

# WAGE AND HOUR UPDATE: DECEMBER, 2015: CALIFORNIA FARM LABOR CONTRACTOR ASSOCIATION

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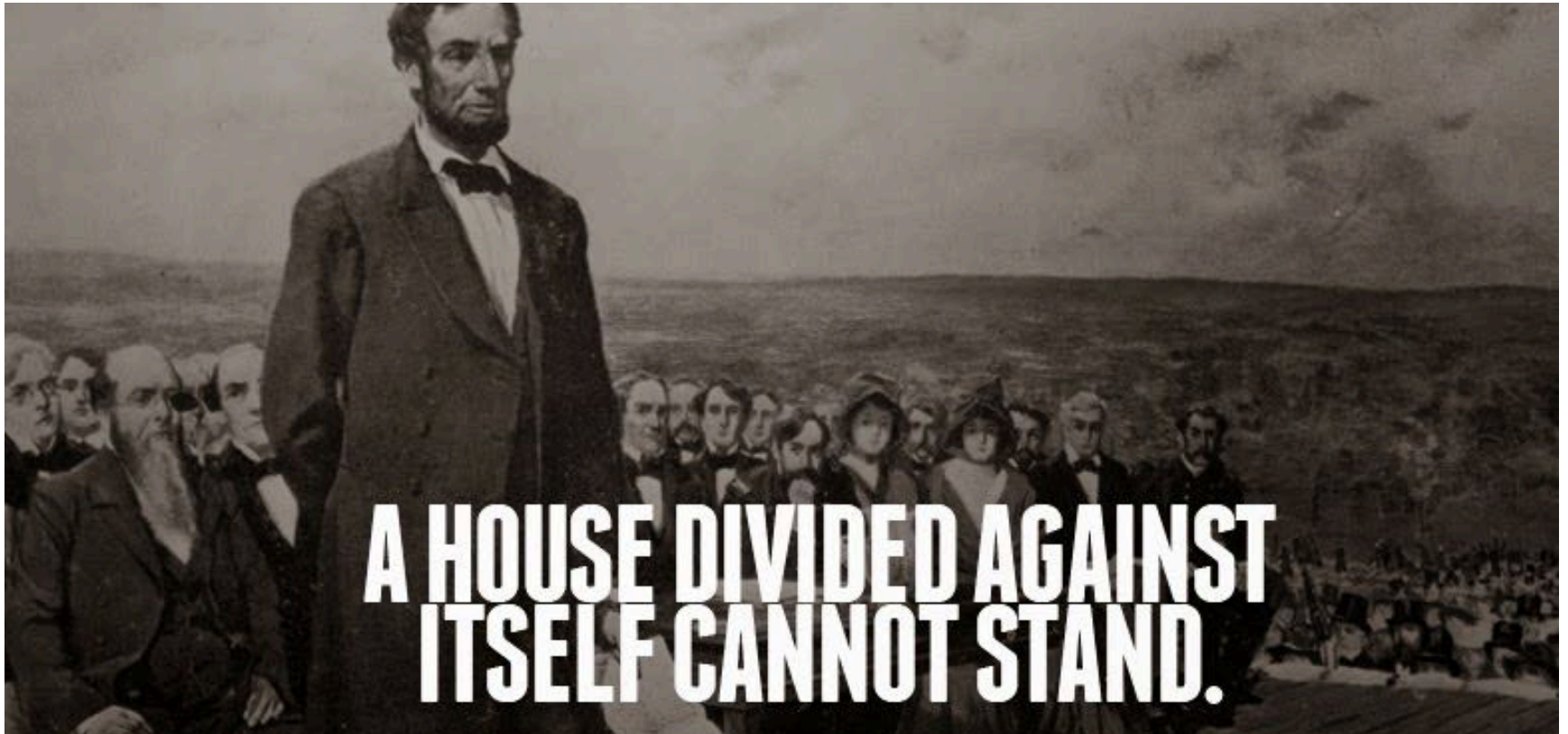
# DISCLAIMER

DISCLAIMER

The following presentation contains general information and is provided as a courtesy to our clients and friends. It should not be relied upon in any particular factual situation without consulting your legal counsel for specific advice.

**WHAT IS THE NUMBER  
ONE ISSUE THAT  
CHALLENGES GROWERS  
AND FARM LABOR  
CONTRACTORS IN  
CALIFORNIA TODAY?**

# DIVISION



# JOINT LIABILITY (AB 1897)

- Requires a grower to share with a labor contractor **all civil legal responsibility and civil liability** for all workers supplied by that labor contractor for the **payment of wages and the failure to obtain valid workers' compensation coverage.**
- Prohibits a grower from shifting to the labor contractor legal duties or liabilities under workplace safety provisions with respect to workers provided by the labor contractor.
- Does not prohibit client employers and labor contractors from mutually contracting for otherwise lawful remedies for violations of its provisions by the other party.

# PROTECT THE CIRCLE

PROTECT THE CIRCLE



GOVERNMENT  
AGENCIES



PLAINTIFF'S  
ATTORNEYS



UNIONS

# RISK MANAGEMENT STRATEGIES

- Arbitration agreements
  - Class Waivers
  - PAGA risk
  
- Handbooks
  
- Documentary, Policy, Compliance review.
  
- Litigation vs. Damage Control.

# ***CONTRACTS***

- No fresh approaches for many years.
- Why are we still trying to stick it to each other?
- Many growers still looking for ways to use the FLC as a shield.
  - Need to change expectations.
- The contract should promote cooperation – protection of the circle.
  - Industry evolving, not there yet.
- Implications of indemnification.

# WHAT IS THE ALTERNATIVE?

- Simplify, read, and understand.
  - Employers need to become more engaged in the contents of their contracts.
  - No more disregard of the written contract.
  
- Promote cooperation and joint defense.
  - *In the event that either Grower or Contractor becomes aware of any actual or potential legal claim or government investigation concerning compliance with laws pertaining to labor and/or employment, regardless of whether such claim or investigation involves employees of Contractor, Grower, or both, the party that obtains knowledge of the actual or potential claim or investigation shall immediately notify the other party, and the parties shall meet and confer to determine which party shall have primary responsibility for handling the matter, and to determine a mutually cooperative approach to efficiently minimize the risk of exposure to both parties.*

# ***LABOR CONTRACTOR RED FLAGS***

- **Capitalization:** How hard is it for them to cover payroll?
- **Overdependence on Mayordomo:** How much contact between management and the workforce?
- **Lack of Technological Sophistication:** Utilizing the tools of modern business?
- **Internal Infrastructure/Specialization:** Safety/compliance/HR support?
- **Administrative Infrastructure:** Office vs. bookkeeper. Bilingual staff?
- **Industry Participation:** Taking advantage of resources to manage risk.

# ***MINIMUM WAGE AND PIECE RATE***

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

# ***WHAT ARE THE IMPLICATIONS?***

- Results from two Court of Appeal decisions in 2013.
  - First DLSE analysis November 1, 2013.
  
- Created immediate risk of liability for all piece rate employers.
  - Unpaid wages
  - Ancillary violations – check stubs.
  
- Imposes compliance obligations going forward
  - Rest periods easy to quantify.
  - Non-productive time challenges – how to capture the day?

# ***AB 1513***

- Represents a political compromise to address massive liability to large employers.
- Codifies the Bluford/Gonzales/DLSE formula for minimum wage and productive rate pay for non-productive time and piece rates.
- Creates a safe harbor for certain employers who pay employees back wages – 4% of gross payroll or actual rest period / NPT hourly pay by July 2016.
- Provides an affirmative defense in certain pending cases.
- Concedes liability on minimum wage; concedes retroactive application of law.
- Many employers will find no help here.
- Further litigation is inevitable.
- What are our options?

# ***HOW TO PAY FOR REST AND RECOVERY PERIODS***

- Employees must be compensated for rest and recovery periods at a regular hourly rate at the productive rate based on their piece rate production (of course, provided that the productive rate is at least minimum wage).
  - This includes both the regular 10 minute rest periods, as well as breaks taken due to heat.
  - Employers still have the obligation to pay additional wages whenever employees' piece rate production is not enough to meet or exceed minimum wage.
  
- The productive rate is determined by dividing the total piece rate compensation for the workweek by the total hours worked performing piece rate work.
  
- The productive rate must be paid for rest and recovery periods, as long as the employee has been earning at least minimum wage on the piece rate.

# ***CALCULATING THE PRODUCTIVE RATE***

- Example 1: Piece rate employee works 40 hours, five days in a week. Employee takes two rest periods per day, and earns \$360.00 for the week.
- Total rest time = 10 min x 2 rest periods x 5 days = 100 minutes = 1.667 hours.
- Productive time = 40 hours – 1.667 hours = 38.333 hours
- “Productive rate” =  $\$360 / 38.33 \text{ hours} = \$9.39 \text{ per hour}$ . Remember that this calculation must exceed minimum wage, or you must make up the shortfall.
- Rest break hourly compensation = 1.667 hours x \$9.39 per hour = \$15.65.
- Total Weekly Compensation =  $\$360.00 + \$15.65 = \$375.65$ .

## ***HOW TO PAY NONPRODUCTIVE TIME***

- “Other nonproductive time” requiring additional hourly compensation is defined as the 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. As there has not been any interpretation of this definition, employers should be conservative, and carefully record and pay activities that are not directly related to the piece rate production.
- Any other “nonproductive time” must be paid at an hourly rate no less than the applicable minimum wage. California minimum wage is currently \$9.00 per hour and will increase to \$10.00 per hour on January 1, 2016.

# ***HEALTHY FAMILIES ACT: PAID SICK LEAVE***

# Entitlement

- Healthy Families Act” (HFA) effective July 1, 2015.
  - Accrual begins on July 1, 2015 or first date of hire, whichever is later.
- All employees who work in California for 30 or more days within a year.
- Employees, including part-time and temporary employees, must accrue at least one hour of paid leave for every 30 hours worked.
- An employee who is exempt from overtime requirements is deemed to work 40 hours per workweek unless the employee’s normal workweek is less than 40 hours.

# Exceptions

- Does not apply to the following:
  - An employee covered by a collective bargaining agreement;
    - Collective Bargaining Agreement must:
      - provide for the wages, hours of work, and working conditions of employees,
      - expressly provide for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees,
      - final and binding arbitration of disputes concerning the application of its paid sick days provisions,
      - Premium wage rates for all overtime hours worked, and
      - Regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.
  - A provider of in-home supportive services under specific conditions; or
  - An individual employed by an air carrier as a flight deck or cabin crew member.

# Usage

- May begin using accrued sick leave on the 90<sup>th</sup> calendar day of employment, after which the employee may use paid sick days as they are accrued.
- Employer may limit use at 3 days or 24 hours per year.
  - Accrued paid sick days shall carry over to the following year of employment.
  - Accrual can be capped annually at 6 days or 48 hours.
  - For partial days, an employer can require employees to take at least two hours of leave, but otherwise the determination of how much time is needed is left to the employee.
- Notice to employer:
  - Foreseeable: employee shall provide reasonable advance notice.
  - Not Foreseeable: employee shall provide notice as soon as possible.

# Part-time and Agricultural Employees

## ■ Part-time employees

- DLSE interprets the reference to “three days” to state an equivalent of 24 hours (based on an 8 hour workday) and is not a limitation that can be used to prohibit a part-time employee from using at least 24 hours of accrued leave in a year. Therefore, the minimum amount that you have to be allowed to take cannot fall below 24 hours.

## ■ Agricultural Employees

- The Healthy Families Act requires 3 days or 24 hours or whichever is greater.
- Wage Order 14 provides for a workday up to a 10 hours per day. If an employee falls under wage order 14 and works more than 8 hours per day then provide them with either 3 days or 30 hours of paid sick leave.

# When Can Paid Sick Leave Be Used?

- An employee may use paid sick leave for:
  - Themselves or a family member for the diagnosis, care or treatment of an existing health condition or preventive care.
    - Family members include the employee's parent, child, spouse, registered domestic partner, grandparent, grandchild, and sibling. Preventive care would include annual physicals or flu shots.
  - Specified purposes for an employee who is a victim of domestic violence, sexual assault or stalking.

# Alternative to Accrual

- Employer can provide 24 hours or 3 days at the beginning of each calendar year, anniversary date, or 12 month basis.
- Employer won't need to track accrual but will need to track and display usage on wage statement or other written document.
- Under this method, employer is not required to provide for carry over of sick leave.

# Seasonal Employees

- What happens if I am a seasonal employee and I only work 60 days one year but return to the same employer within one year and work another 60 days?
  - The paid sick leave law requires that your accrued sick leave be restored to you if you return to the same employer within 12 months from the previous separation. Although an employer does not have to allow an employee use of the paid sick leave prior to working 90 days, because the law specifically requires that the leave be restored to you, in your second year, you have met the 90 day restriction on use after 30 days (due to working 60 days in the prior year) and can begin to use your paid sick leave after working 30 days in the second year.
  
- What happens if I return to work for the same employer after more than one year?
  - The paid sick leave law does not require that your accrued sick leave be restored to you. Whether you have to re-establish eligibility by working another 30 days within a year and 90 days before use, is a question that is not addressed in the new law and will depend on the particular facts of the situation to answer.

# Paid Time Off (PTO)

- An employer is not required to provide additional paid sick days if:
  - The existing paid leave policy or paid time off policy provides both the same hours for usage AND is for the same purpose as outlined in Paid Sick Leave Provision.
    - Satisfies the accrual, carry over, and use requirements; or
    - Provides no less than three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment or calendar year.
  - PTO policy must be in writing.
  - Employers may offer more time and usage than provided in Paid Sick Leave provision but not less.

# How to Pay Sick Leave

- Employers can pay sick leave in either of the following three ways:
  1. Same as regular rate of pay for the workweek in which the employee uses sick time.
  2. Employees total wages not including overtime divided by the employees total hours worked in the full pay period of the prior 90 days of employment.
  3. **Exempt employees:** sick leave shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

# Examples on How to Pay Sick Leave

- Employee was paid a piece rate of \$0.36 per square foot for 16,500 square feet during 400 hours of work in a 90 day period. He earned \$5,940.
  - His hourly rate for sick leave is  $\$5,940 \div 400 \text{ hours} = \$14.85$  per hour.

# Separation

- An employer need not pay out accrued, unused paid sick days upon termination, resignation, or other separation from employment.
- If an employee separates from an employer and is rehired by the employer within one year from the date of separation, previously accrued and unused paid sick days must be reinstated. The employee may use those previously accrued and unused paid sick days upon rehiring.
- If an employer has a separate PTO plan, a final payout of PTO is due at separation.

# Protection from Retaliation

- Paid Sick Leave law protects employees who:
  - Use sick leave,
  - File a complaint with the Labor Commissioner's Office,
  - Allege a violation of these rights,
  - Cooperate in an investigation or prosecution,
  - Or oppose a policy or practice prohibited by this article.
  
- Prohibits an employer from:
  - Denying an employee the right to use paid sick leave, or
  - discharging, threatening to discharge, demoting, suspending, or in any manner discriminating against an employer
  
- There is a rebuttable presumption of unlawful retaliation if the employer acts in a manner described above within 30 days of the employee's request for leave or other protected activity.

## Notice Requirement

- At all times, employers must provide employees with written notice of the amount of leave on the employee's check stub or other written statement provided with the check.
  
- Employers must display a poster in a conspicuous place containing all of the following:
  - An employee is entitled to accrue, request, and use paid sick days;
  - The amount of sick days provided for by the HFA;
  - The terms of use of paid sick days;
  - That retaliation or discrimination against an employee who requests paid sick days or uses paid sick days, or both, is prohibited and that an employee has the right under this article to file a complaint with the Labor Commissioner.
  
- Employers must keep for at least three years of records documenting the hours worked and paid sick days accrued and used by an employee.

## Notice requirement continued

- An English language poster can be found at:
  - [http://www.dir.ca.gov/dlse/Publications/Paid\\_Sick\\_Days\\_Poster\\_Template\\_\(11\\_2014\).pdf](http://www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf)
  
- A Spanish language poster can be found at:
  - [http://www.dir.ca.gov/dlse/Publications/Paid\\_Sick\\_Days\\_Poster\\_Template\\_Spanish.pdf](http://www.dir.ca.gov/dlse/Publications/Paid_Sick_Days_Poster_Template_Spanish.pdf)
  
- The DLSE has updated the mandatory notice to employees that must be provided to all new hires. Employers should be sure to check the box that sick leave is provided.
  - The English form can be found at:
  - [http://www.dir.ca.gov/dlse/Publications/LC\\_2810.5\\_Notice\\_\(Revised-11\\_2014\).pdf](http://www.dir.ca.gov/dlse/Publications/LC_2810.5_Notice_(Revised-11_2014).pdf)
  - The Spanish form can be found at:
  - [http://www.dir.ca.gov/dlse/Publications/LC\\_2810\\_5\\_Notice\\_Spanish.pdf](http://www.dir.ca.gov/dlse/Publications/LC_2810_5_Notice_Spanish.pdf)

# Penalties for Violating HFA

- The Labor Commissioner will have the authority to investigate and enforce any violations that are committed in violation of the new HFA. An employer who willfully violates the posting requirements is subject to a civil penalty of not more than one hundred dollars (\$100) per each offense.
- If any other violation of paid sick leave has occurred, the Labor Commissioner may order reinstatement, back pay, the payment of sick days unlawfully withheld, and the payment of an administrative penalty of up to eight thousand (\$8,000.00) dollars, depending on the amount sick days withheld and the harm caused to the employee.

# Six Steps to Successful Compliance

1. Display poster on paid sick leave where employees can read it easily.
2. Provide written notice to individual employee at time of hire with paid sick leave information.
3. Provide for accrual of one hour of sick leave for 30 hours of work for eligible employee to use.
4. Allow eligible employees to use accrued paid sick leave upon request or notification.
5. Show how many hours of sick leave an employee has available. This must be on a pay stub or a document issued the same day as a paycheck.
6. Keep records showing how many hours have been earned and used for three years.

# Scenario 1

- Employer hires seasonal workers paid on a piece rate basis. Some employees return year after year, while others only work on season.
  - Does the employer have to maintain records of accrued paid sick leave?
    - Yes.
  - Are returning employees entitled to carry over of un-used leave?
    - Yes, if they return within one year from the date of separation.
  - Does the employer have to pay out un-used sick leave at the end of the season?
    - No.

# UNIFY AGAINST THE COMMON FOE

