minimum wage. This small distinction is significant. The obligation that is at issue in this provision is the employer's obligation to pay for tools, not the employer's obligation to pay a certain wage.

Employers cannot require employees to purchase tools, goods, or services, and employers (and supervisors) should not sell anything to employees. Employees may claim that they were forced to make the purchases due to the supervisor or employer's control over their job, which can result in liability to the employer.

No charges for lost or broken tools or equipment

Generally, when an employee owes a debt to the employer due to a loan or the loss or breakage of employer property, the employer is in no better position than any other creditor. If the employee refuses to make good on the loss, the employer's option is to go to court unless the employee give a bond, as discussed below.

Employers cannot charge employees who lose or break the employer's tools or equipment without facing the possibility of an illegal payroll deduction. Although the Wage Orders allow such deductions when the loss or breakage is due to the employee's gross negligence, even the Labor Commissioner acknowledges that the courts will refuse to enforce this rule because only a court, not an employer, can decide whether the employee's actions rise to the level of gross negligence.

Employers can require employees to give a deposit for employer property entrusted to the employee. However, employers must comply with the requirements of the Employee Bond Law, discussed in Section X, for such deposits.

and 3 show the "hourly," "weekly," and "annual" exempt salary thresholds, the statute technically calls for the minimum wage to be at least equal to the monthly amount. Accordingly, the monthly amounts in Figures 2 and 3 are the amounts that employers should focus on.

Figure 2. Minimum Exempt Salaries—Employers with 25 or Fewer Employees

Year	Hourly	Weekly	Monthly	Annually
2020	$12	$960	**$4,160**	$49,920
2021	$13	$1,040	**$4,507**	$54,080
2022	$14	$1,120	**$4,853**	$58,240
2023	$15	$1,200	**$5,200**	$62,400

Figure 3. Minimum Exempt Salaries—Employers with 26 or More Employees

Year	Hourly	Weekly	Monthly	Annually
2020	$13	$1,040	**$4,507**	$54,080
2021	$14	$1,120	**$4,853**	$58,240
2022	$15	$1,200	**$5,200**	$62,400
2023	$15	$1,200	**$5,200**	$62,400

If an employer misclassifies an employee as an exempt employee, they risk losing the exemption and subjecting themselves to liability for any time that would have been considered overtime but for the employee being wrongly classified as exempt.

"Large" versus "small" employer

Employers must properly determine whether they employ "25 or fewer" employees (so-called "small" employers), or "26 or more" employees ("large" employers). This is especially important for employers in California agriculture where growers and producers are frequently relying on workers hired through farm labor contractors (FLCs).

While the law is silent on this specific issue, the California Labor Commissioner has provided some guidance for employers.[1] This guidance is not binding on courts, but a court would likely give the Labor Commissioner's guidance substantial weight.

According to the Labor Commissioner, an employer with 26 or more employees at any time during a pay period should apply the large employer minimum wage to its employees for that pay period. In addition, the Labor Commissioner stated that because employers are required by Labor Code section 2810.5 to provide workers a "Notice to Employee" upon hire and in advance of changes in the terms of their compensation, before an employer switches to a different minimum wage rate, the employer must notify all affected employees in writing and wait until the next pay period to implement the change.

The Labor Commissioner's guidance would almost certainly be applied to analyze this issue. Therefore, in determining whether an employer is "large" or "small" for purposes of California's minimum wage law increase schedule, there are a few things to consider:

First, in any pay period where a grower's direct hire employees *and* any FLC-hired employees combine to total 26 or more employees, the grower is considered a large employer. For example, imagine a grower with 10 direct hires contracts with an FLC to provide 20 workers. The grower's 10 direct hire employees are aggregated with the 20 FLC-hired employees, and the grower would be considered a large employer subject to the "large employer" overtime requirements.

Second, in any pay period where an FLC has a total of 26 or more direct hires, the FLC must abide by the large employer requirements, *regardless of where the FLC's direct hire employees are working*. For example, imagine an FLC has 50 direct hires, and Grower A and Grower

[1] The Labor Commissioner's guidance can be accessed at: https://www.dir.ca.gov/dlse/SB3_FAQ.htm

B have five employees, each. If 40 of the FLC's employees perform services for Grower A, and 10 perform services for Grower B. The 10 employees performing services for Grower B are still subject to the "large employer" requirements because the FLC is a large employer. In other words, even though there are only 15 total employees working for Grower B (five direct hire employees and 10 FLC-hired employees), all of the FLC's employees are subject to the new overtime requirements because the FLC has 50 employees. The FLC is therefore going to bill the grower at the "large employer" rate.

A related question is whether Grower B is required to comply with the new overtime requirements as to Grower B's five direct hire employees? In this situation, Grower B's five direct hire employees would not be subject to the new overtime requirements because Grower B's five direct hire employees and the 10 FLC-hired employees do not combine to total 26 or more employees. Of course, in this scenario it is important to remember that Grower B would still be required to pay overtime to the 10 FLC-hired employees according to the large employer overtime requirements because the FLC would still be a large employer in and of themselves (remember, the FLC in this example had 50 total employees).

Cities and Counties with specific minimum wage ordinances

Several cities and counties in California have their own minimum wage requirements that are higher than the state rate. For example, Berkeley, Emeryville, Los Angeles, Mountain View, Oakland, Palo Alto, Pasadena, San Diego, and San Mateo are but a few of the cities that require a higher minimum wage than state law. Most notably, San Francisco's minimum wage increased to $15.59 per hour on July 1, 2019, and requires that on July 1 of each year, the minimum wage rate be adjusted based on the annual increase in the Consumer Price Index.

Note, exempt salary thresholds are based on state minimum wage. Therefore, employers are *not* required to use local minimum wage requirements as the basis for calculating minimum exempt salary.

Federal minimum wage poster

As discussed above, the federal minimum wage has long been lower than the California minimum wage. Accordingly, California employers tend to pay little attention to the federal minimum wage. However, it is important not to overlook the need to post the most current federal minimum wage poster. If your company is ever inspected by the federal Department of Labor ("DOL"), or the federal Equal Employment Opportunity Commission ("EEOC"), one of the things that they will look for is whether you have all of the required posters displayed.

Contact your poster supplier to obtain the most current poster, or you can download it from the Department of Labor website.

The English version is at:

<http://www.dol.gov/esa/whd/flsa/index.htm>

The Spanish version is at:

<http://www.dol.gov/esa/regs/compliance/posters/flsaspan.htm>

"Average hourly rate"

For employees on piece rate or other non-hourly compensation method, the employer must be sure that minimum wage is paid for all hours worked by ensuring that the employee's average hourly rate equals or exceeds minimum wage **each hour**.

This is a critical difference between California law and federal law. Under federal law, the employer complies with minimum wage if the employee averages minimum wage or more across **each pay period**. The California Labor Commissioner will not allow California employers to use the average rate over the workweek or the pay period to satisfy the minimum wage obligation.

time as time worked for overtime purposes and must be pay it at the agreed rate of pay.

Some employers pay employees a premium sum for being on call although the law does not require such premiums. These sums must be included when computing the regular rate of pay for overtime purposes.

fields before the scheduled starting time to ensure that employees do not perform any work before the starting time. Employees who earn piece rates or production bonuses are often eager to pick the "best" row and to get set up so that they can begin producing immediately at the start of their shift. Many growers have incurred significant liability in lawsuits alleging a failure to pay employees for work performed "off the clock." Acts as simple as picking a row and setting up strawberry trays, moving wheelbarrows, or gathering packing supplies can expose employers to liability as work performed before the start time.

The keys to avoiding "off-the-clock" work claims are good recordkeeping policies and practices, well-trained supervisors, and periodic field monitoring at the start time to ensure that employees are not permitted to enter the fields before the scheduled start of the shift. Other measures can also protect against these types of allegations. For example, if the employer does not deliver the necessary supplies for the day until the start time, employees cannot claim that they gathered or set up any items until the start of the shift. A few minutes delay after the start time for employees to get set up and started is better than the risk of exposure to unpaid wage allegations.

Changing clothes and washing up

Other types of non-productive time can also be compensable. Time spent changing clothes or washing up on the employer's premises is compensable if it is compelled by the necessities of the employer's business. For example, if the temperature in the work area requires employees to wear warm clothing that they would not ordinarily wear, then time spent changing into those clothes will be compelled by the necessities of the employer's business. Under this standard, employees are entitled to compensation for time spent changing into protective clothing, such as suits to prevent pesticide exposure. Such time is compensable regardless of how little time is required to change into the required attire.

Standby time

Standby time occurs where an employee is expected to be available to report to work if the employer determines that it needs the employee at some unspecified time. On-call or standby time is not compensable time when the employee can use the time for the employee's own benefit, considering:

- Geographic restrictions on the employee's movement;
- Required response time;
- The nature of the employment relationship and industry practices; and
- Any other limitation on the employee's ability to use the time for his or her own benefit.

An agreement between employer and employee has *no* effect on the determination whether on-call time is compensable; the outcome depends upon the actual circumstances.

"Controlled" standby is where the employer requires an employee to be close to the work site and reachable during a specific time period. If the employee's movements are so restricted that the employee cannot use the time for their own purposes, then the standby time will be compensable. The employee may be paid less for standby time than the employee receives for regular, productive work.

"Uncontrolled" standby occurs where an employee leaves the workplace and merely informs the employer of where the employee may be contacted in case the employee is needed. Usually, these arrangements are informal enough that the employee has time to pursue their own activities. As long as the employee can pursue their own pursuits, the time will not be compensable.

Alone, carrying a company phone does not make on-call time compensable as long as the employee can use the time as the employee pleases. In most cases, 50 or 60 minutes of response time is sufficient to ensure the employee can use the time to his or her benefit, but more time may be necessary in rural areas where travel time is extended, leading to compensable standby time. Time spent on call backs, including reasonable travel time from the point where the employee is called and back, is compensable. Employers must count on-call

SECTION III

Wage Orders

Introduction to California's "Wage Orders"

California's Wage Orders address topics such as hours and days of work, minimum wage and overtime, alternative work weeks, reporting time pay, record retention, uniforms and equipment, meals and rest breaks, and others. The employer must know which wage order applies in order to know what rules apply to different groups of employees.

The Wage Orders are classified as "industry orders" and "occupation orders." If an industry order applies to a business, then that industry order will usually establish the rules applicable to all of the business's employees. If no industry order applies, then one or more "occupation orders" will apply to the employees, depending on their specific occupations.

There is no industry order that is generally applicable to agriculture, although industry orders do apply to some related packing and processing operations. In order to determine the rules that govern wages and hours for employees in agriculture, it is important to examine what the employee does in order to see which order applies.

Figure 4. Occupational Activities Under Wage Order 14

1. **Preparation, care, and treatment of farmland**, pipeline, or ditches, including leveling for agricultural purposes, plowing, discing, and fertilizing the soil.
2. **Sowing and planting** of any agricultural commodity.
3. **Care of agricultural or horticultural commodities**, including but not limited to cultivation, irrigation, weed control, thinning, heating, pruning, or tying, fumigating, spraying, and dusting.
4. **Harvesting** any agricultural or horticultural commodity, including but not limited to picking, cutting, threshing, mowing, knocking off, field chopping, bunching, baling, balling, field packing, and placing in field containers or in the vehicle in which the commodity will be hauled, and transportation on the farm or to a place of first processing or distribution.
5. **Assembly and storage of agricultural or horticultural commodities**, including but not limited to loading, road siding, banking, stacking, binding, and piling.
6. **Raising, feeding, and management** of livestock, fur bearing animals, poultry, fish, mollusks, and insects, including but not limited to herding, housing, hatching, milking, shearing, handling eggs, and extracting honey.
7. **Harvesting** fish.
8. **Conservation, improvement or maintenance of the farm** and its tools and equipment.

Field work and related activities

Wage Order 14 is an occupation order, which covers agricultural work related to cultivation and handling of farm products up through the harvest, including field packing and transportation to the place of first processing or distribution, as well as the maintenance of soil, buildings, and machinery for farms. The complete list of activities covered by Wage Order 14 is shown in Figure 4.

It is important to understand that Wage Order 14 always applies to persons employed in "agricultural occupations" even if another wage order applies to

the rest of the employer's operations. Therefore, even where an industry order applies to the employer's overall operations, Wage Order 14 will still apply to employees engaged in agricultural occupations. This is a critical difference from other occupation orders. For example, Wage Order 4 only applies to clerical employees if no other Wage Order applies, but Wage Order 14 will always apply to farm employees who plant, cultivate, harvest, or field pack agricultural or horticultural commodities, or maintain and improve the farm or its tools and equipment.

Overtime under Wage Order 14. Historically, employees under Wage Order 14 could work up to 10 hours in a day without being paid overtime. However, as is discussed below, the overtime rules for Wage Order 14 are changing.

Cannabis cultivation

Employees working in cannabis cultivation are not considered "agricultural" workers and are not covered under Wage Order 14. Rather, the Department of Industrial Relations takes the position that employees working in cannabis cultivation fall under Wage Order 4. As such, employees engaged in the cultivation of cannabis are entitled to overtime pay for hours worked in excess of eight in any workday, or more than 40 hours in any workweek, and double their regular rate of pay for hours worked in excess of 12 in any workday and for all hours worked in excess of 8 on the seventh consecutive day of work in a workweek.

Packing, processing, and preparation

If an employer operates a facility for packing, processing, cooling, or otherwise preparing agricultural products for market, then one of two industrial orders will apply to that operation: Wage Order 13 or Wage Order 8.

Wage Order 13 applies to on-the-farm operations handling *only* products produced by the grower who operates the facility.

Wage Order 8, on the other hand, applies to commercial packing or processing operations (which are those operations that handle products from growers other than the one who operates the facility).

Figure 5 shows examples of the kind of activities that are covered by Wage Orders 8 and 13.

Overtime under Wage Orders 8 and 13. Under both Wage Orders 8 and 13, employees are entitled to overtime after eight hours worked in a day (with double time after 12 hours in a day) and 40 hours worked in a week.

There has been some confusion in the salad industry whether processing plants fall under Wage Orders 8 and 13 (depending on the product handled) or whether they fall under Wage Order 1 (manufacturing industry). While the Labor Commissioner and the courts have never directly addressed the question, treatment of other industries demonstrates that salad processing operations appropriately fall under Wage Orders 8 and 13.

For example, under federal law, wineries are treated as manufacturing operations, and are *not* considered agricultural under any circumstances. The reasoning is that wine making involves transformation of the grape into an entirely new product. However, the Labor Commissioner has explicitly said that wineries fall under Wage Orders 8 and 13 under California law. Thus, salad processing, which does not involve nearly the same degree of alteration of an agricultural commodity, falls squarely under Wage Orders 8 and 13.

Figure 5. Examples of Activities that Fall Under Wage Orders 8 and 13

- Grading
- Sorting
- Cooling
- Icing
- Packing
- Dehydrating
- Cracking
- Shelling
- Candling
- Separating
- Slaughtering
- Plucking
- Pasteurizing
- Fermenting
- Ripening
- Molding
- Or, otherwise preparing any agricultural, horticultural, meat, or dairy product for distribution, including all incidental operations.

may seem trivial, when aggregated across numerous years and hundreds of employees, the amount of backpay owed can be crippling for a company.

Travel time

Generally, time spent traveling to work is not compensable. However, sometimes, time that would not ordinarily be compensable can become compensable because of control exercised by the employer.

In one case, *Morillion v. Royal Packing*,[6] a grower required employees to use company provided transportation to the fields. The employees reported to a designated point, where they were picked up by company buses and driven to their work locations. The employees were not permitted to use any other form of transportation.

The California Supreme Court held that the time spent traveling on the buses was compensable working time because by requiring the employees to take certain transportation to a work site, the employer subjected those employees to its control by determining when, where, and how they traveled. Employers can provide optional free transportation to employees without paying them for their travel time, as long as employees are not required to use the transportation.

Travel directly to field locations. While travel to and from work is generally not compensable, when an employee is required to report to a work site other than the regular site, and goes directly to that site without going to the regular site, the employer must pay the employee travel time for any time in excess of the employee's normal commute time. If the employee reports to the regular workplace, and then travels to another site, the travel to the assigned work site must be compensated.

According to the Labor Commissioner, if employees do not have a regular reporting place like a shop or office, but report directly to the fields every morning, their travel to the place of first reporting is not compensable. However, if travel to remote field locations significantly increases the employees' commute time, the Labor Commissioner is more likely to find that the additional travel time is compensable. Handbooks and policies should clearly explain the geographic range in which the employees will be expected to report.

What this means for employers

Agricultural employers can avoid the problem through handbook policies that clearly inform employees that they have no regular reporting site. The policy should clearly state that the employer has work sites in a number of locations, and that employees can expect to report to any of those sites on a particular day. Maps showing the possible reporting locations should be available for employees, and should be posted on company bulletin boards. However, employers should be aware that extremely remote locations may trigger an obligation to pay for the extended commute time. Employers with fields or work locations separated by significant distances should consult with labor counsel to develop practices and policies that fit the specific circumstances.

Even time that is intended to be for the benefit of employees can be compensable. For example, if an employer requires employees to participate in a mandatory exercise and stretching period prior to the beginning of work in order to prevent and reduce employee injuries, then the time spent "warming up" will be compensable because the employees are subject to the employer's control. Employers must remember that working time will not be limited to the time in which the employees perform the duties for which they were hired; it includes all periods in which the employees are subject to the control of the employer or are "suffered or permitted" to work.

Practical tip

Employers must train their supervisors to prevent employees from performing any work prior to the scheduled start time, and should periodically watch the

[6] *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, *as modified (May 10, 2000)*.

SECTION VIII

Compensable Time

Introduction

The law treats a wide range of activities as "working time," which must be compensated and included when calculating overtime obligations. The definition of working time is very broad, and includes all time when an employee is subject to the control of an employer, and includes all the time in which the employee is "suffered or permitted to work," whether or not required to do so. Under this broad definition, periods of time in which the employee performs no duties are compensable, as long as the employee is subject to the control of the employer.

The "de minimis" doctrine

Under federal law, courts will forgive employers for not paying employees for small amounts of otherwise compensable time upon a showing that the bits of time are administratively difficult to record. These small amounts of time usually occur on the front- and back-ends of shifts while employees are clocking in or out, turning lights and other systems on or off, and unlocking or locking the facilities. This doctrine, the so-called "de minimis" exception, was previously recognized in California as well, however, on July 26, 2018, the California Supreme Court decided that the de minimis exception no longer applies in California. As a result, employers must be sure to compensate employees for any and all time that employees work, regardless of how minor or trivial the amount of time and money may seem.

Employers must ensure that workplace policies and procedures do not have the effect of requiring employees to perform off-the-clock work. This may require amended employee handbooks and employer procedures for clocking in and out, and starting and stopping operations. Employers can no longer require employees to clock out, and then lock up on the way out. Instead, employers must alter their practices to ensure that employees are compensated for the time they spend locking up, turning off lights, setting alarms, and shutting down systems.

In *Troester v. Starbucks Corp.*,[5] a Starbucks employee brought a class action lawsuit on behalf of all Starbucks employees who were required to close up the store. The employee argued that Starbucks's computer software required employees to clock out on every closing shift before activating the store's alarm, existing the store, and locking the front door. These tasks required employees to work a few extra *minutes* each closing shift, which on average added up to about eight hours (or, $75) of unpaid time per employee per year. The California Supreme Court held that under California law, employers are required to compensate employees for all the time that employees are required to work, which includes the small bits of time spent locking up and shutting off lights. Furthermore, the fact that recording certain small bits of time might be difficult is no longer an excuse that will forgive payment of all wages owed.

Troester is yet another example of how California law is more stringent than federal law, and is less forgiving toward employers. And, while the amounts at issue

[5] *Troester v. Starkbucks Corp.* (2018) 5 Cal.5th 829, *as modified on denial of reh'g (Aug. 29, 2018).*

SECTION IV

Overtime

Federal law versus California law

Under federal law, nonexempt employees are generally owed overtime for all hours worked in excess of 40 hours in a workweek. Under California, however, overtime pay is primarily based on the number of hours worked in a workday. In addition, employers must also account for the number of hours worked during a workweek. Given that California law is more favorable to employees than federal law, this is an area where employers must apply state law over federal law.

The 8/40 Wage Orders

Of the 17 Wage Orders in California, 16 of them follow the same "eight-and-forty" requirements for overtime, which generally requires employees to be paid overtime for all hours worked in excess of 8 in a workday, and 40 in a workweek. In fact, the only Wage Order that follows a different standard is Wage Order 14. Accordingly, this text covers Wage Order 14 first, and then discusses overtime under all of the other Wage Orders.

Overtime under Wage Order 14

Wage Order 14 is an occupation order which covers agricultural work related to cultivation and handling of farm products up through the harvest, including field packing and transportation to the place of first processing or distribution, as well as the maintenance of soil, buildings, and machinery for farms.[2]

Historically, Wage Order 14 required that overtime to be paid as follows:

- Employees receive an overtime premium of one-and-one-half times their regular rate of pay for all hours worked beyond 10 in a single day;
- Employees also receive one-and-one-half times their regular rate of pay for the first eight hours worked on the seventh consecutive day of work within a single workweek; and
- Employees are paid twice the regular rate of pay for all hours beyond eight on the seventh consecutive day of work in the workweek.

From a historical perspective, a common misconception in agriculture was that employees working under Wage Order 14 were entitled to weekly overtime after 60 hours in a workweek. Under Wage Order 14 there was no weekly overtime. Rather, the only obligation under Wage Order 14 was to pay overtime after 10 hours worked in a workday, and on the seventh consecutive day of work in the same workweek. However, and is discussed below, this is changing due to AB 1066.

Assembly Bill 1066

Assembly Bill 1066 was signed into law in 2016 by former Governor Brown. The law gradually lowers the daily hours of work threshold—and enacts a weekly hours of work threshold—for paying overtime to agricultural employees. For "large" employers, i.e., employers with 26 or more employees, the changes began to take effect in 2019. For "small" employers, i.e., employers with 25 or fewer employees, the changes will

[2] Cal. Lab. Code, § 1173.

not take effect until 2022. The full implementation schedule is shown in Figure 6.

Other changes to Wage Order 14. In addition to the changes to the overtime thresholds, there are several other changes being brought about by AB 1066 that are worth noting.

WEEKLY OVERTIME: While there has never been a weekly overtime threshold for agricultural workers, AB 1066 has brought an end to that. Accordingly, agricultural employers will now have to factor weekly overtime into their practices for calculating an employee's compensation. As shown in Figure 6, large employers had to make this adjustment beginning in 2019, while small employers are still permitted to operate under the historic rules for a few more years. For 2020, for example, large employers must pay overtime after nine hours in a single workday, or 50 hours in a single workweek. On the other hand, small employers do not have to worry about weekly overtime. Accordingly, small employers must pay overtime after 10 hours in a workday.

ONE DAY'S REST IN SEVEN: Under the old rules, agricultural employers were exempt from the requirement to provide employees with one day's rest in seven days. Thus, agricultural employers could require agricultural workers to work on the seventh consecutive day. However, AB 1066 brought an end to this exemption. Accordingly, beginning on January 1, 2017, all agricultural employers regardless of size, are prohibited from requiring employees to work on the seventh consecutive workday in the workweek.

THE "IRRIGATOR EXEMPTION": The last change to Wage Order 14 brought about by AB 1066 concerns the irrigator exemption. Historically, Wage Order 14 exempted irrigators from overtime. Specifically, under the old rules, in any workweek in which an agricultural employee spent more than half of their time performing the duties of an irrigator, the employee was not entitled to any overtime. Under the new rules, this exemption is no longer applicable. As a result, large employers were required to comply with this new rule beginning in 2019, while small employers will need to begin complying in 2022.

Large versus small employer. One of the most important things to understand about AB 1066 is that it draws the same "large" versus "small" employer distinction that applies for the minimum wage phase-in. Further, the Labor Commissioner has indicated that employers should follow the same guidance with respect to determining which employers are large and small.

Figure 6. AB 1066 Overtime Threshold Hours Phase-in

Date	For Employers with 26 or More Employees	For Employers with 25 or Fewer Employees
Jan. 1, 2019	9.5 hours/day; 55 hours/week	10 hours/day
Jan. 1, 2020	9 hours/day; 50 hours/week	10 hours/day
Jan. 1, 2021	8.5 hours/day; 45 hours/week	10 hours/day
Jan. 1, 2022	8 hours/day; 40 hours/week	9.5 hours/day; 55 hours/week
Jan. 1, 2023	8 hours/day; 40 hours/week	9 hours/day; 50 hours/week
Jan. 1, 2024	8 hours/day; 40 hours/week	8.5 hours/day; 45 hours/week
Jan. 1, 2025	8 hours/day; 40 hours/week	8 hours/day; 40 hours/week

Updated Wage Order 14. The Department of Industrial Relations ("DIR") has issued an updated Wage Order 14, which is consistent with the changes brought about by AB 1066. The new Wage Order 14 can be accessed at the following link:

- https://www.dir.ca.gov/Iwc/IWCArticle14.pdf

of all duty during meal periods. For example, the Labor Commissioner has stated that there are only three situations where on-duty meal periods might be appropriate:

1. A sole worker in a coffee kiosk;
2. A sole worker in an all-night convenience store; and
3. A security guard stationed alone at a remote site.

However, the Ninth Circuit Court of Appeals has questioned whether these situations meet the high standard for demonstrating that an on-duty meal period is legitimately necessary. Accordingly, employers are advised to work closely with labor counsel in this area, and proceed with great caution before determining their employees can agree to on-duty meal periods.

Ultimately, the more prudent approach is to avoid on-duty meal period waivers if at all possible, because the Labor Commissioner is hostile to waivers, and narrowly interprets the circumstances in which on-duty meal periods are permissible. The Labor Commissioner's enforcement position is that financial or operational difficulties for the employer due to the meal period will not justify an on-duty meal period. For example, the Labor Commissioner has ruled that necessary training conducted during a lunch break in order to accommodate work scheduling is an impermissible on-duty meal period that exposes the employer to the obligation to provide premium pay.

practical purposes a written waiver will be necessary evidence if a meal (or rest) period claim arises.

Designated eating place. If employees are required to eat on the premises, then the employer must designate a suitable place for that purpose. (Keep in mind that if the employee is not free to leave the premises for a meal period, the employee is subject to the employer's control and must be paid for the time, in addition to the required premium pay for failure to provide a proper meal period.)

Meal period waivers. Meal period waivers should always be in writing. Furthermore, the smaller period of time the waiver covers the better. For example, it is best to have employees sign a meal period waiver each and every time they waive a meal. On the other hand, meal period waivers covering months or seasons leave employers vulnerable to employees arguing they told a supervisor or manager that their waiver was revoked.

See "Appendix B" for illustrations and exercises of common scenarios involving the scheduling of meal and rest periods.

Premium pay for meal and rest period violations

The penalty for failing to authorize and permit meal and rest periods is as follows:

- One additional hour of pay at the employee's regular rate of pay for each day that the employer fails to authorize and permit a rest period that complies with these requirements; and
- One additional hour of pay at the employee's regular rate of pay for each day that the employer fails to provide a meal period that complies with these requirements.

In this context, a few things are important to understand. First, even if the employer fails to allow more than one rest period, the penalty is one hour of pay for each day. The same rule applies to meal period violations. In other words, the maximum penalty is two hours of premium pay per day regardless of the number of meal and rest period violations in a given day. The additional pay for meal and rest period violations must be included in the employee's next paycheck.

Secondly, the employer does not face the penalty if the employee freely chooses to forego the rest period and there is no coercion or encouragement by the employer. (However, for practical purposes, employers should ensure that employees take all of their rest periods because it is likely that an employee will claim that the employer encouraged or coerced them to skip the rest break. If the employee decides to forego the rest period, they should be required to certify in writing that they are waiving the break voluntarily and without encouragement or coercion by the employer.)

Finally, it is worth noting that in a technical sense, the one of hour of pay is actually considered a wage, and not a penalty. From a liability perspective, this distinction is critical because unpaid wages are subject to a three-year statute of limitations as opposed to the one-year limitations period that is typically applicable to penalties. Accordingly, employers should take extra precautions when it comes to meal and rest periods because employees can reach back three years to complain about violations.

Many employers think that as long as they leave it up to their employees to decide when to take their meal and rest periods, they are immune from suit. **That is absolutely not true.** These types of violations are no-fault violations, and the employee can only waive breaks in very limited circumstances, and even then, usually only in writing. Double-checking your wage and hours policies and practices to ensure compliance can go a long way toward avoiding costly litigation down the road. Any questionable policies or practices should be reviewed with experienced labor counsel.

On-duty meal periods

On-duty meal periods are allowed only when the nature of the work prevents the employee from being relieved of all duty. In addition, on-duty meal periods must be (i) agreed to in writing by both parties; (ii) paid; and (iii) freely revocable at any time in writing by the employee.

Caution! On-duty meal periods are a very limited exception to the rule that employees must be relieved

Overtime for office, packing, processing, and other non-agricultural employees

Wage Orders 4, 8, and 13 have similar overtime rules.

- Employees are entitled to one and one half times their regular rate of pay for hours worked beyond eight in a day.
- Employees are entitled to one and one half times their regular rate of pay for all hours worked beyond 40 in a single workweek.
- Twice the regular rate of pay must be paid for all hours worked in excess of twelve hours in a day.
- One and one half times the regular rate of pay must be paid for the first eight hours of the seventh consecutive day of work in a single workweek.
- Twice the regular rate must be paid for all hours beyond eight on that seventh day.

Defining the "workweek" and "workday"

Employers may define the workday and the workweek however they wish. The workday is not the portion of the day when employees are working, it is a consecutive 24-hour period starting at the same time each calendar day. If not otherwise defined by the employer, the workday runs from 12:01 a.m. to midnight.

If the workweek runs from Sunday through Saturday, employees will be entitled to seventh consecutive day overtime for all work performed on Saturday.

The workweek is any seven consecutive 24-hour periods starting on the same calendar day each week. The Labor Commissioner will presume a Sunday through Saturday workweek unless otherwise defined by the employer. If the workweek runs from Sunday through Saturday, they will be entitled to seventh day overtime for all work performed on Saturday. For this reason, many agricultural employers define their workweek as running from 12:01 a.m. Monday through midnight on Sunday. This schedule reflects the typical Monday through Saturday workweek in agriculture, and establishes Sunday as the seventh day for overtime purposes.

Understanding seventh-day rest. One area that has sometimes caused confusion concerns what constitutes the seventh day for purposes of the one-day's-rest-in-seven rule. Generally, every employee is entitled to at least one day off in a seven-day workweek, and an employer cannot require an employee to go without a day of rest.[3] It is important to note that employees are entitled to one day of rest in each *workweek* and not one day of rest on a "rolling" calendar basis. Specifically, in *Mendoza v. Nordstrom, Inc.*,[4] the California Supreme Court ruled that the required "day of rest" is measured by the workweek as defined by the employer, and not on a seven-day rolling calendar basis. The Court agreed that the law allows a limited exception for part-time employees who work no more than six hours a day and not more than 30 hours in a workweek. The Court further clarified that employees may voluntarily decide to work seven consecutive days during a single workweek, after the employees have been informed of their right to take a day of rest.

If an employee chooses to work on the seventh consecutive day in the workweek, it is always best practice to have the employee sign a document acknowledging that the employee understands their rights, and is freely choosing to waive such rights.

[3] Cal. Lab. Code, §§ 551 and 552.

[4] *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074.

SECTION V

Calculating Overtime

Understanding the "regular rate of pay"

One of the most common misconceptions among employers and employees alike is that overtime is paid at "time-and-a-half," which implies that overtime is paid at one-and-a-half times the employee's hourly rate. While this formula is sometimes true, it is not always the case, and should not be the extent of your understanding of the overtime formula. Overtime is a product of an employee's "**regular rate of pay**," a concept which is the cornerstone of the overtime calculation. In this regard, it is important to note that the regular rate of pay is *not* necessarily just the agreed rate of pay for the employee's straight time hours. Rather, the regular rate of pay is the actual hourly rate paid for the employee's work including the agreed rate *plus all other forms of compensation*, including:

- Commissions;
- Nondiscretionary bonuses;
- Piece work earnings; and
- The value of meals and lodging.

Items that are *not* included in the regular rate of pay include the following:

- Gifts (i.e., for holidays or birthdays, as a reward for service, but only those where the timing and amount are not based on any objective factors and are left entirely to the employer's discretion);
- Hours paid but not worked (i.e., vacation, holidays, sick leave, reporting time pay, or split shift premiums);
- Expense reimbursement;
- Discretionary bonuses;
- Profit-sharing plans (as long as the contributions are to a bona fide plan without regard to hours worked, production levels, or efficiency);
- ERISA plan payments (i.e., health benefit plans, many retirement plans, and similar benefits); and
- Overtime pay.

Formulas for calculating the regular rate of pay

The simplest overtime calculation is for employees who are paid hourly, with no other forms of compensation. For these employees, simply apply the applicable overtime premium to their hourly rate, and pay that rate for each overtime hour. For non-exempt employees who are paid on a piece-rate basis, or who receive incentive-based bonuses, housing, or other compensation each week, the following formulas apply:

Standard calculation. In most cases, the regular rate of pay is the total weekly compensation divided by the maximum number of permissible straight time hours (usually 40 hours per week, but remember that Wage Order 14 has unique overtime thresholds). The overtime premiums (1.5 or 2) are then applied to this rate to determine the compensation due for overtime hours. This is the method used for salaried, nonexempt employees, because their salary can only cover their straight time hours under California law. If they receive no additional compensation, their regular rate of pay is 1/40th of their weekly salary.

Piece-rate. See Section VI, Piece Rate Issues, for a complete discussion of the formula used for calculating the regular rate of pay under a piece-rate system.

employees inadvertently taking late meal periods (a technical violation of the law).

See Figure 9 for a "California Meal and Rest Period Chart," which shows the number of meal and rest periods that need to be provided depending on the length of the shift.

Figure 9. California Meal and Rest Period Chart

Hours in the Workday	Rest Periods	Meal Periods
Less than 3.5 hours	0	0
3.5 hours, but not more than 5 hours	1	0
More than 5 hours, but not more than 6 hours	1	1*
More than 6 hours, but not more than 10 hours	2	1
More than 10 hours, but not more than 12 hours	3	2*
More than 12 hours, but not more than 14 hours	3	2
More than 14 hours, but not more than 15 hours	3	3*
More than 15 hours, but not more than 18 hours	4	3

* Can waive the last meal period of the day by mutual consent of the employee and the employer. A meal period must be provided for each work period of not more than five hours. The 5 hour period starts when the employee begins the workday or resumes work following an unpaid meal period.

Recording requirements. Employers are required to keep records of the start and stop times of meal periods. It is insufficient to merely record the start time and indicate that it was "30 minutes."

"Rolling" five-hour basis theory. The California Supreme Court has rejected the argument that the meal period obligation is to provide a meal period on a rolling five-hour basis. For example, a rolling basis would mean that a second meal period was owed any time an employee worked more than five hours after the employee finished the first meal period. Because the rolling five-hour basis theory has been rejected, if an employee takes a meal period early in the shift, and then works more than five hours after finishing their first meal period, a second meal period will only be required if the employee works more than 10 hours in the workday.

Policing meal periods. The California Supreme Court has also held that employers are only obligated to "provide" meal periods, and that they do not have to ensure that no work is performed. Accordingly, an employer satisfies their duty to provide a meal period if the employer does all of the following:

- Relieves the employee of all duty;
- Relinquishes control over their activities;
- Permits the employee a reasonable opportunity to take an uninterrupted, 30-minute meal period; and
- Does not impede or discourage the employee from doing so.

Of course, while employers are not required to "police" meal periods, the obligation to "provide" meal periods is still an affirmative duty, and employers must be able to show that they did more than merely make meal periods available. Accordingly, employers should take all reasonable measures to ensure that employees take their meal periods. For example, employers should require employees to take their meal periods, and prohibit employees from skipping, delaying, shortening them below 30 minutes (even if the employee wants to). In addition, employer policies should explain that meal periods are authorized and permitted, should prohibit any interference with the taking of a meal period, and should require that employees report any interference with their meal (and rest) periods. Finally, any time an employee chooses to forego a meal period, the employee should sign a written agreement stating that the choice was made without coercion or pressure from the employer. Although such a waiver is not legally mandatory, for

SECTION VII

Meal and Rest Periods

The basic requirements

Employers must authorize and permit nonexempt employees to take ten minutes of net rest time for every four hours worked, or major fraction thereof. Employers must also authorize and permit nonexempt employees to a 30-minute unpaid meal period after no more than five hours of work in a workday.

Rest periods

Employers must authorize and permit paid rest periods for all nonexempt employees at a rate of 10 minutes of net rest period time for every four hours worked, or "major fraction thereof." Rest breaks are paid time, but employees must be relieved of all-duty, meaning the employer cannot control the employee, and must allow the employee to go off the premises (although, the employee would only be able to travel five minutes away, before having to return to their worksite). In addition, rest periods must be provided as near as is practicable to the middle of each work period.

"Major fraction thereof." The California Supreme Court has confirmed that a major fraction of four hours is anything over two hours. For example, in an 8-hour day, an employee will be entitled to 20 minutes of net rest time because eight hours, divided by four hours is two 4-hour periods.

On a 12-hour shift, the employer must provide three rest period. The final rest period should occur at approximately the tenth hour of the day.

Rest periods may not be combined with or added on to meal breaks, and may not be used to allow an employee to come in late or leave early, *even if the employee requests it*. Specifically, stacking a rest period with a meal period will result in a rest period violation as though the rest period was not provided.

Meal periods

Employers must provide employees with a duty-free meal period of at least 30 minutes before the end of the fifth hour of work in a workday. However, if six hours will complete the day of work, then the meal period may be waived by the employee. Waivers should be in writing. Meal periods may be unpaid if they are at least 30 minutes long and if the employee is relieved of all duty (which includes being free to leave the premises).

A second meal period is required if the employee works more than ten hours in a workday. However, if 12 hours will complete the day of work, then the second meal period may be waived by the employee. Again, any waivers of second meal periods should be in writing.

"No later than the end of the employee's fifth hour of work." The meal period requirement as stated in the Wage Orders requires employers to provide a meal period "no later than the end of the employee's fifth hour of work." Employers often wonder whether this means that the meal period must begin by the 4:59 mark, or the by the 5:00 mark? The best practice is err on the side of caution and schedule meal periods to begin at the 4:45 mark. This will help to prevent

More than one rate. When employees work at more than one rate of pay (such as when travel time is compensated at a different rate), employers must use the "weighted average" method to determine the regular rate of pay. First, determine weekly pre-overtime compensation by applying the applicable rate of pay to all hours worked at each rate, including overtime hours. Then, divide the total weekly pre-overtime compensation by the total number of hours worked (including overtime hours). This calculation produces the regular rate of pay. The employee is entitled to the total pre-overtime compensation, plus an additional one half (0.5) of the regular rate of pay for overtime hours, and an additional full regular rate (1.0) for all double time hours.

Non-discretionary bonuses. There are three different formulas that can apply when an employee receives a non-discretionary bonus: the piece-rate formula, the flat sum bonus formula, and the standard bonus formula which is used for other types of bonuses. Thus, the first step to properly calculating the regular rate of pay with non-discretionary bonuses is determining which formula to apply. In this regard, always begin by considering whether the non-discretionary bonus is a "production" bonus. A "production" bonus is a non-discretionary bonus that is based on the number of units of production. This is important to understand because a "production" bonus is actually considered a piece-rate system and is subject to the rules discussed in Section VI, Piece Rate Issues.

The next thing to consider is whether the bonus is a "flat sum" bonus or not. A "flat sum" bonus is a bonus that is set at a fixed amount and is intended to incentivize the completion of work through a particular period of time (e.g., week, weekend shift, season, etc.). The following are examples of flat sum bonuses:

- $15 for every weekend shift worked;
- $20 for every graveyard shift worked; and
- $100 for every month of continuous employment.

The key element of a flat sum bonus is that it is not intended to reward an employee for each hour worked, and does not increase in rough proportion to the number of hours worked. Rather, a flat sum bonus is intended to reward the completion of a period of time regardless of the number of hours worked during such period of time. Given that a flat sum bonus is not intended to compensate all hours worked, the payment of a flat sum bonus is only intended as base compensation for the straight hours worked. Therefore, with flat sum bonuses, both the increased base compensation and the overtime premium are required to be added to the compensation for all overtime and double time hours. The specific formula used in connection with flat sum bonuses is discussed below.

While the differences between production bonuses and flat sum bonuses might seem trivial, it is critical to use the appropriate formula in order to accurately calculate all wages owed.

FLAT SUMP BONUSES: If the employee is an hourly employee (or a non-exempt salaried employee) and they receive a flat sum bonus, then the regular rate of pay is equal to the hourly rate plus the per hour value of the flat sum bonus. The per hour value of the flat sum bonus is calculated by dividing the bonus by the total straight time hours actually worked during the bonus period. Employees are entitled to 1.5 times the regular rate of pay for all overtime hours during the period of time when the bonus was earned, and twice the rate for the double time hours worked during that period.

A sample calculation might look like this: Assume William Worker, who is paid $16 per hour, worked 40 hours of straight time and 20 hours of overtime in a given bonus period, and received a flat sum bonus of $100. William's regular rate of pay would be calculated as follows:

	$	100.00	William's flat sum bonus
÷		40 hours	The number of straight time hours William actually worked during the bonus period.
=	$	2.50	The per hour value of William's flat sum bonus.
+	$	16.00	William's agreed-upon hourly rate
=	$	18.50	William's regular rate of pay for this bonus period.

In this example, William's overtime hours would be paid at $27.75 per hour ($18.50 × 1.5). Thus, and

assuming this bonus period was a single workweek, William's total compensation would be: $1,295, which is calculated by adding $640 (40 hours × $16 per hour) plus $555 (20 overtime hours × $27.75 per hour) plus a flat sum bonus of $100.

OTHER BONUSES: If the employee is an hourly employee (or a non-exempt salaried employee) and they receive a nondiscretionary bonus which is not a production bonus and not a flat sum bonus, then overtime on the bonus should be separately calculated because the straight time component of the overtime hours has already been compensated by the bonus. In other words, if the amount of the bonus increases in rough proportion to the number of all hours worked (i.e., straight time and overtime hours), then the bonus constitutes payment for the straight time component of all hours worked (i.e., straight time and overtime hours). Accordingly, only the half-time premium component of the overtime hours needs to be added to the employee's compensation. So, instead of multiplying the per hour value of the bonus by 1.5, you only need to multiple the per hour value by one-half (0.5).

A sample calculation might look like this: Assume William Worker, who is paid $16 per hour, worked 40 hours of straight time and 20 hours of overtime in a given bonus period, and received a safety bonus of $100. The per hour value of William's safety bonus would be calculated as follows:

	$ 100.00	William's safety bonus
÷	60 hours	The number of all hours William actually worked during the bonus period.
=	$ 1.67	The per hour value of William's safety bonus.

In this example, and assuming this bonus period was a single workweek, William's total compensation would be: $1,236.80, which is calculated by adding $640 ($16 per hour × 40 straight time hours), plus $480 ($16 per hour × 1.5 × 20 overtime hours), plus $100 in bonus compensation, plus $16.80 ($1.67 × 0.5 × 20 overtime hours).

Additional notes concerning bonuses and overtime

Non-discretionary bonuses and incentives versus discretionary bonuses. Non-discretionary bonuses, production bonuses, and incentives must be included in the calculation of the regular rate of pay for overtime purposes. Only discretionary bonuses may be excluded from the regular rate of pay. Bonuses are discretionary only if the fact of payment and the amount of the bonus are in the sole discretion of the employer and are not paid pursuant to an agreement or promise that causes the employee to expect payment if the employee satisfies a specified goal or condition.

Disclose all non-discretionary bonus and incentive plans and draft them carefully. Employers must disclose all non-discretionary bonuses and incentive plans to employees in writing, and should carefully draft the written description of the plan to achieve the purpose of the bonus. For example, an end of season bonus should clearly state that the employee must work until the end of the season to earn the bonus, or an employee may leave before the end of the season and still be able to claim entitlement to a proportional share of the bonus for the portion of the season that the employee did work.

The bonus period. Calculating the regular rate of pay is fairly straightforward when a non-discretionary bonus only covers one weekly pay period. However, the calculation becomes more complex when a bonus is earned over more than one pay period. The first step is to identify the type of bonus. If the bonus is simply a flat sum, such as a payment for staying until the end of the season, then it is considered similar to a salary. The total amount of the bonus is divided by the number of straight time hours actually worked during the period in which the bonus was earned. One-and-one-half times this amount will be due for each overtime hour worked during the period in which the bonus was earned, and twice this amount is due for any double time hours worked during the bonus period.

On the other hand, if the bonus is not a flat sum bonus (and not a production bonus), then the total amount of the bonus is divided by the total number of hours worked during the bonus period, including straight time hours and overtime hours. One-half times this

desirable result. Second, federal law states that the regular rate of pay is always an hourly rate, and prohibits this method of overtime compensation unless the employer and employee agree in writing before the performance of any work. This requirement could persuade a court that the same requirement applies in California. Further, a court could view an employer-required agreement as involuntary and find an overtime violation. Lastly, this method of pay encourages workers to maximize their production during overtime hours in order to maximize their earnings. By reducing overall weekly production to an hourly rate, the employer takes into account all fluctuations in productivity and rewards those who consistently produce.

Figure 8. Sample Piece Rate Paystub

XYZ Farming, Inc.
1141 West Shaw Avenue, Fresno, California 93711

Employee	SSN/Employee ID
Worker, William	***-**-3412

No. of Pieces	Piece Rate	Amount
675	$1.00/unit	$ 675.00
0	$100/row	$ -
Total Earned for Productive Work:		$ 675.00

Item	Hours	Rate/Hour	Amount
Productive	40.00	$16.88	$ 675.00
Non-productive	10.00	$16.00	$ 160.00
Rest Time	2.00	$14.40	$ 28.80
Vacation Used	0.00		$ -
Sick Used	0.00		$ -
Overtime	20.00	$7.20	$ 144.00
Double Time	0.00		$ -
		Gross Earnings:	$ 1,007.80

Pay Period	
Beginning Date:	03/10/2019
Ending Date:	03/17/2019
Pay Date:	03/22/2019

Deductions	Amount
Federal Withholding	$ 59.00
FICA	$ 73.29
Medicare	$ 17.14
CA Withholding PIT	$ 11.33
CA State DI	$ 11.82
Total Deductions:	$ 172.58

Total Hours in Pay Period	
Regular	40.00
Overtime	20.00
Double Time	0.00
Total Hours:	60.00
Available Paid Sick:	24.00
Available Vacation:	56.00

Gross Earnings:	$ 1,007.80
Total Deductions:	$ 172.58
Net Earnings:	$ 835.22

REQUIREMENTS FOR COMPENSATING NON-PRODUCTIVE TIME: Non-productive time must be compensated separate from any piece-rate compensation, and such compensation must be at an hourly rate that is no less than the applicable minimum wage. For employees compensated on a piece-rate basis, employers must track all nonproductive time.

Step 3—Rest and recovery period compensation: The third step is to calculate the total rest and recovery period compensation.

DETERMINING THE "AVERAGE HOURLY RATE": The formula for determining the average hourly rate to be paid for rest and recovery periods is as follows:

> Divide the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.

(Cal. Lab. Code, § 226.2, subd. (a)(3)(i).)

Here is the same formula expressed in an equation:

	$	675.00	Total piece-rate compensation
+	$	160.00	Total NPT compensation
=	$	835.00	Total "compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime"
÷		58 hours	Total "hours worked during the workweek, exclusive of rest and recovery periods"
=	$	14.40	The "average hourly rate"

WHAT ALL IS INCLUDED IN THE DEFINITION OF "REST AND RECOVERY PERIOD"? One thing that is important to note is that AB 1513 did not change the definition of "rest periods, and recovery periods include "a cooldown period afforded an employee to prevent heat illness."

Step 4—Overtime premium compensation: The fourth step in this process only applies if the piece-rate worker worked overtime during the workweek. If the employee did not work any overtime during the workweek, then you can skip ahead to Step 5. However, if the employee did work overtime, then you will have to calculate the overtime premium compensation. The overtime premium rate for purposes of calculating a piece-rate employee's overtime compensation is calculated by multiplying the number of overtime hours worked during the workweek by the half-time overtime premium (0.5).

See "Appendix A" for a complete illustration of the steps required to calculate gross piece-rate compensation.

AB 1513's paystub requirements for piece-rate compensation

Employers must include all compensable rest and recovery periods and nonproductive time on an itemized wage statement:

- 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; and
- The total hours of other nonproductive time, the rate of compensation, and the gross wages paid for that time during the pay period.

Figure 8, below, is a sample piece-rate paystub, and shows piece-rate earnings, NPT, and rest and recovery periods as being separately compensated.

Simplified (and faulty) piece-rate overtime calculation

Some employers pay overtime to piece workers by paying 1.5 times the piece rate for overtime hours, and twice the piece rate for double time hours. While the Labor Commissioner has stated that this method is technically legal, employers should avoid this method for several reasons. First, depending upon work patterns, the employer will either overpay or underpay overtime when compared to the traditional method of calculating a regular hourly rate, neither of which is a

amount will be due for each overtime hour worked during the period in which the bonus was earned, and the full amount is due for any double time hours worked during the bonus period.

"Pyramiding" of overtime

Only straight time hours count towards the applicable weekly overtime limit, which prevents employees from earning overtime on top of overtime, or "pyramiding" overtime. Once an employee has been paid overtime for eight in a day, those hours do not count towards the 40-hour weekly limit.

For example, assume a packing shed employee works ten hours each day, Monday through Saturday. The work would be performed under Wage Order 8 or 13, and the employee would earn eight hours of straight time and two hours of daily overtime for the first five days of the week. On Friday morning, the employee has already worked 40 hours total during the week, but the employee has only worked 32 *straight time* hours. Thus, the employee will not hit the 40-hour weekly limit until working eight hours on the fifth day. On Saturday morning, the employee has already worked 40 straight time hours, and is entitled to weekly overtime for all hours worked on Saturday. (See Figure 7.)

Figure 7. Pyramiding Overtime Example

Day	Total Daily Hours	Straight Time	Overtime
Mon.	10	8	2
Tues.	10	8	2
Wed.	10	8	2
Thurs.	10	8	2
Fri.	10	8	2
Sat.	10	-	10
Sun.	No Work	-	-

SECTION VI

Piece-rate Issues

Introduction

This section explores some of the common issues that arise under California law when compensating employees on a piece-rate system. At the outset it is important to note that compensating employees pursuant to a piece-rate system requires a strong understanding of California's wage and hour laws, as they are highly technical and riddled with numerous areas that can trip up even the most well-intentioned employers. The best advice we can give you if you are considering using a piece-rate system is to work closely with labor counsel and a payroll provider who both have experience calculating piece-rate wages under California law.

Defining "piece work"

Piece-rate compensation or piece work is defined as work that is paid for according to the number of units produced. Thus, a piece rate must be based upon an ascertainable figure paid for completing a particular task, e.g., filling a bin, picking an item, producing a widget, etc. The following are all examples of piece-rate plans:

- Agricultural workers paid by the number of rows thinned;
- Milk-testers paid by the number of cows tested;
- Packers paid by the number of crates filled; and
- Drivers paid by the number of miles driven.

In recent years, there has been some confusion amongst employers as to whether "production bonuses" constitute non-discretionary bonuses or piece work. In this regard, it is worth noting that the title or label that a "bonus" is given is irrelevant. Instead, employers must look to the unit of measurement that the bonus is based on. If the unit of measurement is related to the quantity produced or tasks completed, then the "bonus" is considered a piece rate. On the other hand, if the bonus is tied to a factor other than quantity, than the bonus is likely not a piece rate.

The following "production" bonuses would be considered piece rates (despite being labeled "production" bonuses) because the amount of the bonus is tied to the quantity of things produced or completed:

- $1.00 for every bucket of fruit harvested.
- $100 for every 100 pounds of produce harvested.
- $50 for every row of trees thinned.

On the other hand, the following bonuses would likely not be considered piece-rate systems because the unit of measurement is something other than a unit of production:

- $0.05 for every hour of work without a safety violation.
- $100 for completing a season without any quality of work infractions.
- $50 for completing a month without any occurrences of tardiness.

Ultimately, regardless of the label that an incentive plan is given, the more that the plan appears to be tied to the quantity of work performed, the more likely it will be considered a piece-rate system, which should be calculated and compensated according to the rules discussed in this section. Given that there are separate requirements for each kind of incentive plan (i.e., flat sum bonuses, piece-rate systems, and other bonus systems), it is critical that employers correctly classify their incentive plans. In this regard, employers are strongly encouraged to work closely with experience labor counsel to analyze their plans.

California's unique piece-rate rules

Under federal law, an employer can comply with minimum wage if the average hourly rate across a *pay period* meets or exceeds federal minimum wage. Thus, under federal law, an employer can simply divide total piece-rate earnings by total hours worked in the pay period to make sure that the employer has complied with minimum wage. Under this method, an employee might earn less than minimum wage on a given day during the pay period, but as long as the employee averages minimum wage, there is no violation.

However, under California law, employees are entitled to minimum wage for **each and every hour** that they work. Furthermore, California has specific rules for calculating compensation on a piece-rate basis. Accordingly, employers must apply California law over federal law with respect to calculating pay for piece workers.

Assembly Bill 1513

Effective January 1, 2016, AB 1513 established compensation and wage statement requirements for rest and recovery periods and "other nonproductive time" for employees being compensated on a piece-rate basis.

AB 1513's requirements for piece-rate compensation

Regardless of how the piece-rate plan is structured, employers are prohibited from treating the piece-rate compensation as including compensation for rest and recovery periods and non-productive time. In other words, employees must be compensated for rest and recovery periods separate from any piece-rate compensation, and the rate of compensation for rest and recovery periods must be the higher of:

- The employee's "average hourly rate" for the workweek (discussed below); and
- The applicable minimum wage.

In other words, the hourly rate of compensation for rest and recovery periods must be the same as the hourly rate (averaged over the workweek) that an employee earned during the workweek for time during which the employee was performing work. If, for some reason, this average hourly rate comes out to less than minimum wage, then the employee must be paid at minimum wage.

Calculating gross compensation for piece-rate workers

Calculating a piece-rate worker's weekly gross compensation involves a four-step process:

Step 1—Piece-rate compensation: The first step is the easiest. In order to calculate the total piece-rate compensation, multiple the number of pieces earned during the workweek by the piece-rate. For example, ABC Company agrees to pay its employees $1.00 per bin packed, and William Worker packs 675 bins, then William's total piece-rate compensation is equal to $675.00.

Step 2—Non-productive time compensation: The next step is to calculate the total non-productive time (or, "NPT") compensation. This step requires understanding both the concept of "non-productive time," or as the Labor Code refers to it, "other non-productive time," and the requirements for compensating non-productive time.

WHAT IS NON-PRODUCTIVE TIME? California Labor Code section 226.2 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." Accordingly, what constitutes "other nonproductive time" under this definition will vary depending upon the nature of the work. If, for example, William Worker works in a packinghouse and is paid according to the number of boxes he packs, then non-productive time would be any time that William is at work, but not engaged in activities directly related to packing, e.g., downtime spent waiting for the packing line to be serviced or repaired, time spent in trainings, time spent talking with his supervisor, etc.