



no peace with a piece rate unless every hour is paid

MSK Client Alert

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Piece-rate compensation pays employees on a task-completed basis rather than a fixed hourly rate in order to provide an economic incentive for focused and efficient work. Piece-rate systems accordingly often result in greater employee productivity. Now a recent California Court of Appeal decision has upset traditional piece-rate compensation at some employers.

In *Gonzalez v. Downtown LA Motors, LP*, a class of 108 automobile service technicians who worked for the defendant dealership were paid on a piece-rate system for servicing vehicles. They successfully argued that they also were entitled to separate hourly compensation for all their time spent waiting for repair work and doing non-piece-rate tasks. Since piece-rate compensation is common in the fashion, health care (pay-per-visit), equipment installation, manufacturing, and other industries, this decision will affect all California employers who compensate employees in such a manner. Where a piece rate is paid, an employee's compensation for each day worked must be no less than the minimum wage and overtime still must be calculated for hours in excess of 8 in a day or 40 in a week.

In *Gonzalez*, the service technicians were paid an established rate for each "flag hour" they completed. A "flag hour" was time spent on actual vehicle repair, with each repair task assigned its own number of flag hours. Since the vehicle service technicians could and usually did earn more than minimum wage every week under the flag-hour system, they were not paid separately for any nonrepair tasks they performed, such as cleaning their work area while waiting for the next vehicle to service, or for any other nonrepair time.

Even though the vehicle service technicians usually earned more than minimum wage every week under the flag-hour system, and the dealership contended that it paid minimum wage if they did not, the Court of Appeal held that California's minimum wage law required the dealership to separately pay at least minimum wage for their time spent on nonrepair tasks or waiting for vehicles to arrive.

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The Court of Appeal rejected the dealership's practice of "averaging" total weekly compensation over total weekly hours worked. The Court examined Wage Order No. 4-2001 ("Wage Order 4"), which 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." [Emphasis added.]

The dealership argued that its compensation procedure complied with Wage Order 4 because the technicians were paid "not less than" the minimum wage for "all hours worked." The Court of Appeal did not agree, concluding that the technicians should have been separately paid at least minimum wage for every hour of time spent waiting for repair work or performing nonrepair tasks.

The Court found *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (Cal. Ct. App. 2005), to be persuasive, and grounded its decision on that earlier case. In *Armenta*, the Court concluded that Wage Order 4 "expresses the intent to ensure that employees be compensated at the minimum wage for each hour worked" and, importantly, that the method of averaging employees' pay over their hours worked for minimum wage purposes violated California's minimum wage law.

While the dealership contended that *Armenta* did not concern piece-rate workers, the Court did not agree, noting that Wage Order 4 states that it applies "to all persons employed in professional technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis." The Court also remarked that the *Armenta* decision was consistent with the strong California public policy "favoring protection of workers' general welfare."

The Court declined to address rest breaks, although the dealership had argued that the Court's decision would compel additional wages for every rest break. Further, the Court did not believe that its decision addressed employees compensated under commission plans or any other incentive-based compensation system. The Court explained that, despite its decision, the incentive to work for flag hours remained strong since the technicians would earn significantly more by working on cars than waiting for cars to arrive or doing nonrepair tasks.

ASK MSK

Q: What should employers who pay employees on a piece rate or similar production incentive system be doing in light of this decision?

A: Those employers should examine their compensation system to ensure that they pay employees at least minimum wage (now \$8.00/hour) for each hour or partial hour of their working time (including rest breaks) not spent on the piece-rate or incentive pay system, such as periods when work is not available or when performing ancillary tasks not paid under that system.



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Q: How can employers keep track of working time not spent on the piece-rate or other production incentive system?

A: Employers probably are going to have to redesign their timekeeping method to account for working time not spent on the piece-rate or other production incentive system and to have employees confirm that their time record submission includes all working time (and rest breaks) not spent on that system.

Q: Is there an easier alternative for minimum wage compliance under a piece-rate or other production incentive system?

A: Yes. One way would be to pay employees a base hourly wage (at least minimum wage) for every hour of work, plus overtime pay if worked, with employees receiving more money for achieving stated production or output goals (i.e., base pay and overtime, plus a potential weekly or monthly achievement bonus). However, for overtime law compliance, it would be easier if the bonus is stated as a percentage of the total base compensation (including overtime pay) paid during the bonus earning period, such as an additional 10% of that total hourly compensation. Paying a bonus on this percentage of total hourly compensation basis already incorporates any overtime worked to achieve the bonus. Otherwise, overtime pay has to be recalculated over the bonus earning period and additional overtime compensation paid because of the bonus, which is a long-established legal requirement despite its burden on employers.