

RESOLUTION 02-04-2016

DIGEST

Payment of Wages: Piece Rate Compensation

Amends Labor Code section 226.2 to limit the requirement that an employer use due diligence to locate and pay former employees who no longer work for the employer and who have relocated.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 226.2 to read as follows:

§226.2

1 This section shall apply for employees who are compensated on a piece-rate basis for any
2 work performed during a pay period. This section shall not be construed to limit or alter
3 minimum wage or overtime compensation requirements, or the obligation to compensate
4 employees for all hours worked under any other statute or local ordinance. For the purposes of
5 this section, "applicable minimum wage" means the highest of the federal, state, or local
6 minimum wage that is applicable to the employment, and "other nonproductive time" means time
7 under the employer's control, exclusive of rest and recovery periods, that is not directly related to
8 the activity being compensated on a piece-rate basis.

9 (a) For employees compensated on a piece-rate basis during a pay period, the following
10 shall apply for that pay period:

11 (1) Employees shall be compensated for rest and recovery periods and other
12 nonproductive time separate from any piece-rate compensation.

13 (2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to
14 the other items specified in that subdivision, separately state the following, to which the
15 provisions of Section 226 shall also be applicable:

16 (A) The total hours of compensable rest and recovery periods, the rate of compensation,
17 and the gross wages paid for those periods during the pay period.

18 (B) Except for employers paying compensation for other nonproductive time in
19 accordance with paragraph (7), the total hours of other nonproductive time, as determined under
20 paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay
21 period.

22 (3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly
23 rate that is no less than the higher of:

24 (i) An average hourly rate determined by dividing the total compensation for the
25 workweek, exclusive of compensation for rest and recovery periods and any premium
26 compensation for overtime, by the total hours worked during the workweek, exclusive of rest and
27 recovery periods.

28 (ii) The applicable minimum wage.

29 (B) For employers who pay on a semimonthly basis, employees shall be compensated at
30 least at the applicable minimum wage rate for the rest and recovery periods together with other
31 wages for the payroll period during which the rest and recovery periods occurred. Any additional
32 compensation required for those employees pursuant to clause (i) of subparagraph (A) is payable
33 no later than the payday for the next regular payroll period.

34 (C) (i) Employers who meet the requirements in clause (ii) shall have until April 30,
35 2016, to program their payroll systems to perform and record the calculation required by clause
36 (i) of subparagraph (A) and comply with the itemized statement requirements in paragraph (2),
37 so long as the employer pays piece rate employees for all rest and recovery periods at or above
38 the applicable minimum wage from January 1, 2016, to April 30, 2016, inclusive, and pays the
39 difference between the amounts paid and the amounts that would be owed under clause (i) of
40 subparagraph (A), together with interest calculated in accordance with subdivision (c) of Section
41 98.1, by no later than April 30, 2016.

42 (ii) For an employer to meet the requirements of this subparagraph, all of the following
43 shall apply:

44 (I) The employer was acquired by another legal entity on or after July 1, 2015, and before
45 October 1, 2015.

46 (II) The employer employed at least 4,700 employees in this state at the time of the
47 acquisition.

48 (III) The employer employed at least 17,700 employees nationwide at the time of the
49 acquisition.

50 (IV) The employer was a publicly traded company on a national securities exchange at
51 the time of the acquisition.

52 (4) Employees shall be compensated for other nonproductive time at an hourly rate that is
53 no less than the applicable minimum wage.

54 (5) The amount of other nonproductive time may be determined either through actual
55 records or the employer's reasonable estimates, whether for a group of employees or for a
56 particular employee, of other nonproductive time worked during the pay period.

57 (6) An employer who is found to have made a good faith error in determining the total or
58 estimated amount of other nonproductive time worked during the pay period shall remain liable
59 for the payment of compensation for all hours worked in other nonproductive time, but shall not
60 be liable for statutory civil penalties, including, but not limited to, penalties under Section 226.3,
61 or liquidated damages based solely on that error, provided that both of the following are true:

62 (A) The employer has provided the wage statement information required by subparagraph
63 (B) of paragraph (2) and paid the compensation due for the amount of other nonproductive time
64 determined by the employer in accordance with the requirements of paragraphs (4) and (5).

65 (B) The total compensation paid for any day in the pay period is no less than what is due
66 under the applicable minimum wage and any required overtime compensation.

67 (7) An employer who, in addition to paying any piece-rate compensation, pays an hourly
68 rate of at least the applicable minimum wage for all hours worked, shall be deemed in
69 compliance with paragraph (4).

70 (b) Notwithstanding any other statute or regulation, the employer and any other person
71 shall have an affirmative defense to any claim or cause of action for recovery of wages, damages,
72 liquidated damages, statutory penalties, or civil penalties, including liquidated damages pursuant
73 to Section 1194.2, statutory penalties pursuant to Section 203, premium pay pursuant to Section
74 226.7, and actual damages or liquidated damages pursuant to subdivision (e) of Section 226,
75 based solely on the employer's failure to timely pay the employee the compensation due for rest
76 and recovery periods and other nonproductive time for time periods prior to and including
77 December 31, 2015, if, by no later than December 15, 2016, an employer complies with all of the
78 following:

79 (1) The employer makes payments to each of its employees, except as specified in
80 paragraph (2), for previously uncompensated or undercompensated rest and recovery periods and
81 other nonproductive time from July 1, 2012, to December 31, 2015, inclusive, using one of the
82 formulas specified in subparagraph (A) or (B):

83 (A) The employer determines and pays the actual sums due together with accrued interest
84 calculated in accordance with subdivision (c) of Section 98.1.

85 (B) The employer pays each employee an amount equal to 4 percent of that employee's
86 gross earnings in pay periods in which any work was performed on a piece-rate basis from July
87 1, 2012, to December 31, 2015, inclusive, less amounts already paid to that employee, separate
88 from piece-rate compensation, for rest and recovery periods and other nonproductive time during
89 the same time, provided that the amount by which the payment to each employee may be
90 reduced for amounts already paid for other nonproductive time shall not exceed 1 percent of the
91 employee's gross earnings during the same time.

92 (2) Payment shall not be required for any part of the time period specified in paragraph
93 (1) for which either of the following apply:

94 (A) An employee has, prior to August 1, 2015, entered into a valid release of claims not
95 otherwise banned by this code or any other applicable law for compensation for rest and
96 recovery periods and other nonproductive time.

97 (B) A release of claims covered by this subdivision executed in connection with a
98 settlement agreement filed with a court prior to October 1, 2015, and later approved by the court.

99 (3) By no later than July 1, 2016, the employer provides written notice to the department
100 of the employer's election to make payments to its current and former employees in accordance
101 with the requirements of this subdivision and subdivision (c).

102 (A) The notice must include the legal name and address of the employer and must be
103 mailed or delivered to the Director of Industrial Relations, Attn: Piece-Rate Section, 226.2
104 Election Notice, 1515 Clay Street, 17th Floor, Oakland, CA 94612. The director may provide for
105 an email address to receive notices electronically in lieu of postal mail.

106 (B) The department shall post on its Internet Web site either a list of the employers who
107 have provided the required notice or copies of the actual notices. The list or notices shall remain
108 posted until March 31, 2017.

109 (4) The employer calculates and begins making payments to employees as soon as
110 reasonably feasible after it provides the notice referred to in paragraph (3) and completes the
111 payments by no later than December 15, 2016, to each employee to whom the wages are due, or
112 to the Labor Commissioner pursuant to Section 96.7 for any employee whom the employer
113 cannot locate.

114 (5) The employer provides each employee receiving a payment with an accompanying
115 accurate statement that contains all of the following information:

116 (A) A statement that the payment has been made pursuant to this section.

117 (B) A statement as to whether the payment was determined based on the formula in
118 subparagraph (A) of paragraph (1), or on the formula in subparagraph (B) of paragraph (1).

119 (C) If the payment is based on the formula in subparagraph (A) of paragraph (1), a
120 statement, spreadsheet, listing, or similar document that states, for each pay period for which
121 compensation was included in the payment, the total hours of rest and recovery periods and other
122 nonproductive time of the employee, the rates of compensation for that time, and the gross wages
123 paid for that time.

124 (D) If the payment is based on the formula in subparagraph (B) of paragraph (1), a
125 statement, spreadsheet, listing, or similar document that shows, for each pay period during which
126 the employee had earnings during the period from July 1, 2012, through December 31, 2015,
127 inclusive, the gross wages of the employee and any amounts already paid to the employee,
128 separate from piece-rate compensation, for rest and recovery periods and other nonproductive
129 time.

130 (E) The calculations that were made to determine the total payment made.

131 (c) An employer who makes a reasonable and good faith effort to make the payments
132 described in paragraph (1) of subdivision (b), and to provide the accurate statement described in
133 paragraph (5) of subdivision (b), to all employees, but who solely through good faith error fails
134 to make a payment to one or more employees as described in paragraph (1) of subdivision (b), or
135 to provide an accurate statement as described in paragraph (5) of subdivision (b), shall not lose
136 the affirmative defense set forth in subdivision (b) as a result of that good faith error if the
137 employer, within 30 days of discovery or notice of the error, makes the payment described in
138 paragraph (1) of subdivision (b) together with accrued interest calculated in accordance with
139 subdivision (c) of Section 98.1 for any delay in payment after December 15, 2016, to the
140 employees and accompanies the payment with an accurate statement as described in paragraph
141 (5) of subdivision (b). The employer shall have the burden of proving that a failure to pay an
142 employee was solely the result of good faith error.

143 (d) (1) If the employer seeks to utilize the affirmative defense in subsection (b), the~~The~~
144 employer shall use due diligence, including, but not limited to, the use of people locator services,
145 to locate and pay former employees who no longer work for the employer in the event that
146 former employees have relocated. For payments made to the Labor Commissioner pursuant to
147 paragraph (4) of subdivision (b), the employer shall pay the Labor Commissioner an additional
148 administrative fee equal to one-half of 1 percent of the aggregate payments made, or two
149 thousand five hundred dollars (\$2,500), whichever is less, for deposit into the Labor
150 Enforcement and Compliance Fund.

151 (2) Any payments made to the Labor Commissioner pursuant to paragraph (4) of
152 subdivision (b) shall be accompanied by a statement, in both printed and electronic format, that
153 identifies each employee for whom payment is made, the amount payable to that employee, and
154 if available, the employee's last known address and social security number.

155 (3) The employer shall preserve all records of hours worked, calculations of hours
156 worked, and records of payments made to employees and the Labor Commissioner pursuant to
157 subdivision (b) and this subdivision, until December 16, 2020, and furnish the records related to
158 an employee on request by the employee.

159 (e) Beginning on January 1, 2016, and ending on July 1, 2016, if the employer has not
160 provided the notice required by paragraph (3) of subdivision (b), or ending on December 15,
161 2016, if the employer has provided the notice required by paragraph (3) of subdivision (b), the
162 statute of limitations shall be tolled for that period of time for any claims based on failure to fully
163 compensate employees compensated on a piece-rate basis for rest and recovery periods and other
164 nonproductive time prior to January 1, 2016.

165 (f) Any notice to the Labor and Workforce Development Agency on or before December
166 31, 2015, pursuant to paragraph (1) of subdivision (a) of Section 2699.3, alleging violations
167 based upon failure to properly compensate employees for rest and recovery periods, is void as to
168 those alleged violations. Beginning January 1, 2016, and subject to the tolling provisions of
169 subdivision (e), an aggrieved employee or representative shall give written notice by certified

170 mail to both the Labor and Workforce Development Agency and the employer of any violations
171 based on failure to compensate employees fully for rest and recovery periods and other
172 nonproductive time.

173 (g) The provisions in subdivisions (b), (c), (d), (e), and (f) shall not apply to any of the
174 following:

175 (1) Damages and penalties previously awarded in an order or judgment that was final and
176 not subject to further appeal as of January 1, 2016.

177 (2) Claims based on the failure to provide paid rest or recovery periods or pay for other
178 nonproductive time for which all of the following are true:

179 (A) The claim was asserted in a court pleading filed prior to March 1, 2014, or was
180 asserted in an amendment to a claim that relates back to a court pleading filed prior to March 1,
181 2014, and the amendment or permission for amendment was filed prior to July 1, 2015.

182 (B) The claim was asserted against a defendant named with specificity and joined as a
183 defendant, other than as an unnamed (DOE) defendant pursuant to Section 474 of the Code of
184 Civil Procedure, in the pleading referred to in subparagraph (A), or another pleading or
185 amendment filed in the same action prior to January 1, 2015.

186 (3) Claims that employees were not advised of their right to take rest or recovery breaks,
187 that rest and recovery breaks were not made available, or that employees were discouraged or
188 otherwise prevented from taking such breaks.

189 (4) Claims for unpaid wages, damages, and penalties that accrue after January 1, 2016.

190 (5) Claims for paid rest or recovery periods or pay for other nonproductive time that were
191 made in any case filed prior to April 1, 2015, when the case contained by that date an allegation
192 that the employer has intentionally stolen, diminished, or otherwise deprived employees of
193 wages through the use of fictitious worker names or names of workers that were not actually
194 working.

195 (6) An employer that is a new motor vehicle dealer, as defined by Section 426 of the
196 Vehicle Code.

197 (h) Amendment to assert the affirmative defense provided in subdivision (b) in actions
198 filed on or after March 1, 2014, unless final and not subject to further appeal as of January 1,
199 2016, shall be permitted.

200 (i) Nothing in this section shall limit or bar any action or proceeding by the Labor
201 Commissioner or any private party for any failure to provide a rest and recovery period in
202 accordance with any provision of this code, any order of the Industrial Welfare Commission, or
203 any regulation adopted by the Department of Industrial Relations or any of its divisions, other
204 than actions or proceedings based solely on the employer's failure to timely pay the
205 compensation due for rest and recovery periods.

206 (j) Nothing in this section precludes a judge from awarding statutory, contractual, or
207 common fund attorney's fees or costs in connection with an action filed before October 1, 2015.

208 (k) This section shall remain in effect only until January 1, 2021, and as of that date is
209 repealed.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: As written, subsection (d), which requires the employer to use diligent efforts to locate all former employees, would apply to all employers who pay employees by piece rate. However, read in the context of the entire statute, it is apparent that the drafters only intended to impose this requirement if the employer is using the affirmative defense required in subsection (b), which requires the employer, among other things, to locate and pay all employees who were not paid for rest or recovery periods or other nonproductive time prior to the effective date of this statute.

The Solution: This resolution clarifies that the obligation to seek out former employees only applies if the employer is seeking to satisfy and utilize the affirmative defense provided in subsection (b).

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION:

Not known.

AUTHOR AND PERMANENT CONTACT: Melissa L. Bustarde, Esq., Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

* * * * *

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Labor Code section 226.2 to limit the requirement that an employer use due diligence to locate and pay former employees who no longer work for the employer and who have relocated. This resolution should be approved in principle because it corrects a drafting error in the statute.

As written, Labor Code section 226.2, subdivision (d), requires employers who have compensated employees on a piece work basis, without paying for non-productive compensable time, to use due diligence to locate and pay former employees. For former employees who have relocated, these efforts shall include, but not be limited to, the use of people locator services. Section 226.2, enacted in 2015, explains how employers are to compensate employees who work for a piece rate for their non-productive time, such as rest breaks and mandatory safety meetings.

Subdivision (b) provides a defense for employers who make good faith efforts to pay additional wages to workers who were compensated on a piece-rate basis.

As currently written, subdivision (d) requires all employers to locate and pay employees who have relocated. This amendment would impose that requirement only if the employer seeks to take advantage of the affirmative defense of subdivision (b). If read literally, section 226.2, subdivision (d), would require all employers to track down employees who were compensated on a piece work basis, whether or not the employer wishes to take advantage of the affirmative defense or prefers to wait until a lawsuit is started and fight or resolve the claim on its merits. It seems likely that the drafters intended subdivision (d) to apply only to those employers seeking to take advantage of the affirmative defense.