S248726

Case No. S248726

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT FLORES, individually, on behalf of others similarly situated, and on behalf of the general public,
Plaintiffs/Petitioners,
v.
DELTA AIR LINES, INC.,
Defendant/Respondent.

On Grant of Request to Decide Certified Questions from the United States Court of Appeals for the Ninth Circuit Pursuant to California Rules of Court, Rule 8.548
Ninth Circuit No. 17-15124

PETITIONERS' MOTION TO TAKE JUDICIAL NOTICE

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Counsel for Plaintiffs/Petitioners

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT:

Pursuant to Rule 8.252 of the California Rules of Court, Plaintiffs and Petitioners Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores ("Plaintiffs") hereby move the Court for an order taking judicial notice of the following legislative history of AB 1513 (codified at California Labor Code section 226.2):

- AB 1513, Analysis of Senate Committee on Labor and Industrial Relations, Hearing Date Sept. 3, 2015.
- AB 1513, Senate Floor Analysis, Sept. 11, 2015.

True and correct copies of this legislative history, attached hereto, were printed from http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1513. Pages 1-7 of the attachment contain the September 3, 2015 Analysis of Senate Committee on Labor and Industrial Relations; pages 8-15 of the attachment contain the September 11, 2016 Senate Floor Analysis.

These documents are relevant to the certified questions pending before this Court because the third question addresses the "*Armenta/Gonzalez* bar on averaging wages," and the legislative history confirms the Legislature's understanding that the court of appeal decision in *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 was

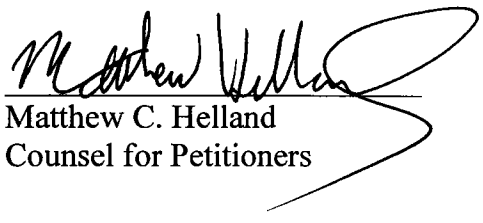
"in keeping with prior legal decision and statutes in California...." Attach. at 12.

This legislative history is properly subject to judicial notice under Evidence Code section 452(c) because it reflects official acts of the California Legislature. *See Elsner v. Uveges* (2004) 34 Cal.4th 915, 929 n.10 (judicial notice of legislative committee analysis); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 280 n. 9 ("committee reports ... are indisputably proper subjects of judicial notice"). Although the cited portions of the legislative history occurred before the district court's order granting summary judgment to Delta on Plaintiffs' minimum wage claims, the resulting statute (Labor Code section 226.2) did not take effect until after the district court's summary judgment order, which is why Plaintiffs did not file a request for judicial notice in the district court.

Pursuant to Rule 8.252(a)(3), Plaintiffs will serve a copy of this motion on Delta.

Dated: September 10, 2018

Respectfully submitted
NICHOLS KASTER, LLP
ALTSHULER BERZON LLP



Matthew C. Helland
Counsel for Petitioners

PROOF OF SERVICE

Case: *Oman v. Delta Airlines, Inc.*,
California Supreme Court No. S248726
(U.S. Court of Appeals for the 9th Circuit, No. 17-15124)

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On September 10, 2018, I served the following document(s):

PETITIONERS' MOTION TO TAKE JUDICIAL NOTICE

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

Thomas M. Peterson
Robert Jon Hendricks
Andrew P. Frederick
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, California 94105
Attorneys for Respondent Delta Air Lines, Inc.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this September 10, 2018 at San Francisco, California.

Jean Perley

SENATE COMMITTEE ON LABOR AND INDUSTRIAL RELATIONS
Senator Tony Mendoza, Chair
2015 - 2016 Regular

Bill No:	AB 1513	**Hearing Date:**	September 3, 2015
Author:	Williams		
Version:	August 27, 2015		
Urgency:	No	**Fiscal:**	Yes
Consultant:	Gideon L. Baum		

Subject: Employment: workers' compensation and piece rate compensation.

KEY ISSUE

Should the Legislature clarify the statutory requirements for piece-rate compensation?

Should the Legislature provide an affirmative defense and safe harbor for employers who, by December 15, 2016, fully compensate their employees, as specified, for all under-compensated or uncompensated rest periods, recovery periods, or unproductive time between July 1, 2012 and December 31, 2015?

ANALYSIS

Existing law requires that, when an employee is compensated on a "piece rate" basis, the employer must include in the employee's wage stub the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis. (Labor Code §226)

Existing law provides that, if an employee suffers injury as a result of a knowing and intentional failure by an employer to provide a wage stub, the employee is entitled to recover the greater of all actual damages or $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of $4,000, and is entitled to an award of costs and reasonable attorney's fees. (Labor Code §226 (e))

Existing law provides that the Industrial Welfare Commission with the ability to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.
(Labor Code §516)

Existing law require every employer to authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The employer must provide a rest period of 10 minutes for every 4 hours worked, and rest periods must be counted as hours worked and not be deducted from the employee's wages.
(IWC Wage Orders 1-15; Labor Code §226.7)

Existing law require that, if an employer fails to provide an employee a rest period, the employer must pay the employee 1 hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.
(IWC Wage Orders 1-15; Labor Code §226.7)

Existing law provides additional rest periods, known as recovery periods, to provide employees with a cooloff period to avoid heat illness. If an employer fails to provide an employee a recovery period, the employer must pay the employee 1 hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided. (Labor Code §226.7)

Existing court decisions require that nonproductive time, which is time under the employer's control for which the employee is not producing "pieces", rest periods, and recovery periods must be compensated separately and distinctly at the minimum wage or more. (*Gonzelez v. Downtown LA Motors* (215 Cal.App.4th 36 (2013)) and *Bluford v. Safeway Stores* (C066074 (2013)))

This bill would:

1) Codify the *Gonzalez* and *Bluford* decisions that nonproductive time, rest breaks, and recovery breaks are separately compensated;
2) Codify that, for rest and recovery periods, the rate of compensation is the higher of the average hourly rate or the applicable minimum wage;
3) Codify that, for nonproductive time, the rate of compensation is not less than the minimum wage; and
4) Codify how nonproductive time, rest breaks, and recovery break compensation is calculated.

This bill would also allow employers to utilize an affirmative defense against claims of an employer's failure to timely pay compensation due for rest periods, recovery periods, and nonproductive time if the alleged failure occurred between July 1, 2012 and December 31, 2015 if the employer:

1) Make payments to all current and former piece-rate employees for uncompensated or undercompensated rest and recovery periods and nonproductive time, plus interest, from July 1, 2012 to December 31, 2015; **or**
2) Make payments to all current and former piece-rate employees in an amount equal to 4% of the gross earnings from July 1, 2012 to December 31, 2015. Deductions for previous separate payments for rest, recovery, and nonproductive time are permitted, but must not exceed 1% of the employee's gross earnings during the same period. **This methodology cannot be utilized by new motor vehicle dealers with 25 or more employees.**

The employer must also:

3) Provides a statement to the current and former employees that shows the calculation of hours worked and how the employer determined the wages due;
4) Provides payment to the current and former employees no later than December 15, 2016;
5) Provide notice to the Labor Commissioner on the employer's election to make payments to current and former employees by July 1, 2016; and
6) Preserves all records of hours worked, calculations of hours worked, and records of make whole payments to employees until December 16, 2020, and also furnish these records to the current or former employee upon request.

If the employer complies with the above, the employer shall have an affirmative defense for any action that seeks back wages, penalties, or liquidated damages relating to an employer's failure

to timely pay compensation due for rest periods, recovery periods, and nonproductive time, including to paying less than the minimum wage or having an inaccurate wage stub.

This bill would require that the Department of Industrial Relations (DIR) to post on their website either a list of employers who have elected to utilize the safe harbor or copies of actual notices of the election of the safe harbor.

This bill would require that, if an employer who wishes to comply with the above-discussed requirements for an affirmative defense but cannot locate an employee, the employer must instead remit the payments to the Labor Commissioner, plus a fee no greater than $2,500, so that the Labor Commissioner may locate the employee. Prior to doing so, the employer must utilize due diligence and finding the employees including, but not limited to, a people locator service.

This bill would provide that an employer does not need to make any payments for the period of July 1, 2012 and December 31, 2015 if any of the following applies:

1) An employer has, prior to August 1, 2015, entered into a valid release of claims for compensation for rest and recovery periods and other nonproductive time;
2) A release of claims was executed in connection with a settlement agreement filed with a court prior to October 1, 2015, and was later approved by the court.

This bill would also toll the statute of limitations from January 1, 2016 to July 1, 2016 for any claims based on the failure to compensate rest periods, recovery periods, and nonproductive time for piece-rate compensated employees **where the employer has not provided notice to employees as discussed above**. If the employer has provided a notice to the former or current employee, the statute of limitations is tolled until December 15, 2016.

The safe harbor shall not apply to any of the following:

1) The damages or penalties were previously awarded in an order or judgment that was final and not subject to further appeal as of January 1, 2016;
2) Claims where the employees were not advised of their right to take rest or recovery breaks, the breaks were not made available, or employees were discouraged from taking such breaks;
3) Claims based on the failure to provide paid rest periods, recovery periods, or nonproductive time asserted in an action filed prior to April 1, 2015 where the case contains an allegation that the employer has intentionally stolen wages through the use of fictitious worker names;
4) Claims asserted in a court filing prior to March 1, 2014 or claims asserted prior to March 1, 2014 and amended prior to July 1, 2015; and
5) Claims for unpaid wages, damages, and penalties that accrue after January 1, 2016.

This bill would allow for the assertion of an affirmative defense through an amended filing if the action was filed on or after March 1, 2014, unless the action is final and not subject to further appeals as of January 1, 2016.

This bill would protect the affirmative defense for employers if, after making a reasonable and good faith effort to comply with the requirements of the safe harbor, fails to make appropriate payments or provide accurate statements to all employees. The employer would have the burden of proving that the failure was **solely the result of a good faith error**.

This bill would make additional changes to law in order to allow the Labor Commissioner to enforce and effectuate the provisions of this bill.

This bill would also revise and recast the piece rate wage requirements after January 1, 2021 to reflect the cessation of the safe harbor provisions.

This bill would also delete three obsolete workers' compensation study requirements.

COMMENTS

1. Background on Piece Rate Compensation and Recent Court Decisions:

   Piece rate compensation, as the name suggests, is a method of calculating worker compensation by piece or unit, rather than by hour. For example, workers could be paid by unit sewn, bushel picked, or truck unpacked. However, under both federal and state law, the worker's compensation must still be at least the minimum wage for the hours worked. This requirement is well established in the law, and it was not the subject of recent litigation. Rather, recent litigation addressed whether nonproductive time and rest breaks needed to be counted as hours worked when calculating the minimum wage equivalency for piece rate wages.

   As was discussed above, both *Gonzalez* and *Bluford* found that rest periods, recovery periods, and nonproductive time must be compensated separately and at least at the minimum wage. While these decisions were in keeping with prior legal decision and statutes in California, many stakeholders raised concerns on the impact of *Gonzalez* and *Bluford*. For employers who did not compensate their employees for their nonproductive time, the potential liability from these decisions on employers can be significant.

   Post-*Gonzalez*, it is clear the employer would be liable for separately compensated nonproductive time, rest breaks, and recovery breaks. However, the employer would also face, at a minimum, liability for paying less than the minimum wage, producing an incorrect wage stub, and failure to provide rest breaks. *These violations trigger a penalty structure that is geared for employers who refuse to follow the minimum wage law and engage in wage theft, rather than employers who were caught up in an adverse court decision.* This creates a challenging dynamic: while on one hand some employers may be facing insolvency due to liability they could not foresee, aggrieved workers are owed wages for their time.

2. How AB 1513 Would Work:

   Broadly speaking, AB 1513 can be divided into two portions. The first portion deals with separate compensation for nonproductive time and rest and recovery periods. The second portion creates a narrow safe harbor for employers to address their liability under *Gonzalez* and *Bluford*. Each with be discussed below.

   Piece Rate Compensation and Separate Compensation for Nonproductive Time and Rest and Recovery Periods

   As noted above, both *Gonzalez* and *Bluford* held that piece rate workers must separately compensate the workers' nonproductive time, as well as their rest and recovery breaks. AB

1513 would codify that requirement, with nonproductive time being separately compensated at the minimum wage or higher. Importantly, however, **rest and recovery periods** would be **separately compensated as an average of the hourly piece rate**. By doing so, it would ensure that workers are not facing a disincentive in the form of a lower average hourly wage if they take necessary breaks for their health and well-being.

AB 1513's Safe Harbor Provisions

As was discussed above, AB 1513 contains an unusual provision: a limited safe harbor for employers from claims resulting from *Gonzalez* and *Bluford*. In a nutshell, the AB 1513 safe harbor provides an 11 ½ month window for the employer to do the following:

1) Calculate back wages for both former and current workers;
2) Notifying the Division of Labor Standards Enforcement (DLSE) that the employer is utilizing the safe harbor;
3) Transmitting the back wages the effected workers, including information on how the back wages were calculated; and
4) If, after due diligence, a worker cannot be found, transmitting the wages to DLSE, with a processing fee.

If an employer decides to do all of the above, he or she would have a limited safe harbor from resulting from the *Gonzalez* and *Bluford* decisions. However, it is important to note that the safe harbor isn't a simple immunity from claims due to underpayment or nonpayment of nonproductive time and/or rest and recovery periods. Rather, it is an *affirmative defense* – the employer would need to prove-up that he or she met the above requirements. Outside of a good faith error, **the employer loses the affirmative defense if he or she fails to meet the above requirements, and therefore loses access to the safe harbor.**

AB 1513 and Attorney Fees

As was noted above, AB 1513 provides an affirmative defense for employers who pay back wages and comply with specified requirements. The bill is silent on the payment of attorney fees when an affirmative defense is successfully utilized. Some stakeholders have raised concerns that this silence could lead to judges denying attorney fees if the affirmative defense is utilized. However, in being silent, AB 1513 does not alter or address one way or the other any existing statutory or common law as to attorney fees.

3. Calculating Unpaid Nonproductive Time, Rest Periods & Recovery Periods:

Under AB 1513, there are two methods for calculating unpaid or underpaid nonproductive time, rest periods, and recovery periods. The first method is to pay uncompensated or undercompensated rest and recovery periods and nonproductive time, plus interest. On the surface, this would appear to be a relatively simple calculation. However, significant conflicts between workers and employers on what constitutes as nonproductive time and productive time can exist. Further, such disputes can vary significantly from industry to industry.

Therefore, AB 1513 creates a second method for calculating unpaid or underpaid nonproductive time, rest periods, and recovery periods. In this method, the employer pays the worker 4% of his or her gross piece rate wages. While credits are allowed, they can only

lower the payment to 3% of the worker's gross piece rate wages. While the 4% figure is, by definition, an estimation of the unpaid rest and recovery periods and nonproductive time, it is an estimate that comes from prior cases and DIR enforcement actions involving unpaid rest and recovery periods and nonproductive time.

Further, it is worth noting that 4% of gross wages can be a significant figure. For example, the California annual average wage for farm workers is $19,950. Over the 3.5 year period that AB 1315 covers, the 4% calculation would yield back wages of $2,793 per worker. Even if the employer were able to take advantage of maximum credits, the back wages would drop to $2094.75.

4. Nonproductive Time and New Car Dealers:

As was discussed earlier, new car dealers are required to pay back wages that are actually owed and are excluded from the provision that allows an employer to pay former and current workers 4% of gross wages to enter AB 1513's safe harbor. The California New Car Dealers Association (CNCDA) objects to this provision strongly, referring to their exclusion as "outrageous". However, back wages from recent settlements suggest that the workers employed by the new car dealers have significantly higher rates of nonproductive time compared to workers employed in other industries who are paid on a piece rate basis.

For example, in the *Gonzalez* case, the court rules that workers had an average of 1.85 hours per day of nonproductive time. This is more than 23% of their workday, which is much higher than the 4% discussed above. Further, additional settlements from other cases involving new car dealers have yielded nonproductive time ranging from 19% to 25% of workers' workdays, suggesting that the *Gonzalez* case was not an unusual situation. Noting the scale of the differences between new car dealers and other employers who compensate their employees on a piece rate basis, proponents argue that the exclusion of new car dealers from the 4% estimation provision is appropriate.

5. Proponent Arguments:

Proponents argue that AB 1513 addresses a historically vexing challenge of calculating appropriate piece rate compensation, yet balances the needs of workers and employers. Specifically, proponents note that AB 1513 provides clear guidance for employers on appropriate wages during rest periods, recovery periods, and nonproductive time, and that these wage rates would not create disincentives for workers who want to take their breaks. Proponents also note that AB 1513 that provides an affirmative defense for employers, but only if they retroactively compensate employees for their rest periods, recovery periods, and nonproductive time. Proponents argue that AB 1513 is a fair compromise for both employers and workers, addressing a situation where there was a significant development in case law.

6. Opponent Arguments:

The California New Car Dealers (CNCDA) opposes AB 1513, arguing that new car dealers should be exempted from the bill. Specifically, CNCDA argues that their exclusion from estimated wage calculations is unjust, and that they do not have the necessary records to fall under the "safe harbor" affirmative defense. CNCDA further notes that AB 1513 tolls the statute of limitations on nonpayment/underpayment of rest periods, recovery periods, and nonproductive time, allowing workers to pursue past claims even if the car dealer is currently

complying with *Gonzalez*. Finally, CNCDA raises concerns that AB 1513 may lead to wages discrepancies between state and local minimum wages, leading to higher wages for nonproductive time than productive time.

7. Prior Legislation:

SB 435 (Padilla), Chapter 719, Statutes of 2013, extends existing rest period protections available within the Industrial Welfare Commission orders to workers paid on a "piece-rate basis" as well as make them applicable during an employee's recovery period.

SUPPORT

California Conference of Machinists
California Teamsters Public Affairs Council
California Labor Federation
Driscoll's Strawberry Associates, Inc.

OPPOSITION

California New Car Dealers Association (CNCDA)

-- END --

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

THIRD READING

Bill No: AB 1513
Author: Williams (D)
Amended: 9/9/15 in Senate
Vote: 21

SENATE LABOR & IND. REL. COMMITTEE: 5-0, 6/24/15
AYES: Mendoza, Stone, Jackson, Leno, Mitchell

SENATE LABOR & IND. REL. COMMITTEE: 4-1, 9/9/15 (pursuant to Senate Rule 29.10)
AYES: Mendoza, Jackson, Leno, Mitchell
NOES: Stone

ASSEMBLY FLOOR: 79-0, 4/16/15 (Consent) - See last page for vote

SUBJECT: Employment: Workers' compensation and piece-rate compensation

SOURCE: Author

DIGEST: This bill provides an affirmative defense and safe harbor for employers who, by December 15, 2016, fully compensate their employees, as specified, for all under-compensated or uncompensated rest periods, recovery periods, or unproductive time between July 1, 2012 and December 31, 2015.

ANALYSIS:

Existing law:

1) Requires that, when an employee is compensated on a "piece rate" basis, the employer must include in the employee's wage stub the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis. (Labor Code §226)

2) Provides that, if an employee suffers injury as a result of a knowing and intentional failure by an employer to provide a wage stub, the employee is entitled to recover the greater of all actual damages or $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of $4,000, and is entitled to an award of costs and reasonable attorney's fees. (Labor Code §226 (e))

3) Provides that the Industrial Welfare Commission with the ability to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers. (Labor Code §516)

4) Requires every employer to authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The employer must provide a rest period of 10 minutes for every 4 hours worked, and rest periods must be counted as hours worked and not be deducted from the employee's wages. (IWC Wage Orders 1-15; Labor Code §226.7)

5) Requires that, if an employer fails to provide an employee a rest period, the employer must pay the employee one hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided. (IWC Wage Orders 1-15; Labor Code §226.7)

6) Provides additional rest periods, known as recovery periods, to provide employees with a cooloff period to avoid heat illness. If an employer fails to provide an employee a recovery period, the employer must pay the employee one hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided. (Labor Code §226.7)

Existing court decisions require that nonproductive time, which is time under the employer's control for which the employee is not producing "pieces", rest periods, and recovery periods must be compensated separately and distinctly at the minimum wage or more. (*Gonzelez v. Downtown LA Motors* (215 Cal.App.4th 36 (2013)) and *Bluford v. Safeway Stores* (C066074 (2013)))

This bill:

1) Codifies the *Gonzalez* and *Bluford* decisions that nonproductive time, rest breaks, and recovery breaks are separately compensated.

2) Codifies that, for rest and recovery periods, the rate of compensation is the higher of the average hourly rate or the applicable minimum wage.

3) Codifies that, for nonproductive time, the rate of compensation is not less than the minimum wage.

4) Codifies how nonproductive time, rest breaks, and recovery break compensation is calculated.

5) Allows employers to utilize an affirmative defense against claims of an employer's failure to timely pay compensation due for rest periods, recovery periods, and nonproductive time if the alleged failure occurred between July 1, 2012, and December 31, 2015 if the employer:

   a) Make payments to all current and former piece-rate employees for uncompensated or undercompensated rest and recovery periods and nonproductive time, plus interest, from July 1, 2012, to December 31, 2015; *or*

   b) Make payments to all current and former piece-rate employees in an amount equal to 4% of the gross earnings from July 1, 2012, to December 31, 2015. Deductions for previous separate payments for rest, recovery, and nonproductive time are permitted, but must not exceed 1% of the employee's gross earnings during the same period.

   c) Provides a statement to the current and former employees that shows the calculation of hours worked and how the employer determined the wages due.

   d) Provides payment to the current and former employees no later than December 15, 2016.

   e) Provide notice to the Labor Commissioner on the employer's election to make payments to current and former employees by July 1, 2016.

   f) Preserves all records of hours worked, calculations of hours worked, and records of make whole payments to employees until December 16, 2020, and also furnish these records to the current or former employee upon request.

   If the employer complies with the above, the employer shall have an affirmative defense for any action that seeks back wages, penalties, or liquidated damages relating to an employer's failure to timely pay compensation due for rest

periods, recovery periods, and nonproductive time, including to paying less than the minimum wage or having an inaccurate wage stub.

6) Permits specified employers to have an additional four months to program their payroll systems as long as the employer pays piece rate employees for all rest and recovery periods at or above the applicable minimum wage during the extension and pays the difference between the amounts paid and the amounts owed, plus interest, by April 30, 2016. To qualify for this additional four months, an employer must:

   a) Have been acquired by another legal entity on or after July 1, 2015 and before October 1, 2015;

   b) Have employed at least 4,700 employees in this state at the time of the acquisition;

   c) Have employed at least 17,700 employees nationwide at the time of the acquisition; and

   d) Have been a publically traded company on a national securities exchange at the time of the acquisition.

7) Tolls the statute of limitations from January 1, 2016 to July 1, 2016 for any claims based on the failure to compensate rest periods, recovery periods, and nonproductive time for piece-rate compensated employees *where the employer has not provided notice to employees as discussed above*. If the employer has provided a notice to the former or current employee, the statute of limitations is tolled until December 15, 2016.

8) Prohibits the safe harbor from applying to any of the following:

   a) The damages or penalties were previously awarded in an order or judgment that was final and not subject to further appeal as of January 1, 2016;

   b) Claims where the employees were not advised of their right to take rest or recovery breaks, the breaks were not made available, or employees were discouraged from taking such breaks;

   c) Claims based on the failure to provide paid rest periods, recovery periods, or nonproductive time asserted in an action filed prior to April 1, 2015 where the case contains an allegation that the employer has intentionally stolen wages through the use of fictitious worker names;

d) Claims asserted in a court filing prior to March 1, 2014 or claims asserted prior to March 1, 2014 and amended prior to July 1, 2015;

e) Claims for unpaid wages, damages, and penalties that accrue after January 1, 2016; and

f) An employer that is a new motor vehicle dealer.

Background

Piece rate compensation and recent court decisions. Piece rate compensation, as the name suggests, is a method of calculating worker compensation by piece or unit, rather than by hour. For example, workers could be paid by unit sewn, bushel picked, or truck unpacked. However, under both federal and state law, the worker's compensation must still be at least the minimum wage for the hours worked. This requirement is well established in the law, and it was not the subject of recent litigation. Rather, recent litigation addressed whether nonproductive time and rest breaks needed to be counted as hours worked when calculating the minimum wage equivalency for piece rate wages.

As was discussed above, both *Gonzalez* and *Bluford* found that rest periods, recovery periods, and nonproductive time must be compensated separately and at least at the minimum wage. While these decisions were in keeping with prior legal decision and statutes in California, many stakeholders raised concerns on the impact of *Gonzalez* and *Bluford*. For employers who did not compensate their employees for their nonproductive time, the potential liability from these decisions on employers can be significant.

Post-*Gonzalez*, it is clear the employer would be liable for separately compensated nonproductive time, rest breaks, and recovery breaks. However, the employer would also face, at a minimum, liability for paying less than the minimum wage, producing an incorrect wage stub, and failure to provide rest breaks. *These violations trigger a penalty structure that is geared for employers who refuse to follow the minimum wage law and engage in wage theft, rather than employers who were caught up in an adverse court decision.* This creates a challenging dynamic: while on one hand some employers may be facing insolvency due to liability they could not foresee, aggrieved workers are owed wages for their time.

Comments

How AB 1513 works. Broadly speaking, AB 1513 can be divided into two portions. The first portion deals with separate compensation for nonproductive

time and rest and recovery periods. The second portion creates a narrow safe harbor for employers to address their liability under *Gonzalez* and *Bluford*. Each with be discussed below.

Piece rate compensation and separate compensation for nonproductive time and rest and recovery periods. As noted above, both *Gonzalez* and *Bluford* held that piece rate workers must separately compensate the workers' nonproductive time, as well as their rest and recovery breaks. AB 1513 codifies that requirement, with nonproductive time being separately compensated at the minimum wage or higher. Importantly, however, *rest and recovery periods* would be *separately compensated as an average of the hourly piece rate*. By doing so, it would ensure that workers are not facing a disincentive in the form of a lower average hourly wage if they take necessary breaks for their health and well-being.

AB 1513's safe harbor provisions. As was discussed above, AB 1513 contains an unusual provision: a limited safe harbor for employers from claims resulting from *Gonzalez* and *Bluford*. In a nutshell, the AB 1513 safe harbor provides an 11 ½ month window for the employer to do the following:

1) Calculate back wages for both former and current workers;
2) Notifying the Division of Labor Standards Enforcement that the employer is utilizing the safe harbor;
3) Transmitting the back wages the effected workers, including information on how the back wages were calculated; and
4) If, after due diligence, a worker cannot be found, transmitting the wages to DLSE, with a processing fee.

If an employer decides to do all of the above, he or she would have a limited safe harbor from resulting from the *Gonzalez* and *Bluford* decisions. However, it is important to note that the safe harbor isn't a simple immunity from claims due to underpayment or nonpayment of nonproductive time and/or rest and recovery periods. Rather, it is an *affirmative defense* – the employer would need to prove-up that he or she met the above requirements. Outside of a good faith error, *the employer loses the affirmative defense if he or she fails to meet the above requirements, and therefore loses access to the safe harbor.*

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT: (Verified 9/10/15)

California Conference of Machinists
California Labor Federation
California Teamsters Public Affairs Council
California Trucking Association
Driscoll's Strawberry Associates, Inc.
Grimmway Enterprises, Inc.
Maricopa Orchards
Monterey County Farm Bureau
The Wonderful Company

OPPOSITION: (Verified 9/10/15)

California Citrus Mutual
California Cotton Growers Association
California Cotton Ginners Association
California Employment Law Council
California Fresh Fruit Association
California Grain and Feed Association
California Pear Growers Association
California Tomato Growers Association
Nisei Farmers League
Western Agricultural Processors Association

ARGUMENTS IN SUPPORT: Proponents argue that AB 1513 addresses a historically vexing challenge of calculating appropriate piece rate compensation, yet balances the needs of workers and employers. Specifically, proponents note that AB 1513 provides clear guidance for employers on appropriate wages during rest periods, recovery periods, and nonproductive time, and that these wage rates would not create disincentives for workers who want to take their breaks. Proponents also note that AB 1513 that provides an affirmative defense for employers, but only if they retroactively compensate employees for their rest periods, recovery periods, and nonproductive time. Proponents argue that AB 1513 is a fair compromise for both employers and workers, addressing a situation where there was a significant development in case law.

ARGUMENTS IN OPPOSITION: Opponents, including California Citrus Mutual and the California Cotton Growers Association, oppose AB 1513. While acknowledging that AB 1513 allows employers to come into compliance and avoid continued exposure from non-productive time wage claims, opponents argue that AB 1513 contains provisions that unfairly excludes participation by some agricultural employers. Opponents argue that safe-harbor exclusions, as expressly

inserted by use of the March 1, 2014 date sacrifices some companies to continued legal exposure in exchange for legal protections afforded to others. Opponents also point to the provision excluding any company for which an active claim is open alleging the adding of "ghost" employees to reduce or eliminate employee wages from use of payment calculation formulas and exposure protections afforded by AB 1513.

ASSEMBLY FLOOR: 79-0, 4/16/15
AYES: Achadjian, Alejo, Travis Allen, Baker, Bigelow, Bloom, Bonilla, Bonta, Brough, Brown, Burke, Calderon, Campos, Chang, Chau, Chávez, Chiu, Chu, Cooley, Cooper, Dababneh, Dahle, Daly, Dodd, Eggman, Frazier, Beth Gaines, Gallagher, Cristina Garcia, Eduardo Garcia, Gatto, Gipson, Gomez, Gonzalez, Gordon, Gray, Grove, Hadley, Harper, Roger Hernández, Holden, Irwin, Jones, Jones-Sawyer, Kim, Lackey, Levine, Linder, Lopez, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Melendez, Mullin, Nazarian, Obernolte, O'Donnell, Olsen, Patterson, Perea, Rendon, Ridley-Thomas, Rodriguez, Salas, Santiago, Steinorth, Mark Stone, Thurmond, Ting, Wagner, Waldron, Weber, Wilk, Williams, Wood, Atkins
NO VOTE RECORDED: Quirk

Prepared by: Gideon L. Baum / L. & I.R. / (916) 651-1556
9/11/15 8:43:13

**** **END** ****