

# Overtime for Farm Labor Contractors

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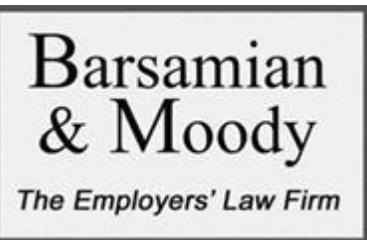
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# Disclaimer

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which commonly give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.



# Overview

- Introduction
- Determining the Wage Order
- Overtime Rules
- Workday and Workweek
- Calculating the Regular Rate of Pay for Overtime
- Calculating Overtime on Nondiscretionary Bonuses
- Requiring Mandatory Overtime
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# Introduction

- Changes to ag labor management:
  - Increasing use of H-2A Visa program
    - CA went from 25,453 in all of 2020 to 16,226 in first half of 2021
  - Redesign
  - Mechanization
    - Strawberries, blueberries
  - Robotics

# Determining the Wage Order

The employer must know which wage order applies in order to know which rules apply to different groups of employees. In order to determine the rules that govern wages and hours for employees in agriculture, it is important to examine what the employee actually does.

The primary Wage Orders that will be discussed are Wage Orders 14, 8, and 13.

# Wage Order 14

- Wage Order 14: covers agricultural work related to cultivation and handling of farm products up through the harvest, including field packing and transportation to the place of first processing or distribution, as well as the maintenance of soil, buildings, and machinery for farms.
- This wage order ALWAYS applies to persons in “agricultural occupations” even if another wage order applies to the rest of the employer’s overall operations.
- EMPLOYEES WORKING IN CANNABIS CULTIVATION ARE NOT CONSIDERED AGRICULTURAL WORKERS UNDER WAGE ORDER 14.

# Wage Order 8 and 13

- Wage Order 8 applies to commercial packing or operations (those that handle products from growers other than the one who operates the facility.)
- Wage Order 13 applies to on-the-farm operations handling only products produced by the grower who operates the facility
- Under both Wage Order 8 and 13, employees are entitled to overtime after eight hours worked in a day (with double time after 12 hours in a day) and 40 hours worked in a week.

# Overtime Rules for Wage Orders 14, 8, and 13

## Wage Order 14:

- One and one-half times their regular rate of pay for all hours worked **over 8.5** in a workday and **over 45** hours in a workweek.
- Seventh Consecutive Day: One and one-half times the regular rate of pay for the first 8, and then double time for hours beyond 8.

## Wage Orders 8 and 13

- One and one-half times regular rate of pay for all hours worked **over 8** in a workday and **over 40** hours in a workweek.
- Double time after 12 hours in a day.
- Seventh Consecutive Day: One and one-half times the regular rate of pay for the first 8, and then double time for hours beyond 8.

# Phase in for paying overtime to ag employees is as follows under AB1066:

| Date            | For Employers with 26 Employees or More | For Employers with 25 Employees or Less |
|-----------------|---|---|
| January 1, 2021 | 8.5 hours/day; 45 hours/week            | 10 hours/day                            |
| January 1, 2022 | 8 hours/day; 40 hours/week              | 9.5 hours/day; 55 hours/week            |
| January 1, 2023 | 8 hours/day; 40 hours/week              | 9 hours/day; 50 hours/week              |
| January 1, 2024 | 8 hours/day; 40 hours/week              | 8.5 hours/day; 45 hours/week            |
| January 1, 2025 | 8 hours/day; 40 hours/week              | 8 hours/day; 40 hours/week              |

# Workday

- Workday is defined as any consecutive 24-hour period starting at the same time each calendar day. The DLSE presumes the workday is 12:01 AM to midnight unless you designate another workday.
- Daily overtime is based on the number of hours worked in a single workday.
- An employee can work 16 straight hours without overtime if the time worked is spread out over two workdays. Ex. 3:30 PM to midnight, then midnight to 8:30 AM (assuming one 30-minute meal period each day).

# Workweek

- Workweek is defined as any 7 consecutive 24-hour periods starting on the same calendar day each week. Unless you specifically designate another workweek, the DLSE presumes a workweek of Sunday to Saturday.
- Cannot designate workweek to circumvent statutory requirement to pay overtime for the 7<sup>th</sup> consecutive day worked in a workweek.

# Straight-Time Hours

- Straight-time is normal working hours that are paid at a regular rate. Only hours worked at straight-time apply to the weekly limit on hours worked.
- This prevents overtime from pyramiding, so an employee does not earn overtime on top of overtime already paid. Once an employee has been paid overtime for working over the daily limit, those hours do not count toward the weekly limit.

# Regular Rate of Pay

Regular rate of pay is NOT the agreed date of pay for the employee's straight time hours. It is the **actual** hourly rate paid for the employee's work include the agreed rate plus all other forms of compensation.

This includes: hourly earnings, commission, nondiscretionary bonuses, piecework earnings, and the value of meals and lodging (in some circumstances)

Items **NOT** included in regular rate of pay include: gifts, hours paid but not worked (vacation, holiday, sick leave, etc.), expense reimbursement, discretionary bonuses, profit sharing plans, ERISA plan payments, overtime pay.

# Calculating the Regular Rate of Pay

- While employers may pay employees based on hourly, salaried, commission, piece work or other method, overtime is always calculated on an hourly basis.
- Regular rate of pay can never be below the minimum hourly wage.

# Formulas for Calculation of RRP

Non-exempt Hourly: simply apply the applicable overtime premium (1.5 or 2) to their hourly rate, and pay that rate for each overtime hour, unless the employee earned other income such as nondiscretionary bonuses, etc.

## Non-Exempt Salaried:

- Standard Calculation:

$$\frac{\text{Total weekly compensation}}{\text{maximum number of permissible straight hours (40)}}$$

# Formulas for Calculation of RRP

More than one rate of pay: must use the weighted average method

- Calculation:

Total weekly compensation

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Total hours worked (including overtime)

- Example: Employee earns \$14 an hour picking and \$13 an hour traveling
  - Total hours: 50
  - \$14/hour x 40 hours: 560
  - \$13/hour x 10 hours: 130
  - \$560 + \$130 = \$690 total weekly compensation
  - \$690/50 hours = \$13.80 RRP

# Formulas for Calculation of RRP

- $\$13.80/2 = \$6.90$  (overtime premium)
- Based on calculations above, employee earns:
  - If employee is traveling while on OT, earns \$19.90 per OT hour.
    - \$13/hour travel rate, plus OT premium of \$6.90
  - If employee is picking while on OT, earns \$20.90 per OT hour.
    - \$14/hour picking rate, plus OT premium of \$6.90

# Formulas for Calculation of RRP

- Piece Rate:

$$\frac{\text{Total earnings for the week}}{\text{Total hours worked (including overtime)}}$$

For each time and half hour worked, the employee is entitled to an additional **one-half** his regular rate. For each double time hour, the employee must receive the **full regular rate** in addition to his/her regular compensation.

- More Than One Rate:

- First, determine weekly pre-overtime compensation by applying the applicable rate of pay to all hours worked at each rate, including overtime hours.
- Then, divide the total weekly pre-overtime compensation by the total number of hours worked (including overtime hours). This calculation produces the regular rate of pay. The employee is entitled to the total pre-overtime compensation, plus an additional one half of the regular rate of pay for time and a half hours, and an additional full regular rate for all double time hours.

# Calculating Overtime on Bonuses

- Extra wages paid to an employee based on predetermined factors that cannot be withheld unless the employee fails to meet stated goal.
- Payment of a nondiscretionary bonus must be included in the Regular Rate of Pay.
- Method of calculation depends on whether it is a production bonus or a flat-sum bonus.

# Calculating Overtime on Production Bonus

- Production bonus is a percentage of production or some formula other than a flat amount.

- Formula:

Total bonus for the week

Total hours worked (including overtime)

- First, calculate the overtime due on the regular hourly rate and then separately compute the overtime due on the bonus.

# Calculating Overtime on Flat-Sum Bonus

- If the bonus is a flat sum, such as \$20 for working on Sundays, a different formula is required.

- Formula:

Total bonus for the week

Total hours worked (**excluding** overtime)

- A flat-sum bonus is not tied to number of hours worked, so only non-overtime hours can be considered when calculating the Regular Rate of Pay on the flat-sum bonus.

# Requiring Mandatory Overtime

- Employers generally can require overtime as needed, except for requiring a seventh consecutive day of work.
- If you will require overtime, consider making it part of the essential functions in job descriptions. This makes it clear to applicants and employees that overtime is expected.
- Employees who avoid working overtime can be disciplined under your policies.
- Note that accommodations must be considered if the reason an employee cannot work overtime is due to a medical or religious issue.

# Wage Order Limitations on Overtime

- Wage Order 8: An employee can work up to 72 hours in a workweek after which he must have 24 hours off duty. Exceptions in grape, tree-fruit, cotton ginning, and tree-nut industries (see Section 3 of Wage Order).
- Wage Order 13: Any work in excess of 72 hours in a week must be voluntary. Cannot terminate or discriminate against employee who refuses to work more than 72 hours.

# Compensatory Time Off

- Private employers in California are not permitted to offer CTO in lieu of paying overtime, unless the employer is one of the rare few who is exempt from the Fair Labor Standards Act. If you are covered by the FLSA, you are prohibited from offering CTO instead of paying overtime.

# Solutions?

- Limit hours
- Limit days
- Multiple FLCs
- Sharing employees
- ????????

# Scenario 1: Daily Overtime

|       | Sun | Mon                  | Tues                 | Wed                  | Thurs                | Fri                  | Sat | TOTAL |
|-------|-----|----------------------|----------------------|----------------------|----------------------|----------------------|-----|-------|
| Hours | Off | 8:00 AM –<br>4:30 PM | 8:00 AM –<br>6:30 PM | 8:00 AM –<br>5:30 PM | 7:00 AM –<br>6:30 PM | 8:00 AM –<br>4:30 PM | Off |       |
| Total | 0   | 8                    | 10                   | 9                    | 11                   | 8                    | 0   | 46    |
| Wages |     |                      |                      |                      |                      |                      |     |       |
| 1.0x  | 0   | 8                    | 8                    | 8                    | 8                    | 8                    | 0   | 40    |
| 1.5x  | 0   | 0                    | 2                    | 1                    | 3                    | 0                    | 0   | 6     |
| 2.0x  | 0   | 0                    | 0                    | 0                    | 0                    | 0                    | 0   | 0     |

# Scenario 2: Daily and Weekly Overtime

|       | Sun                   | Mon                  | Tues                 | Wed                   | Thurs                | Fri                  | Sat | TOTAL |
|-------|-----------------------|----------------------|----------------------|-----------------------|----------------------|----------------------|-----|-------|
| Hours | 3:00 PM –<br>11:30 PM | 3:00 AM –<br>2:30 PM | 3:00 AM –<br>5:00 PM | 3:00 PM –<br>11:30 PM | 3:00 AM –<br>2:30 PM | 3:00 AM –<br>5:00 PM | Off |       |
| Total | 8                     | 11                   | 13                   | 8                     | 11                   | 13                   | 0   | 64    |
| Wages |                       |                      |                      |                       |                      |                      |     |       |
| 1.0x  | 8                     | 8                    | 8                    | 8                     | 8                    | 0                    | 0   | 40    |
| 1.5x  | 0                     | 3                    | 4                    | 0                     | 3                    | 12                   | 0   | 22    |
| 2.0x  | 0                     | 0                    | 1                    | 0                     | 0                    | 1                    | 0   | 2     |

# Scenario 3: Shifts Spanning Two Days

|       | Sun                   | Mon  | Tues   | Wed  | Thurs | Fri                   | Sat                   | TOTAL |
|-------|-----------------------|--|--|--|-------|-----------------------|-----------------------|-------|
| Hours | 8:00 PM –<br>12:00 AM | 12:30 AM –<br>5:30 AM<br>8:00 PM –<br>12:00 AM | 12:30 AM –<br>5:30 AM<br>8:00 PM –<br>12:00 AM | 12:30 AM –<br>6:30 AM<br>8:00 PM –<br>12:00 AM | Off   | 8:00 PM –<br>12:00 AM | 12:30 AM –<br>6:30 AM |       |
| Total | 4                     | 9  | 9  | 10   | 0     | 4                     | 6                     | 42    |
| Wages |                       |  |  |  |       |                       |                       |       |
| 1.0x  | 4                     | 8  | 8  | 8  | 0     | 4                     | 6                     | 38    |
| 1.5x  | 0                     | 1  | 1  | 2  | 0     | 0                     | 0                     | 4     |
| 2.0x  | 0                     | 0  | 0  | 0  | 0     | 0                     | 0                     | 0     |

# Scenario 4: Daily, Weekly and 7<sup>th</sup> Day Overtime

|       | Sun               | Mon                | Tues               | Wed               | Thurs             | Fri               | Sat               | TOTAL |
|-------|-------------------|--------------------|--------------------|-------------------|-------------------|-------------------|-------------------|-------|
| Hours | 6:00 AM – 5:30 PM | 6:00 AM – 10:00 PM | 6:00 AM – 11:00 PM | 6:00 AM – 4:30 PM | 6:00 AM – 8:00 PM | 6:00 AM – 8:00 PM | 6:00 AM – 8:00 PM |       |
| Total | 11                | 15                 | 16                 | 10                | 13                | 13                | 13                | 91    |
| Wages |                   |                    |                    |                   |                   |                   |                   |       |
| 1.0x  | 8                 | 8                  | 8                  | 8                 | 8                 | 0                 | 0                 | 40    |
| 1.5x  | 3                 | 4                  | 4                  | 2                 | 4                 | 12                | 8                 | 37    |
| 2.0x  | 0                 | 3                  | 4                  | 0                 | 1                 | 1                 | 5                 | 14    |

# Scenario 5: 7<sup>th</sup> Day Overtime

|       | Sun                  | Mon                  | Tues                 | Wed                  | Thurs                | Fri                  | Sat                  | TOTAL |
|-------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|-------|
| Hours | 1:00 PM –<br>3:00 PM | 1:00 PM –<br>3:00 PM | 1:00 PM –<br>4:00 PM | 1:00 PM –<br>5:00 PM | 1:00 PM –<br>3:00 PM | 1:00 PM –<br>5:00 PM | 1:00 PM –<br>4:00 PM |       |
| Total | 2                    | 2                    | 3                    | 4                    | 2                    | 4                    | 3                    | 20    |
| Wages |                      |                      |                      |                      |                      |                      |                      |       |
| 1.0x  | 2                    | 2                    | 3                    | 4                    | 2                    | 4                    | 0                    | 17    |
| 1.5x  | 0                    | 0                    | 0                    | 0                    | 0                    | 0                    | 3                    | 3     |
| 2.0x  | 0                    | 0                    | 0                    | 0                    | 0                    | 0                    | 0                    | 0     |

# Thank you!

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