

New Washington Supreme Court Decision on Piece Rate Pay

On July 16, 2015, the Washington Supreme Court decided the case of *Demetrio v. Sakuma Bros. Farms, Inc.*, where a group of agricultural piece rate workers brought suit against the owners of a berry farm, arguing that they were entitled to separate pay for rest-breaks, in addition to their piece work pay.

The Court unanimously decided in favor of the piece rate workers, holding:

(1) Employers must pay piece rate workers for rest periods “separate and apart from the piece rate;”

and

(2) In addition to the worker’s piece rate earnings, Employers must pay each piece rate worker for their rest periods in an amount equal to the greater of: (i) the minimum wage; or (2) the deemed hourly rate referred to as the “regular rate” calculated by taking the worker’s total weekly piece work earnings, divided by the hours worked by the worker during such period, excluding required break times (regardless of whether they are taken or not). See below example.

Unless and until modified by the courts or the legislature, the July 16th ruling impacts many agricultural employers who uses a piece rate payment system. This Court ruling appears to apply to all piece rate workers, including H2A workers under a piece rate payment system.

Immediate Action Plan Items to Comply with the Ruling

If not already in practice, you should immediately begin to separately compensate all piece rate workers for their rest-breaks in the manner described above. The importance of implementing these practices cannot be understated: The Court decision makes it a violation of wage and hour laws if you fail to comply with the ruling, and failure to comply may give rise to claims and penalties related to the wrongful withholding of wages. As an abundance of caution, for those in mid-payroll cycles, best practice would be to calculate the rest-break pay for all days worked by the piece rate worker during the current pay period, and include this rest-break payment in the piece rate worker’s next pay check.

Prohibited Practices

The Court specifically stated that you cannot pay a piece rate worker minimum wage for rest-break periods (unless that worker’s calculated “regular rate” is equal to or less than the minimum wage). If the “regular rate” exceeds minimum wage, then you must pay them at least their “regular rate” for rest-breaks.

Attached Example for Implementation

The attached sheet outlines a recommended tracking and calculation, designed for circulation with your HR and/or supervisory employees as necessary to maximize compliance.

Long Term Considerations

1. *Contracted Regular Rates.* Importantly, the Court leaves the door open for employers to contract with workers at an agreed upon rate, as long as it is at the “regular rate” or higher. This may be a viable option to reduce the administrative burden of calculating the “regular rate” for each worker, each week.

For example, a conservative approach may be to set the pay rate for rest-breaks, at least as much as the calculated “**regular rate**” of your highest paid piece rate worker. This way you will always satisfy the Court’s ruling. Of course, a contracted rate for rest-breaks may not be ideal in every situation, and there are other variations possible to comply with the ruling and control the additional administrative and payroll expense. We present this as an area of consideration as you begin making long-term business decisions in light of the July 16th decision.

2. *Modified Pay Structures.* Although it is unclear if this will fully comply with the Court’s ruling, some in the industry are looking at the possibility of moving the piece rate workers to an hourly employee, and then provide pay bonuses for higher production. For example, providing a former piece rate worker with a contract for employment at or above the hourly minimum wage rate, and then if the worker exceeds some production quota, paying them a proportional production bonus. It is unclear how this type of modification will be received by the workers and how it will be interpreted by the courts. Risk exists that this approach may still fall short of satisfying the Court’s decision.

Retroactive Application.

The Court’s decision applies to compensation for piece rate workers, effective beginning July 16, 2015. In its holding, the Court declined to address whether its decision applies *retroactively*. In other words, if this ruling is deemed to apply retroactively (July 15, 2015 and earlier), agricultural employers who have used a piece rate system of payment in the past and did not make separate, additional payment for rest-breaks as described above, may have potentially liability for past “missed” rest-break payments to its piece rate workers. The look back period could be as long as three years, and could also include interest and penalties on the amounts due. We are hopeful there will be a judicial or legislative solution to this retroactivity issue.

Because of the retroactivity implications, we recommend each agricultural employer immediately take the following steps:

1. Ensure all payroll records for the prior 3 years are preserved. Any failure to maintain those records may give rise to additional liability should these rest-break payments for piece rate workers be required (i.e., if it is determined that the rest-break payments are due for July 15, 2015 and earlier, or in the event of an audit, class action claim, or other regulatory process).
2. Calculate the rest-break payments due piece rate workers for the prior 3 years, if the Court’s ruling were determined to be retroactive. Interest will need to be calculated on those amounts at 12% from the date such workers would normally have been paid. Each employer should develop contingency plans on how to manage that potential liability, if the ruling is determined to be retroactive.

We will continue to closely monitor the developments related to the July 16th Court ruling and investigate options to mitigate its impacts on our clients.

FOR IMMEDIATE RELEASE:

PIECE RATE TRACKING AND CALCULATION

For all piece rate workers, each week:

1. Track the **total hours worked each day** and the **required rest-breaks** (whether taken or not) for each piece rate worker.
2. Calculate the **total piece work earnings** for each worker during the week.
3. Calculate the “**regular rate**” as follows: The greater of (1) the minimum wage; or (2) the worker’s **total piece work earnings** divided by the **hours worked by the worker**, excluding **required rest-break time**.

Example 1: Worker A’s total piece rate earnings for the week is **\$1,000.00** and he/she **worked for 40 hours** (8 hours a day for 5 days), including the required **two 10 minute rest-breaks** each day (total of 10 required rest-breaks). Worker A’s “regular rate” would be $\$1,000.00 / (40 \text{ hours} - 100 \text{ minutes})$ of required rest-breaks), which equals approximately \$26.09/hour. Note that the \$26.09/hour is greater than the minimum wage rate. Therefore, in addition to Worker A’s weekly piece work pay of \$1,000.00, he/she would be entitled to be separately paid for the 100 minutes of required rest-breaks at such worker’s regular rate of \$26.09/hour. This comes out to an additional \$8.70 per day (an additional \$43.50 for the week). The total compensation to Worker A for the week = \$1,043.50 (\$1,000 for piece rate earnings, plus \$43.50 for required rest-breaks paid at Worker A’s regular rate).

Example 2: Worker B’s total piece rate earnings for the week would be **\$350.00** and he/she **worked for 40 hours** (8 hours a day for 5 days), including the required **two 10 minute rest-breaks** each day (total of 10 required rest-breaks). Worker B’s “regular rate” would calculate at $\$350.00 / (40 \text{ hours} - 100 \text{ minutes})$ of required rest-breaks), which equals approximately \$9.13/hour. Note that this is lower than the current minimum wage rate of \$9.47/hour, so Worker B’s “regular rate” is adjusted up to the minimum wage rate.