

PRACTICAL SOLUTIONS TO WAGE AND HOUR CHALLENGES

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Minimum Wage



- California minimum wage: \$9.00 per hour July 1, 2014, and \$10.00 per hour effective January 1, 2016
- Federal minimum wage is \$7.25 per hour effective July 24, 2009.
- All California employees must receive minimum wage for all hours worked in each day, whether they are paid on a piece rate, salary, or commission basis.
- 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.
 - **Employers cannot average the piece rate earnings, and must compensate employees for rest breaks and other non-productive time. The courts say minimum wage, the DLSE says average rate based on production.**
- 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 Labor Commissioner will not allow California employers to use the average rate over any period of time to satisfy the minimum wage obligation.
- **Remember compensable time issues! “Suffer or permit” / subject to control.**

Calculating Minimum Wage and Piece Rate

- Piece rate employees must receive hourly compensation for all “non-productive time.”
- Minimum wage for all time EXCEPT paid rest breaks.
 - There must be “no deduction from wages” during rest breaks.
 - DLSE believes this means the average productive rate must be paid to maintain worker compensation levels.
- How is this calculated?

Piece Rate Calculations: Minimum Wage

- Example 1: Piece rate employee works 40 hours, five days in a week. Employee takes two rest periods per day, and earns \$360.00 for the week.
 - Total rest time = 10 min x 2 rest periods x 5 days = 100 minutes = 1.667 hours.
 - Productive time = 40 hours – 1.667 hours = 38.333 hours
 - “Productive rate” = \$360 / 38.33 hours = \$9.39 per hour.
Remember that this calculation must exceed minimum wage, or you must make up the shortfall.
 - Rest break hourly compensation = 1.667 hours x \$9.39 per hour = \$15.65.

- Total Weekly Compensation = \$360.00 + \$15.65 = \$375.65.

Piece Rate Calculations: Overtime

- When employees work at more than one rate of pay employers must use a **weighted average** to determine the regular rate.
 - 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 of the regular rate of pay for time and a half hours, and an additional full regular rate for all double time hours.

Piece Rate Calculations: Overtime

- **Piece Rate Only (Traditional Calculation):** Divide total piece rate earnings for the week by all hours worked in the week (including overtime). Pay one half of this rate times the number of time and a half hours, and the full rate for all double time hours
 - Example: Employee works six days in a workweek, usually 10 hours per day. This week, the employee works 3 11 hour days (3 hours overtime) and earns a total of \$1000 working piece rate.
 - $\$1000 / 63 \text{ hours} = \15.87 per hour
 - $.5 \times \$15.87 \text{ per hour} = \$7.94 \text{ per hour} \times 3 \text{ o/t hours} = \23.82
 - Total wages due = **\$1023.82**

- **The problem? Does not account for rest break compensation.**

Piece Rate Calculations: Overtime

- Example: Employee works six days per week, 10 hours per day, but works three hours overtime (three 11 hour days). 3 rest breaks are taken on the 11 hour days, and 2 are taken on the 10 hour days. Total hours worked = 63. Employee earns \$1000 piece rate compensation.
 - Total rest time = (10 min x 2 rest periods x 3 days) + (10 min x 3 rest periods x 3 days) = 150 minutes = 2.5 hours.
 - Productive time = 63 hours – 2.5 hours = 60.5 hours
 - “Productive rate” (regular rate of pay) = \$1000 / 60.5 hours = \$16.53 per hour.
 - Rest break hourly compensation = 2.5 hours x \$16.53 per hour = \$41.33. Total wages before overtime = **\$1041.33**.
 - This calculation has already incorporated base wages. **You can turn this into a weighted average calculation if there is other hourly work by using the rate for that work for the total wages before overtime. Just apply the base rate for that hourly work and add to the pre-overtime compensation before determining regular rate of pay.**
- Overtime premium wage = .5 x \$16.53 per hour x 3 overtime hours = \$24.80.
Remember – the breaks were paid at an hourly rate that is equal to the regular rate of pay!
- **Total Compensation due: \$1041.33 + \$24.80 = \$1066.13.**

Changing Clothes and Washing Up

- Other types of nonproductive 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. However, employees are not entitled to compensation where the time spent changing clothes is "de minimis."

Other Compensable Time Issues

- Even time that is intended to be for the benefit of employees can be compensable. Example: Mandatory exercise and stretching period prior to the beginning of work is compensable and must be on the clock and paid.
- Employers must train their supervisors to prevent employees from performing any work prior to the scheduled start time, and should periodically watch the fields before the scheduled starting time to ensure that employees do not perform any work before the starting time.
- 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 such claims are good recordkeeping 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.

Field to Field Travel

- It is very common for employees to finish one field, and then move to another field during the work day. This is one of the riskiest practices in agriculture.
- **Compensable time:** The time spent traveling must be compensated, accounted for in minimum wage calculations, and counted toward overtime. Remember, for piece rate workers this is nonproductive time that needs to be paid.
- **Expense Reimbursement:** If workers are not provided transportation, vehicle expenses (IRS Mileage rate) must be paid.
- **Workers Compensation:** If workers must move from place to place in the workday, and are not provided transportation, then workers' compensation will cover the travel to and from work, and will cover any accidents.
- **MSPA:** By requiring people to move, but not providing transportation are we expanding exposure by “causing transportation to be used?”

Movement Between Wage Orders

- Many agricultural employees switch duties during the workweek, and even during the workday. This can bring them under different overtime requirements of the various IWC orders and the FLSA.
- ***Example: Grower with a winery***
- Field work is scheduled for 10 hours a day, six days a week. Winery work is scheduled for eight hours a day, five days a week.
 - The field work falls under IWC Order 14. An employee who performs field work for no more than 10 hours on a weekday and no more than six workdays in a workweek is not entitled to overtime.
 - In contrast, the winery work falls under either IWC Order 8 (if grapes grown by other farmers are processed there) or IWC Order 13 (if grapes grown by only that farmer are processed there). No matter which of those two IWC orders applies, an employee working in the winery is entitled to overtime after 8 hours in a day and 40 hours in a week.
- Problems can arise, however, when an employee switches from the field to the winery, or vice versa, during either the same workweek or the same workday.
 - An employee who switches during a workday from work covered by one IWC order to another must be paid overtime if the order under which he is working requires it be paid for that part of the workday.

Movement Between Wage Orders

Impact of the FLSA

- The FLSA requires overtime after 40 hours per workweek, but it specifically excludes agricultural work from its coverage.
- An employee who performs **any amount** of nonagricultural work during a workweek is entitled to overtime after 40 hours worked, even if he performs mostly agricultural work during that workweek.
- **Work in a winery is not agricultural work under the FLSA.** An employee who switches between the winery and the fields during a workweek is deemed a nonagricultural employee under the FLSA for the entire workweek and entitled to overtime after 40 hours worked, with both his winery and field work counted toward that limit and beyond.
- While such an employee is entitled to FLSA overtime for working more than 40 hours of mixed agricultural and non-agricultural work in a workweek, he might not be entitled to overtime under either IWC Order 8 or 14. This is one of the rare examples where a California lawyer must follow the FLSA over California law because the FLSA is more favorable to the employee.
- As many variables exist in the overtime analysis for agricultural employment, it is important to thoroughly assess each situation. Failure to do so could result in potential overtime liability.
- *Employers who allow employees to move between field work and winery operations must keep accurate records that show how many hours employees work in different types of work, and what time of day they perform that work in order to ensure proper payment of overtime.*

Rest Breaks

■ Rest Breaks: Basic Requirements:

- Authorize and permit ten (10) net minutes of rest for each four hours (or major fraction thereof) worked. Anything over 2 hours is a major fraction of four hours. **Additional breaks must be made available under the heat stress regulation. Remember that rest breaks must be paid!**
- If an employee works less than 3.5 hours, no rest period need be authorized.
- Rest periods must be provided as near as is practicable to the middle of each work period.
- Rest breaks 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.
- Rest breaks are paid time and are controlled by the employer, so employees may be required to remain on the premises.

- **Penalty for failure to provide:** One additional hour of pay at their regular rate for each day that an employer fails to authorize and permit a rest break.

Meal Breaks

■ Meal Breaks: Basic requirement:

- “Provide” (Authorize and permit under Wage Order 14) at least a thirty (30) minute duty free meal after no more than five (5) hours of work.
- If six (6) hours will complete the day of work, then the meal period may be waived by the employee.
- Meal periods may be unpaid if they are at least thirty (30) minutes long and if the employee is relieved of all duty and is free to leave the premises.
- If employees must remain on the premises to eat, then the employer must provide a suitable place for them to eat. If employees are not free to leave during the meal period, it is an on-duty meal period.
- The employer satisfies its obligation by notifying employees of the right to take the meal break, providing a reasonable opportunity for them to do so, and by not interfering with the ability to take the meal. **WAIVERS ARE RISKY!**

- **Meal periods must be recorded.** The record must have the time of day when each employee started and ended a meal period.

Tools & Equipment

■ Tools and Equipment

- 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.
- 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. (Except safety devices required by OSHA)
- 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.
- Employers cannot charge employees who lose or break the employer's tools or equipment without facing the possibility of an illegal payroll deduction.
- Uniforms must be supplied by the employer **if required**.
- **Issues:** Clippers, pruning shears. Tool Maintenance – When, where, how?

Defining the Workday and Workweek

- Workweek: Any seven consecutive 24 hour periods
- Workday: Any 24 hour period.
- Both can be defined by the employer.
 - More than one workday can be defined.
- WHY?
- Saturday – Sunday is the default
- *Sunday – Saturday can minimize seventh day overtime*

The Night Harvest Problem

- Many vineyards unknowingly incur overtime due to overnight shifts.
 - Overtime can be calculated by the length of the shift. Assume the following work schedule with no defined work day or work week:
 - Sunday: 5:00 pm – 3:30 am (less one half hour for lunch) = 10 hours
 - Monday: 5:00 pm – 3:30 am (less one half hour for lunch) = 10 hours
 - Tuesday: 5:00 pm – 3:30 am (less one half hour for lunch) = 10 hours
 - Wednesday: OFF = 0 hours
 - Thursday: 5:00 pm – 3:45 am (less one half hour for lunch) = 10:15 hours
 - Friday: 5:10 pm – 3:30 am (less one half hour for lunch) = 10 hours
 - Saturday: 5:00 pm – 3:30 am (less one half hour for lunch) = 10 hours
- **By the length of the shift, the employee works 15 minutes of overtime on Thursday.**
- The problem:
 - The workday normally runs with the **calendar day**, unless defined otherwise by the Company in writing.
- The solution:
 - Defining a workday in writing for overnight shifts that coincides with the shift, such as a 12:00 pm to 12:00 am workday, in order to keep the entire shift within a single 24 hour period.

The Night Harvest Problem



<u>Sun</u>	<u>Mon</u>	<u>Tue</u>	<u>Wed</u>	<u>Thu</u>	<u>Fri</u>	<u>Sat</u>
12:01 am – 3:30 am (3.5) --	12:01 am – 3:30 am (3.5) --	12:01 am – 3:30 am (3.5) --	12:01 am – 3:30 am (3.5)	0 -- 5:00 pm – 9:00 pm (4.0) 9:30 pm – midnight (2.5)	12:01 am – 3:45 am (3.8) -- 5:10 pm – 9:10 pm (4.0) 9:40 pm – midnight (2.4)	12:01 am – 3:40 am (3.7) -- 5:00 pm – midnight (7.0)
5:00 pm – 9:00 pm (4.0) 9:30 pm – midnight (2.5)	5:00 pm – 9:00 pm (4.0) 9:30 pm – midnight (2.5)	-- 5:00 pm – 9:00 pm (4.0) 9:30 pm – midnight (2.5)	37 HOURS OFF!			
10.0	10.0	10.0	3.5	6.5	10.2	10.7

Total Overtime: 8.2 @ time and a half; 2.7 at double time. **Because the worker did not get a full calendar day off of work, he has hours worked on each day of the seventh day workweek, triggering seventh day overtime.**

A night shift workday starting at noon solves the problem.

Sun	12:00 AM
	1:00 AM
	2:00 AM
	3:00 AMShift Ends (3:30 am)
	4:00 AM
	5:00 AM
	6:00 AM
	7:00 AM
	8:00 AM
	9:00 AM
	10:00 AM
	11:00 AM
12:00 PM	
1:00 PM	
2:00 PM	
3:00 PM	
4:00 PM	
5:00 PMShift Starts	
6:00 PM	
7:00 PM	
8:00 PM	
9:00 PM	
10:00 PM	
11:00 PM	
Mon	12:00 AM
	1:00 AM
	2:00 AM
	3:00 AMShift Ends (3:30 am)
	4:00 AM
	5:00 AM
	6:00 AM
	7:00 AM
	8:00 AM
	9:00 AM
	10:00 AM
	11:00 AM
12:00 PM	
1:00 PM	
2:00 PM	
3:00 PM	
4:00 PM	
5:00 PMShift Starts	
6:00 PM	
7:00 PM	
8:00 PM	
9:00 PM	
10:00 PM	
11:00 PM	
12:00 AM	
Tue	12:00 AM

FEELING FRUSTRATED?





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