

AN IMPERFECT SYSTEM: PIECE RATE EMPLOYMENT AND THE IMPACT ON CALIFORNIA'S CENTRAL VALLEY AGRICULTURE INDUSTRY¹

I. INTRODUCTION

A. *What is Piece Rate?*

“Piece rate or piece work is defined as ‘work paid for according to the number of units turned out.’² Piece rate compensation is based on paying a specified sum for completing a particular task or making a particular item.”³ Many farm laborers in California’s Central Valley have been able to tap into the high wages that are paid by farmers and labor contractors who pay “by the piece” rather than by the traditional hourly rate.⁴ For many Central Valley farmers and labor contractors, piece rate is the perfect solution for increasing productivity and turning a profit.

In the agricultural context, piece rate employment would generally occur when employees are paid per bin of oranges, per tray of blueberries, and or other produce harvested in a particular quantity, which would then be compensated at a particular rate per quantity harvested. The reason farmers find this method attractive, as compared to the traditional hourly rate, is because it motivates employees and the price of harvest can roughly be determined by the available units of harvestable produce. Therefore, a farmer can project more precisely how much produce will cost to harvest. However, several of these same farmers and labor contractors paying their workers what seemed to be extremely fair and even generous wages, found themselves defending multi-million-dollar class action litigation against their employees as plaintiffs.

Piece rate work is usually preferred by farmers because it incentivizes employees to work quickly to turn out more pieces. Instead of paying a flat

¹ Disclaimer: This article does not constitute legal advice. The contents of this article do not warranty anything for any purpose.

² *Piece work*, AMERICAN HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=Piecework>.

³ *Piece-Rate Legislation (AB 1513) Fact Sheet*, STATE OF CALIFORNIA DEP’T OF INDUSTRIAL RELATIONS, https://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FACT_SHEET.htm.

⁴ *Occupational Employment and Wages, May 2016*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/2016/may/oes452099.htm>. (In 2016, the mean per hour wage for “Agricultural Workers, All Others” in California was \$16.88 per hour, significantly higher than minimum wage).

rate of ten dollars per hour, farmers find it more attractive to pay twenty-five dollars per bin of oranges for example, because the cost to harvest a bin of oranges in this regard is constant, regardless if it takes thirty minutes, or two hours, the bin still cost the farmer twenty-five dollars to harvest. On the other hand, if a farmer elects to pay employees an hourly wage, the employee would not have the incentive to work as quickly and the same bin of oranges may cost the farmer much more than twenty-five dollars and the cost of harvest would be far less predictable.

As a consequence of piece rate incentive work, some farmers have found that employees rush their work in great efforts to achieve more pieces (e.g. bins of oranges) and employees may be likely to perform subpar work and include produce that doesn't meet standards, either in haste or intentionally to achieve more pieces to earn more money. However, farmers have generally found piece rate to serve as an excellent predictor of harvest cost while also giving employees an opportunity to earn excellent money. A laborer in agriculture would have a very realistic shot at earning what amounts to several times the minimum wage in a piece rate setting compared to the traditional approach of minimum wage paid on an hourly basis.⁵

Due to the potential of earning high wages, many wonder what the problem with piece rate employment is and why many farmers in the Central Valley have faced and continue to face multi-million-dollar litigation. It simply is not intuitive. Farmers are afforded the ability to predict labor cost while giving employees the opportunity to make excellent wages. The issue is that piece rate employment is often an imperfect system within the context of California's complex wage and hour statutory scheme, which is overwhelmingly employee friendly.⁶

While it appears that employees who are paid piece rate wages may be earning large sums of money, many attorneys representing aggrieved parties would charge that piece rate employers often violate California's wage and hour laws. This claim is made when employers fail to grant employees proper rest and recovery periods (commonly known as "[ten] minute breaks"), thirty minute meal periods (commonly known as "lunch breaks") and by failing to pay wages when employees work during periods of time when workers are not earning a piece rate wage (commonly known as "non-productive time") while under the control of their employer. This imperfect system has given rise to significant Plaintiff favored litigation in California during the last eight years,

⁵ *Occupational Employment and Wages, May 2015*, BUREAU OF LABOR STATISTICS, https://www.bls.gov/oes/2015/may/oes_34900.htm#45-0000. (In 2015, the average farm laborer in Napa County earned \$41,940 for the year. Bureau of Labor Statistics).

⁶ *Labor Laws and Regulations*, STATE OF CALIFORNIA LABOR AND WORKFORCE DEVELOPMENT AGENCY, <http://www.labor.ca.gov/laborlawreg.htm>. (Stating "the mission of the California Labor Commissioner's Office is to ensure a just day's pay in every workplace in the State and to promote economic justice through robust enforcement of labor laws").

costing many employers, including farmers, millions of dollars in legal fees, costs, civil penalties, and damages.

B. Navigating the Imperfect System

Part I of this comment discusses and analyzes the imperfect system that piece rate employment creates within the context of California's intricate wage and hour statutory scheme. Part II of this comment explains how piece rate employment is used in the agriculture industry and further explains the consequences of utilizing piece rate employment. Part III examines the infamous Trilogy of California cases that served as the precedent to create Assembly Bill 1513. Part IV explains Assembly Bill 1513, now codified as California Labor Code section 226.2, and the conundrum that employers and Courts have found themselves in due to the lack of clarity concerning employee rights and the liabilities that emerged from the Trilogy. Part V concludes with the advantages and disadvantages of using piece rate employment in California and explores how to improve the imperfect system.

II. BACKGROUND ON PIECE RATE EMPLOYMENT

A. Which Industries Utilize Piece Rate?

Piece rate employment is widespread and touches and concerns many industries. In addition to the agriculture industry, piece rate employment is commonly seen in industries that involve automotive repair, transportation, technical installation, and factory workers.⁷ For example, an auto mechanic may be paid fifty dollars for each alternator he installs, a transport truck driver may be paid forty-eight cents for each mile he drives, an HVAC technician may be paid five hundred dollars for every air conditioner he installs, or a factory worker may be paid one dollar for every hinge he makes. In any industry where the employer is paid by the piece, the common denominator is true: the more pieces the employee produces, the more money he makes. Because there is an incentive to work during every available minute in a piece rate system, employees often find themselves interested in working through their ten-minute rest and recovery breaks and thirty-minute meal periods.

However, under California's labor laws, employees (depending on their employment type as defined by the respective IWC wage order)⁸ are generally

⁷ Gail Cecchettini Whaley, *New Piece-Rate Legislation: Guidance*, HRWATCHDOG, <http://hrwatchdog.calchamber.com/2015/12/new-piece-rate-legislation-guidance> (Dec. 22, 2015). ("The piece-rate compensation system is common in industries such as agriculture, manufacturing, automotive repair, truck driving, salons and spas, among others").

⁸ *Labor Laws and Regulations*, *supra* note 6.

entitled to a paid ten-minute rest break commencing before the end of every fourth hour worked during the work day. It is also true that employees in California are generally entitled to a thirty minute off duty meal period commencing prior to the end of the fifth hour worked and an employee is entitled to a second such meal period if he works more than ten hours in a day.⁹ The employee upon mutual consent and agreement with his employer may waive one such meal period but the not the other.¹⁰ However, many employers are not accustomed to such complex statutory wage and hour regulations and end up violating the law when they allow their employees to continue to work through their rest and recovery periods and or meal periods without additional compensation.

Under California law, employees are generally entitled to an hour of premium pay when they are caused to work through any portion of their rest and recovery period and or meal period.¹¹ The Fourth District Court of Appeal has clarified that an employee can earn up to two hours of premium pay per day when employers cause employees not to enjoy their right to an off-duty paid rest and recovery break and or an off-duty meal period.¹² For many employers who allow their employees to work through their meal periods and 10-minute breaks without compensating them a premium wage, employees become able to reach back to recoup damages for unpaid wages including costs and fees, and interest extending back as far as four years under California's Unfair Business Practices laws.¹³

⁹ *Industrial Welfare Commission Order No. 14-2001 Regulating Wages, Hours and Working Conditions in the Agricultural Occupations*, STATE OF CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, <https://www.dir.ca.gov/IWC/IWCArticle14.pdf>; CAL LAB. CODE § 512 (West 2011).

¹⁰ *Industrial Welfare Commission Order No. 14-2001 Regulating Wages, Hours and Working Conditions in the Agricultural Occupations*, STATE OF CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, <https://www.dir.ca.gov/IWC/IWCArticle14.pdf>; CAL LAB. CODE § 512 (West 2011).

¹¹ *Industrial Welfare Commission Order No. 14-2001 Regulating Wages, Hours and Working Conditions in the Agricultural Occupations*, STATE OF CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, <https://www.dir.ca.gov/IWC/IWCArticle14.pdf>; CAL LAB. CODE § 512 (West 2011).

¹² *United Parcel Service Wage & Hour Cases*, 196 Cal.App.4th 57, 69 (2011). (“Therefore, while section 226.7 is reasonably susceptible of alternative interpretations (one allowing a single premium payment per work day and another allowing up to two), we believe it is more reasonable to construe the statute as permitting up to two premium payments per workday—one for failure to provide one or more meal periods, and another for failure to provide one or more rest periods”).

¹³ CAL BUS. & PROF. CODE § 17208 (1977).

B. What are the Consequences of a Complex Compensation System?

Employers and employees alike find themselves scratching their heads and looking for ways to patch up the seemingly imperfect and complex system of piece rate employment when employees are under the control of the employer (also known as “on the clock”), but are not earning piece rate pay.¹⁴ For example, if a mechanic who is paid fifty dollars for each alternator he installs is spending time ordering parts, tidying up the shop, talking to customers, or if a transport truck driver is doing a pre-inspection for safety, fueling up his truck, or doing paperwork (also known as “non-productive work”) neither the mechanic nor the transport truck driver is earning a wage because he is not engaged in installing an alternator or turning his wheels to earn a wage (also known as “productive work”). Employers who elect to pay their employees piece rate pay often get into trouble when they fail to pay their employees for “non-productive time” – that time that the employee is caused to suffer under the control of their employer, without being compensated by piece rate.¹⁵

For years, agricultural employees have been paid by the piece of produce harvested. However, employees were not paid when they readied their equipment, they were not paid an hour of premium pay in addition to their piece rate pay for missing a ten-minute rest and recovery break, and they were not paid an hour of premium pay for missing their thirty-minute meal period. Defense counsel for many farmers and labor contractors would argue that employees made large wages, and that if they were averaged out, employees made more than the required minimum wage for all hours worked. Under this theory, defense counsel would argue that no labor violation should be assessed and that the employees had the opportunity to take their breaks and meal periods but elected not to, so it is not the employer’s fault.¹⁶

In California, that is not so. Both the California Legislature and California’s judiciary are very employee friendly. The Courts have answered such charges by clarifying that in California (as opposed to Federal), that it is unlawful to “average” piece rate pay, and all non-productive time must be paid *separately* from piece rate pay. Moreover, California’s statutory scheme and interpreting

¹⁴ *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 582 (2000). (“The standard for control is quite minimal: The word ‘includes’ introduces the ‘suffered or permitted to work’... the definition of ‘hours worked’ is expanded by, rather than limited to, the time spent when an employee is ‘suffered or permitted to work’”).

¹⁵ CAL LAB. CODE § 226.2 (West 2016). (“other nonproductive time’ means 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”).

¹⁶ *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 319 (2005). (“Appellant argued that their average hourly rate in any given pay period was higher than California’s minimum wage and, therefore, it had not violated section 1194. Appellant noted that this “averaging” method was consistent with the approach utilized by the federal courts”).

case law make it clear and well settled that the employer is liable to ensure that its policies and practices provide that their employees are able to take their paid off-duty rest and recovery breaks and off-duty meal periods as required by statute.¹⁷ Where employees fail to enforce such policies, and employees miss a rest period or meal period, employers must pay their employees an hour of premium pay (up to twice daily) or otherwise face disgorgement, civil penalties, costs and fees, and interest thereupon in costly plaintiff-friendly litigation.

Today, piece rate work is still heavily utilized by employers in many industries including California's agricultural industry. However, many employers become defendants because many employers break the law by failing to set up employment systems that meet the statutory requirements of California's many complex wage and hour laws. Although many employers may find piece rate systems to be a liability and they may believe that they should be done away with, one of the world's leading authorities on agricultural piece rate systems, retired Labor Farm Management Advisor for the University of California, Gregorio Billikopf, believes that ultimately both employee and employer in the agriculture industry can benefit from piece rate employment. Billikopf argues that this can be accomplished if the proper system, practices, and policies are adopted to ensure fairness and compliance with the law.¹⁸ Although employers can become exposed, proper review of the laws and consultation with a competent employment attorney can result in a system that avoids breaking the law and otherwise probable litigation while allowing for predictability of overhead while providing exceptional income opportunities for piece rate workers. Although the laws surrounding piece rate employment law are complex, avoiding liability is incumbent on the employer to develop the proper system to ensure that their adopted practices comply with California law and are carried out.

III. THE INFAMOUS TRILOGY

Since the beginning of California's crop harvesting history, farmers and labor contractors have found it essential to hire workers on a piece rate basis. Piece rate workers are encouraged to work harder and faster as the amount of

¹⁷ *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1017 (2012). (“On the most contentious of these, the nature of an employer's duty to provide meal periods, we conclude an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done”).

¹⁸ Gregorio Billikopf, *Crew workers split between hourly and piece-rate pay-California Agriculture*, UNIVERSITY OF CALIFORNIA, AGRICULTURE AND NATURAL RESOURCES, (Nov. 15, 2004) <http://calag.ucanr.edu/Archive/?article=ca.v050n06p5>. (“When properly managed, piece-rate pay can result in enhanced wages for crew workers and increased productivity for growers”).

production that they produce is directly proportional to their earnings.¹⁹ There is little incentive for farmers and labor contractors to hire employees on an hourly basis, because hourly pay does not encourage productivity necessarily in the same regard as piece rate.²⁰ However, as the rapid development in piece rate workers' rights shows, piece rate employers for many years tended to treat employees differently than hourly employees, allowing piece rate workers to skip their rest breaks, work through lunch breaks, and compensate the employee for their productive time only.

In California, there is a trilogy of cases that served as the precedent to springboard Assembly Bill 1513. AB 1513 would aim to curb the onslaught of litigation against employers and to establish bright line rules for piece rate employment. The trilogy of cases that are credited with the necessity to create AB 1513 and codify it into law, known as California Labor Code section 226.2, are *Armenta v. Osmose*, 135 Cal.App.4th 314 (2005), *Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36, (2013) and *Bluford v. Safeway Inc.*, 216 Cal.App.4th 864, (2013).

The answer to whether or not piece rate workers enjoy the same protections and benefits as hourly workers would drastically begin to take shape with the Opinion in *Armenta v. Osmose, Inc.* by the Second District Court of Appeal. After *Armenta*, the flood gates open to multiparty litigation seeking huge damages after the Courts in *Gonzalez v. Downtown LA Motors, LP* and *Bluford v. Safeway Stores, Inc.* applied *Armenta* in their Opinions, culminating in a huge victory for piece rate workers. The "Infamous Trilogy" not only paved the way for piece rate workers but also resulted in the need for legislation in order to codify rights for piece rate workers while also attempting to temper the onslaught of litigation against employers.²¹ This resulted in Assembly Bill 1513, which would later be codified in California Labor Code section 226.2.²²

A. *Armenta*

Osmose, Inc. is a corporation that provides services to power poles, providing restoration and repair to the power poles, among other things.²³ Between 1996 and 2000 several employees worked for Osmose, Inc. who would later become Plaintiffs against Osmose.²⁴ The Osmose employees alleged that during their employment, they worked in rural areas of California

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Piece-Rate Compensation Requirement*, STATE OF CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS, <https://www.dir.ca.gov/pieceratebackpayelection/piecerate.html>.

²² *Id.*

²³ *About Osmose*, OSMOSE, <http://www.osmose.com>.

²⁴ *Armenta*, 135 Cal.App.4th at 317.

where they would repair and restore power poles.²⁵ However, employees became disgruntled because they were only paid for the time that they spent actively repairing and restoring power poles.²⁶ This meant that for all of the time that employees spent driving their company vehicles to rural distant locations to repair the power poles, all of the time that was spent loading company vehicles with tools and supplies, and all the time that was spent by employees performing mandatory paperwork was all completely uncompensated.²⁷ Plaintiffs ultimately filed an action to recover their unpaid wages.²⁸

The primary contention brought by Plaintiffs was that Osmose violated California Labor Code section 1194 by failing to pay minimum wage for all hours worked, whereby Plaintiffs also sought liquidated damages, statutory penalties, and attorney's fees.²⁹ California Labor Code section 1194 makes it clear that an employer must pay its employee at least minimum wage for all hours worked.³⁰ Osmose responded to the Plaintiffs' claims that in fact all of the hours that the Plaintiffs worked were compensated for if the Court would take into account the total pay for any given pay period divided by all hours worked (including productive and non-productive hours), then such an average would result in no employee ever making less than legal minimum wage.³¹ Therefore, the outcome on this case rested on the legal finding as to whether or not the legislature intended to ensure that employees receive at least minimum wage for all hours worked during a work week on the average, or on the other hand if the intent was to ensure that each individual hour that an employee works is compensated at a rate no less than minimum wage.

i. The Armenta Court's Analysis

The Court's analysis reflects that public policy heavily favors employees in California: "California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked."³² This public policy is rooted in the quasi legislative regulations as promulgated by the Industrial Welfare

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ CAL LAB. CODE § 1194 (West 2008). ("Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit").

³¹ *Armenta*, 135 Cal.App.4th at 319.

³² *Id.* at 324.

Commission's wage orders setting forth the regulations for the various types of employment in California. Pertaining specifically to the Osmose Plaintiffs, the Court examined Wage Order No. 4: "Wage Order No. 4, section 4(B) provides: 'Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.'"³³

This language expresses the intent to ensure that employees be compensated at the minimum wage for each hour worked.³⁴ Read together with California Labor Code sections 221, 222, 223, the Court had more than enough legislative intent to rule in the Plaintiffs' favor.³⁵ The Court interpreted that these three labor codes collectively stand for the proposition that when an employee is paid for an hour of work, no part of that hour of pay can be credited to other hours of work; each individual hour must be compensated at either the statutory and or agreed upon rate if that rate is more than the statutory rate.³⁶ Simply put, an employer cannot average pay or credit pay to be compliant with California's statutory law. Every hour worked must be compensated for on its own.³⁷

Osmose, Inc. would have preferred if the *Armenta* Court would have extended the holding in the Federal Northern District Court case *Medrano v. D'Arrigo Bros. Co. of California* to the instant action.³⁸ In *Medrano*, a group of aggrieved migrant farm workers sued their employer for failing to compensate them for non-productive time such as travel time among other things.³⁹ Ultimately, the Federal Court was not willing to interpret the Industrial Welfare Commission's wage order 14 section 4(b) provision so broadly in the employees' favor, according with Federal cases which established that averaging is an acceptable method to comply with minimum wage statutory requirements.⁴⁰ Applying this logic to a state court case, the

³³ *Id.* at 314.

³⁴ *Id.* at 323.

³⁵ *Id.* ("Sections 221, 222, and 223 articulate the principal that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation").

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Medrano v. D'Arrigo Bros. Co.*, 125 F.Supp.2d 1163 (2000).

³⁹ *Id.* at 1164. ("Plaintiffs are agricultural workers, and D'Arrigo is an agricultural employer engaged in the business of planting, harvesting, grading, packaging, packing, and processing vegetables. Plaintiffs allege that from 1996 to the present, D'Arrigo has not accurately recorded or compensated them for all hours worked").

⁴⁰ *Armenta*, 135 Cal.App.4th at 322-23.. ("The *Medrano* court noted that numerous federal courts had adopted this averaging formula in assessing minimum wage law violations, albeit under different statutes. The *Medrano* court rejected the DLSE letter opinion found persuasive by the trial court here, citing U.S. Dept. of Labor v.

Armenta Court found such Federal precedent unpersuasive in light of California's unmistakable public policy interest in protecting the employee: "...the state is empowered to go beyond the federal statutes and regulations in adopting protective laws and regulations for the benefit of employees. The federal authorities are of little assistance, if any, in construing state laws and regulations that provide greater protection to workers. (*Bell*, at pp. 817–818.) Similarly, where the language or intent of state and federal labor laws substantially differs, reliance on federal regulations or interpretations to construe state regulations is misplaced. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798.)"⁴¹

The *Armenta* Opinion was a huge victory for the Plaintiff employees who worked for Osrose, Inc. for years without compensation for non-productive time, recovering an award for damages, statutory penalties, and substantial attorney's fees. *Armenta* promulgated the now embedded precept in California that employees must be compensated according to the statutory requirement and or agreed upon rate, whichever is higher, for each and every hour worked.⁴² Averaging under the federal scheme is not acceptable in California and is not persuasive in light of *Armenta*.⁴³ Despite the clear rule set in *Armenta*, it was seemingly unknown as to whether or not the Opinion in *Armenta* was applicable to piece rate workers. This question would soon be answered by the Second District Court of Appeal in 2013 in *Gonzalez v. LA Downtown Motors LP*.

B. *Gonzalez*

Armenta was clear that in California, every hour that an employee works must be compensated.⁴⁴ This means that employers are not allowed to average pay over hours worked to demonstrate statutory compliance.⁴⁵ This also means that in accord with California's statutory scheme and legislative intent, which heavily aim to protect employees, employers in California are barred from applying as a credit, any portion of hourly compensation toward an employee's hours worked that were not compensated for on their own in an attempt to comply with California law. Simply stated, every single hour that an employee

Cole Enterprises, Inc., 62 F.3d 775, 780 (1995); *Hensley v. MacMillan Bloedel Containers*, 786 F.2d 353, 357 (1986); *Dove v. CoupCole Enterprises Inc.*, 759 F.2d 167, 171 (1985); *Hensley v. MacMillan Bloedel Containers*, 786 F.2d 353, 357 (1986); *Dove v. Coupe*, 759 F.2d 167, 171 (1985); *Blankenship v. Thurston Motor Lines, Inc.*, 415 F.2d 1193, 1198 (1969); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (1960)".

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Armenta*, 135 Cal.App.4th at 324.

⁴⁵ *Id.*

works in California must be compensated for on its own without averaging pay in any period and or receiving a credit from another source, and such compensation must be in an amount that meets and or exceeds the statutory minimum. In 2013, the Second District Court of Appeal decided in *Gonzalez v. Downtown LA Motors, LP* that *Armenta* is not only applicable to hourly employees, but piece rate employees too.⁴⁶

i. The Underlying Facts and Resulting Lawsuit

In *Gonzalez*, Plaintiffs were service technicians working for Downtown LA Motors Mercedes Benz between 2002 and 2008.⁴⁷ Employees were compensated based on their production.⁴⁸ Technicians would be assigned a rate, which took into account things like experience and qualification, which ranged between seventeen dollars to thirty-two.⁴⁹ Then, when customers' automobiles would arrive, technicians would perform work on the vehicles and accrue "flags".⁵⁰ The number of flags that a technician would accrue was predetermined by the employer who decided the amount of time that it should take for a technician to perform a specific task.⁵¹ Therefore, the technician's work was not compensated with respect to the amount of time that he spent on the task, but merely the number of flags that he accrued multiplied by his rate of pay.⁵² Therefore, the employees in *Gonzalez* were paid a particular rate multiplied by the number of pieces that they accrued, making them "piece rate" workers.⁵³ The flaw with this type of pay scheme primarily resided with the fact that technicians were not receiving compensation during times when they were not working on a customer's vehicle.⁵⁴

The Plaintiffs worked an eighty hour pay period.⁵⁵ However, they challenged their employer's compensation schedule because the Plaintiffs were not compensated for time while waiting for customers to arrive so that they could perform automotive tasks in order to begin accruing flags.⁵⁶ During these periods of time, Plaintiffs were told that they could not leave work because a customer might come in.⁵⁷ "While waiting for repair work, they were expected to perform various non-repair tasks, including obtaining parts, cleaning their

⁴⁶ *Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36, 41 (2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Gonzalez*, 215 Cal.App.4th at 36.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Gonzalez*, 215 Cal.App.4th at 42.

work stations, attending meetings, traveling to other locations to pick up and return cars, reviewing service bulletins, and participating in online training.”⁵⁸ The problem with the employer’s policies and practices with respect to compensation here is that they were not paying their employees for time worked other than repair tasks. Plaintiffs therefore filed a lawsuit seeking to recover unpaid wages, applicable penalties, and attorney’s fees.⁵⁹

The Defendant employer in *Gonzalez* contended that, “compliance may be achieved by supplementing a technician’s piece-rate wages in an amount necessary to cover any shortfall between those wages and the ‘minimum wage floor,’ or the amount the technician would have earned if paid an hourly minimum wage for all hours ‘on the clock,’ including waiting time, during a pay period.”⁶⁰ This unclear position taken by the Defendant suggests that they would be in compliance with California’s minimum wage laws if the Court took into consideration that the amount of money that Plaintiffs achieved earning “flags” could be apportioned toward hours spent performing non-repair tasks because the amount of money that Plaintiffs earned performing repair tasks was in excess of minimum wage.⁶¹ According to the Defendant, such an apportionment would cause compliance. However, *Armenta* expressly rejected such reasoning years prior and so it is no surprise that Defendant argued to the Court that *Armenta* should not apply.⁶²

ii. *The Analysis of the Court*

The Court’s analysis in *Gonzalez* is unmistakably parallel to *Armenta* in light of the legislative policy to protect California’s employees and to ensure payment of all wages earned. The intent of full payment for all hours worked is expressly stated in the Industrial Welfare Commission’s applicable Wage Order and Title 8 of the California Code of Regulations as contemplated in *Gonzalez*.⁶³ As far as the *Gonzalez* Court was concerned, whether an

⁵⁸ *Gonzalez*, 215 Cal.App.4th at 42.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 48. (“The principal argument advanced by DTLA and its amici curiae is that *Armenta* concerned only hourly employees and the *Armenta* court’s construction of Wage Order No. 4 should not be applied to workers who are compensated on a piece-rate basis”).

⁶³ *Id.* at 49. (“By its terms, Wage Order No. 4 does not allow any variance in its application based on the manner of compensation. Subdivision 1 of the wage order states that subject to exceptions that are not applicable here: ‘This order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis’ (Cal. Code Regs., tit. 8, § 11040, subd. 1, italics added.) CA(6) (6) Subdivision 4(B) similarly requires uniform application of the minimum wage requirements regardless

individual was paid hourly or piece rate (“manner of compensation”) was not dispositive as to the application of *Armenta*.⁶⁴ Regardless if an employee is hourly or piece rate, the employee must be compensated for each hour worked, without averaging or applying a credit, in an amount consistent with the statutory minimum or in excess thereof.⁶⁵

The Defendant tried to thwart the applicability of *Armenta* by reminding the Court that under Federal Law, Courts have allowed averaging of employee compensation to comply with minimum wage statutory requirements.⁶⁶ Unfortunately for the Defendant in *Gonzalez, Cardenas v. Foodservices, Inc.* was decided by the Federal Central District Court of California in 2011.⁶⁷ In *Cardenas*, a group of transport truck drivers who were paid by the piece sued their employer, alleging that their employer failed to compensate them for non-productive time such as pre and post shift duties among other things.⁶⁸ The *Cardenas* defendant argued that because the employees were piece rate workers, that they should not gain the benefit of *Armenta*, which involved hourly employees.⁶⁹ Ultimately the Court said, “Though *Armenta* did not involve a piece-rate pay formula, and involved an employer who violated an explicit agreement, those distinctions do not detract from the decision's holding that [t]he averaging method used by the federal courts for assessing a violation of the federal minimum wage law does not apply to California law-based claims.”⁷⁰ The *Cardenas* court then held that ““a piece-rate formula that does not compensate directly for all time worked does not comply with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all hours worked.””⁷¹

The logic applied by the *Cardenas* Court accords with *Armenta* as well as the legislative intent behind the applicable IWC Wage order, and public policy that heavily favors employees. *Cardenas* may have in fact solidified Downtown LA Motors LP's fate as the Court announced, “Like the court in *Cardenas*, we find the court's reasoning in *Armenta* to be equally applicable to employees compensated on a piece-rate basis.”⁷² The result of *Gonzalez* is a

of how an employee is paid: ‘Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.’ (Cal. Code Regs., tit. 8, § 11040, subd. 4(B), italics added.)”.

⁶⁴ *Gonzalez*, 215 Cal.App.4th at 49.

⁶⁵ *Id.*

⁶⁶ *Id.*; *Cardenas v. McLane Foodservices, Inc.*, 796 F.Supp.2d (2011).

⁶⁷ *Gonzalez*, 215 Cal.App.4th at 49.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Cardenas*, 796 F.Supp.2d at 1252.

⁷¹ *Id.*

⁷² *Gonzalez*, 215 Cal.App.4th at 36, 49.

huge victory for piece rate workers in California. If there was ever a doubt before as to whether or not piece workers had to be directly compensated for non-productive time, *Gonzalez* answered that.

The holding in *Gonzalez* is important for those employing workers on a piece rate basis, not just in technical industries, but other industries too such as agriculture, as these employees are governed by IWC Wage Order No. 14. IWC Wage Order No. 14 Section 1 unambiguously declares that, “This order shall apply to all persons in an agricultural occupation whether paid on a time, piece rate, commission, or other basis...”⁷³ Therefore, *Gonzalez* charged employees with a very powerful weapon to seek unpaid wages, ramping up in some cases, millions of dollars in class action damages. However, the force that plaintiff piece rate employees could unleash would soon be realized when the Court decided its Opinion in *Bluford v. Safeway, Inc.* only a short time later.

C. *Bluford*

In 2013, the Third District Court of Appeal came out with an Opinion in *Bluford v. Safeway, Inc.* that further entrenched the fact that the laws that govern hourly employees and piece rate employees are not so divergent. Specifically, the question that was resolved in *Bluford* was whether or not piece rate workers should receive paid rest and recovery breaks, which must be paid separately from their piece rate compensation?⁷⁴ The Court of Appeal answered this question with a resounding yes.⁷⁵

Bluford was a case that involved a group of unionized transport truck drivers who worked for SafeWay, Inc.⁷⁶ The compensation schedule for these workers was seemingly complex whereby workers were paid based on the number of miles that they drove, the type of task that they performed, and received certain hourly compensation for delays.⁷⁷ However, this system of compensation was

⁷³ *Industrial Welfare Commission Order No. 14-2001 Regulating Wages, Hours and Working Conditions in the Agricultural Occupations*, STATE OF CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS (Jan. 2001)

https://www.dir.ca.gov/iwc/Wage_orders_January2001/IWCArticle14.html.

⁷⁴ *Bluford v. Safeway Inc.*, 216 Cal.App.4th 864, 872 (2013). (“Thus, contrary to Safeway’s argument, a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law”).

⁷⁵ *Id.*; *Reinhardt v. Gemini Motor Transport*, 869 F.Supp.2d 1158, 1168 (2012). (Piece-rate pay system that did not separately pay truckdrivers for nondriving duties violates California law requiring compensation for each hour worked); *Cardenas v. McLane FoodServices, Inc.*, 796 F.Supp.2d 1246, 1252 (2011). (Piece-rate pay system that did not separately pay truckdrivers for nondriving duties and rest periods violates California law requiring compensation for each hour worked).

⁷⁶ *Bluford* 216 Cal.App.4th at 867.

⁷⁷ *Id.*

challenged by transport truck drivers because they were not being compensated separately for their rest and recovery periods, commonly known as breaks.⁷⁸ Safeway, Inc. challenged *Bluford's* contention alleging that drivers received compensation for breaks because it was built into their piece rate compensation scheme.⁷⁹ Stated another way, the pay that drivers would receive for performing tasks and driving miles contained a built in fractional amount that was credited toward break pay, according to Safeway. The Court didn't accept this argument, citing to *Armenta*:

...under the rule of *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 [37 Cal. Rptr. 3d 460] rest periods must be separately compensated in a piece-rate system. Rest periods are considered hours worked and must be compensated. (Cal. Code Regs., tit. 8, §§ 11070, subd. 12, 11090, subd. 12.) Under the California minimum wage law, 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. (§§ 11070, subd. 12, 11090, subd. 12; *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 297, fn. 5 [120 Cal. Rptr. 3d 442].).⁸⁰

In the end, *Bluford* stands for the proposition that an employee's compensation for their rest and recovery periods is inalienable.⁸¹ Every employee in California is entitled to paid breaks pursuant to the applicable IWC Wage Order.⁸² These break earnings are considered wages and must be compensated.⁸³ *Bluford* further establishes that all piece rate workers have to be paid for rest and recovery periods separately from their piece rate compensation.⁸⁴

D. *The Aftermath of The Trilogy*

Initially when the Opinions of the Trilogy were rendered, they established what became a Plaintiff attorney's dream. *Armenta* made it clear that averaging a piece rate worker's wages to establish that they were paid for all hours of work ostensibly, is not allowed⁸⁵. *Gonzalez* stands for the proposition that

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Bluford* 216 Cal.App.4th at 867.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Armenta*, 135 Cal.App.4th at 324. ("While the averaging method utilized by the federal courts to assess whether a minimum wage violation has occurred may be appropriate when considered in light of federal public policy, it does not advance the policies underlying California's minimum wage law and regulations. California's

piece rate wages pay for productive time and that all non-productive time must be paid to the employee separately from piece rate wages.⁸⁶ *Bluford* stands for the proposition that piece rate workers are entitled to paid rest and recovery breaks compensated separately from their piece rate wages.⁸⁷ This means that the mechanic who is tidying the shop and ordering parts and talking to the customer must be paid a separate wage from his piece rate compensation when he installing an alternator. It does not matter if the mechanic's combined piece rate pay for the pay period averages out to be higher than minimum wage for all hours worked, including non-productive hours and productive hours. In addition, the piece rate mechanic must also be paid a California compliant wage amount separately for his statutorily entitled rest and recovery periods.

The precedent that the Trilogity set forth opened the floodgates to widespread Plaintiff oriented litigation, allowing employees to sue their employers successfully reaching back four years for unpaid wages. Much more damaging, employers found themselves being served with complex class action litigation with complaints including causes of action carrying heavy civil penalties under the Private Attorneys General Act, seemingly deputizing Plaintiffs and readying quick class-action style litigation which would regularly include millions of dollars in damages.⁸⁸

Armenta was the epicenter of a force that gave piece rate workers a powerhouse arsenal against their employers. *Armenta* clarified that all time that an employee spends while under the control of his employer is compensable⁸⁹. *Armenta* was applied in *Gonzalez* to piece rate workers specifically, clarifying that all "non-productive" time is compensable and it must be paid separately from the employee's piece rate pay; there are no such

labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked. We conclude, therefore, that the FLSA model of averaging all hours worked 'in any work week' to compute an employer's minimum wage obligation under California law is inappropriate").

⁸⁶ *Gonzalez*, 215 Cal.App.4th at 40-41. ("We too find the court's reasoning in *Armenta* to be persuasive. Applying that reasoning here, we conclude that class members were entitled to separate hourly compensation for time spent waiting for repair work or performing other non-repair tasks directed by the employer during their work-shifts, as well as penalties under Labor Code section 203, subdivision (a)").

⁸⁷ *Bluford*, 216 Cal.App.4th at 872. ("A piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law").

⁸⁸ *Private Attorney's General Act (PAGA) – Filing*, State of California Dep't of Industrial Relations, <https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>. ("The Labor Code Private Attorneys General Act (PAGA) authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations").

⁸⁹ *Armenta*, 135 Cal.App.4th at 323.

thing as credits or averaging in California to offset non-productive time wages.⁹⁰ Shortly after *Gonzalez*, *Bluford* clarified that piece rate workers are to receive paid rest and recovery breaks like all other employees under the applicable IWC Wage Order, as they are wages.⁹¹ The net effect of these three cases created a gigantic surge that empowered aggrieved employees who as piece rate workers for years were not paid for their non-productive time, their rest and recovery break times, for meal-periods that they worked through, including other damages, interests, and penalties.

In the Central Valley, the agricultural industry was notably impacted by the *Trilogy*.⁹² Farmers and labor contractors had traditionally paid employees by the piece.⁹³ Paying by the piece helps predict labor costs to the farmer and also provides an incentive to the employee to work harder and faster to earn more money.⁹⁴ In the citrus industry, for example, workers are paid per bin of oranges or lemons they harvest, and in the blueberry and grape industries, workers are paid per tray that they harvest. Many farm workers find this method of compensation to be preferential because employees earn substantially more than minimum wage.⁹⁵ It is not uncommon for an industrious employee harvesting fruit to be paid many times the hourly minimum wage when compensated by the piece.⁹⁶

Despite the high wages that farmers pay their employees during harvest and pruning seasons, many farmers violated the law by failing to pay their employees for their non-productive time, their breaks, and premium pay for those times that employees elected to work through their meal periods.⁹⁷ As a result, many farmers and labor contractors in California's Central Valley have found themselves defending multi-million-dollar litigation against their employees who were seeking large damages and interests in class action and Private Attorneys General Act type lawsuits. Because of the various types of wage and hour violations that are alleged in these type of employment cases,

⁹⁰ *Gonzalez*, 215 Cal.App.4th at 49.

⁹¹ *Bluford*, 216 Cal.App.4th at 864.

⁹² *AB 1513 Piece-Rate Legislation*, LABOR AND WORKFORCE DEVELOPMENT AGENCY CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, (Jan. 1, 2016) https://www.dir.ca.gov/pieceratebackpayelection/AB_1513_Presentation.pdf.

⁹³ Gregorio Billikopf, *Designing an Effective Piece Rate*, PIECE RATE PAY DESIGN-UNIVERSITY OF CALIFORNIA (Jan. 30, 2008), <https://nature.berkeley.edu/ucce50/ag-labor/7research/7calag06.htm>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Occupational Employment and Wages, May 2015 supra* note 6.

⁹⁷ *AB 1513 Piece-Rate Legislation, supra* note 92.

the statute of limitations⁹⁸ under the Business and Profession Code⁹⁹ allows employees to recoup their lost wages as far back as four years.

As a consequence of this barrage of litigation, the axiom that “farmers are land rich and cash poor”¹⁰⁰ was soon realized as a substantial portion of the agricultural industry in the Central Valley was threatened by huge damages and litigation expenses that would seemingly bankrupt farmers. The net effect of bankrupting farmers in California would be catastrophic in light of the world’s dependence on California’s bounty. The legislature was confronted with the reality for a need to streamline the complex laws that surround piece rate employment and offer employers a reprieve from the onslaught of huge litigation costs and damages that were flowing from the Trilogy.

Looking to fix this broken system and to abate the wave of litigation against California’s employers (many of whom were in the agricultural industry) Assemblyman Dos Williams proposed Assembly Bill 1513 (AB 1513) in 2015. AB 1513 meant to address the issues flowing from the recent appellate Court Opinions.¹⁰¹ AB 1513 would clarify the Opinions of the Trilogy seemingly by stating under certain terms that non-productive time must be paid separately from productive time and also offered employers a “Safe Harbor” provision which would work as a defense against possibly harmful litigation.¹⁰² Under the Safe Harbor provision, if piece rate employers took the opportunity to pay their employees 4% of the their total wages earned from 2012 through 2015 then the legislature found that such a remedy would make up for past harms caused by unpaid wages that piece rate workers experienced

⁹⁸ CAL BUS. & PROF. CODE § 17208 (1977). (“Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment”).

⁹⁹ CAL BUS. & PROF. CODE § 17200 (1992). (“As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code”).

¹⁰⁰ *Estate Tax Forces Farmers to Play Defense*, USA TODAY (Nov. 8, 2017), <https://www.usatoday.com/story/opinion/2017/11/08/estate-tax-forces-farmers-play-defense-editorials-debates/846267001>. (“We are land rich but cash poor.” Zippy Duvall, president of the American Farm Bureau Federation).

¹⁰¹ *AB 1513 Piece-Rate Legislation*, *supra* note 92.

¹⁰² CAL LAB. CODE § 226.2 (West 2016). (“In general terms, Labor Code section 226.2 does two things: It establishes compensation and wage statement requirements for rest and recovery periods and ‘other nonproductive time’ for piece-rate employees going forward from the effective date of the statute. It establishes, for certain employers and under certain circumstances, an ‘affirmative defense’ to any claim or cause of action for damages or statutory penalties based on an employer’s alleged failure to pay compensation due for rest and recovery periods and other nonproductive time for time periods prior to the effective date of the statute”).

while offering employers a bar to recovery that plaintiffs sought. This Safe Harbor defense came to an end in 2016.¹⁰³ Employers either took advantage of the defense or did not.¹⁰⁴ Despite these improvements that the Bill would offer the Labor Code, there is still no shortage of piece rate litigation today begging the question whether or not AB 1513, which was later codified as California Labor Code section 226.2, was enough.

IV. LABOR CODE SECTION 226.2

As a testament to the power of litigation and the law that flows from Decisions and Opinions, the California Legislature found it necessary to respond in particular to the consequences of *Bluford* and *Gonzalez*.¹⁰⁵ The conundrum that employers and Courts quite frankly found themselves in was the lack of clarity with respect to employee rights and the liabilities that emerged from the Trilogy. It appeared that the obligation of the employer was not exactly clear in the complex scheme of paying a piece rate employee, but despite that, employees used what many referred to as a “sword” to plunge deeply into the pockets of their employers, including many Central Valley farmers. Assemblyman Dos Williams recognized the imperative to do two things with new legislation: First, to help clarify the obligations of a piece rate employer and second, to make it fair to employers being sued as a consequence of newly developed law, giving employers the chance to cure past violations.

Williams’ stated purpose for the bill was to clarify confusion in the statute after two landmark court cases and, with the support of employers and workers, established a fair and manageable method of payment for “rest breaks” and “non-productive time.”¹⁰⁶ The bill provided employers, who were facing costly litigation, with a window of time from liability to justly compensate employees for back pay without having to pay penalties.¹⁰⁷ More specifically Williams stated that,

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *AB 1513 Piece-Rate Legislation, supra* note 92. (“These decisions led to class actions and PAGA cases to recover back pay and penalties from employers who had not paid employees separately for this time. While *Gonzalez* and *Bluford* remain in dispute, employer and employee representatives joined the Administration in an effort to resolve back wage claims and set compensation rules going forward without further litigation. The result of this effort was AB 1513”).

¹⁰⁶ *News Release 2016-68, Reminder: July 1 Deadline for Employers to Participate in AB 1513’s Safe Harbor from Penalties on Piece-Rate Back Payments*, CALIFORNIA DEP’T OF INDUSTRIAL RELATIONS (Jun. 27, 2016) <https://www.dir.ca.gov/DIRNews/2016/2016-68.pdf>.

¹⁰⁷ *Id.*

AB 1513 added a new section 226.2 to the Labor Code concerning piece-rate compensation. The new section does two things: [First, it] clarifies pay requirements for rest and recovery breaks and other non-productive time going forward. [Second, it] provides an optional means to make back payments for previously uncompensated time in exchange for relief from damages and penalties.¹⁰⁸

As prong one, AB 1513 which was signed into law under Jerry Brown in 2015 as California Labor code 226.2 does appear at first blush to clarify and streamline the compensation requirements and methodologies of piece rate workers. Very generally speaking, the statute says among other things that: 1. Piece rate workers should be paid the highest of the applicable Federal, State, and or Local minimum wage; 2. non-productive work and rest and recovery compensation must be paid separately from piece rate pay; 3. Rest and recovery break compensation and non-productive time compensation must be paid separately from piece rate pay; 4. The wage statement must include additional information such as the number of pieces, the rate of compensation, the rate of compensation for breaks, the amount, and the amount of¹⁰⁹ non-productive time and the rate of compensation which must not be less than the applicable minimum wage.

Although the statute seems straight forward, Section 226.2 can prove not to be user friendly, confusing, and cause employers a lot of grief in the Courtroom. As to point one above, the statute reads:

This section shall apply for employees who are compensated on a piece-rate basis for any work performed during a pay period. This section shall not be construed to limit or alter minimum wage or overtime compensation requirements, or the obligation to compensate employees for all hours worked under any other statute or local ordinance. For the purposes of this section, applicable minimum wage means the highest of the federal, state, or local minimum wage that is applicable to the employment, and other nonproductive time means 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.¹¹⁰

Employers may not be fully informed which standard of minimum wage applies to their employee and could potentially be underpaying their employee or overpaying their employee. As to the second point, the statute provides, "Employees shall be compensated for rest and recovery periods and other non-productive time separate from any piece-rate compensation."¹¹¹ While rest and

¹⁰⁸ AB 1513 *Piece-Rate Legislation*, *supra* note 92 at 2.

¹⁰⁹ *Id.*

¹¹⁰ CAL. LAB. CODE § 226.2 (West 2016).

¹¹¹ CAL. LAB. CODE § 226.2 (A)(1) (West 2016).

recovery breaks are well defined in the law, non-productive time could be ambiguous.

In *Armenta*, the Court found that employees had to be compensated for non-productive time as they were driving their company vehicle to rural areas to start work as it is obvious that the employees were under the control of their employer.¹¹² While it is likely clear that employees aren't under the control of their employer as they are commuting to work, it is unclear whether or not situations where the employer provides transportation to work could arguably be classified as an employee subject to the control of their employer and summarily be deemed "non-productive" time whereby an employee could demand compensation. As to point three, the method of compensation for rest and recovery periods is very confusing for employers.

Compensation for rest and recovery time is determined as follows: "at a regular hourly rate that is no less than the higher of: (i) An average hourly rate determined by dividing 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 [or by the] applicable minimum wage."¹¹³ In almost any practical application of section 226.2, the amount of compensation owed to the employee will exceed minimum wage in light of their average piece rate earnings. Therefore, it is evident that there is no set amount that an employer can pay their employee for their rest and recovery compensation without using a very confusing statutory method to comply with the law.

Following the statutory language to the extent that rest and recovery compensation is derived from an average hourly pay with respect to compensation over time, deducting there from premium pay and rest and recovery time and pay necessarily means that the outcome will vary every week. To demonstrate how difficult, it is to stay in compliance with rest and recovery compensation in a piece rate context, Bryan Little, director of labor affairs for the California Farm Bureau Federation (CFBF) made a recommendation that may not be compliant with the law.¹¹⁴ Based on his experience both in government, serving with the U.S. Department of Labor, and in agriculture, as chief operating officer for the Farm Employers Labor Service (FELS), Little proposed combining an hourly base wage with incentives to increase production.¹¹⁵ "So you're making a minimum base rate of [ten] dollars per hour, let's say; and then you get paid [two] dollars for every piece you produce on top of that," suggested Little.¹¹⁶ It has been long believed that employers could "cheat the system" by simply paying piece rate

¹¹² *Armenta v. Osmose, Inc.*, *supra* note 31 at 317.

¹¹³ CAL. LAB. CODE 226.2 (3) (West 2016).

¹¹⁴ Brian German, *Assembly Bill 1513 Challenges Farmers on How to Pay Workers*, CALIFORNIA AG TODAY (May 24, 2016), <https://californiaagtoday.com/assembly-bill-1513-hurts-workers>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

workers a base rate plus their piece rate pay and remain in compliance with the law. This may or may not be true. If it's not, then the unsuspecting employer could expect litigation.

Employers using an hourly-plus-bonus or similar compensation structure should reassess their approach in light of AB 1513. A base hourly rate paid for rest and recovery period time may be undercompensating employees under AB 1513. It may be necessary to apply the 'average hourly rate' calculation to determine the correct rate of pay for rest and recovery periods. Failure to comply with AB 1513 could subject an employer to back wages and extremely costly penalties, including Private Attorneys General Act ('PAGA') penalties.¹¹⁷

Retired University of California Labor Management Farm Advisor Gregorio Billikopf stands in stark contrast to Little's suggestion, finding that paying a piece rate worker a blanket hourly wage with an accompanying piece rate for productive work is one of the worst and most "perverse" methods of compensation an employer can employ in an effort to stay compliant with the law.¹¹⁸ As Billikopf points out, paying a piece rate worker a blanket wage ensures that the fastest and most efficient workers are paid less per employee effort and rewards dilatory employees who can put out less effort and still collect a disproportionate wage.¹¹⁹ According to Billikopf, an hourly wage should not be used as a means to stay compliant with the law as the end effect is such that the best workers are punished and employers may unknowingly be out of compliance with the law anyway by paying the incorrect rate to their employees for their rest and recovery breaks in addition.¹²⁰

A. *The Backpay Defense*

AB 1513 and Labor Code section 226.2 are not absolute bad news for employers. For those employers who had piece rate employees leading up to the codification of AB 1513 into Labor Code section 226.2, law makers provided a chance for such employers to avail themselves of a superior defense against many wage and hour damage claims, known as the "Safe Harbor defense".

¹¹⁷ *Private Attorney's General Act (PAGA)*, STATE OF CALIFORNIA DEP'T OF LABOR AND WORKFORCE DEVELOPMENT AGENCY, http://www.labor.ca.gov/Private_Attorneys_General_Act.htm.

¹¹⁸ Gregorio Billikopf, *Labor Management in Agriculture: Cultivating Personnel Productivity*, LABOR MANAGEMENT IN AGRICULTURE- UNIVERSITY OF CALIFORNIA (Apr. 19, 2014), <https://nature.berkeley.edu/ucce50/ag-labor/7labor>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

Employers will have eleven and a half months to make back payments to their employees. Employers who do so will have a legal defense to claims for damage and other penalties associated with the prior failure to pay what was due for such time. Back payments are required for time period of July 1, 2012, through December 31, 2015. Employer may pay actual amounts owed plus 10% interest or Pay 4% of gross earnings during look-back period (with some credits for prior payments – see statute.¹²¹

However, the time has now expired for employers to comply with the statute and receive the Safe Harbor defense. For those employers that did comply, it is quite certain that Plaintiffs' attorneys would shy away from pursuing claims against them. However, for reasons unknown, many employers did not opt to avail themselves of the Safe Harbor defense and continue to either knowingly or unknowingly fail to adhere to the codified requirements of Section 226.2 and will mostly likely find themselves in the courtroom at some point. In addition, the Safe Harbor defense does not defend employers into perpetuity. Employers are still obligated to follow the requirements of Labor Code section 226.2 regardless of whether or not they opted to cure past violations.¹²²

B. Should Piece Rate Work Be Abolished?

Retired University of California Agriculture Labor Advisor Gregorio Billikopf is a strong proponent of piece rate systems, when they are fair for the employee and compliant with the law.¹²³ “Piece-rate has the potential of being a very effective pay method. The good news is that both the enterprise and the employee can benefit—now and in the long run.”¹²⁴ Piece rate, as Billikopf points out, has been around since Biblical times: “Piece rate—in some form or another—has been around since recorded history. For instance, we read in Exodus 5:18 that the children of Israel had a minimum number of pieces that were required of them, spoken of in terms of ‘tales of bricks.’”¹²⁵ Considering that piece rate systems have been around for so long and beneficial to both employer and employee, it is a system that is worthwhile to keep, according to Billikopf.¹²⁶ On the one hand, farmers can predict their labor costs and employees can earn exceptional money.

However, higher production may mean cutting corners to get more money and farmers may throttle back on pay rates leaving employees unhappy. Billikopf refers to this as farmers and labor contractors “playing games” with the piece rate system.¹²⁷ The most concerning point in setting up the system

¹²¹ *AB 1513 Piece-Rate Legislation, supra* note 92 at 9-10.

¹²² *Id.*

¹²³ Billikopf, *supra* note 18.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

appears to be compliance with the law. Labor Code 226.2 is highly complex and ambiguous. Simply going to an attorney who specializes in employment will help stay in compliance with this law, however, there is no guarantee against litigation. Many terms within Labor Code 226.2 are ambiguous. An employer may believe he or she is paying their employee for all “non-productive” work, however, a court may ultimately have a different interpretation of what “non-productive” means for example. Therefore, in order to avoid unnecessary litigation for employers and to protect the employees of California, it is necessary for the legislature to revisit Labor Code 226.2 to define ambiguous terms and to streamline otherwise complicated calculations to determine rest and recovery pay within the context of a complex compensation system. It is unfair to underpay an employee, but it also unfair to penalize a good faith employer who has fallen prey to a complicated law.

Piece rate pay is a double-edged sword. It is indispensable on the one hand to motivate workers to work harder and faster, to be able to predict labor costs, while rewarding and incentivizing those workers for their hard work. Piece rate should unequivocally not be eliminated. It would be an absurdity for the legislature to abolish an employment practice that is as ancient as the Pharos. The piece rate system is really caught in tumult by the unfinished and contrived statutes that are absolutely not user friendly and are unnecessarily complicated by ambiguous terms and complex calculations. The answer is not to abolish, and neither is the correct answer to wait and see how case law sorts things out. A proactive legislature is needed in California today to streamline the statutes that govern piece rate pay and make them user friendly to help keep employers compliant which in essence protects the employee, which is California’s public policy hallmark.

V. CONCLUSION

The concept of piece rate reaches far back into history to its first known documented source in Exodus. Despite this ancient labor precept, modern laws that regulate piece rate are still sorting out employee rights and employer obligations. In California’s Central Valley, piece rate is still very much alive, but it is uncertain if it is healthy. Certainly, there are benefits received by both farmers and farm laborers from piece rate systems. Farmers champion the predictability of labor costs whereas piece rate employees like the incentive to work fast and yield an output that translates into dollars far exceeding any potential that hourly minimum wage could ever provide. However, this symbiosis is abruptly interrupted when farmers find themselves defending multi-party multi-million-dollar litigation against the employees that the farmers believed had been paid more than a fair wage.

The Trilogy of *Armenta*, *Gonzalez*, and *Bluford* created an obvious tool for employees to recoup lost wages, penalties, and other damages against their piece rate employer. The resulting force from these three cases became so

powerful that the need to clarify piece rate worker rights and employer obligations became evident. Labor Code section 226.2 was an attempt to abate threats to both agricultural employers and employees. However, even today heavy piece rate litigation continues. Many champion *Bluford* and *Gonzalez* as the quintessential cases that gave piece rate workers a voice against unfair labor practices. Conversely, these are the same cases that drove multi-million-dollar litigation threatening generations'-old family farms ominously lurking in the shadows of a pre-Trilogy and pre-AB1513 era haunting farmers like a ghoul in the night.

While Labor Code 226.2 has streamlined many previously unanswered and murky areas of the law, such as whether or not non-productive time is compensable, the scope and nature of terms like “non-productive”, “premium pay”, and “separate” are still subject to interpretation and not always as clear as they seem as well as the complex calculations that employers are expected to follow to stay compliant within California’s statutory scheme. While the piece rate system should stay as the superior method of compensation for California’s agriculture industry, the California Legislature should earnestly consider clarifying many ambiguous terms, further streamlining the process, and making piece rate law user friendly. Doing so will promote fairness among employers and employees alike while helping to avoid costly litigation.

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