What is a Piece Rate Employer to Do?
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WHAT IN THE HECK IS GOING ON?
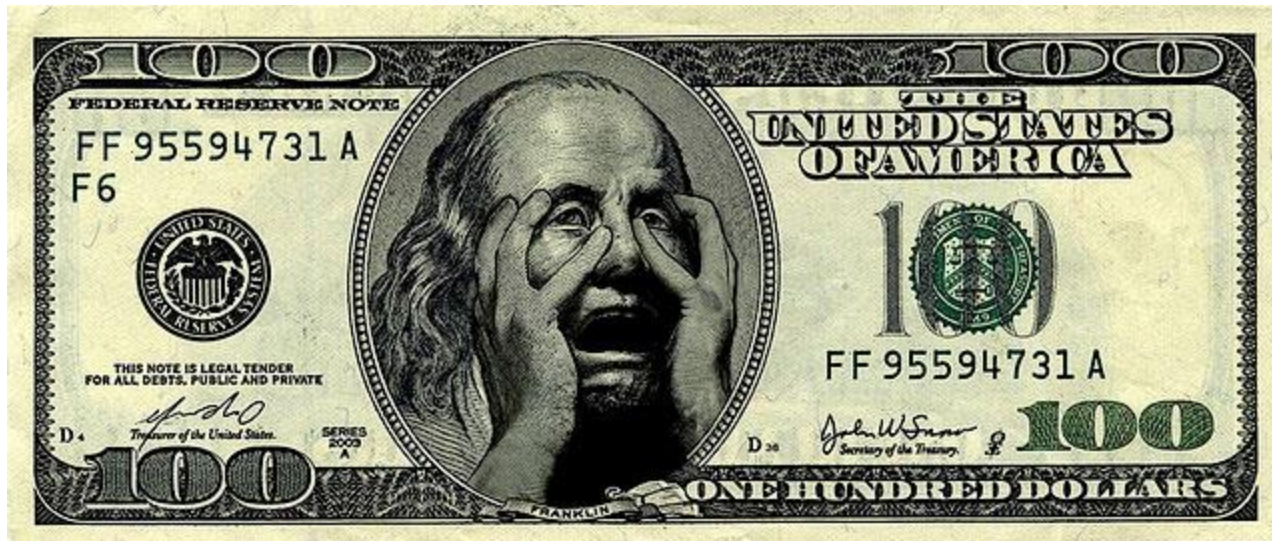
Major Court Decisions Affect Minimum Wage and Piece Rates

Gonzalez v. Downtown LA Motors

- Decided March 6, 2013. Review denied by Supreme Court.
    - NOT A CHANGE IN THE LAW!
    - This decision interprets what the law has always been.
    - This decision is final.

- Auto mechanics
    - Credited for "flag hours" – time spent actually performing repairs. Flag hours paid at designated rates - $17-$32 per hour.
    - Non-productive hours tracked.
    - Employees paid the higher of minimum wage or flag hour total.
    - Employer determined minimum wage by calculating flag horu total and comparing it to minimum wage total.
    - Lots of down time when no repairs are performed (no cars), and miscellaneous work (training, clean up, meetings, etc.) were performed.
    - Techs were not permitted to leave during down time.
    - At a court trial, the employer was ordered to pay over $1.2 million in wages, penalties, and interest.
- Employer appealed.

Court of Appeal Decision

- "State wage and hour laws reflect the strong public policy favoring protection of workers' general welfare and society's interest in a stable job market."

  - **Wage and hour laws are interpreted liberally to protect workers.**

- Hours worked = time during which an employee is subject to the control of an employer, and includes all time the employee is suffered or permitted to work, whether or not required to do so.

- Allowing an employer to average its employees' compensation over the their total hours worked contravenes the Labor Code and the Wage Orders by effectively reducing the employees' contractual rate of compensation.

Court of Appeal Decision

- Employees performed non-piece rate tasks at their employer's control and direction.

  - ☐ Even time spent waiting was at the employer's control and direction, because employees were not permitted to leave.

- Hours worked = time during which an employee is subject to the control of an employer, and includes all time the employee is suffered or permitted to work, whether or not required to do so.

- **CONCLUSION: Employers may not average piece rate earnings to cover waiting time and other non-piece rate tasks.**

- **Specifically did not address rest breaks.**

Bluford v. Safeway Stores

- Decided May 8, 2013. Review denied by Supreme Court.
  - □ NOT A CHANGE IN THE LAW!
  - □ This decision interprets what the law has always been.
  - □ This decision is final.

- Truck Drivers under union contract
  - □ Paid mileage rate for driving, fixed flat rate for specified tasks (e.g., paid for number of pallets delivered and picked up), hourly rates for a pre-determined number of minutes (e.g. 10 minutes for set up time at each store), and an hourly rate for delays beyond the driver's control (breakdowns, highway construction, etc.)
  - □ Meal periods recorded. Rest period authorization acknowledged in writing.
  - □ Trial court refused to certify a class.
- Plaintiff appealed.

Court of Appeal Decision

- "Common proof demonstrates that Safeway did not **separately compensate drivers for their rest periods** in the manner required by California law."

- "There is no doubt Safeway was required to provide the drivers with paid rest periods. . . . **Rest periods must be separately compensated in a piece rate system.**"

- **"Employees must be compensated for each hour worked at either the legal minimum wage or the contractual hourly rate, and compliance cannot be determined by averaging hourly compensation."**

- Management testified that the rates were set at a level designed to compensate for the rest periods, but the court stated that this was merely prohibited averaging.

Court of Appeal Decision

- Safeway argued that the decision would disrupt piece rate systems statewide.

- "Yet Safeway itself already pays drivers an hourly rate for certain defined and recorded tasks. There is no evidence that its compensation system will collapse by complying with controlling law and having to include one additional element – rest periods – that must be separately paid at an hourly rate."

Compliance Options

- **Hourly Floor (safest method)**
    - Set hourly floor (minimum wage or guaranteed hourly minimum)
    - Pay hourly
    - Establish piece rate as an incentive bonus – calculate to allow historical earnings.
    - Challenge: Acceptance in some commodities.

- **Pure Piece Rate plus Minimum Wage**
    - Pay pure piece rate, but record and pay non-productive work on an hourly basis.
    - Recordkeeping is the challenge.
    - Greater control in the fields will be necessary…and greater recordkeeping burden on foremen.
- REMEMBER YOUR CHECK STUBS!!

Agency Response

- **DLSE**
  - So far, very little guidance.
  - Field offices are refusing to provide information in writing.
  - "We thought you would all go hourly."
  - Expect inconsistent enforcement.

- **US DOL**
  - Federal law allows averaging for minimum wage.
  - In recent years, the federal government has sought to enforce state law through MSPA, without much progress.
  - Unlikely to see DOL push aggressively on this…but possible.
  - Federal minimum wage violations on piece rate continue to focus on multiple people working under a single name.

How Can Employers Defend themselves?

- This is as bad as it gets.

    - Potentially can be applied retroactively to establish liability at all piece rate operations.

    - Change ASAP is critical to avoid exposure.

- If sued, take one of two approaches.
    - ☐ Cash out the other side – early settlement in order to "clear the books" and move forward.
    - ☐ Dig in for the long fight.

- Some employers will be forced to fight retroactive application of these decisions.

Retroactive Application of Case Law

- Case law has held that considerations of fairness and public policy require the prospective application of a judicial decision when that decision changes a settled rule of law that the parties have relied.

- Other factors which may be considered in determining whether a judicial decision should prospectively or retroactively apply include:

  - ☐ The nature of the change as substantive or procedural,

  - ☐ Retroactivity's effect on the administration of justice, and

  - ☐ The purposes to be served by the new rule and the ability of litigants to foresee the upcoming change.

Retroactive Application of Case Law

■ Courts have held that "unlike statutory enactments, judicial decisions, particularly those in tort cases, are generally applied retroactively."

■ Courts will make exceptions, focusing on:

☐ How many cases are affected?

☐ Did people reasonably rely on the prior rule?

☐ The purposes to be served by the new rule and the ability of litigants to foresee the upcoming change.

☐ How foreseeable was the change in the law?

Retroactive Application of Case Law

- Arguments in favor of prospective application only:
  - ☐ Long history of piece rate compensation under the old rules

  - ☐ Virtually all piece rate employers in ag are affected/

  - ☐ DLSE never enforced minimum wage for "non-productive time.

  - ☐ Employers relied on state approved FLC training.

  - ☐ Even proponents of the rule tried to pass a bill making this change (SB 1538 in 2004).

Retroactive Application of Case Law

- Arguments in favor of retroactive application:

  - ☐ The language of California's minimum wage law has not changed.

  - ☐ Multiple cases in federal and state court predicted this change, and DLSE manuals suggest this rule as early as 2002.

  - ☐ California has strong public policy in favor of workers.

    - Employee advocates can argue that employers may be hurt by this, but employees have been hurt worse.

  - ☐ California courts are generally friendly to labor, and unfriendly to agriculture.

Time to Circle the Wagons