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2:42 PM 10/31/2013

Introduced by Senator PadillaFebruary 21, 2013

An act to amend Section 226.7 of the Labor Code, relating to compensation.

LEGISLATIVE COUNSEL'S DIGEST

SB 435, as introduced, Padilla. Compensation: piece-rate workers: rest and recovery periods.

Existing law prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission (IWC) and establishes penalties for an employer's failure to provide a mandated meal or rest period. Existing law establishes the Division of Labor Standards Enforcement (DLSE) in the Department of Industrial Relations for the enforcement of labor laws, including wage claims.

This bill would make that prohibition applicable to any meal or rest or recovery period mandated by applicable statute or applicable regulation, standard, or order of the IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The bill would require employers to pay employees for any rest period mandated by law, including any applicable statute or applicable regulation, standard, or order of the IWC, the board, or the Division of Occupational Safety and Health, that is not provided. The bill would require the rate of pay for the rest and recovery periods of piece-rate workers to be the average piece-rate wage, as specified. The bill would authorize a piece-rate worker, pursuant to a civil action or a claim filed with DLSE, to recover his or her unpaid average piece-rate wage for each rest or recovery period in which a violation of these provisions occurred. The bill would provide that it does not apply to an employee

whose wages, hours, and working conditions are covered by a collective bargaining agreement that expressly addresses rest or recovery periods for employees paid on a piece-rate basis.

Vote: majority. Appropriation: no. Fiscal committee: yes.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 226.7 of the Labor Code is amended to
 2 read:

3 226.7. (a) ~~No~~As used in this section, “piece-rate basis” means
 4 a method of payment based on units of production earned by an
 5 employee during a work day or a pay period, or any fraction
 6 thereof. “Unit of production” means any measurable or
 7 quantifiable employee activity that can be assigned a monetary
 8 value for purposes of computing pay for activity performed by the
 9 employee during a work day or pay period or fraction thereof.

10 (b) An employer shall not require any employee to work during
 11 any meal or rest or recovery period mandated by an pursuant to
 12 any applicable statute, or applicable regulation, standard, or order
 13 of the Industrial Welfare Commission, the Occupational Safety
 14 and Health Standards Board, or the Division of Occupational
 15 Safety and Health.

16 ~~(b)~~
 17 (c) If an employer fails to provide an employee a meal period
 18 or rest period in accordance with an any state law, including, but
 19 not limited to, any applicable statute or applicable regulation,
 20 standard, or order of the Industrial Welfare Commission, the
 21 Occupational Safety and Health Standards Board, or the Division
 22 of Occupational Safety and Health, the employer shall pay the
 23 employee one additional hour of pay at the employee’s regular
 24 rate of compensation for each work day that the meal or rest or
 25 recovery period is not provided.

26 (d) (1) Rest or recovery periods mandated pursuant to any state
 27 law, including but not limited to, statute, or regulation, standard,
 28 or order of the Industrial Welfare Commission, the Occupational
 29 Safety and Health Standards Board, or the Division of
 30 Occupational Safety and Health, shall be counted as hours worked
 31 for which there shall be no deduction from wages. An employee
 32 working on a piece-rate basis shall be compensated for rest periods

1 *by being paid his or her average piece-rate wage during each pay*
2 *period, or portion of a pay period, in which the employee was paid*
3 *on a piece-rate basis.*

4 *(2) Pursuant to a civil action or a claim filed with the Division*
5 *of Labor Standards Enforcement, an employee working on a*
6 *piece-rate basis may recover his or her unpaid average piece-rate*
7 *wage for each rest or recovery period in any pay period in which*
8 *a violation of this subdivision occurred in addition to any amounts*
9 *owed pursuant to subdivision (c).*

10 *(e) This section does not apply to an employee whose wages,*
11 *hours, and working conditions are covered by a collective*
12 *bargaining agreement that expressly addresses rest or recovery*
13 *periods for employees paid on a piece-rate basis.*

Regarding meal and rest periods, existing law requires the following:

Meal Periods: An employer may not employ a worker for a period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day is no more than six hours, the meal period may be waived by mutual consent of both parties. A second 30 minute meal period is required if an employee works more than ten hours per day, except if total hours worked is no more than 12, the second meal period may be waived by mutual consent only if the first meal period was not waived. (Labor Code §512)

Rest Periods: Industrial Welfare Commission Wage Orders require that employers authorize and permit nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle of each work period. The rest period is based on the total hours worked and must be at the minimum rate of a net 10 consecutive minutes for each 4 hour work period, or major fraction thereof. A rest period is not required for employees whose total daily work time is less than 3.5 hours. According to the IWC wage orders, authorized rest periods are counted as time worked and therefore, must be paid by the employer.

Under existing law , no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. If an employer fails to provide an employee a meal period or rest period in

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Consultant: Alma Perez

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accordance with an applicable order of the IWC, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided. (Labor Code §226.7)

This Bill would extend existing rest period protections available within the Industrial Welfare Commission orders to workers paid on a "piece-rate basis" as well as make them applicable during an employee's recovery period, as specified.

Specifically, this bill would:

Define "piece-rate basis" as a method of payment based on units of production earned by an employee during a work day or pay period, or any fraction thereof.

Add to the existing IWC wage order requirements regarding meal and rest periods, the following:

- o Prohibit an employer from requiring an employee to work during any meal, rest or recovery period mandated pursuant to any applicable statute, regulation, or standard of the Occupational Safety and Health Standards Board (OSHSB), or the Division of Occupational Safety and Health (Cal/OSHA).
- o Extend the requirement that employers pay one additional hour for failure to provide a meal, rest or recovery period as required by applicable statutes, regulations, or standards of the OSHSB or Cal/OSHA.

Provide that rest or recovery periods mandated pursuant to any statute, regulation, standard, or order of the IWC, the OSHSB, or Cal/OSHA, shall be counted as hours worked for which there shall be no deduction from wages. [IWC orders already require - this bill would codify the requirement]

Specify that employees working on a "piece-rate basis" shall be compensated for rest periods by being paid his/her average piece-rate wage during each pay period, or portion

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of, in which the employee was paid on a piece-rate basis.

Authorize a piece-rate worker, pursuant to a civil action or a claim filed with the Division of Labor Standards Enforcement, to recover his/her unpaid average piece-rate wage for each rest or recovery period in which a violation of these provisions occurred.

Provide that the provisions of this bill do not apply to an employee whose wages, hours, and working conditions are covered by a collective bargaining agreement that expressly addresses rest or recovery periods for employees paid on a piece-rate basis.

COMMENTS

1. Background on the IWC, the OSHSB and Cal/OSHA:

Under existing law, one of the functions of the Department of Industrial Relations (DIR) is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment. Within DIR there are various boards and divisions tasked with the execution of these requirements.

Industrial Welfare Commission (IWC):

It is the duty of the IWC to ascertain the wages, hours and conditions of labor and employment in the various occupations, trades and industries in which employees are employed in this state. Through its seventeen (17) industry specific wage orders, the IWC establishes requirements on hours and days of work, minimum wages, reporting time, and meal and rest periods, among others. While the IWC is currently not in operation due to budget constraints, the Division of Labor Standards Enforcement (DLSE) continues to enforce the provisions of the wage orders.

Division of Occupational Safety and Health (also known as Cal/OSHA):

Cal/OSHA protects workers and the public from safety hazards

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through its Occupational Safety and Health, elevator, amusement ride, aerial tramway, ski lift and pressure vessel inspection programs, and also provides consultative assistance to employers.

Occupational Safety and Health Standards Board (OSHSB):

The Standards Board is the standard-setting agency within Cal/OSHA tasked with the responsibility of adopting reasonable and enforceable standards at least as effective as federal standards to ensure a safe and healthful workplace for employees.

Division of Labor Standards Enforcement (DLSE):

The DLSE is the entity responsible for the adjudication of wage claims, investigation of discrimination and public works complaints, and enforcement of Labor Code statutes and Industrial Welfare Commission wage orders.

2. Rest Period Requirements in Statute, Standards and IWC Wage Orders:

Each of the seventeen (17) IWC Wage Orders includes a section on rest period requirements - authorizing non-exempt employees to take a rest period at a rate of ten (10) minutes per 4 hours or major fraction thereof. According to the IWC wage orders, authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

Existing Labor Code §226.7 prohibits an employer from requiring any employee to work during any meal or rest period mandated by an applicable order of the IWC. Furthermore, an employer who fails to provide this meal or rest period is required to pay the employee one additional hour of pay for each work day that the meal or rest period is not provided.

In addition to the IWC orders and Labor Code §226.7, the Heat Illness Prevention regulations established by the Occupational Safety and Health Standards Board have an additional requirement regarding a rest period applicable to all outdoor places of employment. Since August 2005, employers in the State of California have been required by regulation to protect outdoor employees from the hazard of heat illness.

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This regulation was promulgated in response to unusually hot summer temperatures over a wide area of the state which led to a greatly elevated number of cases of serious heat illness in the workplace, including a number of deaths. This regulation, codified at Title 8 CCR §3395, came about first by adoption of an emergency temporary standard and was followed by adoption of a permanent standard in 2006. Under these regulations, employees are allowed and encouraged to take a cool-down rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to protect themselves from overheating.

3. Are workers paid on "piece-rate basis" taking their meal and rest periods?

According to the DLSE's Enforcement Policies and Interpretations Manual, piece rate or piece work is a method of payment based on units of production completed. However, all requirements that apply to hourly employees also apply to piece-rate employees - including meal and rest period requirements.

Unfortunately, our state and country has been facing a workplace enforcement crisis with violations of many of our long-established labor protections. According to a 2010 report published by the Institute for Research on Labor and Employment at UCLA, titled Wage Theft and Workplace Violations in Los Angeles, surveying 1,815 workers in Los Angeles County, a large majority of L.A. respondents (89.6 percent) worked enough consecutive hours to be legally entitled to a meal break. However, 80.3 percent of at-risk workers and 69.8 percent of the total sample experienced a meal break violation in the previous work week. Meal break violations took a variety of forms, from receiving a shortened meal break to not receiving one at all. Regarding a rest break, the survey found that 81.7 percent of respondents eligible for rest breaks (and 77.3 percent of the full L.A. sample) were either denied a break entirely or had a shortened break.

The UCLA report further revealed that pay-related violations are often obscured by non-hourly pay arrangements and/or cash payment in the absence of legally required statements of

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earnings and deductions. According to the report, informal pay systems may facilitate minimum wage and other violations, while making it harder for workers to claim their rights under the law.

4. Need for this bill?

Although existing law affords employees - by statute, regulation and standards - the ability and protections to take a meal and rest period, there have been concerns raised regarding rest periods not taken by employees paid on a piece-rate basis. While a meal period is unpaid (as long as the employee is relieved of all duty), rest periods are construed as "hours worked" and must be compensated at the employee's regular rate of pay. However, current law is silent about how this requirement is supposed to be implemented for industries paying on a piece-rate basis.

This bill would clarify that a piece rate worker is entitled to be paid for a rest and recovery period and provides a formula [average piece-rate] for determining compensation rates for piece rate workers. Additionally, the bill would prohibit an employer from requiring an employee to work during any meal, rest or recovery period mandated by applicable statute or regulation, standard, or order of the IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. Current law requires this of IWC wage orders; this bill would simply add to the prohibition any mandate by the OSHA Standards Board or Cal/OSHA -- such as rest breaks found in heat illness regulations.

By codifying the requirement that all rest periods be counted as hours worked - for which there shall be no deduction of wages - the Legislature would ensure that all workers entitled to a rest period are paid for that time regardless of whether the requirement appears in the IWC wage orders, statute or regulations.

5. Suggested Committee Amendments:

Although Labor Code §512 requires an employer to provide its
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employees with a 30 minute meal period, without reference as to whether the employee is exempt or non-exempt, the Industrial Welfare Commission Wage Orders exclude employees that satisfy specified executive, administrative, and professional duties qualifying them for exemption. The IWC wage order exempts these employees from wage and hour requirements such as daily overtime and meal and rest periods. However, the exclusions from such wage and hour mandates are found solely in the IWC Wage Orders.

The author may wish to amend the bill to clarify that the provisions of this bill do not change the applicability of current law -- and exempt employees would continue to be exempt.

The provisions of this bill would introduce the concept of a "recovery period" as a new term in the Labor Code. Committee staff suggests amending the bill to include a definition to a "recovery period." Staff recommends the following:

As used in this section, "recovery period" means the cool-down rest period afforded to employees to prevent heat illness.

6. Proponent Arguments :

According to proponents of the measure, this bill will clarify how paid rest breaks and recovery periods are to be compensated by employers when employees are paid on a piece rate basis. Proponents argue that piece rate workers, unlike their hourly or salaried counterparts, are often induced to work through their rest or recovery periods because they suffer a loss of income. They believe this bill is necessary to increase incentives for piece rate workers to actually take their rest and heat stress recovery periods rather than 'willingly' working through them to avoid losing money.

According to the sponsors of the measure, a 2004 CA Rural Legal Assistance Foundation survey of more than 1,000 piece rate farm workers laboring in the raisin harvest, found that more than 70% of workers 'voluntarily' worked through rest periods to avoid losing money. Nearly two-thirds of them said they would be "more likely" to take rest periods if they were

paid their average piece rate earnings during that time. The sponsors argue that it is significant that these results were obtained from surveying workers in Central Valley raisin

harvests where triple digit temperatures have resulted in farm worker deaths from heat stress. They argue that while not all piece rate workers potentially face a life or death decision when they are not given their rest periods, compliance by employers with these important state policies should not be so insidiously undermined by the manner in which workers are paid.

7. Opponent Arguments :

Opponents argue that this bill will threaten a new wave of destructive and costly litigation to California employers by including exempt employees under the one-hour penalty for failure of an employer to provide a meal or rest period. According to opponents, for over ten years, CA employers suffered as a result of class action litigation regarding the meaning of the term "provide" with regard to meal and rest periods for hourly, non-exempt employees. With this bill, opponents are concerned that the penalty provision of Labor Code §226.7 would be significantly expanded to include exempt employees by making the penalty available to not just those employers that fail to comply with the IWC Wage Orders, but also to any employer who fails to comply with statutory meal and rest period requirements in Labor Code § 512.

Additionally, opponents contend that, as exempt employees, employers do not track such employees' time, thereby making it extremely difficult for employers to adequately and fairly defend themselves in litigation. Opponents also argue that the proposed definition of piece-rate is also extremely broad, as it could include exempt employees who are paid, in part, a production bonus based upon a specific unit of time, number of items sold, or even certain amount of sales. Furthermore, they argue that this bill could significantly increase costs for employers who have employees with mandated periods of rest that could be characterized as "recovery periods" subject to compensation. For example, IWC Wage Order No. 5-2001 mandates that an employee who works 24 consecutive hours must receive at least 8 hours of off-duty time. It also states that an

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employee's time spent sleeping is not considered hours worked. Opponents are concerned, that this bill would potentially transform such time spent sleeping or the mandated 8 hours of off-duty time as compensable, as a "recovery period."

8. Prior Legislation :

SB 1538 (Alarcon) of 2004: Vetoed by the Governor
Much like this bill, SB 1538 would have required employers to

pay employees for any rest period mandated by statute, regulation, or order of the IWC and would establish the formula by which the rate of pay would have been determined for the rest periods of piece-rate workers in the agricultural and garment industries, as specified.

AB 755 (De La Torre) of 2005: Vetoed by the Governor
Almost identical to SB1538, however, AB 755 does not enumerate the formula that would have been used to determine the rate of pay of piece-rate workers, but rather states that it be the "average piece-rate" wage.

SUPPORT

California Rural Legal Assistance Foundation - Co-Sponsor
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Teamsters Public Affairs Council
Engineers & Scientists of California, IFPTE Local 20
International Longshore & Warehouse Union
National Lawyers Guild Labor & Employment Committee
Professional and Technical Engineers, IFPTE Local 21
United Farm Workers
United Food and Commercial Workers Western States Council
UNITE-HERE, AFL-CIO
Utility Workers Union of America, Local 132

OPPOSITION

Air Conditioning Trade Association
California Association of Winegrape Growers
California Chamber of Commerce

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California Framing Contractors Association
California Professional Association of Specialty Contractors
California Retailers Association
National Federation of Independent Business
Plumbing-Heating-Cooling Contractors Association of California
Western Electrical Contractors Association

AMENDED IN SENATE APRIL 16, 2013

SENATE BILL

No. 435

Introduced by Senator Padilla

February 21, 2013

An act to amend Section 226.7 of the Labor Code, relating to compensation.

LEGISLATIVE COUNSEL'S DIGEST

SB 435, as amended, Padilla. Compensation: piece-rate workers: rest and recovery periods.

Existing law prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission (IWC) and establishes penalties for an employer's failure to provide a mandated meal or rest period. Existing law establishes the Division of Labor Standards Enforcement (DLSE) in the Department of Industrial Relations for the enforcement of labor laws, including wage claims.

This bill would make that prohibition applicable to any meal or rest or recovery period mandated by applicable statute or applicable regulation, standard, or order of the IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The bill would require employers to pay employees for any rest period mandated by law, including any applicable statute or applicable regulation, standard, or order of the IWC, the board, or the Division of Occupational Safety and Health, that is not provided. The bill would require the rate of pay for the rest and recovery periods of piece-rate workers to be the average piece-rate wage, as specified. The bill would authorize a piece-rate worker, pursuant to a civil action or a claim filed with DLSE, to recover his or her unpaid average piece-rate wage for

each rest or recovery period in which a violation of these provisions occurred. The bill would provide that it does not apply to an employee whose wages, hours, and working conditions are covered by a collective bargaining agreement that expressly addresses rest or recovery periods for employees paid on a piece-rate basis, *or to employees exempt under specified law.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
 State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 226.7 of the Labor Code is amended to
 2 read:
 3 226.7. (a) As used in this section, ~~“piece-rate section:~~
 4 (1) *“Piece-rate basis”* means a method of payment based on
 5 units of production earned by an employee during a work day or
 6 a pay period, or any fraction thereof. ~~“Unit~~
 7 (2) *“Recovery period”* means a cooldown period afforded an
 8 employee to prevent heat illness.
 9 (3) *“Unit of production”* means any measurable or quantifiable
 10 employee activity that can be assigned a monetary value for
 11 purposes of computing pay for activity performed by the employee
 12 during a work day or pay period or fraction thereof.
 13 (b) An employer shall not require any employee to work during
 14 any meal or rest or recovery period mandated pursuant to any
 15 applicable statute, or applicable regulation, standard, or order of
 16 the Industrial Welfare Commission, the Occupational Safety and
 17 Health Standards Board, or the Division of Occupational Safety
 18 and Health.
 19 (c) If an employer fails to provide an employee a meal period
 20 or rest period in accordance with any state law, including, but not
 21 limited to, any applicable statute or applicable regulation, standard,
 22 or order of the Industrial Welfare Commission, the Occupational
 23 Safety and Health Standards Board, or the Division of Occupational
 24 Safety and Health, the employer shall pay the employee one
 25 additional hour of pay at the employee’s regular rate of
 26 compensation for each work day that the meal or rest or recovery
 27 period is not provided.
 28 (d) (1) Rest or recovery periods mandated pursuant to any state
 29 law, including, but not limited to, a statute, or a regulation,

1 standard, or order of the Industrial Welfare Commission, the
2 Occupational Safety and Health Standards Board, or the Division
3 of Occupational Safety and Health, shall be counted as hours
4 worked for which there shall be no deduction from wages. An
5 employee working on a piece-rate basis shall be compensated for
6 rest periods by being paid his or her average piece-rate wage during
7 each pay period, or portion of a pay period, in which the employee
8 was paid on a piece-rate basis.

9 (2) Pursuant to a civil action or a claim filed with the Division
10 of Labor Standards Enforcement, an employee working on a
11 piece-rate basis may recover his or her unpaid average piece-rate
12 wage for each rest or recovery period in any pay period in which
13 a violation of this subdivision occurred in addition to any amounts
14 owed pursuant to subdivision (c).

15 (e) This section does not apply to an employee whose wages,
16 hours, and working conditions are covered by a collective
17 bargaining agreement that expressly addresses rest or recovery
18 periods for employees paid on a piece-rate basis.

19 (f) *This section does not apply to an employee who is exempt*
20 *pursuant to any state law, including, but not limited to, a statute*
21 *or a regulation, standard, or order of the Industrial Welfare*
22 *Commission.*

| SENATE RULES COMMITTEE | SB 435 |
| Office of Senate Floor Analyses |
| 1020 N Street, Suite 524 |
| (916) 651-1520 Fax: (916) |
327-4478

THIRD READING

Bill No: SB 435
Author: Padilla (D)
Amended: 4/16/13
Vote: 21

SENATE LABOR & INDUSTRIAL RELATIONS COMMITTEE : 4-1, 4/10/13
AYES: Lieu, Leno, Padilla, Yee
NOES: Wyland

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

SUBJECT : Compensation: piece-rate workers: rest and
recovery periods

SOURCE : California Rural Legal Assistance Foundation

DIGEST : This bill extends existing rest period protections
available within the Industrial Welfare Commission (IWC) wage
orders to workers paid on a "piece-rate basis" as well as make
them applicable during an employee's recovery period, or to
employees exempt under law, as specified.

ANALYSIS :

Existing law establishes, within the Department of Industrial
Relations (DIR), the following entities:

1.IWC: to regulate employee wages, hours and working
conditions. (Labor Code Sections 70-74)

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2.Division of Occupational Safety and Health (Cal/OSHA): tasked
with the responsibility of protecting workers and the public

from safety hazards through its various programs.

3. Occupational Safety and Health Standards Board (OSHSB): to adopt reasonable and enforceable standards at least as effective as federal standards.
4. Division of Labor Standards Enforcement: to adjudicate wage claims, investigate discrimination and public works complaints, and enforce Labor Code and IWC wage orders.

Existing law, with certain exceptions, defines a day's work as eight hours of labor. Any additional hours worked in excess of eight hours in one day, or a 40-hour workweek, must be compensated with the payment of overtime.

Regarding meal and rest periods, existing law requires the following:

1. Meal Periods: An employer may not employ a worker for a period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day is no more than six hours, the meal period may be waived by mutual consent of both parties. A second 30 minute meal period is required if an employee works more than ten hours per day, except if total hours worked is no more than 12, the second meal period may be waived by mutual consent only if the first meal period was not waived.
2. Rest Periods: IWC wage orders require that employers authorize and permit nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle of each work period. The rest period is based on the total hours worked and must be at the minimum rate of a net 10 consecutive minutes for each 4 hour work period, or major fraction thereof. A rest period is not required for employees whose total daily work time is less than 3.5 hours. According to the IWC wage orders, authorized rest periods are counted as time worked and therefore, must be paid by the employer.

Under existing law, no employer shall require any employee to work during any meal or rest period mandated by an applicable

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order of the IWC. If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the IWC, the employer shall pay the employee one additional hour of pay at the employee's regular rate of

compensation for each work day that the meal or rest period is not provided. (Labor Code Sec.226.7)

This bill extends existing rest period protections available within the IWC wage orders to workers paid on a "piece-rate basis" as well as make them applicable during an employee's recovery period, as specified.

Specifically, this bill:

1. Defines "piece-rate basis" as a method of payment based on units of production earned by an employee during a work day or pay period, or any fraction thereof.
2. Adds to the existing IWC wage order requirements regarding meal and rest periods, the following:
 - A. Prohibits an employer from requiring an employee to work during any meal, rest or recovery period mandated pursuant to any applicable statute, regulation, or standard of the Occupational Safety and Health Standards Board (OSHSB), or the Division of Occupational Safety and Health (Cal/OSHA).
 - B. Extends the requirement that employers pay one additional hour for failure to provide a meal, rest or recovery period as required by applicable statutes, regulations, or standards of the OSHSB or Cal/OSHA.
 - C. Provides that rest or recovery periods mandated pursuant to any statute, regulation, standard, or order of the IWC, the OSHSB, or Cal/OSHA, shall be counted as hours worked for which there shall be no deduction from wages. [IWC orders already require -this bill would codify the requirement]
 - D. Specifies that employees working on a "piece-rate basis" shall be compensated for rest periods by being paid his/her average piece-rate wage during each pay period, or portion of, in which the employee was paid on

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a piece-rate basis.

- E. Authorizes a piece-rate worker, pursuant to a civil action or a claim filed with the Division of Labor Standards Enforcement, to recover his/her unpaid average piece-rate wage for each rest or recovery period in which

a violation of these provisions occurred.

- F. Provides that the provisions of this bill do not apply to an employee whose wages, hours, and working conditions are covered by a collective bargaining agreement that expressly addresses rest or recovery periods for employees paid on a piece-rate basis, or to employees exempt under the law, as specified.

Comments

Rest Period Requirements in Statute, Standards and IWC Wage Orders:

Each of the seventeen (17) IWC wage orders includes a section on rest period requirements - authorizing non-exempt employees to take a rest period at a rate of ten (10) minutes per 4 hours or major fraction thereof. According to the IWC Wage Orders, authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

In addition to the IWC wage orders and Labor Code Sec.226.7, the Heat Illness Prevention regulations established by the OSHSB have an additional requirement regarding a rest period applicable to all outdoor places of employment. Since August 2005, employers in the State of California have been required by regulation to protect outdoor employees from the hazard of heat illness. This regulation was promulgated in response to unusually hot summer temperatures over a wide area of the state which led to a greatly elevated number of cases of serious heat illness in the workplace, including a number of deaths. This regulation, codified at Title 8 California Code Regulations Section 3395, came about first by adoption of an emergency temporary standard and was followed by adoption of a permanent standard in 2006. Under these regulations, employees are allowed and encouraged to take a cool-down rest in the shade for a period of no less than 5 minutes at a time when they feel the need to do so to protect themselves from overheating.

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Prior Legislation

SB 1538 (Alarcon, 2004) would have required employers to pay employees for any rest period mandated by statute, regulation, or order of the IWC and would establish the formula by which the rate of pay would have been determined for the rest periods of piece-rate workers in the agricultural and garment industries,

as specified. Vetoed by the Governor.

AB 755 (De La Torre, 2005), almost identical to SB 1538, however, AB 755 did not enumerate the formula that would have been used to determine the rate of pay of piece-rate workers, but rather states that it be the "average piece-rate" wage. Vetoed by the Governor.

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

SUPPORT : (Verified 4/29/13)

California Rural Legal Assistance Foundation (source)
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Teamsters Public Affairs Council
Engineers & Scientists of California, IFPTE Local 20
International Longshore & Warehouse Union
National Lawyers Guild Labor & Employment Committee
Professional and Technical Engineers, IFPTE Local 21
United Farm Workers
United Food and Commercial Workers Western States Council
UNITE-HERE, AFL-CIO
Utility Workers Union of America, Local 132

OPPOSITION : (Verified 4/29/13)

Air Conditioning Trade Association
California Association of Winegrape Growers
California Framing Contractors Association
California Professional Association of Specialty Contractors
California Retailers Association
National Federation of Independent Business
Plumbing-Heating-Cooling Contractors Association of California
Western Electrical Contractors Association

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ARGUMENTS IN SUPPORT : According to proponents of the measure, this bill will clarify how paid rest breaks and recovery periods are to be compensated by employers when employees are paid on a piece-rate basis. Proponents argue that piece-rate workers, unlike their hourly or salaried counterparts, are often induced to work through their rest or recovery periods because they suffer a loss of income. They believe this bill is necessary to increase incentives for piece-rate workers to actually take their rest and heat stress recovery periods rather than

"willingly" working through them to avoid losing money.

According to the sponsor of the measure, a 2004 CA Rural Legal Assistance Foundation survey of more than 1,000 piece-rate farm workers laboring in the raisin harvest, found that more than 70% of workers "voluntarily" worked through rest periods to avoid losing money. Nearly two-thirds of them said they would be "more likely" to take rest periods if they were paid their average piece-rate earnings during that time. The sponsors argue that it is significant that these results were obtained from surveying workers in Central Valley raisin harvests where triple digit temperatures have resulted in farm worker deaths from heat stress. They argue that while not all piece-rate workers potentially face a life or death decision when they are not given their rest periods, compliance by employers with these important state policies should not be so insidiously undermined by the manner in which workers are paid.

ARGUMENTS IN OPPOSITION : Opponents argue that this bill will threaten a new wave of destructive and costly litigation to California employers by including exempt employees under the one-hour penalty for failure of an employer to provide a meal or rest period. According to opponents, for over ten years, CA employers suffered as a result of class action litigation regarding the meaning of the term "provide" with regard to meal and rest periods for hourly, non-exempt employees. With this bill, opponents are concerned that the penalty provision of Labor Code Section 226.7 would be significantly expanded to include exempt employees by making the penalty available to not just those employers that fail to comply with the IWC wage orders, but also to any employer who fails to comply with statutory meal and rest period requirements in Labor Code Section 512.

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Additionally, opponents contend that, as exempt employees, employers do not track such employees' time, thereby making it extremely difficult for employers to adequately and fairly defend themselves in litigation. Opponents also argue that the proposed definition of piece-rate is also extremely broad, as it could include exempt employees who are paid, in part, a production bonus based upon a specific unit of time, number of items sold, or even certain amount of sales. Furthermore, they argue that this bill could significantly increase costs for employers who have employees with mandated periods of rest that could be characterized as "recovery periods" subject to compensation. For example, IWC Wage Order No. 5-2001 mandates

that an employee who works 24 consecutive hours must receive at least 8 hours of off-duty time. It also states that an employee's time spent sleeping is not considered hours worked. Opponents are concerned, that this bill would potentially transform such time spent sleeping or the mandated 8 hours of off-duty time as compensable, as a "recovery period."

PQ:ej 4/29/13 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

AMENDED IN ASSEMBLY AUGUST 5, 2013

AMENDED IN SENATE APRIL 16, 2013

SENATE BILL

No. 435

Introduced by Senator Padilla

February 21, 2013

An act to amend Section 226.7 of the Labor Code, relating to compensation.

LEGISLATIVE COUNSEL'S DIGEST

SB 435, as amended, Padilla. Compensation: ~~piece-rate workers: meal and~~ rest and recovery periods.

Existing law prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission (IWC) and establishes penalties for an employer's failure to provide a mandated meal or rest period. ~~Existing law establishes the Division of Labor Standards Enforcement (DLSE) in the Department of Industrial Relations for the enforcement of labor laws, including wage claims.~~

This bill would make that prohibition applicable to any meal or rest or recovery period mandated by applicable statute or applicable regulation, standard, or order of the IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The bill would require ~~employers~~ *an employer* to pay ~~employees~~ *an employee*, for any *meal or rest or recovery* period mandated by law, ~~including any applicable statute or applicable regulation, standard, or order of the IWC, the board, or the Division of Occupational Safety and Health, that is not provided. The bill would require the rate of pay for the rest and recovery periods of piece-rate workers to be the average piece-rate wage, as specified. The bill would authorize a piece-rate~~

worker, pursuant to a civil action or a claim filed with DLSE, to recover his or her unpaid average piece-rate wage for each rest or recovery period in which a violation of these provisions occurred. The bill would provide that it does not apply to an employee whose wages, hours, and working conditions are covered by a collective bargaining agreement that expressly addresses rest or recovery periods for employees paid on a piece-rate basis, or to employees exempt under specified law. *one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest or recovery period is not provided. The bill would define "recovery period" for those purposes.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 226.7 of the Labor Code is amended to
2 read:
3 226.7. (a) As used in this ~~section~~: *section*, "recovery period"
4 *means a cooldown period afforded an employee to prevent heat*
5 *illness.*
6 (1) ~~"Piece-rate basis" means a method of payment based on~~
7 ~~units of production earned by an employee during a work day or~~
8 ~~a pay period, or any fraction thereof.~~
9 (2) ~~"Recovery period" means a cooldown period afforded an~~
10 ~~employee to prevent heat illness.~~
11 (3) ~~"Unit of production" means any measurable or quantifiable~~
12 ~~employee activity that can be assigned a monetary value for~~
13 ~~purposes of computing pay for activity performed by the employee~~
14 ~~during a work day or pay period or fraction thereof.~~
15 (b) An employer shall not require any employee to work during
16 any meal or rest or recovery period mandated pursuant to any
17 applicable statute, or applicable regulation, standard, or order of
18 the Industrial Welfare Commission, the Occupational Safety and
19 Health Standards Board, or the Division of Occupational Safety
20 and Health.
21 (c) If an employer fails to provide an employee a meal ~~period~~
22 or rest *or recovery* period in accordance with any state law,
23 including, but not limited to, any applicable statute or applicable
24 regulation, standard, or order of the Industrial Welfare
25 Commission, the Occupational Safety and Health Standards Board,

1 or the Division of Occupational Safety and Health, the employer
2 shall pay the employee one additional hour of pay at the
3 employee's regular rate of compensation for each workday that
4 the meal or rest or recovery period is not provided.

5 ~~(d) (1) Rest or recovery periods mandated pursuant to any state
6 law, including, but not limited to, a statute, or a regulation,
7 standard, or order of the Industrial Welfare Commission, the
8 Occupational Safety and Health Standards Board, or the Division
9 of Occupational Safety and Health, shall be counted as hours
10 worked for which there shall be no deduction from wages. An
11 employee working on a piece-rate basis shall be compensated for
12 rest periods by being paid his or her average piece-rate wage during
13 each pay period, or portion of a pay period, in which the employee
14 was paid on a piece-rate basis.~~

15 ~~(2) Pursuant to a civil action or a claim filed with the Division
16 of Labor Standards Enforcement, an employee working on a
17 piece-rate basis may recover his or her unpaid average piece-rate
18 wage for each rest or recovery period in any pay period in which
19 a violation of this subdivision occurred in addition to any amounts
20 owed pursuant to subdivision (c).~~

21 ~~(e) This section does not apply to an employee whose wages,
22 hours, and working conditions are covered by a collective
23 bargaining agreement that expressly addresses rest or recovery
24 periods for employees paid on a piece-rate basis.~~

25 ~~(f) This section does not apply to an employee who is exempt
26 pursuant to any state law, including, but not limited to, a statute
27 or a regulation, standard, or order of the Industrial Welfare
28 Commission.~~

Date of Hearing: August 14, 2013

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Roger Hernández, Chair
SB 435 (Padilla) - As Amended: August 5, 2103

SENATE VOTE : 25-11

SUBJECT : Compensation: meal and rest and recovery periods

SUMMARY : Enacts provisions of law related to recovery periods, as specified. Specifically, this bill :

- 1) Provides that, in addition to meal and rest periods, an employer shall not require any employee to work during any "recovery period" mandated by any applicable statute, regulation, standard or order of the Occupational Safety and Health Standards Board (Standards Board) or the Division of Occupational Safety and Health (DOSH).
- 2) Defines a "recovery period" as a cool-down period afforded an employee to prevent heat illness.
- 3) Provides that an existing provision of law that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of compensation for each work day that a meal or rest period is not provided also applies to work days that a "recovery period" is not provided.

FISCAL EFFECT : According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS : According to the author, this bill is intended to encourage workers exposed to extreme heat to take recovery periods.

Existing Meal and Rest Period Requirements of Current Law

Under current law, an employer may not employ a worker for a period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day is no more than six hours, the meal period may be waived by mutual consent of both parties. A second 30 minute meal period is required if an employee works more than ten hours per day, except if total hours worked is no

more than 12, the second meal period may be waived by mutual consent only if the first meal period was not waived. (Labor Code §512).

In addition, the Industrial Welfare Commission (IWC) Wage Orders require that employers authorize and permit nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle of each work period. The rest period is based on the total hours worked and must be at the minimum rate of a net 10 consecutive minutes for each 4 hour work period, or major fraction thereof. A rest period is not required for employees whose total daily work time is less than 3.5 hours. According to the IWC Wage Orders, authorized rest periods are counted as time worked and therefore, must be paid by the employer.

Existing Labor Code §226.7 prohibits an employer from requiring any employee to work during any meal or rest period mandated by an applicable order of the IWC. Furthermore, an employer who fails to provide this meal or rest period is required to pay the employee one additional hour of pay for each work day that the meal or rest period is not provided.

"Recovery Periods" Under the Existing Heat Illness Prevention Standard

In addition to the IWC orders and Labor Code §226.7, the Heat Illness Prevention regulations established by the Occupational Safety and Health Standards Board have an additional requirement regarding a "recovery" period applicable to all outdoor places of employment. Since August 2005, employers in the State of California have been required by regulation to protect outdoor employees from the hazard of heat illness. This regulation was promulgated in response to unusually hot summer temperatures over a wide area of the state which led to a greatly elevated number of cases of serious heat illness in the workplace, including a number of deaths. This regulation, codified at Title 8 CCR §3395, came about first by adoption of an emergency temporary standard and was followed by adoption of a permanent standard in 2006. Under these regulations, employees are allowed and encouraged to take a cool-down rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to protect themselves from overheating.

ARGUMENTS IN SUPPORT :

The California Rural Legal Assistance Foundation (one of the sponsors of this measure), writes the following in support:

"[This bill], as amended, generally treats heat stress-related cool down recovery periods the same way daily rest periods are treated under the Labor Code: Employers would be prohibited from requiring workers to perform any work during any heat stress recovery period and, if the employer failed to provide such a recovery period in accordance with state law, the employer would have to pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that a recovery period was not provided.

The right of workers to be afforded heat stress-related recovery periods to cool down during high heat conditions is established by California Code of Regulations, Title 8, Section 3395(d). Although compliance with these requirements is argued to be improving in a number of industries, Cal-OSHA reported, for 2012, that overall compliance with the heat stress regulation (found during inspections) was only 69% in agriculture and 72% in construction, illustrating that many violations likely continue to occur. (See Cal-OSHA Advisory Committee Report Summaries, June 6, 2013.) Currently, the sole remedy for a violation is a citation issued by DOSH.

Given the critical importance of protecting workers from avoidable heat stress illness, and continued limited DOSH enforcement resources, the sponsors and supporters of [this bill] believe it is appropriate to extend to workers the same strong protections from violations of recovery period requirements as are provided for violations of daily rest period requirements. This will allow both the Division of Labor Standards Enforcement and workers themselves to take action if an employer requires work during, or fails to provide, a cool down recovery rest period."

COMMITTEE STAFF COMMENTS :

- 1) As introduced, this bill also contained provisions related to employees paid on a piece-rate basis, including a requirement that such employees be compensated at their average piece-rate earnings during mandated rest or

recovery periods. However, with the most recent set of amendments, the piece-rate provisions have been deleted from the bill.

- 2) In addition, at the request of then-opponents of the bill, the author and the sponsor previously agreed to add language to the bill to provide an exemption for specified exempt employees. However, according to the sponsor, in the most recent set of amendments, this language was inadvertently deleted. Therefore, the author and the sponsor have agreed to add the language back to the bill, but due to legislative time constraints will take that amendment in the Assembly Appropriations Committee.

PRIOR RELATED LEGISLATION :

SB 1538 (Alarcón) of 2004 would have required employers to pay employees for any rest period mandated by statute, regulation, or order of the IWC and would have established the specific formula by which the rate of pay would have been determined for the rest periods of piece-rate workers in the agricultural and garment industries, as specified. SB 1538 was vetoed by Governor Schwarzenegger.

AB 755 (De La Torre) of 2005 was similar to SB 1538. However, AB 755 merely stated that piece-rate workers in the agriculture and garment industries would be compensated at their "average piece-rate wage" for rest periods. AB 755 was also vetoed by Governor Schwarzenegger.

Among other things, AB 2346 (Butler) of 2012 would have required an agricultural employee working on a piece-rate basis to be compensated at the employee's average piece-rate wage during the pay period in which a rest period or recovery period was taken. However, this provision was subsequently amended out of the bill.

REGISTERED SUPPORT / OPPOSITION :

Support

California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Rural Legal Assistance Foundation (sponsor)
California Teamsters Public Affairs Council

Engineers & Scientists of California, IFPTE Local 20
International Longshore & Warehouse Union
National Lawyers Guild Labor & Employment Committee
Professional and Technical Engineers, IFPTE Local 21
United Farm Workers
United Food and Commercial Workers Western States Council
UNITE HERE!
Utility Workers Union of America, Local 132

Opposition

None on file.

Analysis Prepared by : Ben Ebbink / L. & E. / (916) 319-2091

Date of Hearing: August 21, 2013

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Mike Gatto, Chair

SB 435 (Padilla) - As Amended: August 5, 2013

Policy Committee: Labor and
Employment Vote: 6-1

Urgency: No State Mandated Local Program:
No Reimbursable: No

SUMMARY

This bill extends existing rest period protections to any applicable statute, regulation, or order by the Occupational Safety and Health Standards Board (OSHSB) or the Division of Occupational Safety and Health (Cal/OSHA). Specifically, this bill:

Applies existing rest period protections to an employee's recovery period. Defines recovery period as a cooldown period afforded to an employee to prevent heat illness.

FISCAL EFFECT

Minor, absorbable fiscal impact to the Department of Industrial Relations, OSHSB, and Cal/OSHA to implement this measure.

COMMENTS

1)Purpose . Current law prohibits an employer from requiring an employee to work during any meal or rest period mandated by the Industrial Welfare Commission (IWC). If the employer fails to comply with this mandate, he or she is required to pay the employee one additional hour of pay at the regular rate of compensation for each work day this requirement is not met.

In 2005, OSHSB promulgated heat-related illness regulations, which establish an additional requirement regarding a rest period applicable to all outdoor places of employment. Under these regulations, employees are allowed and encouraged to take a cool-down rest in the shade for a period of no less

than five minutes at a time when they feel the need to do so to protect themselves from overheating. The regulations are specific as to temperature and the availability of shade and

water.

According to the author, "The state regulations [on heating illness] require employers to allow and encourage workers to take a rest break in the shade for a period of no less than five minutes in order to cool-down and to protect themselves from overheating. However, workers often do not take these recovery periods. A 2007 California Rural Legal Assistance survey of more than 1,000 farm workers laboring in the raisin harvest found that more than 70% of workers 'voluntarily' worked through rest periods to avoid losing money."

This bill extends existing rest period protections to any applicable statute, regulation, or order by OSHSB or Cal/OSHA, including those related to heat illness.

2)Existing law establishes the following entities:

- a) IWC, which delineates the wages, hours and conditions of labor and employment in the various occupations, trades and industries in which employees are employed in this state. Through its 17 industry specific wage orders, the IWC establishes requirements on hours and days of work, minimum wages, reporting time, and meal and rest periods, among others. While the IWC is currently not in operation due to budget constraints, the DLSE continues to enforce the provisions of the wage orders.

Each of the IWC wage orders includes a section on rest period requirements - authorizing non-exempt employees to take a rest period at a rate of ten minutes per four hours or major fraction thereof. According to the IWC wage orders, authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

- b) Cal/OSHA and OSHSB. The California Occupational Safety and Health Act of 1973 was enacted to ensure safe and healthful working conditions for all California workers by, among other things, authorizing the enforcement of effective standards as well as assisting and encouraging employers to maintain safe and healthful working

conditions. Cal/OSHA is charged with enforcing occupational health and safety laws, orders, and standards, including the investigation of alleged violations of those provisions.

OSHSB is a three-member judicial body appointed by the governor and confirmed by the Senate, which handles appeals from private and public-sector employers regarding citations for alleged violations of workplace safety and health laws.

3)Author's amendment regarding exempt employees . As part of the August 5 amendments, a subdivision concerning exempt employees was inadvertently removed from the bill. The author is requesting to reinstate this language with modifications, which does not alter the committee's fiscal analysis:

Analysis Prepared by : Kimberly Rodriguez / APPR. / (916)
319-2081

AMENDED IN ASSEMBLY AUGUST 22, 2013

AMENDED IN ASSEMBLY AUGUST 5, 2013

AMENDED IN SENATE APRIL 16, 2013

SENATE BILL

No. 435

Introduced by Senator Padilla

February 21, 2013

An act to amend Section 226.7 of the Labor Code, relating to compensation.

LEGISLATIVE COUNSEL'S DIGEST

SB 435, as amended, Padilla. Compensation: meal and rest ~~and~~ *or* recovery periods.

Existing law prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission (IWC) and establishes penalties for an employer's failure to provide a mandated meal or rest period.

This bill would make that prohibition applicable to ~~any~~ *a* meal or rest or recovery period mandated by applicable statute or applicable regulation, standard, or order of the IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. *The bill would exempt specified employees from the prohibition.* The bill would require an employer to pay an employee, for any meal or rest or recovery period mandated by law, one additional hour of pay at the employee's regular rate of compensation for each ~~work day~~ *workday* that the meal or rest or recovery period is not provided. The bill would define "recovery period" for those purposes.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 226.7 of the Labor Code is amended to
2 read:

3 226.7. (a) As used in this section, “recovery period” means a
4 cooldown period afforded an employee to prevent heat illness.

5 (b) An employer shall not require ~~any~~ *an* employee to work
6 during ~~any~~ *a* meal or rest or recovery period mandated pursuant
7 to ~~any~~ *an* applicable statute, or applicable regulation, standard, or
8 order of the Industrial Welfare Commission, the Occupational
9 Safety and Health Standards Board, or the Division of Occupational
10 Safety and Health.

11 (c) If an employer fails to provide an employee a meal or rest
12 or recovery period in accordance with ~~any~~ *a* state law, including,
13 but not limited to, ~~any~~ *an* applicable statute or applicable
14 regulation, standard, or order of the Industrial Welfare
15 Commission, the Occupational Safety and Health Standards Board,
16 or the Division of Occupational Safety and Health, the employer
17 shall pay the employee one additional hour of pay at the
18 employee’s regular rate of compensation for each workday that
19 the meal or rest or recovery period is not provided.

20 (d) *This section shall not apply to an employee who is exempt*
21 *from meal or rest or recovery period requirements pursuant to*
22 *other state laws, including, but not limited to, a statute or*
23 *regulation, standard, or order of the Industrial Welfare*
24 *Commission.*

O

SENATE THIRD READING
 SB 435 (Padilla)
 As Amended August 22, 2013
 Majority vote

SENATE VOTE :25-11

LABOR & EMPLOYMENT 6-1 APPROPRIATIONS 12-5

Ayes:	Roger Hernández, Alejo, Chau, Gomez, Gorell, Holden	Ayes:	Gatto, Bocanegra, Bradford, Ian Calderon, Campos, Eggman, Gomez, Hall, Holden, Pan, Quirk, Weber
Nays:	Morrell	Nays:	Harkey, Bigelow, Donnelly, Linder, Wagner

SUMMARY : Enacts provisions of law related to recovery periods, as specified. Specifically, this bill :

- 1)Provides that, in addition to meal and rest periods, an employer shall not require any employee to work during any "recovery period" mandated by any applicable statute, regulation, standard or order of the Occupational Safety and Health Standards Board (Standards Board) or the Division of Occupational Safety and Health (DOSH).
- 2)Defines a "recovery period" as a cool-down period afforded an employee to prevent heat illness.
- 3)Provides that an existing provision of law that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of compensation for each work day that a meal or rest period is not provided also applies to work days that a "recovery period" is not provided.
- 4)Provides that these provisions do not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, as specified.

FISCAL EFFECT : According to the Assembly Appropriations Committee, this bill will result in minor and absorbable fiscal

impact to the Department of Industrial Relations, the Standards Board, and DOSH to implement this measure.

COMMENTS : According to the author, this bill is intended to encourage workers exposed to extreme heat to take recovery periods.

The California Rural Legal Assistance Foundation (one of the sponsors of this measure), writes the following in support:

[This bill], as amended, generally treats heat stress-related cool down recovery periods the same way daily rest periods are treated under the Labor Code: Employers would be prohibited from requiring workers to perform any work during any heat stress recovery period and, if the employer failed to provide such a recovery period in accordance with state law, the employer would have to pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that a recovery period was not provided.

The right of workers to be afforded heat stress-related recovery periods to cool down during high heat conditions is established by California Code of Regulations, Title 8, Section 3395(d). Although compliance with these requirements is argued to be improving in a number of industries, [DOSH] reported, for 2012, that overall compliance with the heat stress regulation (found during inspections) was only 69% in agriculture and 72% in construction, illustrating that many violations likely continue to occur. (See Cal-OSHA Advisory Committee Report Summaries, June 6, 2013.) Currently, the sole remedy for a violation is a citation issued by DOSH.

Given the critical importance of protecting workers from avoidable heat stress illness, and continued limited DOSH enforcement resources, the sponsors and supporters of [this bill] believe it is appropriate to extend to workers the same strong protections from violations of

recovery period requirements as are provided for violations of daily rest period requirements. This will allow both the Division of Labor Standards Enforcement and workers themselves to take action if an employer requires work during, or fails to provide, a cool down recovery rest period.

Analysis Prepared by : Ben Ebbink / L. & E. / (916) 319-2091

FN: 0001805

| SENATE RULES COMMITTEE | SB 435 |
| Office of Senate Floor Analyses |
| 1020 N Street, Suite 524 |
| (916) 651-1520 Fax: (916) |
327-4478

UNFINISHED BUSINESS

Bill No: SB 435
Author: Padilla (D)
Amended: 8/22/13
Vote: 21

SENATE LABOR & INDUSTRIAL RELATIONS COMMITTEE : 4-1, 4/10/13
AYES: Lieu, Leno, Padilla, Yee
NOES: Wyland

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

SENATE FLOOR : 25-11, 5/2/13
AYES: Beall, Block, Calderon, Corbett, Correa, De León,
DeSaulnier, Evans, Galgiani, Hancock, Hernandez, Hill, Hueso,
Jackson, Lara, Leno, Lieu, Liu, Monning, Padilla, Pavley,
Price, Steinberg, Wright, Yee
NOES: Anderson, Berryhill, Emmerson, Fuller, Gaines, Huff,
Knight, Nielsen, Roth, Walters, Wyland
NO VOTE RECORDED: Cannella, Wolk, Vacancy, Vacancy

ASSEMBLY FLOOR : 54-23, 9/4/13 - See last page for vote

SUBJECT : Compensation: piece-rate workers: rest and
recovery periods

SOURCE : California Rural Legal Assistance Foundation
Teamsters Public Affairs Council

DIGEST : This bill enacts provisions of law related to
recovery periods, as specified.

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Assembly Amendments eliminate all the provisions related to
piece-rate and limit this bill to the provisions related to

recovery periods.

ANALYSIS :

Existing law establishes, within the Department of Industrial Relations (DIR), the following entities:

1. Industrial Welfare Commission (IWC): to regulate employee wages, hours and working conditions.
2. Division of Occupational Safety and Health (Cal/OSHA): tasked with the responsibility of protecting workers and the public from safety hazards through its various programs.
3. Occupational Safety and Health Standards Board (OSHSB): to adopt reasonable and enforceable standards at least as effective as federal standards.
4. Division of Labor Standards Enforcement: to adjudicate wage claims, investigate discrimination and public works complaints, and enforce Labor Code (LAB) and IWC wage orders.

Existing law, with certain exceptions, defines a day's work as eight hours of labor. Any additional hours worked in excess of eight hours in one day, or a 40-hour workweek, must be compensated with the payment of overtime.

Regarding meal and rest periods, existing law requires the following:

1. Meal periods . An employer may not employ a worker for a period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day is no more than six hours, the meal period may be waived by mutual consent of both parties. A second 30 minute meal period is required if an employee works more than 10 hours per day, except if total hours worked is no more than 12, the second meal period may be waived by mutual consent only if the first meal period was not waived.

2. Rest periods . IWC wage orders require that employers

CONTINUED

authorize and permit nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle of each work period. The rest period is based on the total hours worked and must be at the minimum rate of a net 10 consecutive minutes for each four hour work period, or major fraction thereof. A rest period is not required for employees whose

total daily work time is less than 3.5 hours. According to the IWC wage orders, authorized rest periods are counted as time worked and therefore, must be paid by the employer.

Under existing law, no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the IWC. If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the IWC, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

This bill enacts provisions of law related to recovery periods, as specified. Specifically, this bill:

1. Provides that, in addition to meal and rest periods, an employer shall not require any employee to work during any "recovery period" mandated by any applicable statute, regulation, standard or order of OSHSB or Cal/OSHA.
2. Defines a "recovery period" as a cool-down period afforded an employee to prevent heat illness.
3. Provides that an existing provision of law that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of compensation for each work day that a meal or rest period is not provided also applies to work days that a "recovery period" is not provided.
4. Provides that these provisions do not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, as specified.

Comments

Rest period requirements in statute, standards and iwc wage orders . Each of the 17 IWC wage orders includes a section on

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rest period requirements - authorizing non-exempt employees to take a rest period at a rate of 10 minutes per four hours or major fraction thereof. According to the IWC Wage Orders, authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

In addition to the IWC wage orders and LAB Section 226.7, the Heat Illness Prevention regulations established by the OSHSB have an additional requirement regarding a rest period applicable to all outdoor places of employment. Since August 2005, employers in the State of California have been required by

regulation to protect outdoor employees from the hazard of heat illness. This regulation was promulgated in response to unusually hot summer temperatures over a wide area of the state which led to a greatly elevated number of cases of serious heat illness in the workplace, including a number of deaths. This regulation, codified at Title 8 California Code Regulations Section 3395, came about first by adoption of an emergency temporary standard and was followed by adoption of a permanent standard in 2006. Under these regulations, employees are allowed and encouraged to take a cool-down rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to protect themselves from overheating.

Prior Legislation

SB 1538 (Alarcon, 2004) would have required employers to pay employees for any rest period mandated by statute, regulation, or order of the IWC and would have established the formula by which the rate of pay would have been determined for the rest periods of piece-rate workers in the agricultural and garment industries, as specified. The bill was vetoed by Governor Schwarzenegger.

AB 755 (De La Torre, 2005), almost identical to SB 1538, did not enumerate the formula that would have been used to determine the rate of pay of piece-rate workers, but rather states that it be the "average piece-rate" wage. The bill vetoed by Governor Schwarzenegger.

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

SUPPORT : (Verified 9/4/13)

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California Rural Legal Assistance Foundation (co-source)
Teamsters Public Affairs Council (co-source)
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Teamsters Public Affairs Council
Engineers and Scientists of California, International Federation
of Professional and Technical Engineers Local 20
International Longshore and Warehouse Union
National Lawyers Guild Labor and Employment Committee
Professional and Technical Engineers, International Federation
of Professional and Technical Engineers Local 21
United Farm Workers

United Food and Commercial Workers Western States Council
UNITE-HERE, AFL-CIO
Utility Workers Union of America, Local 132

OPPOSITION : (Verified 9/4/13)

Air Conditioning Trade Association
California Framing Contractors Association
California Professional Association of Specialty Contractors
California Retailers Association
National Federation of Independent Business
Plumbing-Heating-Cooling Contractors Association of California
Western Electrical Contractors Association

ARGUMENTS IN SUPPORT : According to proponents, this bill will clarify how paid rest breaks and recovery periods are to be compensated by employers when employees are paid on a piece-rate basis. Proponents argue that piece-rate workers, unlike their hourly or salaried counterparts, are often induced to work through their rest or recovery periods because they suffer a loss of income. They believe this bill is necessary to increase incentives for piece-rate workers to actually take their rest and heat stress recovery periods rather than "willingly" working through them to avoid losing money.

According to the co-sponsor of this bill, California Rural Legal Assistance Foundation (CRLAF), a 2004 CRLAF survey of more than 1,000 piece-rate farm workers laboring in the raisin harvest, found that more than 70% of workers "voluntarily" worked through rest periods to avoid losing money. Nearly two-thirds of them said they would be "more likely" to take rest periods if they

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were paid their average piece-rate earnings during that time. CRLAF argues that it is significant that these results were obtained from surveying workers in Central Valley raisin harvests where triple digit temperatures have resulted in farm worker deaths from heat stress. They argue that while not all piece-rate workers potentially face a life or death decision when they are not given their rest periods, compliance by employers with these important state policies should not be so insidiously undermined by the manner in which workers are paid.

ARGUMENTS IN OPPOSITION : The opponents argue that this bill will threaten a new wave of destructive and costly litigation to California employers by including exempt employees under the one-hour penalty for failure of an employer to provide a meal or rest period. According to the opponents, for over 10 years, California employers suffered as a result of class action litigation regarding the meaning of the term "provide" with regard to meal and rest periods for hourly, non-exempt

employees. With this bill, the opponents are concerned that the penalty provision of LAB Section 226.7 would be significantly expanded to include exempt employees by making the penalty available to not just those employers that fail to comply with the IWC wage orders, but also to any employer who fails to comply with statutory meal and rest period requirements in LAB Section 512.

Additionally, the opponents contend that, as exempt employees, employers do not track such employees' time, thereby making it extremely difficult for employers to adequately and fairly defend themselves in litigation. The opponents also argue that the proposed definition of piece-rate is also extremely broad, as it could include exempt employees who are paid, in part, a production bonus based upon a specific unit of time, number of items sold, or even certain amount of sales. Furthermore, they argue that this bill could significantly increase costs for employers who have employees with mandated periods of rest that could be characterized as "recovery periods" subject to compensation. For example, IWC Wage Order No. 5-2001 mandates that an employee who works 24 consecutive hours must receive at least eight hours of off-duty time. It also states that an employee's time spent sleeping is not considered hours worked. Opponents are concerned, that this bill will potentially transform such time spent sleeping or the mandated 8 hours of off-duty time as compensable, as a "recovery period."

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ASSEMBLY FLOOR : 54-23, 9/4/13

AYES: Alejo, Ammiano, Atkins, Bloom, Bocanegra, Bonilla, Bonta, Bradford, Brown, Buchanan, Ian Calderon, Campos, Chau, Chesbro, Cooley, Daly, Dickinson, Eggman, Fong, Fox, Frazier, Garcia, Gatto, Gomez, Gonzalez, Gordon, Gorell, Gray, Hall, Roger Hernández, Holden, Jones-Sawyer, Levine, Lowenthal, Medina, Mitchell, Mullin, Muratsuchi, Nazarian, Pan, Perea, V. Manuel Pérez, Quirk, Quirk-Silva, Rendon, Salas, Skinner, Stone, Ting, Weber, Wieckowski, Williams, Yamada, John A. Pérez

NOES: Achadjian, Allen, Bigelow, Chávez, Conway, Dahle, Donnelly, Beth Gaines, Grove, Hagman, Harkey, Jones, Linder, Logue, Maienschein, Mansoor, Morrell, Nestande, Olsen, Patterson, Wagner, Waldron, Wilk

NO VOTE RECORDED: Melendez, Vacancy, Vacancy

PQ:ek 9/5/13 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Senate Bill No. 435

Passed the Senate September 6, 2013

Secretary of the Senate

Passed the Assembly September 4, 2013

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2013, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 226.7 of the Labor Code, relating to compensation.

LEGISLATIVE COUNSEL'S DIGEST

SB 435, Padilla. Compensation: meal and rest or recovery periods.

Existing law prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission (IWC) and establishes penalties for an employer's failure to provide a mandated meal or rest period.

This bill would make that prohibition applicable to a meal or rest or recovery period mandated by applicable statute or applicable regulation, standard, or order of the IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The bill would exempt specified employees from the prohibition. The bill would require an employer to pay an employee, for any meal or rest or recovery period mandated by law, one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided. The bill would define "recovery period" for those purposes.

The people of the State of California do enact as follows:

SECTION 1. Section 226.7 of the Labor Code is amended to read:

226.7. (a) As used in this section, "recovery period" means a cooldown period afforded an employee to prevent heat illness.

(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but

not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

(d) This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.

Approved _____, 2013

Governor

Senate Bill No. 435

CHAPTER 719

An act to amend Section 226.7 of the Labor Code, relating to compensation.

[Approved by Governor October 10, 2013. Filed with
Secretary of State October 10, 2013.]

LEGISLATIVE COUNSEL'S DIGEST

SB 435, Padilla. Compensation: meal and rest or recovery periods.

Existing law prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission (IWC) and establishes penalties for an employer's failure to provide a mandated meal or rest period.

This bill would make that prohibition applicable to a meal or rest or recovery period mandated by applicable statute or applicable regulation, standard, or order of the IWC, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The bill would exempt specified employees from the prohibition. The bill would require an employer to pay an employee, for any meal or rest or recovery period mandated by law, one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided. The bill would define "recovery period" for those purposes.

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(d) This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.