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AB-1513 Employment: workers' compensation and piece-rate compensation. (2015-2016)

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Assembly Bill No. 1513

CHAPTER 754

An act to add and repeal Section 226.2 of, and to repeal Sections 77.7, 127.6, and 138.65 of, the Labor Code, relating to employment.

[Approved by Governor October 10, 2015. Filed with Secretary of State October 10, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1513, Williams. Employment: workers' compensation and piece-rate compensation.

(1) Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment.

Existing law requires the Commission on Health and Safety and Workers' Compensation to undertake a specified study examining the causes of the number of insolvencies among workers' compensation insurers to be conducted by an independent research organization, and requires the commission and the Department of Industrial Relations, no later than July 1, 2009, to publish the report of the study on its Internet Web site and to inform the Legislature and the Governor of the availability of the report.

Existing law requires the administrative director, in consultation with the commission and other entities, to conduct a study of medical treatment provided to workers who have sustained industrial injuries and illness, and to report and make recommendations to the Legislature on or before July 1, 2004.

Existing law requires the administrative director, after consultation with the Insurance Commissioner, to contract with a qualified organization to study the 2003 and 2004 legislative reforms on insurance rates, and to submit the study to the Governor and Legislature. Existing law requires the Governor and the Insurance Commissioner to review that study and make recommendations, and authorizes them to submit proposals to the Legislature.

This bill would repeal these obsolete workers' compensation study requirements.

(2) Existing law prohibits an employer from requiring an employee to work during any meal or rest or recovery period mandated by an applicable statute or specified regulation, standard, or order, establishes penalties for an employer's failure to provide a mandated meal or rest or recovery period, and requires rest or recovery periods to be counted as hours worked. Existing law establishes the Division of Labor Standards Enforcement in the Department of Industrial Relations for the enforcement of labor laws, including laws related to wage claims. Existing law requires every employer, semimonthly or at the time of each payment of wages, to furnish each employee with an accurate itemized statement in writing showing specified information. A knowing and intentional violation of this provision by an employer is a misdemeanor, as specified.

This bill would require the itemized statement provided to employees compensated on a piece-rate basis to also separately state the total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods

during the pay period, and the total hours of other nonproductive time, as specified, the rate of compensation, and the gross wages paid for that time during the pay period. The bill would require those employees to be compensated for rest and recovery periods and other nonproductive time at or above specified minimum hourly rates, separately from any piece-rate compensation. The bill would define "other nonproductive time" for purposes of these provisions to mean 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. Because a knowing and intentional violation of these requirements would be a crime, the bill would impose a state-mandated local program.

The bill, until January 1, 2021, would provide that an employer shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, the employer complies with specified requirements, subject to specified exceptions.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 77.7 of the Labor Code is repealed.

SEC. 2. Section 127.6 of the Labor Code is repealed.

SEC. 3. Section 138.65 of the Labor Code is repealed.

SEC. 4. Section 226.2 is added to the Labor Code, to read:

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

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

(2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable:

(A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period.

(B) Except for employers paying compensation for other nonproductive time in accordance with paragraph (7), the total hours of other nonproductive time, as determined under paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay period.

(3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:

(i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.

(ii) The applicable minimum wage.

(B) For employers who pay on a semimonthly basis, employees shall be compensated at least at the applicable minimum wage rate for the rest and recovery periods together with other wages for the payroll period during which the rest and

recovery periods occurred. Any additional compensation required for those employees pursuant to clause (i) of subparagraph (A) is payable no later than the payday for the next regular payroll period.

(C) (i) Employers who meet the requirements in clause (ii) shall have until April 30, 2016, to program their payroll systems to perform and record the calculation required by clause (i) of subparagraph (A) and comply with the itemized statement requirements in paragraph (2), so long as the employer pays piece rate employees for all rest and recovery periods at or above the applicable minimum wage from January 1, 2016, to April 30, 2016, inclusive, and pays the difference between the amounts paid and the amounts that would be owed under clause (i) of subparagraph (A), together with interest calculated in accordance with subdivision (c) of Section 98.1, by no later than April 30, 2016.

(ii) For an employer to meet the requirements of this subparagraph, all of the following shall apply:

(I) The employer was acquired by another legal entity on or after July 1, 2015, and before October 1, 2015.

(II) The employer employed at least 4,700 employees in this state at the time of the acquisition.

(III) The employer employed at least 17,700 employees nationwide at the time of the acquisition.

(IV) The employer was a publicly traded company on a national securities exchange at the time of the acquisition.

(4) Employees shall be compensated for other nonproductive time at an hourly rate that is no less than the applicable minimum wage.

(5) The amount of other nonproductive time may be determined either through actual records or the employer's reasonable estimates, whether for a group of employees or for a particular employee, of other nonproductive time worked during the pay period.

(6) An employer who is found to have made a good faith error in determining the total or estimated amount of other nonproductive time worked during the pay period shall remain liable for the payment of compensation for all hours worked in other nonproductive time, but shall not be liable for statutory civil penalties, including, but not limited to, penalties under Section 226.3, or liquidated damages based solely on that error, provided that both of the following are true:

(A) The employer has provided the wage statement information required by subparagraph (B) of paragraph (2) and paid the compensation due for the amount of other nonproductive time determined by the employer in accordance with the requirements of paragraphs (4) and (5).

(B) The total compensation paid for any day in the pay period is no less than what is due under the applicable minimum wage and any required overtime compensation.

(7) An employer who, in addition to paying any piece-rate compensation, pays an hourly rate of at least the applicable minimum wage for all hours worked, shall be deemed in compliance with paragraph (4).

(b) Notwithstanding any other statute or regulation, the employer and any other person shall have an affirmative defense to any claim or cause of action for recovery of wages, damages, liquidated damages, statutory penalties, or civil penalties, including liquidated damages pursuant to Section 1194.2, statutory penalties pursuant to Section 203, premium pay pursuant to Section 226.7, and actual damages or liquidated damages pursuant to subdivision (e) of Section 226, based solely on the employer's failure to timely pay the employee the compensation due for rest and recovery periods and other nonproductive time for time periods prior to and including December 31, 2015, if, by no later than December 15, 2016, an employer complies with all of the following:

(1) The employer makes payments to each of its employees, except as specified in paragraph (2), for previously uncompensated or undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to December 31, 2015, inclusive, using one of the formulas specified in subparagraph (A) or (B):

(A) The employer determines and pays the actual sums due together with accrued interest calculated in accordance with subdivision (c) of Section 98.1.

(B) The employer pays each employee an amount equal to 4 percent of that employee's gross earnings in pay periods in which any work was performed on a piece-rate basis from July 1, 2012, to December 31, 2015, inclusive, less amounts already paid to that employee, separate from piece-rate compensation, for rest and recovery periods and other nonproductive time during the same time, provided that the amount by which the payment to each employee may be reduced for amounts already paid for other nonproductive time shall not exceed 1 percent of the employee's gross earnings during the same time.

(2) Payment shall not be required for any part of the time period specified in paragraph (1) for which either of the following apply:

(A) An employee has, prior to August 1, 2015, entered into a valid release of claims not otherwise banned by this code or any other applicable law for compensation for rest and recovery periods and other nonproductive time.

(B) A release of claims covered by this subdivision executed in connection with a settlement agreement filed with a court prior to October 1, 2015, and later approved by the court.

(3) By no later than July 1, 2016, the employer provides written notice to the department of the employer's election to make payments to its current and former employees in accordance with the requirements of this subdivision and subdivision (c).

(A) The notice must include the legal name and address of the employer and must be mailed or delivered to the Director of Industrial Relations, Attn: Piece-Rate Section, 226.2 Election Notice, 1515 Clay Street, 17th Floor, Oakland, CA 94612. The director may provide for an email address to receive notices electronically in lieu of postal mail.

(B) The department shall post on its Internet Web site either a list of the employers who have provided the required notice or copies of the actual notices. The list or notices shall remain posted until March 31, 2017.

(4) The employer calculates and begins making payments to employees as soon as reasonably feasible after it provides the notice referred to in paragraph (3) and completes the payments by no later than December 15, 2016, to each employee to whom the wages are due, or to the Labor Commissioner pursuant to Section 96.7 for any employee whom the employer cannot locate.

(5) The employer provides each employee receiving a payment with an accompanying accurate statement that contains all of the following information:

(A) A statement that the payment has been made pursuant to this section.

(B) A statement as to whether the payment was determined based on the formula in subparagraph (A) of paragraph (1), or on the formula in subparagraph (B) of paragraph (1).

(C) If the payment is based on the formula in subparagraph (A) of paragraph (1), a statement, spreadsheet, listing, or similar document that states, for each pay period for which compensation was included in the payment, the total hours of rest and recovery periods and other nonproductive time of the employee, the rates of compensation for that time, and the gross wages paid for that time.

(D) If the payment is based on the formula in subparagraph (B) of paragraph (1), a statement, spreadsheet, listing, or similar document that shows, for each pay period during which the employee had earnings during the period from July 1, 2012, through December 31, 2015, inclusive, the gross wages of the employee and any amounts already paid to the employee, separate from piece-rate compensation, for rest and recovery periods and other nonproductive time.

(E) The calculations that were made to determine the total payment made.

(c) An employer who makes a reasonable and good faith effort to make the payments described in paragraph (1) of subdivision (b), and to provide the accurate statement described in paragraph (5) of subdivision (b), to all employees, but who solely through good faith error fails to make a payment to one or more employees as described in paragraph (1) of subdivision (b), or to provide an accurate statement as described in paragraph (5) of subdivision (b), shall not lose the affirmative defense set forth in subdivision (b) as a result of that good faith error if the employer, within 30 days of discovery or notice of the error, makes the payment described in paragraph (1) of subdivision (b) together with accrued interest calculated in accordance with subdivision (c) of Section 98.1 for any delay in payment after December 15, 2016, to the employees and accompanies the payment with an accurate statement as described in paragraph (5) of subdivision (b). The employer shall have the burden of proving that a failure to pay an employee was solely the result of good faith error.

(d) (1) The employer shall use due diligence, including, but not limited to, the use of people locator services, to locate and pay former employees who no longer work for the employer in the event that former employees have relocated. For payments made to the Labor Commissioner pursuant to paragraph (4) of subdivision (b), the employer shall pay the Labor Commissioner an additional administrative fee equal to one-half of 1 percent of the aggregate payments made, or two thousand five hundred dollars (\$2,500), whichever is less, for deposit into the Labor Enforcement and Compliance Fund.

(2) Any payments made to the Labor Commissioner pursuant to paragraph (4) of subdivision (b) shall be accompanied by a statement, in both printed and electronic format, that identifies each employee for whom payment is made, the amount payable to that employee, and if available, the employee's last known address and social security number.

(3) The employer shall preserve all records of hours worked, calculations of hours worked, and records of payments made to employees and the Labor Commissioner pursuant to subdivision (b) and this subdivision, until December 16, 2020, and furnish the records related to an employee on request by the employee.

(e) Beginning on January 1, 2016, and ending on July 1, 2016, if the employer has not provided the notice required by paragraph (3) of subdivision (b), or ending on December 15, 2016, if the employer has provided the notice required by paragraph (3) of subdivision (b), the statute of limitations shall be tolled for that period of time for any claims based on failure to fully compensate employees compensated on a piece-rate basis for rest and recovery periods and other nonproductive time prior to January 1, 2016.

(f) Any notice to the Labor and Workforce Development Agency on or before December 31, 2015, pursuant to paragraph (1) of subdivision (a) of Section 2699.3, alleging violations based upon failure to properly compensate employees for rest and recovery periods, is void as to those alleged violations. Beginning January 1, 2016, and subject to the tolling provisions of subdivision (e), an aggrieved employee or representative shall give written notice by certified mail to both the Labor and Workforce Development Agency and the employer of any violations based on failure to compensate employees fully for rest and recovery periods and other nonproductive time.

(g) The provisions in subdivisions (b), (c), (d), (e), and (f) shall not apply to any of the following:

(1) Damages and penalties previously awarded in an order or judgment that was final and not subject to further appeal as of January 1, 2016.

(2) Claims based on the failure to provide paid rest or recovery periods or pay for other nonproductive time for which all of the following are true:

(A) The claim was asserted in a court pleading filed prior to March 1, 2014, or was asserted in an amendment to a claim that relates back to a court pleading filed prior to March 1, 2014, and the amendment or permission for amendment was filed prior to July 1, 2015.

(B) The claim was asserted against a defendant named with specificity and joined as a defendant, other than as an unnamed (DOE) defendant pursuant to Section 474 of the Code of Civil Procedure, in the pleading referred to in subparagraph (A), or another pleading or amendment filed in the same action prior to January 1, 2015.

(3) Claims that employees were not advised of their right to take rest or recovery breaks, that rest and recovery breaks were not made available, or that employees were discouraged or otherwise prevented from taking such breaks.

(4) Claims for unpaid wages, damages, and penalties that accrue after January 1, 2016.

(5) Claims for paid rest or recovery periods or pay for other nonproductive time that were made in any case filed prior to April 1, 2015, when the case contained by that date an allegation that the employer has intentionally stolen, diminished, or otherwise deprived employees of wages through the use of fictitious worker names or names of workers that were not actually working.

(6) An employer that is a new motor vehicle dealer, as defined by Section 426 of the Vehicle Code.

(h) Amendment to assert the affirmative defense provided in subdivision (b) in actions filed on or after March 1, 2014, unless final and not subject to further appeal as of January 1, 2016, shall be permitted.

(i) Nothing in this section shall limit or bar any action or proceeding by the Labor Commissioner or any private party for any failure to provide a rest and recovery period in accordance with any provision of this code, any order of the Industrial Welfare Commission, or any regulation adopted by the Department of Industrial Relations or any of its divisions, other than actions or proceedings based solely on the employer's failure to timely pay the compensation due for rest and recovery periods.

(j) Nothing in this section precludes a judge from awarding statutory, contractual, or common fund attorney's fees or costs in connection with an action filed before October 1, 2015.

(k) This section shall remain in effect only until January 1, 2021, and as of that date is repealed.

SEC. 5. Section 226.2 is added to the Labor Code, to read:

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

(a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:

(1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.

(2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable:

(A) The total hours of compensable rest and recovery periods, the rate of compensation, and the gross wages paid for those periods during the pay period.

(B) Except for employers paying compensation for other nonproductive time in accordance with paragraph (7), the total hours of other nonproductive time, as determined under paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay period.

(3) (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:

(i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.

(ii) The applicable minimum wage.

(B) For employers who pay on a semimonthly basis, employees shall be compensated at least at the applicable minimum wage rate for the rest and recovery periods together with other wages for the payroll period during which the rest and recovery periods occurred. Any additional compensation required for those employees pursuant to clause (i) of subparagraph (A) is payable no later than the payday for the next regular payroll period.

(4) Employees shall be compensated for other nonproductive time at an hourly rate that is no less than the applicable minimum wage.

(5) The amount of other nonproductive time may be determined either through actual records or the employer's reasonable estimates, whether for a group of employees or for a particular employee, of other nonproductive time worked during the pay period.

(6) An employer who is found to have made a good faith error in determining the total or estimated amount of other nonproductive time worked during the pay period shall remain liable for the payment of compensation for all hours worked in other nonproductive time, but shall not be liable for statutory civil penalties, including, but not limited to, penalties under Section 226.3, or liquidated damages based solely on that error, provided that both of the following are true:

(A) The employer has provided the wage statement information required by subparagraph (B) of paragraph (2) and paid the compensation due for the amount of other nonproductive time determined by the employer in accordance with the requirements of paragraphs (4) and (5).

(B) The total compensation paid for any day in the pay period is no less than what is due under the applicable minimum wage and any required overtime compensation.

(7) An employer who, in addition to paying any piece-rate compensation, pays an hourly rate of at least the applicable minimum wage for all hours worked, shall be deemed in compliance with paragraph (4).

(b) This section shall become operative on January 1, 2021.

SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.