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8 WILLIAM J. KILBERG (*pro hac vice* application to be submitted)
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10 Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
11 Washington, DC 20036-5306
Telephone: 202.955.8500
12 Facsimile: 202.467.0539

13 Attorneys for Plaintiff Nisei Farmers League

14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF FRESNO

17 NISEI FARMERS LEAGUE,

18 Plaintiff,

19 v.

20 CALIFORNIA LABOR AND WORKFORCE
21 DEVELOPMENT AGENCY; DAVID M.
22 LANIER, in his official capacity as Secretary
of California Labor and Workforce
23 Development Agency; DEPARTMENT OF
INDUSTRIAL RELATIONS; CHRISTINE
24 BAKER, in her official capacity as Director of
the Department of Industrial Relations;
25 DIVISION OF LABOR STANDARDS
ENFORCEMENT; JULIE A. SU, in her
26 official capacity as California Labor
Commissioner, and DOES 1 to 10, inclusive,

27 Defendants.
28

CASE NO.: 16CECG02107

**PLAINTIFF NISEI FARMERS
LEAGUE'S EX PARTE APPLICATION
FOR:
(1) AN ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION, AND
(2) A TEMPORARY RESTRAINING
ORDER**

*[Memorandum of Points and Authorities;
Declaration of Manuel Cunha, Jr.;
Declaration of Theodore M. Kider;
Declaration of Joseph C. Hansen; Request for
Judicial Notice; [Proposed] Order re RJN;
[Proposed] Order re OSC/TRO filed
concurrently herewith]*

Hearing Place: Dept. 402 (Judge Hamilton)
Hearing Date: June 30, 2016
Hearing Time: 3:30 p.m.
Action Filed: June 27, 2016

1 **TO THE COURT, THE CLERK, AND ALL PARTIES AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 Plaintiff Nisei Farmers League hereby applies to this Court for a temporary restraining order
4 and for an order requiring Defendants California Labor and Workforce Development Agency, David
5 M. Lanier (in his official capacity as Secretary of California Labor and Workforce Development
6 Agency), Department of Industrial Relations (“DIR”), Christine Baker (in her official capacity as
7 Director of the DIR), Division of Labor Standards Enforcement, and Julie A. Su (in her official
8 capacity as California Labor Commissioner) (collectively, “Defendants”) to show cause why a
9 preliminary injunction should not issue pending trial in this action to preserve the status quo,
10 restraining and enjoining Defendants and their employees, agents, and persons acting with them or on
11 their behalf, from enforcing: (1) the July 1, 2016 deadline to sign up for the so-called “safe harbor”
12 provision under California Labor Code section 226.2(b)(3), thereby tolling the deadline until 30 days
13 after the preliminary injunction expires; (2) the December 15, 2016 payment deadline under Section
14 226.2(b)(4), thereby tolling the deadline until 197 days after the preliminary injunction expires;¹ and
15 (3) any requirements in Section 226.2 dependent on the phrases “other nonproductive time” or
16 “directly related.”

17 This application is made pursuant to California Code of Civil Procedure section 527 and
18 California Rules of Court 3.1150 and 3.1200 *et seq.*, on the following grounds:

19 *First*, a TRO is necessary to suspend enforcement of the July 1, 2016 deadline in Labor Code
20 section 226.2(b)(3)—and to toll the deadline until 10 days after the TRO expires in the event that a
21 preliminary injunction does not issue—to prevent Plaintiff’s members from suffering significant,
22 immediate, and irreparable harm.

23 The statute creates a so-called “affirmative defense” in litigation over back pay ostensibly
24 owed to piece-rate employees if an employer commits to paying “actual sums due” to those
25 employees for time worked from July 1, 2012 through December 31, 2015. But the meaning of
26

27
28 ¹ The 197 days is equal to the number of days between July 1 and December 15 (167), plus an
additional 30.

1 “actual sums due” is unknowable and potentially unconstitutional. Plaintiff maintains that its
2 members properly paid all sums due by paying a piece rate that met or exceeded minimum wage for
3 all hours worked. Defendants have taken public positions on two sides, on the one hand agreeing
4 with Plaintiff, and on the other hand contending that additional sums must be paid, sometimes relying
5 on unsettled law and overbroad applications of two poorly reasoned decisions that, at best, should be
6 limited to their facts. Against this uncertainty (which Defendants recognize exists), employers cannot
7 make an informed decision about whether they owe any sums. Yet the July 1 deadline forces them to
8 *publicly* decide *now* whether they owe such sums by requiring them to either (a) make a public
9 commitment to pay “actual sums due” under Section 226.2(b)(1)(A) to gain the benefit of an
10 affirmative defense, even though they may not owe any sums, or (b) forgo signing up to avoid public
11 scrutiny and thereby waive an affirmative defense to which they might be entitled. Under either
12 scenario, a single misstep over the “actual sums due” language bears immense consequences,
13 including government investigations and civil lawsuits subject to judicial hindsight over the meaning
14 of “actual sums due” that could result in significant civil damages, civil penalties, and even criminal
15 penalties.

16 Plaintiff and its members have no way to know what sums are actually due, and they bring
17 this action in part to obtain judicial clarification over the term so that they can conform their conduct
18 to the law. A stay of the July 1 sign-up deadline for the affirmative defense is essential in the
19 meantime, so as to prevent Plaintiff’s members from suffering the irreparable harm of either being
20 exposed to civil and criminal penalties or losing an affirmative defense the Legislature intended to
21 make available while this Court determines what the law requires. Defendants will not suffer any
22 harm, as the law does not protect or affect Defendants, and the public (including piece-rate
23 employees) would be best served by waiting for the clarity that this action will provide.

24 *Second*, Plaintiff is likely to succeed on the merits of its claims with respect to its contention
25 that certain phrases in Section 226.2(a), including but not limited to the phrases “other nonproductive
26 time” and “directly related,” are unconstitutional. These phrases are so hopelessly vague that not
27 even Defendants can define them, which enables Defendants to arbitrarily and discriminatorily
28 enforce them, at the same time Plaintiff and its members are unable to conform their conduct to the

1 law. Put simply, Plaintiff’s members have no idea what “other nonproductive time” means, yet they
2 are required to time, track, record, and pay for such time or else face exponential civil and criminal
3 penalties. That impossibly vague requirement violates state and federal due process and the Contract
4 Clause and Takings Clause.

5 *Third*, Plaintiff is likely to succeed on the merits of its claims with respect to its contention
6 that the phrase “actual sums due” under Section 226.2(b) violates Plaintiff’s members’ due process
7 rights and is too vague and ambiguous to implement and/or requires clarification. The law before
8 2016 (when the statute went into effect) was disputed and unsettled, and Defendants themselves
9 provided inconsistent, and, at times, arbitrary positions concerning what sums were owed to piece-
10 rate employees. Plaintiff’s position is based on a century of settled law and practice, whereas the
11 internal position that Defendants have discussed—without sharing that position externally with the
12 farm labor contractors they were training—at its most extreme is based on nothing more than two
13 poorly reasoned decisions issued in 2013 with holdings that do not apply beyond their specific facts.
14 This position from Defendants retroactively requires payment where none is required without fair
15 notice based on a single vague term, which violates state and federal due process and the Contract
16 Clause. It also makes the statutory affirmative defense unworkable by creating uncertainty that can
17 only be resolved through judicial intervention.

18 *Fourth*, all of these constitutional defects combine to make Section 226.2 unduly vague as it is
19 currently written. The phrase “other nonproductive time” appears in the statute 21 times, and the
20 phrase “actual sums due” is the linchpin for the statute’s affirmative defense. Section 226.2 is not
21 workable with these constitutional infirmities.

22 *Finally*, without a preliminary injunction, Plaintiff’s members face substantial and irreparable
23 harm. They face potentially business-closing civil damages, civil penalties, and criminal penalties
24 from down-the-road judicial interpretation over an unconstitutional statute under which they cannot
25 conform their conduct to the law. There is good cause to grant the preliminary relief Plaintiff
26 requests of staying and tolling two key deadlines in the statute—the July 1, 2016 sign-up deadline
27 and the December 15, 2016 payment deadline—and enjoining any enforcement of the statute until
28 this case is resolved and the requirements of Section 226.2 are made clear. Plaintiff’s members

1 should not be forced to make painful (and, in some cases, door-shuttering) choices about the
2 requirements of the statute—whether the sums due to invoke the affirmative defense under Section
3 226.2(b) or the requirement to track, record, and pay “other nonproductive time”—based on guesses,
4 hunches, or speculation about what a court may eventually determine was required. Defendants stand
5 to suffer no harm from a preliminary injunction while the Court considers the requirements of the
6 law; to the contrary, they would gain the same necessary clarity that Plaintiff is seeking.

7 Notice of this ex parte application was provided to Defendants, as described in the
8 accompanying Declaration of Joseph C. Hansen. Plaintiff has not previously made an application to
9 any other judicial officer for similar relief.

10 This application is based upon the verified complaint, a conformed copy of which is attached
11 to this application as Exhibit A, as well as the attached Memorandum of Points and Authorities, all
12 declarations filed in support thereof, the request for judicial notice filed in support thereof, all matters
13 of which judicial notice may be taken, and such other evidence and argument as this Court may
14 consider at the hearing on this application.

15 DATED: June 27, 2016

16 GIBSON, DUNN & CRUTCHER LLP
17 JESSE A. CRIPPS
18 PERLETTE MICHÈLE JURA
19 JOSEPH C. HANSEN
20 THEODORE M. KIDER

21 By: Jesse A. Cripps /TJK
22 Jesse A. Cripps

23 Attorneys for Plaintiff Nisei Farmers League

1 **PROOF OF SERVICE**

2 I, Theodore M. Kider, declare as follows:

3 I am employed in the County of Los Angeles, State of California, I am over the age of
4 eighteen years and am not a party to this action; my business address is 333 South Grand Avenue,
Los Angeles, California 90071-3197, in said County and State. On June 27, 2016, I served the
following document(s):

5 **PLAINTIFF NISEI FARMERS LEAGUE'S EX PARTE APPLICATION FOR:**
6 **(1) AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION, AND**
7 **(2) A TEMPORARY RESTRAINING ORDER**

on the parties stated below, by the following means of service:

8 Labor And Workforce Development Agency David M. Lanier
Attn: David M. Lanier Labor and Workforce Development Agency
800 Capitol Mall, Suite 5000 800 Capitol Mall, Suite 5000
9 Sacramento, CA 95814 Sacramento, CA 95814
Phone: (916) 653-9900 Phone: (916) 653-9900
10 david.lanier@labor.ca.gov david.lanier@labor.ca.gov

11 Department of Industrial Relations Christine Baker
Attn: Christine Baker Department of Industrial Relations
12 1515 Clay Street 1515 Clay Street
Oakland, CA 94612 Oakland, CA 94612
13 Phone: (844) 522-6734 Phone: (844) 522-6734
cbaker@dir.ca.gov cbaker@dir.ca.gov

14 Division of Labor Standards Enforcement Julie A. Su
Attn: Julie A. Su Division of Labor Standards Enforcement
15 1515 Clay Street, Room 401 1515 Clay Street, Room 401
Oakland, CA 94612 Oakland, CA 94612
16 Phone: (415) 703-5300 Phone: (415) 703-5300
jsu@dir.ca.gov jsu@dir.ca.gov

17 Office of the Attorney General
18 1300 "I" Street
19 Sacramento, CA 95814-2919
[By Overnight Delivery Only]

20 **BY OVERNIGHT DELIVERY:** I placed a true copy in a sealed envelope addressed as indicated above, on
21 the date shown below. I am familiar with the firm's practice of collection and processing correspondence for
22 delivery by Federal Express, UPS, and/or U.S. Postal Service Overnight Mail; pursuant to that practice,
envelopes placed for collection at designated locations during designated hours are deposited at the respective
office that same day in the ordinary course of business.

23 **BY ELECTRONIC SERVICE:** On the above-mentioned date I caused the documents to be sent to the
24 persons and agencies at the electronic notification addresses as shown above.

25 I am employed in the office of Jesse A. Cripps, a member of the bar of this court, and that the foregoing
26 document(s) was(were) printed on recycled paper.

27 (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is
28 true and correct.

Executed on June 27, 2016.


Theodore M. Kider

Exhibit A

OFFICIAL RECEIPT

Superior Court of California County of
Fresno Civil Division Payment Receipt

Receipt No. **CIVIL-2016-00023108**

Transaction Date 06/27/2016

Payor

Sacramento

3485 Sacramento Dr Ste G, San

Luis Obispo Ca 93401

Description	Amount Paid
-------------	----------------

Nisei Farmers League
16CECG02107

Nisei Farmers League
vs. California Labor and
Workforce Development
Agency

Civil Unlimited Complain 435.00

SUBTOTAL 435.00

Remaining Balance 0.00
Due:

PAYMENT TOTAL 435.00

Check (Ref #9769) 435.00
Tendered

Total Tendered **435.00**

Change 0.00

06/27/2016	Cashier	Audit
08:55 AM	Station CIVIL11	12781768

OFFICIAL RECEIPT

<p align="center">SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-1900</p>	<p align="center">FOR COURT USE ONLY</p> <p>Filed by Court</p>
<p>TITLE OF CASE:</p> <p align="center">Nisei Farmers League vs California Labor and Workforce</p>	
<p align="center">NOTICE OF CASE MANAGEMENT CONFERENCE AND ASSIGNMENT OF JUDGE FOR ALL PURPOSES</p>	<p>CASE NUMBER: 16CECG02107</p>

To All Parties and their Attorneys of Record:

This case has been assigned to Judge **Donald Black** for **all purposes**.
All future hearings will be scheduled before this assigned judge.

You are required to appear at a Case Management Conference on **October 31, 2016** at **10:00 a.m.** in **Dept. #104** of the court located at **1130 "O" Street, Fresno, California**.

You must comply with the requirements set forth in Fresno Superior Court Local Rule Chapter 2.

Failure to appear at the conference may result in imposition of sanctions, waiver of jury trial, or other adverse consequences.

Defendants: Appearance at the Case Management Conference does not excuse you from having to file your response in proper legal form within 30 days after the Summons is served on you. You could lose the case if you do not file your response on time. If you do not know an attorney, and do not have one, you may call an attorney referral service or a legal aide office (*listed in the phone book*).

DECLARATION

I declare under penalty of perjury under the laws of the State of California that I gave a copy of the **Notice of Case Management and Assignment of Judge for All Purposes** to the person who presented this case for filing.

Date: **June 27, 2016**

Clerk, by _____, Deputy
L. Esparza

FOR COURT USE ONLY

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Jesse A. Cripps, SBN 222285
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
TELEPHONE NO.: (213) 229-7000 FAX NO.: (213) 229-7520
ATTORNEY FOR (Name): Nisei Farmers League

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Fresno
STREET ADDRESS: 1130 O Street
MAILING ADDRESS: 1130 O Street
CITY AND ZIP CODE: Fresno, California 93721-2220
BRANCH NAME: B.F. Sisk Courthouse

CASE NAME:
Nisei Farmers League v. Cal. Labor & Workforce Development Agency

CIVIL CASE COVER SHEET
 Unlimited (Amount demanded exceeds \$25,000)
 Limited (Amount demanded is \$25,000 or less)

Complex Case Designation
 Counter **Joinder**
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

FILED
JUN 27 2016
SUPERIOR COURT OF CALIFORNIA
COUNTY OF FRESNO
BY: [Signature] DEPUTY

CASE NUMBER:
16 CE CG 02 107
JUDGE:
DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:
- | | | |
|--|--|---|
| Auto Tort
<input type="checkbox"/> Auto (22)
<input type="checkbox"/> Uninsured motorist (46)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
<input type="checkbox"/> Asbestos (04)
<input type="checkbox"/> Product liability (24)
<input type="checkbox"/> Medical malpractice (45)
<input type="checkbox"/> Other PI/PD/WD (23)
Non-PI/PD/WD (Other) Tort
<input type="checkbox"/> Business tort/unfair business practice (07)
<input type="checkbox"/> Civil rights (08)
<input type="checkbox"/> Defamation (13)
<input type="checkbox"/> Fraud (16)
<input type="checkbox"/> Intellectual property (19)
<input type="checkbox"/> Professional negligence (25)
<input type="checkbox"/> Other non-PI/PD/WD tort (35)
Employment
<input type="checkbox"/> Wrongful termination (36)
<input type="checkbox"/> Other employment (15) | Contract
<input type="checkbox"/> Breach of contract/warranty (06)
<input type="checkbox"/> Rule 3.740 collections (09)
<input type="checkbox"/> Other collections (09)
<input type="checkbox"/> Insurance coverage (18)
<input type="checkbox"/> Other contract (37)
Real Property
<input type="checkbox"/> Eminent domain/Inverse condemnation (14)
<input type="checkbox"/> Wrongful eviction (33)
<input type="checkbox"/> Other real property (26)
Unlawful Detainer
<input type="checkbox"/> Commercial (31)
<input type="checkbox"/> Residential (32)
<input type="checkbox"/> Drugs (38)
Judicial Review
<input type="checkbox"/> Asset forfeiture (05)
<input type="checkbox"/> Petition re: arbitration award (11)
<input type="checkbox"/> Writ of mandate (02)
<input type="checkbox"/> Other judicial review (39) | Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)
<input type="checkbox"/> Antitrust/Trade regulation (03)
<input type="checkbox"/> Construction defect (10)
<input type="checkbox"/> Mass tort (40)
<input type="checkbox"/> Securities litigation (28)
<input type="checkbox"/> Environmental/Toxic tort (30)
<input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)
Enforcement of Judgment
<input type="checkbox"/> Enforcement of judgment (20)
Miscellaneous Civil Complaint
<input type="checkbox"/> RICO (27)
<input checked="" type="checkbox"/> Other complaint (not specified above) (42)
Miscellaneous Civil Petition
<input type="checkbox"/> Partnership and corporate governance (21)
<input type="checkbox"/> Other petition (not specified above) (43) |
|--|--|---|

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|---|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input checked="" type="checkbox"/> Large number of witnesses |
| b. <input checked="" type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input checked="" type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive
4. Number of causes of action (specify): **Eight (8)**
5. This case is is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: June 27, 2016
Jesse A. Cripps

[Signature]
(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

**SUMMONS
(CITACION JUDICIAL)**

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

ALL DEFENDANTS. Additional Parties Attachment form is Attached.

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

NISEI FARMERS LEAGUE

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED

JUN 27 2016

SUPERIOR COURT OF CALIFORNIA
COUNTY OF FRESNO

BY _____ DEPUTY

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

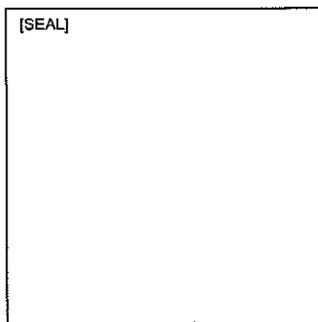
The name and address of the court is:
(El nombre y dirección de la corte es): Fresno County Superior Court
Superior Court of California, County of Fresno
1130 O Street, Fresno, California 93721-2220

CASE NUMBER:
(Número del Caso) **16 CE CG 02 107**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Jesse A. Cripps, 333 South Grand Avenue, Los Angeles, California 90071-3197, (213) 229-7000

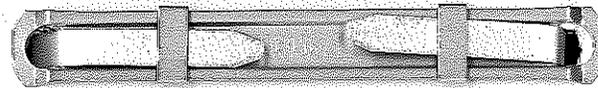
DATE: JUN 27 2016 Clerk, by L. ESPARZA, Deputy
(Fecha) (Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify):
under: CCP 416.10 (corporation) CCP 416.60 (minor)
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 other (specify):
4. by personal delivery on (date):



1 JESSE A. CRIPPS, SBN 22285
 jcripps@gibsondunn.com
 2 PERLETTE MICHELE JURA, SBN 242332
 pjura@gibsondunn.com
 3 JOSEPH C. HANSEN, SBN 275147
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 4 THEODORE M. KIDER, SBN 288179
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 6 Los Angeles, California 90071-3197
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FILED
 JUN 27 2016
 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF FRESNO
 BY _____ DEPUTY

8 WILLIAM J. KILBERG (*pro hac vice* application to be submitted)
 wkilberg@gibsondunn.com
 9 JASON C. SCHWARTZ (*pro hac vice* application to be submitted)
 jschwartz@gibsondunn.com
 10 Gibson, Dunn & Crutcher LLP
 1050 Connecticut Avenue, N.W.
 11 Washington, DC 20036-5306
 Telephone: 202.955.8500
 12 Facsimile: 202.467.0539

13 Attorneys for Nisei Farmers League

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 15 FOR THE COUNTY OF FRESNO

16 **16 CE CG 02 107**

17 NISEI FARMERS LEAGUE,

CASE NO.: _____

18 Plaintiff,

**NISEI FARMERS LEAGUE'S
 VERIFIED COMPLAINT FOR
 PRELIMINARY AND PERMANENT
 INJUNCTIVE AND DECLARATORY
 RELIEF**

19 v.

20 CALIFORNIA LABOR AND WORKFORCE
 DEVELOPMENT AGENCY;
 21 DAVID M. LANIER, in his official capacity
 as Secretary of California Labor and
 Workforce Development Agency;
 22 DEPARTMENT OF INDUSTRIAL
 RELATIONS;
 23 CHRISTINE BAKER, in her official capacity
 as Director of the Department of Industrial
 24 Relations;
 DIVISION OF LABOR STANDARDS
 25 ENFORCEMENT;
 26 JULIE A. SU, in her official capacity as
 California Labor Commissioner; and
 27 DOES 1 to 10, inclusive,

- (1) DUE PROCESS – VAGUENESS
- (2) DUE PROCESS – ARBITRARY DEPRIVATION OF PROPERTY
- (3) DUE PROCESS – LACK OF FAIR NOTICE
- (4) DUE PROCESS – RETROACTIVE PUNISHMENT
- (5) TAKINGS CLAUSE
- (6) CONTRACT CLAUSE
- (7) DECLARATORY RELIEF
- (8) INJUNCTIVE RELIEF

28 Defendants.

1 Plaintiff Nisei Farmers League, acting on behalf of itself and the members of Nisei Farmers
2 League to protect important state and federal constitutional rights, seeks urgent declaratory and
3 injunctive relief against Defendants California Labor and Workforce Development Agency
4 (“LWDA”), David M. Lanier (in his official capacity as Secretary of the LWDA), Department of
5 Industrial Relations (“DIR”), Christine Baker (in her official capacity as Director of DIR), Division
6 of Labor Standards Enforcement (“DLSE”), Julie A. Su (in her official capacity as California Labor
7 Commissioner), and Does 1 through 10, inclusive, as follows:

8 **I. INTRODUCTION AND SUMMARY OF ALLEGATIONS**

9 1. This lawsuit seeks urgent declaratory and injunctive relief from an unconstitutional
10 law—Section 226.2 of the Labor Code, enacted by Assembly Bill No. 1513—which effectively
11 eliminates piece-rate compensation in California by making it impossible for employers to know how
12 to pay employees through piece-rate compensation without being subject to civil and criminal
13 penalties and legislatively enabled private litigation that amounts to the imposition of further
14 penalties. After July 1, 2016, Plaintiff and its members will suffer irreparable harm under this law if
15 this Court does not take action to protect their state and federal constitutional rights.

16 2. For nearly a century, California law has recognized—like many sister states across the
17 nation—that, rather than being limited to hourly compensation, employees should be free to receive
18 compensation tied directly to their hard work. For this reason, since 1919, California law has
19 recognized explicitly what has long been the practice in our nation: Employers can pay employees
20 on a “piece-rate” basis.¹ Thus, an employer could pay an employee a fixed (or variable) amount of
21 money to be earned through the performance or completion of certain activities or tasks, and the more
22 of those activities or tasks that the employee performed or completed, the more he or she would earn.

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26 ¹ The California Labor Code expressly authorizes the use of piece rate pay: It provides that
27 “[w]ages’ includes all amounts for labor performed by employees of every description, whether
28 the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other
method of calculation.” (Lab. Code, § 200). And it provides that “Minimum Wage” must be paid
for all “hours worked in the payroll period, whether the remuneration is measured by time, piece,
commission, or otherwise.” (IWC Wage Order No. 13-2001, § 4, subd. (A).)

1 3. “Piece rate” is an incentive-based form of compensation that rewards employees for
2 hard-work. And numerous studies show that, as compared to hourly compensation, piece rate has the
3 potential to increase employees’ compensation as well as their productivity, which creates numerous
4 benefits for employees and employers, and ultimately cost savings for consumers. For example, as
5 Edward P. Lazear, at Stanford University’s Graduate School of Business, concluded in his article
6 *Performance Pay and Productivity* (90.5 AM. ECON. REV. 1346 (2000)), a switch to a piece-rate
7 compensation scheme from an hourly compensation scheme resulted in an average 44% increase in
8 productivity and an average 10% increase in pay for workers. Indeed, for workers, piece-rate
9 compensation can be part of the American dream; instead of being paid the same hourly rate no
10 matter what they do, employees are directly rewarded for their effort and productivity. Better for the
11 worker and better for the employer.

12 4. Piece-rate compensation is integral to the agricultural industry. Agriculture is an
13 industry that is highly suitable for compensation based on the performance or completion of certain
14 activities, or on the production of certain units. Among other things, it provides an incentive-based
15 compensation scheme that benefits both employers and employees. For example, workers might be
16 paid a fixed amount for each bin of produce that is harvested—those who harvest more and fill more
17 bins will earn more dollars. Those increased earnings for the worker also mean increased
18 productivity. This method of compensation therefore allows agricultural employers to incentivize
19 and reward productivity, something that an hourly rate does not accomplish.

20 5. In 2015, purportedly in response to two California appellate decisions that were
21 expressly limited to their facts,² the California Legislature passed Assembly Bill No. 1513 (“AB
22 1513”), which took effect on January 1, 2016 as Labor Code section 226.2.

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24
25 ² The two 2013 California Court of Appeal decisions, *Gonzalez v. Downtown LA Motors, LP*
26 (2013) 215 Cal.App.4th 36 (“*Gonzalez*”) and *Bluford v. Safeway Stores, Inc.* (2013) 216
27 Cal.App.4th 864 (“*Bluford*”), have been read broadly by Defendants in a way that erroneously
28 creates new requirements that have never before existed, without regard to California’s broader
compensation system and without regard to the structural integrity of California’s piece-rate
system. *Gonzalez* held, on the specific facts presented there, that mechanics paid on a piece-rate
basis should be paid separately and in addition to the piece rate for time spent waiting around for
cars to repair. *Bluford* held, on the specific facts presented there, that rest breaks were not time
spent working on the piece-rate activity and therefore should be compensated separately and in

1 6. In short, although Section 200 of the Labor Code explicitly permits piece-rate
2 compensation (as distinct from hourly wage and other authorized forms of compensation), and
3 nothing has abrogated Section 200, Section 226.2 purports to create new unconstitutionally vague and
4 indiscernible requirements for piece-rate compensation that go even further than *Gonzalez* and
5 *Bluford* and, if interpreted in the way the DLSE suggests, effectively gut piece-rate compensation by
6 all but eliminating it and making it too difficult and unknowable to lawfully pay at a piece rate.

7 7. Section 226.2 purports to graft onto the piece-rate system new phrases and concepts
8 that are so vague they cannot be followed. The result is that the law has become so complex, murky,
9 and vague that an employer can no longer pay on a piece-rate basis without risking subsequent
10 government investigation and/or civil lawsuits—and accompanying civil and criminal penalties—
11 based on amorphous terms that the Legislature acknowledged created “significant conflicts” over
12 interpretation, and which Defendants themselves have admitted cannot be defined.

13 8. The new law, which is unconstitutionally vague, *inter alia*, thus violates state and
14 federal due process guarantees. Section 226.2, which effectively guts piece-rate compensation and
15 creates intolerable uncertainty and unfairness for any piece-rate employer, went into effect on
16 January 1, 2016. Section 226.2(b) purportedly offers employers a “safe harbor” if they make certain
17 commitments and take certain actions by July 1, 2016, but even the steps necessary to lawfully avail
18 oneself of the safe harbor are unconstitutionally vague, unfair, violate the Takings Clause and
19 Contract Clause, and amount to an improper retroactive imposition of penalties, among bringing
20 about numerous other constitutional infirmities.

21 9. For example, Section 226.2(a) requires an employer using a piece-rate compensation
22 scheme to pay separately for rest and recovery periods and for so-called “other nonproductive time.”
23 The statute purports to define “other nonproductive time” in the most incomprehensible terms: time
24 “that is not directly related to the activity being compensated on a piece-rate basis.” (Lab. Code,
25 § 226.2.)

26
27 addition to the piece rate. And although both decisions were expressly limited to the facts
28 presented in those cases, Defendants have read them more broadly, injected insurmountable
vagueness, and the broad application that they have been given is without basis in the statutory
framework and goes well beyond the bounds of codified law.

1 10. The phrases “other nonproductive time” and “directly related” are so vague that neither
2 Nisei Farmers League nor its members can structure their conduct in such a way as to know, with any
3 degree of certainty or otherwise, how to act in compliance with Section 226.2.

4 11. For workers that harvest crops, which of the following is “other non-productive time”:
5 traveling between work sites, attending meetings about the harvest, doing warm-up calisthenics for
6 the harvest, putting on protective gear, sharpening tools? What about a worker who works more
7 slowly because of more frequent pauses while harvesting—is each and every one of those pauses
8 “other nonproductive time”? And how long does the pause or break need to last before it becomes
9 “other nonproductive time”? What about bathroom breaks? What about a worker who chooses to
10 make a personal cell phone call while remaining on the employer’s premises? What about waiting
11 for the containers in which harvested crops are placed when they run out? What if an employee
12 chooses to wait for the weather to change before continuing harvesting, or walks between work
13 stations? These are just a few of the real-world ambiguities created by this new law which make it
14 impossible for employers to know whether they are complying, and impossible for Nisei Farmers
15 League to advise its members on how to comply, without unfair risk of civil and criminal penalties.

16 12. In addition to the uncertainties created by this vague and ambiguous law, employers
17 now face significant time-monitoring and time-recordkeeping problems for piece-rate compensation.
18 How are employers supposed to identify and accurately record “nonproductive” time to ensure it is
19 properly compensated and to sufficiently document that it was compensated fully and correctly?
20 They must now do so to avoid or defend against claims for non-payment or underpayment of wages.
21 Must they use a clock to separately and individually time each of the activities above to ensure that
22 each act, no matter how little time it may take, is properly accounted for? How are they supposed to
23 do this?

24 13. The terms do not define the required conduct with sufficient definiteness to allow a
25 person of common understanding to know and comply with the law’s requirements. Defendants have
26 conceded as much by explaining that “[w]hat constitutes ‘other nonproductive time’ under [the Labor
27 Code] definition will obviously vary.” (DIR, *AB 1513 Piece-Rate Compensation Frequently Asked*
28 *Questions*, available at http://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FAQs.htm.) The

1 Legislature recognized the same: “[S]ignificant conflicts between workers and employers on what
2 constitutes as [sic] nonproductive time and productive time can exist. Further, such disputes can vary
3 significantly from industry to industry.” (S. Comm. on Labor and Indus. Relations, August 27, 2015
4 analysis of AB 1513, at p. 5.) As a result, those phrases are unconstitutionally void for vagueness,
5 *inter alia*.

6 14. They are also void for vagueness for the independent reason that the uncertainty
7 inherent in the unconstitutional law allows for—and in fact all but guarantees—arbitrary and
8 discriminatory enforcement.

9 15. To make matters worse, the new law places Nisei Farmers League members and many
10 other similarly situated employers in a critical and untenable position by requiring them to make a
11 decision by the close of July 1, 2016: the statutorily created deadline for the so-called “affirmative
12 defense” under Section 226.2. That “affirmative defense” applies retroactively to wages paid
13 between 2012 and 2015. It too is premised on unconstitutionally vague, contested, and unclear
14 requirements.

15 16. Section 226.2(b) purportedly creates an affirmative defense to current and future
16 litigation and enforcement actions that may be filed for back pay that is ostensibly owed to piece-rate
17 employees for rest and recovery periods and other nonproductive time. But to take advantage of this
18 “affirmative defense,” employers must sign up by July 1, 2016 and retroactively pay any “actual
19 sums due” for a 3½ year period from July 1, 2012 through December 21, 2015.³ The list of
20 employers who sign up is made publicly available on the DLSE’s website.

21 17. But, confusingly, under the law before January 1, 2016, the “actual sums due” has been
22 subject to varying interpretations. It previously had been settled that an employer could determine
23 the piece rate, pay at a piece rate, and meet the minimum wage requirements by dividing the piece-
24 rate compensation across the hours worked to ensure that the compensation was at least the minimum

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27 ³ Alternatively, the employer can agree to pay four percent of an employee’s gross earnings to
28 piece-rate employees. That “significant” amount “is, by definition, an estimation.” (S. Comm.
on Labor and Indus. Relations, August 27, 2015 analysis of AB 1513, at p. 6.) Many of Nisei
Farmers League’s members could never afford to pay this four percent.

1 wage. If the compensation for all work performed fell below the minimum wage for that period, the
2 employer could “true up” the compensation by paying an additional amount to reach an average
3 hourly minimum wage. Under that interpretation of the law, an employer that paid in that format
4 already has paid the actual sums due under Section 226.2. If that view of the pre-2016 law is correct,
5 an employer who has followed that practice should therefore be able to sign up for the affirmative
6 defense and need not pay anything further in the way of “actual sums due.”

7 18. Yet Defendants have issued conflicting views on the pre-2016 law—on the one hand
8 recognizing this position would be correct, and on the other hand suggesting that more “actual sums
9 due” should be paid. Thus, the “actual sums due” under pre-2016 law is, at best, unclear. Defendants
10 admit the same, describing “the holdings of *Gonzalez* and *Bluford*” as “in dispute” and
11 acknowledging “unsettled controversies over how to compensate piece-rate workers.” (DIR, *New*
12 *Piece-Rate Legislation (AB 1513) Fact Sheet*, available at
13 http://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FACT_SHEET.htm). The Legislature
14 acknowledged “significant conflicts” over the same. If the law is in dispute and unsettled, how can
15 an employer determine whether there are any “actual sums due” as contemplated by the statute?

16 19. By committing to pay “actual sums due” when the term is disputed and unclear, an
17 employer opens itself to investigation and lawsuits based on a subsequent interpretation of the term.
18 If an employer agrees to pay “actual sums due,” and does not pay anything additional based on the
19 supportable belief that no further sums are due, but a court later disagrees, that employer will have
20 exposed itself to civil damages and penalties, and potentially criminal penalties, when it could have
21 paid the sums due had it known what sums were due.

22 20. In comparison, if the employer does not sign up for the “affirmative defense” by the
23 close of July 1, 2016—for example, because it believes it does not owe any further sums under the
24 pre-2016 law and therefore understandably does not want to submit its name to the DLSE suggesting
25 it is an employer that may owe sums for back pay—it waives its right to invoke the affirmative
26 defense. It could then be subject to litigation or an agency enforcement action over piece-rate
27 compensation from 2012 through 2015 in which subsequent judicial interpretation of the previously
28

1 unsettled law might reach the conclusion that the employer should have paid more “actual sums due”
2 and it would therefore enter that litigation with no affirmative defense.

3 21. A judicial declaration is therefore necessary to determine the meaning of the phrase
4 “actual sums due” and/or to deem the phrase unconstitutionally void for vagueness. At minimum, the
5 “unsettled” pre-2016 law does not allow Nisei Farmers League members to make a meaningful and
6 informed decision based on their rights under the law. It is imperative to stay the July 1, 2016
7 deadline while the Court resolves this critical question so that the affirmative defense does not
8 disappear in the meantime.

9 22. The intent of piece-rate compensation is to provide a direct financial reward for
10 employee productivity. But the administrative burden of creating a hybrid system for non-piece-rate
11 and piece-rate time will almost certainly deter employers from utilizing this method of compensation.
12 This burden could also have the impact of reducing the amount of piece-rate pay as a result of the
13 additional non-piece-rate hourly wage that would be required, thereby potentially limiting an
14 employee’s overall compensation.

15 23. Continuing to restrict or burden an employer’s use of piece-rate pay by making it even
16 more costly and difficult to administer causes more harm to an employee than increased protection.

17 24. Making matters worse, the law combines with other portions of California labor law to
18 subject California employers to civil fines and penalties if they misinterpret this unclear law, and can
19 potentially classify certain reasonable interpretations of the new law as criminal conduct. For
20 example, failing to pay properly for “other nonproductive time” can result in liquidated compensatory
21 damages (Lab. Code, § 1194.2) alongside statutory penalties for waiting time pay (Lab. Code, § 203),
22 improper wage statements (Lab. Code, § 226, subd. (e)), additional penalties under the Private
23 Attorney General Act (Lab. Code, § 2698, *et seq.*), and additional civil penalties that the Labor
24 Commissioner may impose (Lab. Code, § 1197.1). Additionally, failing to pay “any employee a
25 wage less than the minimum fixed by an order of the commission” or “[v]iolating or refus[ing] or
26 neglect[ing] to comply with any provision of this chapter [governing wages, hours, and working
27 conditions] or any order or ruling of the commission” is a criminal act punishable “by a fine of not
28 less than one hundred dollars (\$100) or by imprisonment for not less than 30 days.” (Lab. Code,

1 § 1199.) Thus, failing to pay “other nonproductive time” for an activity an employer thought did not
2 fit the definition could result in a minimum wage violation under the rationale that there was not
3 proper compensation for that other nonproductive time. That error could be deemed criminal.

4 25. The problems identified above violate Nisei Farmers League and its members’ state
5 and federal due process rights in multiple ways. In addition to being void for vagueness, the law fails
6 to provide fair or adequate notice of the conduct it requires or prohibits. And the damages and
7 extensive civil and criminal penalties that can be assessed despite one’s best intentions to comply
8 with the law, as well as any insistence by Defendants that Nisei Farmers League members must pay
9 “actual sums due” to invoke the affirmative defense—particularly where Defendants admit that term
10 is unclear and unsettled under pre-2016 law—constitute an arbitrary deprivation of property. Further,
11 requiring Nisei Farmers League members to pay something that would amount to more than the
12 “actual sums due” than were actually due under pre-2016 law constitutes an impermissible retroactive
13 punishment.

14 26. Those same problems violate the Takings Clause because, once an employer signs up
15 to pay actual sums due, any insistence by Defendants to pay more than that which is actually due,
16 including the requirement to pay the money to Defendants when an employee cannot be found,
17 imposes severe retroactive liability on the limited class of piece-rate employers, who could not have
18 anticipated such liability, and the extent of that liability is substantially disproportionate.

19 27. Additionally, the law substantially and illegitimately interferes with contracts between
20 Nisei Farmers League members and their employees, in which the scope and nature of the piece-rate
21 activity and compensation were agreed upon. Such an unjustified interference violates the Contract
22 Clause of the U.S. Constitution.

23 28. Thus, as explained more fully herein, Nisei Farmers League and its members maintain
24 the following, *inter alia*:

- 25 a. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as
26 applied, and Defendants’ enforcement of those provisions, violates due process under
27 state and federal law because the provisions are unconstitutionally vague and unfair.

- 1 b. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as
2 applied, and Defendants’ enforcement of those provisions, violates due process under
3 state and federal law because it arbitrarily deprives Nisei Farmers League and its
4 members of property.
- 5 c. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as
6 applied, and Defendants’ enforcement of those provisions, violates due process under
7 state and federal law because Nisei Farmers League and its members lack fair or
8 adequate notice of what the law requires or forbids.
- 9 d. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as
10 applied, and Defendants’ enforcement of those provisions, violates due process under
11 state and federal law because it constitutes an impermissible retroactive punishment.
- 12 e. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as
13 applied, and Defendants’ enforcement of those provisions, violates the Takings Clause of
14 the Fifth Amendment to the U.S. Constitution because it imposes severe retroactive
15 liability on a limited class of parties that could not have anticipated the liability, and the
16 extent of that liability is substantially disproportionate to the parties’ experience.
- 17 f. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as
18 applied, and Defendants’ enforcement of those provisions, violates the Contract Clause
19 of the U.S. Constitution because it substantially and illegitimately interferes with prior
20 and existing contracts between Nisei Farmer League members and their employees.
- 21 g. An employer that paid piece-rate compensation that ensured that the compensation for all
22 work performed met or exceeded the hourly minimum wage—regardless of whether the
23 time is characterized as productive time or non-productive time—need not make
24 additional payments to satisfy the “actual sums due” provision of the affirmative defense
25 in Section 226.2(b) because that employer has already properly and lawfully
26 compensated the employee in accordance with the applicable minimum wage
27 requirement.
- 28

1 h. If California lawmakers want to explicitly eliminate piece-rate compensation, though
2 such elimination would be unfair to employees and employers alike, they could try to do
3 so by explicitly removing it as an authorized form of compensation under Section 200
4 and specifying that it is no longer a recognized form of compensation in California. But
5 it is unconstitutional, unlawful, and improper to explicitly authorize piece-rate
6 compensation in Section 200 of the Labor Code and then effectively make it impossible
7 to pay through piece-rate compensation by amending Section 226.2 to surreptitiously
8 eliminate piece-rate compensation and/or create so much vagueness and uncertainty that
9 employers cannot, with any degree of reasonable certainty, know how they are expected
10 to lawfully pay piece-rate employees in 2016 and beyond, or for the period of 2012-2015,
11 all the while facing civil damages and penalties and criminal penalties for any misstep
12 identified through judicial hindsight of an intolerably vague law.

13 29. For these and the other reasons set forth herein, Nisei Farmers League respectfully asks
14 this Court to:

- 15 a. Preserve the status quo by extending the safe harbor period created by Section 226.2 until
16 at least six months after adequate and clear direction on lawful piece rate compensation
17 under Section 226.2 is provided for under California law or the statute is deemed
18 unconstitutional;
- 19 b. Declare that the current version of Labor Code section 226.2 is unconstitutional,
20 including, but not limited to, the terms “other nonproductive time,” “directly related,”
21 and “actual sums due”;
- 22 c. Declare “actual sums due” from 2012 through the present—and until a new law that is
23 sufficiently clear is passed—to be those in which the piece-rate compensation equaled or
24 was “trued up” to at least minimum wage;
- 25 d. Preliminarily enjoin the enforcement of Section 226.2 and toll the Section 226.2(b)
26 deadlines;
- 27 e. Permanently enjoin enforcement of Section 226.2 to the extent it is unconstitutional or
28 unlawful;

1 f. Enjoin Defendants from enforcing “actual sums due” as requiring separate payment for
2 non-piece-rate work or rest periods pre-2016 where such time has already been paid
3 through a piece rate.

4 II. PARTIES

5 30. Plaintiff NISEI FARMERS LEAGUE is an agricultural sector association and
6 California nonprofit mutual benefit corporation. Nisei Farmers League represents more than 1,000
7 farmers, packers, processors, dehydrators, and farm labor contractors throughout California’s Central
8 Valley that produce more than 160 agricultural commodities, the majority of which have agricultural
9 cycles requiring piece-rate employees. Nisei Farmers League’s membership includes hundreds of
10 agricultural employers that employ piece-rate employees in vegetable, grape, citrus, row crop, flower,
11 poultry, livestock, nursery crop, and tree-fruit operations. Those members and their employees had
12 and have contracts of employment, whether written, oral, or implied, in which the employers offer a
13 piece rate to cover certain activities and the employees agree to work at a piece rate. These members
14 could otherwise bring their own suit because they are directly affected by Defendants’ unlawful
15 actions and by the unlawful and unconstitutional provisions enacted by AB 1513. Nisei Farmers
16 League brings this action to protect interests that are germane to the purpose of the organization.

17 31. One of the declared purposes of Nisei Farmers League is to “maintain[] an up-to-date
18 working knowledge of [labor regulations] and assist[] [its] members in understanding and staying in
19 compliance with these sometimes daunting regulations and requirements” (“Labor and Immigration,”
20 Nisei Farmers League, available at
21 http://www.niseifarmersleague.com/index.php/p/labor_immigration), which includes understanding
22 and protecting its members’ ability to pay at a piece rate in compliance with the law. Additionally,
23 the relief requested in this lawsuit, which centers on the legal requirements concerning Section 226.2,
24 does not require the participation of individual members of Nisei Farmers League.

25 32. An actual controversy exists between the Nisei Farmers League and Defendants
26 because Defendants seek to enforce unlawful and unconstitutional provisions of Labor Code section
27 226.2 against Nisei Farmers League and its members even though certain provisions of the law are
28 hopelessly vague and allow for arbitrary enforcement, and can lead to civil and criminal penalties in

1 violation of Nisei Farmers League members' due process rights. Defendants' interpretation and
2 enforcement of such a law against Nisei Farmers League and its members will cause irreparable and
3 unconstitutional harm in violation of due process, particularly because Nisei Farmers League and its
4 members have no way to know what conduct will be construed to violate the law and cannot regulate
5 or structure their conduct so as to comply with the law.

6 33. Defendant LABOR AND WORKFORCE DEVELOPMENT AGENCY ("LWDA") is
7 a cabinet-level agency of the State of California that coordinates workforce programs and agencies.
8 The LWDA oversees the Department of Industrial Relations and the Division of Labor Standards
9 Enforcement. As the agency with ultimate oversight over the DIR and DLSE, the LWDA is
10 ultimately responsible for the unconstitutional and unlawful interpretation of and any enforcement
11 actions taken pursuant to Section 226.2 by the DIR and DLSE. The LWDA has its office in
12 Sacramento, California.

13 34. Defendant DAVID M. LANIER is the Secretary of the LWDA and as such is its
14 highest administrative official. Secretary Lanier is sued solely in his official capacity. The LWDA
15 and Secretary Lanier shall be referred to hereafter collectively as "LWDA."

16 35. Defendant DEPARTMENT OF INDUSTRIAL RELATIONS ("DIR") is a department
17 within the LWDA dedicated to working conditions for California's wage earners. DIR administers
18 and enforces laws governing wages, hours and breaks, overtime, retaliation, workplace safety and
19 health, apprenticeship training programs, and medical care and other benefits for injured workers.
20 DIR has four divisions and six commissions, boards and programs, which collectively have offices
21 throughout California, including in Fresno, California. The DIR has issued guidance regarding piece-
22 rate compensation, has a statutory duty to train farm labor contractors regarding wage-and-hour laws,
23 and oversees the Division of Labor Standards Enforcement, which is responsible for administering
24 and enforcing the law at issue in this case.

25 36. Defendant CHRISTINE BAKER is the Director of DIR and as such is its highest
26 administrative official. Director Baker is sued solely in her official capacity. DIR and Director
27 Baker shall be referred to hereafter collectively as "DIR."

28

1 is authorized to grant declaratory relief pursuant to section 1060 of the California Code of Civil
2 Procedure and to grant injunctive relief pursuant to sections 525, 526, and 526(a) of the California
3 Code of Civil Procedure.

4 42. This is an action against a state agency, which may be commenced and tried in the
5 County of Fresno. Venue is proper in this Court pursuant to California Code of Civil Procedure
6 sections 393(b) and 395. Additionally, because this action is brought against public officers and may
7 be commenced in a county where the Attorney General maintains offices and performs its functions
8 (Code Civ. Proc., § 393, subd. (b)), this action is properly brought in the County of Fresno where the
9 Attorney General maintains an office. (*Id.* § 401, subd. (1).) Moreover, venue is proper in Fresno
10 because at least some members of the Nisei Farmers League reside in the county and the effects of
11 the statute are felt by those members in the County of Fresno, such that at least some part of the cause
12 of action arose in Fresno and the Nisei Farmers League members have suffered injury in Fresno.

13 IV. FACTUAL ALLEGATIONS

14 A. Legal Background

15 1. Piece-Rate Compensation Is A Historical And Essential Form Of Compensation

16 43. Piece-rate compensation is when an employer pays an employee a fixed (or variable)
17 amount of money to be earned through the performance or completion of certain activities or tasks,
18 and the more of those activities or tasks that the employee performs or completes, the more he or she
19 earns. Relying on the American Heritage Dictionary, the DLSE has defined it as “[w]ork paid for
20 according to the number of units turned out” and stated that “a piece rate must be based upon an
21 ascertainable figure paid for completing a particular task or making a particular piece of goods.”
22 (DLSE Enforcement Policies and Interpretations Manual, § 2.5.1.) Such compensation might be, for
23 example, a set amount paid per basket of strawberries harvested, per mile driven, or per carburetor
24 replaced.

25 44. Piece-rate compensation is a fundamental form of compensation. The concept formally
26 dates back hundreds of years, and the concept of paying a set amount of money per task completed
27 has existed for much longer than that. It has been explicitly authorized as a lawful form of
28

1 compensation in California since 1919 and is likewise codified by federal statute and around the
2 country.

3 45. Piece-rate compensation is essential to the agricultural industry. It provides a payment
4 structure that incentivizes workers by rewarding productivity. Working harder will result in higher
5 earnings. For example, if two workers are both offered \$5 per bucket of blueberries harvested, they
6 will have an incentive to harvest more blueberries. The worker who harvests four buckets in one
7 hour will earn \$20 for that hour and the worker who only harvests two buckets will earn \$10.
8 Conversely, payment at an hourly rate provides no such incentive. If those same two workers were
9 paid at \$10 per hour, they would have no incentive to harvest even a single bucket of blueberries in
10 the hour. And there would be no rational economic reason for one worker to harvest four buckets in
11 an hour if the other worker was not harvesting even one. (E.g., Edward P. Lazear, *Performance Pay
12 and Productivity*, 90.5 AM. ECON. REV. 1346 (2000) [“[P]aying on the basis of output will induce
13 workers to supply more output”]; Fritz M. Roka, *Compensating Farm Workers through Piece Rates:
14 Implications on Harvest Costs and Worker Earnings*, Doc. FE792 (2009) [“[A]n hourly wage system
15 removes the productivity incentive”].).

16 46. For this reason, piece-rate compensation has been used in the agricultural industry for
17 centuries. (E.g., THE IDEA OF WORK IN EUROPE FROM ANTIQUITY TO MODERN TIMES 282-91 (Josef
18 Ehmer & Catharina Lis, eds., 2009) [discussing “the widespread existence of the piece rate from the
19 late Middle Ages up to the middle of the sixteenth century”].) It continues to be widely used today in
20 California. (E.g., D. Kate Rubin & Jeffrey M. Perloff, *Who Works for Piece Rates and Why*, AM. J.
21 AGRIC. ECON. 75(4), 1036-43 (1993) [analyzing piece-rate pay in the agricultural industry]; Gregorio
22 Billikopf, *Incentive Pay (Pay for Performance)*, U. CAL. AGRIC. ISSUES CTR., Aug. 11, 2006,
23 <https://nature.berkeley.edu/ucce50/ag-labor/7labor/08.htm> [“Individual incentive plans offer the
24 clearest link between a worker’s effort and the reward. Probably the best-known individual or small
25 group incentive pay plan in agriculture is piece rate.”].)

26 47. A historical and central underpinning of the piece-rate compensation method is the
27 concept that the employer can set the conditions of piece-rate compensation within the bounds of the
28 law. The employer may specify the scope of work and the specified rate of pay. The employee, by

1 agreeing to do the work, accepts both the scope of the work and the rate of pay. (E.g., *Kerr's*
2 *Catering Service v. Dep't of Industrial Relations* (1962) 57 Cal.2d 319, 329 [describing “the reliance
3 of the employee on receiving his expected wage, whether it be computed upon the basis of a set
4 minimum, a piece rate, or a commission”].)

5 48. Piece-rate compensation has long been recognized in California as a proper form of
6 payment. For example, in 1919, almost a hundred years ago, the California Legislature defined
7 wages as “all amounts for labor or service performed by employees of every description, whether the
8 amount is fixed or ascertained by the standard of time, task, piece, or other method of calculating the
9 same.” (Assembly Bill No. 187, § 3 (1919).) The California Supreme Court recognized the same:
10 “Wages may be measured by time, by the piece, or by any other standard.” (*Hillen v. Industrial*
11 *Accident Commission* (1926) 199 Cal. 577, 581.)

12 49. Today, Labor Code section 200(a) utilizes nearly identical language, defining wages as
13 “all amounts for labor performed by employees of every description, whether the amount is fixed or
14 ascertained by the standard of time, task, piece, commission basis, or other method of calculation.”
15 That section continues to allow employers to set a rate of pay based on the work done, not merely by
16 the hour. It has not been abrogated.

17 **2. Defendants Have Recognized The Historical Piece-Rate Compensation Practice**
18 **Is Lawful**

19 50. The now-defunct Industrial Welfare Commission issued Wage Orders that remain in
20 place today, under the direction and enforcement of the DIR and DLSE. Wage Order No. 13,
21 regulating “Industries Preparing Agricultural Products for Market, on the Farm,” recognizes piece-
22 rate compensation as a form of wages and states that an employer shall pay an employee “not less
23 than [the current minimum wage] per hour for all hours worked.” (IWC Wage Order No. 13-2001,
24 § 2, subd. (O); *id.* § 4, subd. (A).) Other Wage Orders contain a similar requirement.

25 51. Historically and in certain publications current today, Defendants have interpreted that
26 requirement as requiring that the piece-rate compensation divided by hours worked must be at least
27 the minimum hourly wage.

1 52. For example, Section 10.81 of the 1989 DLSE Operations and Procedures Manual
2 stated: “To determine if employees paid by the piece or commission are receiving the minimum
3 wage, divide the total earnings in the pay period by the total hours – ALL hours worked – in the pay
4 period.” That Manual cited a 1984 DLSE Interpretive Bulletin that explained: “As a general rule,
5 employees may be paid on a piece-rate basis provided that each employee receives no less than the
6 minimum wage . . . for all time worked.”

7 53. Section 33.1.7 of the 1998 DLSE Enforcement Policies and Interpretations Manual
8 advised employers to true up compensation when earnings fell under minimum wage for the week:
9 “Example 3 where piece rate results in less than the minimum wage Since earnings are under the
10 minimum wage, compute earnings for the week on minimum wage basis” to determine the “[t]otal
11 earnings due.” Section 33.1.8 stated: “Group piece work rates: A group rate for piece workers is an
12 acceptable method of computing pay. In this method the total number of pieces produced by the
13 group is divided by the number of persons in the group and each is paid accordingly. The regular rate
14 for each worker is determined by dividing the pay received by the number of hours worked. The
15 regular rate cannot be less than the minimum wage.”

16 54. Additionally, pursuant to statute, the DIR and Labor Commissioner prepared and used
17 training materials through June 2016 that describe a similar, straightforward and common-sense
18 interpretation of how to calculate minimum wage compliance for an employee who receives piece-
19 rate compensation.

20 55. Section 1684 of the Labor Code requires the Labor Commissioner to prepare
21 “appropriate education materials” for farm labor contractors to allow them to study for and pass “a
22 written examination that demonstrates an essential degree of knowledge of the current laws and
23 administrative regulations concerning farm labor contractors.” (Lab. Code, § 1684, subds. (a)(5) and
24 (b).) The Labor Commissioner must also “prepare[]” “classes” for farm labor contractors so that they
25 can “enroll and participate in at least nine hours of relevant educational classes each year.” (Lab.
26 Code, § 1684, subd. (c).)

27 56. The July 2014 Farm Labor Contractor License Exam Study Guide, issued by the DIR,
28 states: “Workers may also be paid a piece rate, but the rate must be at least equal to the minimum

1 wage, including overtime. That means, for example, that the total wage earned by an employee who
2 worked 8 hours on a piece rate must be paid at least equal to the wages he or she would have received
3 if they had been paid \$9 per hour for that 8 hours. In other words, piece rates may not be used to pay
4 employees less than the minimum wage established by law.” That same document also states:
5 “Workers paid on a piece rate must be paid at least the minimum wage. A piece rate cannot be used
6 to pay less than the minimum wage.” No further direction is given about minimum wage compliance
7 for piece-rate workers.

8 57. The September 2015 Farm Labor Contractor License Exam Study Guide, also issued
9 by the DIR, contains the same language.

10 58. The June 2016 Farm Labor Contractor License Exam Study Guide continues to state:
11 “Workers may also be paid a piece rate, but the rate must be at least equal to the minimum wage,
12 including any overtime. For example, an employee who worked 8 hours must be paid at least \$80 (8
13 x 10\$/hr.) even if he/she is paid a piece rate.”

14 59. The 2002 DLSE’s Enforcement Policies and Interpretations Manual, last revised in
15 March 2006 (“DLSE Manual”), contains a slightly different description of the requirements.

16 60. In the DLSE Manual, the DLSE stated that “employees must be paid at least the
17 minimum wage for all hours they are employed.” (DLSE Manual, § 47.7.)

18 61. The DLSE then opines that if an employer precludes an employee “from earning . . .
19 piece rate compensation during a period of time, the employee must be paid at least the minimum
20 wage (or contract hourly rate if one exists) for the period of time the employee’s opportunity to earn
21 commissions or piece rate.” (DLSE Manual, § 47.7.) The DLSE provided as an example a situation
22 in which an employer requires piece-rate workers to attend a meeting and stated that because the
23 piece-rate workers “would not be able to earn compensation at the piece rate, the employer would be
24 required to pay those workers at least the minimum wage (or the contract hourly wage, if one exists)
25 during such period.” (DLSE Manual, § 47.7.1.)

26 62. That position is contrary to what the DIR was teaching farm labor contractors in the
27 Farm Labor Contractor License Exam Study Guide. The DLSE should be estopped from applying its
28 own interpretation against those who justifiably relied on the DIR’s training. The DLSE Manual also

1 assumes, incorrectly, that time spent in a meeting can never be part of a piece rate. That runs
2 contrary to the basic principle that the employer can define the scope of the work included in the
3 piece rate. For example, a homeowner might offer to pay a housekeeper a rate of \$100 to clean a
4 house, so long as the cleaning takes no more than ten hours. The homeowner might define the scope
5 of the cleaning to include everything that needed to be done to mop, vacuum and dust, as well as the
6 time spent being instructed by the employer as to how she wants the house cleaned. And the
7 homeowner might further state that the housekeeper should take at least three ten-minute breaks
8 during the time he is cleaning. By agreeing to do the work, the housekeeper would accept that scope
9 of work and rate of pay. If the employee anticipated that the pay he received would cover the time
10 spent with the homeowner learning how the homeowner wants things to be cleaned, then the
11 employee would have received everything he expected to receive (and would have still been paid
12 minimum wage) even though the employee was not actively cleaning the house during that time. Yet
13 the DLSE's position in its Manual suggests that the meeting time with the homeowner would need to
14 be compensated separately. And if, after four hours, the housekeeper had not yet taken a break and
15 the homeowner then directed the housekeeper to take a ten-minute break, that break would be within
16 the scope of the work agreed to by both parties. It would be part of the rate that was offered to the
17 employee for the piece of work. Yet the DLSE's position in its Manual suggests that the rest break
18 would need to be compensated separately. That is true even though the housekeeper has made
19 minimum wage (e.g., at least \$10/hour) for all hours worked, and the employer did not pay less than
20 was promised to the housekeeper.

21 **3. Two Appellate Decisions Erroneously Upend The Piece-Rate Law, Creating**
22 **Liability Where None Existed**

23 63. The California Court of Appeal sowed confusion in two decisions in 2013 that left both
24 employers and Defendants unsure of how to legally compensate workers on a piece-rate basis.

25 64. In *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 ("*Gonzalez*"),
26 Division 2 of the Second District of the California Court of Appeal held that automotive service
27 technicians who were compensated on a piece-rate basis for repair work were entitled to a *separate*
28 hourly minimum wage for time spent during their work shifts waiting for vehicles to repair or

1 performing other non-repair tasks directed by the employer. The court reached that decision based on
2 an overly broad interpretation and erroneous extension of *Armenta v. Osmose, Inc.* (2005) 135
3 Cal.App.4th 314, a case in which the court held that the employer who deliberately refused to pay for
4 certain hours worked could not effectively “borrow” against other money it had promised and paid to
5 the employee to meet its minimum wage obligations for the unpaid work. *Armenta* had nothing to do
6 with piece-rate compensation; it dealt with an employer who admittedly failed to pay an employee for
7 certain worked performed. The *Gonzalez* court’s reliance and extension of *Armenta* was erroneous.
8 The court in *Gonzalez* also dismissed the defendant and amici’s concerns that its ruling would have
9 “far-reaching negative consequences on all incentive compensation systems in California,” refusing
10 to address the argument by stating that its holding was about “only automotive service technicians.”
11 (*Gonzalez, supra*, 215 Cal.App.4th at pp. 53-54.)

12 65. Two months later, the Third District of the California Court of Appeal decided *Bluford*
13 *v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864 (“*Bluford*”), in which it erroneously held that
14 “rest periods must be separately compensated in a piece-rate system.” (*Id.* at p. 872.) The court also
15 interpreted broadly and incorrectly the holding of *Armenta*, again erroneously extending the specific
16 holding of *Armenta* to piece-rate compensation. Like the court in *Gonzalez*, the *Bluford* court
17 dismissed concerns about the far-reaching negative implications of its decision: In response to
18 Safeway’s concerns that such a holding would “severely disrupt piece-rate pay systems throughout
19 the state,” the court did not address the ramifications of its holding and stated only that “[t]here is no
20 evidence that [Safeway’s] compensation will collapse by complying with controlling law”—i.e., the
21 new requirement just announced by the court in *Bluford*—“and having to include one additional
22 element—rest periods—that must be separately paid at an hourly rate.” (*Id.* at p. 873.)

23 66. As broadly interpreted by Defendants, both cases were incorrectly decided. Defendants
24 have interpreted these cases as creating new requirements for piece-rate compensation that had never
25 before existed.

26 67. There is no requirement in the California Labor Code which provides that an employer
27 can only pay for “productive time” through piece rate pay. In fact, the Labor Code broadly envisions
28

1 that an employer can pay a “piece rate” or through any “other method of calculation.” (Lab. Code,
2 § 200).

3 68. At minimum, the holdings of both cases are limited properly to the facts of those cases
4 and do not extend to the piece-rate payment systems previously used by Nisei Farmers League
5 members. Neither case addressed a vagueness argument.

6 69. The defendants’ concerns in both cases proved correct. *Gonzalez* and *Bluford* created a
7 state of confusion over the requirements of piece-rate compensation that left the State and employers
8 unsure of how to proceed.

9 70. Employers who had used piece-rate compensation for many years and even decades,
10 fully believing that they were complying with the law, were now subject to lawsuits challenging their
11 pay practices for not paying a separate hourly rate for time spent on hourly rest breaks or other
12 various time and tasks that plaintiffs argued should be paid separately from the piece-rate activity.

13 71. The California Legislature observed that these two opinions created “liability
14 [employers] could not foresee.” (S. Comm. on Labor and Indus. Relations, August 27, 2015 analysis
15 of AB 1513, at p. 4.).

16 72. A memorandum in the official legislative history of AB 1513 explained that “[t]hese
17 two Court of Appeal decisions upended the long-standing interpretations and understandings among
18 many employers who believed their piece-rate compensation practices were in full compliance with
19 the law.” (*AB 1513 – Piece-Rate Compensation* [in Author’s File].) That memorandum further noted
20 that many saw the piece-rate compensation “issues as still very much in dispute and unresolved,
21 given that the California Supreme Court has not yet addressed the issues.” (*Ibid.*)

22 **4. Defendants Secretly Change Their Position Regarding Piece-Rate Requirements**

23 73. The cases led to confusion and mixed messaging from Defendants on how to calculate
24 piece-rate compensation. Externally, and supporting the very relief that Plaintiff seeks today, the
25 DIR recognized that there were no longer clear rules. In a “Fact Sheet” the DIR posted on its
26 website, the DIR acknowledged that “the holdings of *Gonzalez* and *Bluford* remain in dispute,” that
27 the cases “have generated class actions and Private Attorney General Act (PAGA) litigation,” and
28 that there were now “unsettled controversies over how to compensate piece-rate workers.” Despite

1 their statutory obligations, Defendants did not update the training materials they were providing to
2 farm labor contractors about how piece-rate pay should be paid. Nor did they update the description
3 of piece-rate compensation in the DLSE Manual.

4 74. Internally, the DLSE was doing something else. In a November 1, 2013 memorandum
5 written by Labor Commissioner Su to DLSE Staff (“2013 Memorandum”), the Labor Commissioner
6 wrote that the two decisions had “clarif[ied] how employers must pay piece-rate workers in order to
7 properly comply with their minimum wage and rest period obligations under California law.”

8 75. Regarding *Gonzalez*, the 2013 Memorandum stated that *Gonzalez* had “extended the
9 holding and reasoning in *Armenta*” and “ma[d]e clear” that “the minimum wage obligation requires
10 two separate assessments: one focused on piece-rate work, the other on non-piece-rate work.” It
11 defined “non piece-rate work” as “time spent performing non piece-rate tasks, . . . includ[ing]
12 required stand-by time waiting for pieces to work on.” It then stated that “[i]f no payment is being
13 made for the non piece-rate work, the employer must pay the amount of the minimum wage for each
14 hour of non piece-rate work.”

15 76. Regarding *Bluford*, the 2013 Memorandum acknowledged that “prior to the *Bluford*
16 decision, [the] application [of the rest period provision in the wage orders] in the context of piece-rate
17 employment had never been specifically addressed.” It extrapolated the holding of *Bluford* to stand
18 for the proposition that “piece-rate wages do not compensate an employee for time spent taking an
19 authorized rest period.” It stated that “the hourly rate payable to piece-rate employees during rest
20 periods is the hourly piece-rate wage calculated by dividing the total weekly piece-rate earnings by
21 the total hours of piece-rate work performed in the week.” According to the Labor Commissioner:
22 “Although calculated at the end of the workweek period instead of at its inception, this hourly piece-
23 rate equates with what the employee would have earned if no rest break had been taken.”

24 77. The 2013 Memorandum concluded that “[t]he case law *now* establishes that piece-rate
25 wages cannot be used to satisfy the employer’s obligation to pay the minimum wage for non piece-
26 rate work, and that each hour of non piece-rate work must be separately compensated.” (Italics
27 added.) Further, “the case law *now* establishes that wages paid for piecework cannot be used to
28 compensate employees for their rest periods.” (Italics added.) In other words, the DLSE was

1 internally stating that both *Gonzalez* and *Bluford* had announced *new* requirements for employers and
2 had purported to *change* the way piece-rate compensation should be calculated.

3 78. Moreover, the DLSE took an incredibly broad view of both opinions, immediately
4 extrapolating them to any and every piece-rate context, notwithstanding the opinions' own attempts
5 to limit their scope.

6 79. Yet, at the same time it was applying these aggressive internal policy changes, the
7 DLSE did not externally communicate its changed view of piece-rate compensation requirements, in
8 spite of the long history of piece-rate compensation, its settled recognition in California law, and
9 Defendants' own training materials teaching the historical practice as proper.

10 80. The 2013 Memorandum even instructed the DLSE to investigate employers based on
11 its overly broad and unannounced position: The DLSE should "examine[]" "[e]mployee
12 compensation programs involving piece-rate workers . . . to insure that these obligations are being
13 complied with."

14 **5. AB 1513 Changes Piece-Rate Law Further**

15 81. The Legislature then enacted Assembly Bill No. 1513 in response to the confusion
16 generated by *Gonzalez* and *Buford*. The Committee on Insurance introduced the Bill on March 5,
17 2015, which at the time contained only a provision related to worker's compensation. Assembly
18 Member Williams introduced an amended version on August 27, 2015 that addressed piece-rate
19 compensation. The Governor approved AB 1513 on October 10, 2015 and the legislation went into
20 effect on January 1, 2016.

21 82. Relevant to piece-rate compensation, AB 1513 added Section 226.2 to the California
22 Labor Code. That section has multiple subdivisions, two of which are most relevant here. Broadly
23 described, Subdivision (a) details new requirements for paying on a piece-rate basis and
24 Subdivision (b) provides a so-called "affirmative defense" for an employer that follows a series of
25 intricate requirements.

26 83. Subdivision (a) requires, in relevant part, "[f]or employees compensated on a piece-rate
27 basis during a pay period":
28

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

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

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

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

12 (3)

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

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

19 (ii) The applicable minimum wage.

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

26

27 (4) Employees shall be compensated for other nonproductive time at an hourly rate that is
28 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

1 under Section 226.3, or liquidated damages based solely on that error, provided that both
2 of the following are true:

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

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

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

13 84. The statute defines “other nonproductive time” as “time under the employer’s control,
14 exclusive of rest and recovery periods, that is not directly related to the activity being compensated
15 on a piece-rate basis.” (Lab. Code, § 226.2.)

16 85. Although the statute offers a definition, the Legislature recognized the limits of its
17 ability to define “other nonproductive time,” noting in a Committee Report: “[S]ignificant conflicts
18 between workers and employers on what constitutes as [sic] nonproductive time and productive time
19 can exist. Further, such disputes can vary significantly from industry to industry.” (S. Comm. on
20 Labor and Indus. Relations, August 27, 2015 analysis of AB 1513, at p. 5.)

21 86. Thus, for piece-rate workers, the statute requires additional compensation for (1) rest
22 and recovery periods, and (2) “other nonproductive time.” The additional compensation for rest
23 breaks must be the higher of the minimum wage or “[a]n average hourly rate determined by dividing
24 the total compensation for the workweek, exclusive of compensation for rest and recovery periods
25 and any premium compensation for overtime, by the total hours worked during the workweek,
26 exclusive of rest and recovery periods.” (Lab. Code, § 226.2, subd. (a)(3)(A).) The additional
27 compensation for “other nonproductive time” must be at “an hourly rate that is no less than the
28 applicable minimum wage.” (Lab. Code, § 226.2, subd. (a)(4).)

87. By requiring employees to be “compensated for rest and recovery periods and other
nonproductive time separate from any piece-rate compensation,” Section 226.2 effected a radical
change in the law governing piece-rate compensation.

1 88. Section 226.2 replaced the law’s prior focus on employer and employee expectations
2 with a new “direct relationship analysis”—one that focuses not on the employee’s expectations and
3 reliance, but on the more abstract question of whether there is a “direct” relationship between the
4 tasks that the employee is performing and the piece work.

5 89. For example, under the case law predating Section 226.2, a homeowner and a
6 housekeeper might agree to a rate—say, \$100—for cleaning a house, so long as the cleaning takes no
7 more than ten hours. As part of that negotiation, the employer could determine that the piece rate
8 could include whatever tasks he saw fit to include: mopping, vacuuming, dusting, or anything else
9 related to the cleaning of the house. And he might further agree that the housekeeper could take ten-
10 minute breaks as needed during the time he was cleaning, that would be included as part of the piece
11 rate pay that was being earned.

12 90. But, under Section 226.2, the housekeeper-homeowner example might turn out
13 differently in many cases. Although the employee may have agreed to a rate of \$100 for cleaning a
14 house—including all tasks directly and indirectly related to the cleaning of that house—the
15 homeowner might be liable for minimum wages if the housekeeper could show that certain tasks he
16 was asked to perform were not “directly related” to the unit—\$100 per house—in which he agreed to
17 be paid. For example, what if the housekeeper takes a call from the homeowner in the middle of
18 cleaning the house, or spends time putting away cleaning supplies at the end of the time spent
19 cleaning? Under Subdivision (a)(1), the housekeeper would potentially be able to seek separate
20 payment for tasks not “directly related” to the activity or time he spent resting, notwithstanding the
21 fact that the parties had understood that all directly and indirectly related time was being paid as part
22 of the \$100 per house rate, including time spent resting, communicating with the homeowner, or even
23 putting away supplies after cleaning.

24 91. Subdivision (b) contains a lengthy series of requirements that give an employer “an
25 affirmative defense” to “any claim or cause of action . . . based solely on the employer’s failure to
26 timely pay the employee the compensation due for rest and recovery periods and other nonproductive
27 time for time periods prior to and including December 31, 2015”:
28

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

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

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

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

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

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

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

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

26 (A) The notice must include the legal name and address of the employer and
27 must be mailed or delivered to the Director of Industrial Relations, Attn: Piece-
28 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.

1
2 (B) The department shall post on its Internet Web site either a list of the
3 employers who have provided the required notice or copies of the actual
4 notices. The list or notices shall remain posted until March 31, 2017.

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

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

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

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

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

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

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

22 92. Thus, to take advantage of the affirmative defense, an employer must agree to pay
23 either “the actual sums due” with interest or “each employee an amount equal to 4 percent of that
24 employee’s gross earnings” for the period of July 1, 2012 through December 31, 2015. (Lab. Code,
25 § 226.2, subd. (b)(1).)

26 93. The legislative history reveals that the Legislature included the second option (paying
27 “4 percent”) because it recognized that it may be too difficult to calculate “actual sums due,”
28 explaining that because “significant conflicts between workers and employees on what constitutes as

1 [sic] nonproductive time and productive time can exist [t]herefore, AB 1513 creates a second
2 method for calculating unpaid or underpaid nonproductive time” of paying four percent of gross
3 wages. (S. Comm. on Labor and Indus. Relations, August 27, 2015 analysis of AB 1513, at p. 5.) It
4 described the “4 percent” option as “a significant figure” that “is, by definition, an estimation of the
5 unpaid rest and recovery periods and nonproductive time” derived “from prior cases and DIR
6 enforcement actions.” (*Id.* at pp. 5-6.)

7 94. Further, to utilize the affirmative defense in Subsection (b), the statute requires that an
8 employer send written notice to the DIR by July 1, 2016 that the employer will “make payments to its
9 current and former employees in accordance with the requirements of” subdivisions (b) and (c).
10 (Lab. Code, § 226.2, subd. (b)(3).) Then all such payments must be made by December 15, 2016.
11 (Lab. Code, § 226.2, subd. (b)(4).)

12 **B. Critical And Essential Terms In Section 226.2 Are So Vague And Faulty That Nisei**
13 **Farmers League Members Do Not Know How To Lawfully Pay At A Piece Rate**

14 95. Section 226.2 does nothing to settle confusion surrounding piece-rate compensation—it
15 compounds it and sets the law on a constitutionally infirm course. There are fundamental defects
16 with the law that prevent Nisei Farmers League and its members from being able to structure their
17 conduct in a lawful way and to act with an understanding of what the law requires. The law is so
18 vague that it has eviscerated piece-rate compensation by making it too difficult, uncertain, and
19 subjective a form of compensation, even though the law does not purport to abrogate Labor Code
20 section 200.

21 **1. “Other Nonproductive Time”**

22 96. There are certain terms in Section 226.2 that are unconstitutionally void for vagueness,
23 facially and as applied, including “other nonproductive time,” which contains the term “directly
24 related” in its definition. The phrase “other nonproductive time” permeates the law. But neither
25 “other nonproductive time” nor “directly related” defines the regulated conduct with sufficient
26 definiteness or specificity to allow Nisei Farmers League members to structure their conduct. A
27 person of common intelligence—or any intelligence for that matter—must guess at the meaning of
28 these terms. They therefore do not provide fair notice of the regulated conduct. Additionally, these

1 terms do not provide minimal or sufficiently definite guidelines so as to prevent arbitrary and
2 discriminatory enforcement. The vagueness of these terms is not hypothetical, but instead has a
3 direct and immediate effect on the members of the Nisei Farmers League.

4 97. The statute defines “nonproductive time” as “time under the employer’s control,
5 exclusive of rest and recovery periods, that is not directly related to the activity being compensated
6 on a piece-rate basis.” (Lab. Code, § 226.2.) That definition therefore turns on whether an activity is
7 “directly related” to the piece-rate activity.

8 98. But there are no guidelines in the statute regarding when an activity is “directly related”
9 such that it does not constitute “other nonproductive time.” The Legislature acknowledged this:
10 “[S]ignificant conflicts between workers and employers on what constitutes as [sic] nonproductive
11 time and productive time can exist.” (S. Comm. on Labor and Indus. Relations, August 27, 2015
12 analysis of AB 1513, at p. 5.)

13 99. Employees of members of Nisei Farmers League engage in different activities in
14 addition to the piece-rate activity. Which of the activities are “directly related” to harvesting fruit:
15 traveling between work sites, attending meetings about the harvest, doing warm-up calisthenics for
16 the harvest, putting on protective gear, or sharpening tools? What about a worker who works more
17 slowly because of more frequent pauses while harvesting—is each and every one of those pauses
18 “other nonproductive time”? And how long does the pause or break need to last before it becomes
19 “other nonproductive time”? What about bathroom breaks? What about a worker who chooses to
20 make a personal cell phone call while being required to remain on the employer’s premises? What
21 about waiting for the containers in which harvested crops are placed when they run out? What if an
22 employee waits for the repair or replacement of equipment, or chooses to wait for the weather to
23 change before continuing harvesting, or walks between work stations?

24 100. Those are just a handful of examples from the agricultural industry. But there are many
25 more industries and contexts involving piece-rate compensation. The DLSE Manual provides
26 “diverse” examples of mechanics, nurses, carpet-layers, telephone technicians, factory workers, and
27 carpenters. (DLSE Manual, § 2.5.2.) All of these industries raise context-specific questions for
28 which the statute fails to provide any guidance. Consider another example: A hair salon may pay a

1 hair stylist on a piece-rate basis for cutting hair. Is sweeping the hair off the floor after the haircut
2 “directly related” to the haircut? What about answering the phone to schedule a customer a few days
3 down the road? Should that phone call be timed and compensated separately even though the
4 scheduling of the haircut was a necessary predicate to completing the haircut? And what about the
5 act of sharpening of the scissors to make the haircut more efficient?

6 101. The permutations and problems across employers and industries are essentially endless.
7 “[S]uch disputes can vary significantly from industry to industry.” (S. Comm. on Labor and Indus.
8 Relations, August 27, 2015 analysis of AB 1513, at p. 5.)

9 102. The term “nonproductive” is problematic on its own. What if an activity is productive
10 but not directly related to the piece-rate activity? Is it then excluded from the definition of “other
11 nonproductive time” because it is productive time, or is it included within the definition because it is
12 not directly related? Put another way, can “nonproductive time” be understood to include productive
13 time? Such a requirement would bend plain language inside out, yet the statute provides no
14 guidance. For example, if a worker voluntarily spends twenty minutes helping another worker with a
15 task unrelated to the activity for which she receives piece-rate compensation, should that time be
16 compensated separately as “other nonproductive time” even though it was productive?

17 103. These terms fail to provide Nisei Farmers League or its members with adequate notice
18 of what the law requires. Members of Nisei Farmers League cannot structure their conduct to comply
19 with this law. The phrase “other nonproductive time” appears over twenty times in Section 226.2. It
20 is in nearly every provision of the law and impacts all the requirements of Section 226.2, from
21 compensation to itemized wage statements to the availability of the affirmative defense. The failure
22 to comply with these requirements can lead to government investigations and civil lawsuits that can
23 result in significant damages and civil and criminal penalties.

24 104. Defendants have recognized there are no guidelines to this standard. The DIR has
25 posted “FAQs” on its website that state: “What constitutes ‘other nonproductive time’ under [the
26 Labor Code] definition will obviously vary depending upon the nature of the work and the ‘activity
27 being compensated on a piece-rate basis.’” That is no answer or guideline at all.

28

1 105. Yet Defendants are tasked with implementing and enforcing the law. The lack of any
2 definite standards for these terms allows Defendants to enforce the law in an arbitrary and
3 discriminatory manner.

4 106. This problem is not hypothetical. The law has gone into effect. Section 226.2 requires
5 Nisei Farmers League members to be compensating employees based on a concept that is so vague
6 that they cannot structure their conduct to follow it. And they must be tracking, recording, and
7 itemizing that time. They also face arbitrary and discriminatory enforcement of the law because
8 Defendants have indicated they will apply it however they choose based on the circumstances. Thus,
9 Nisei Farmers League members face the risk of investigation, lawsuits, and civil and criminal
10 penalties through no fault of their own.

11 107. In short, the requirement to pay separately for “other nonproductive time” is
12 unintelligible in theory and unworkable in practice.

13 **2. “Actual Sums Due”**

14 108. The phrase “actual sums due” raises at least two problems, one related to
15 implementation and the other related to unconstitutional vagueness.

16 109. One of the key problems with Section 226.2 is that there is no way for an employer to
17 safely take advantage of the Subdivision (b) affirmative defense by paying employees “actual sums
18 due” from 2012 through 2015. That is because there was no clear law regarding what “actual sums”
19 were due in those time periods. *Gonzalez* and *Bluford* were issued in 2013, were wrongly decided,
20 did not provide clear guidance on what “actual sums” were due, and created an unsettled area of law
21 with no clear rules. Defendants took their own aggressive position internally regarding the impact of
22 those decisions but also produced external communications that did not adopt or identify those
23 decisions. Defendants acknowledge to this day that the state of law before 2016 was “unsettled” and
24 “remain[s] in dispute.” Thus, Nisei Farmers League members interested in taking advantage of the
25 affirmative defense cannot possibly structure their conduct to safely follow this provision of the law.

26 110. The affirmative defense in Subdivision (b) is only available to an employer that pays
27 “actual sums due” to employees for “uncompensated or undercompensated” rest and recovery periods
28 and “nonproductive” time from July 1, 2012 through December 21, 2015. Properly understood, no

1 additional sums are due if, in that timeframe, an employer paid its employees on a piece-rate basis
2 and ensured that the overall compensation was at least minimum wage for the hours worked. But
3 Defendants have taken conflicting positions on what sums would be due under the law as it existed
4 during that time. The “actual sums due” requirement therefore needs interpretation and clarification
5 before employers have to decide whether to sign up by July 1, 2016, and commit to making such
6 payments.

7 111. An employer may pay “the actual sums due” for the period of July 1, 2012 through
8 December 31, 2015 to invoke the affirmative defense. (Lab. Code, § 226.2, subd. (b)(1).) But, as set
9 forth above, prior to January 1, 2016, there was nothing but confusion regarding how to calculate
10 actual sums due.

11 112. Prior to 2016, certain Nisei Farmers League members who paid at a piece rate would
12 divide the hours worked in a day by the wages earned to ensure that a worker had earned at least a
13 minimum wage. If the worker had not earned enough, then the employer would “true up” the
14 amount. So if a worker was paid \$5 per bucket of blueberries and harvested 14 buckets over eight
15 hours of work, that worker would have earned \$70. The employer would then “true up” the day’s
16 work by paying an additional \$10 to ensure that the worker earned \$80 for eight hours of work—at
17 least the \$10 minimum wage. That had been the prevailing practice and one that complied with the
18 law and compensated rest and recovery periods and other nonproductive time by ensuring that at least
19 minimum wage was paid for all hours worked.

20 113. There are countless examples of real-world situations that demonstrate the lack of
21 clarity over the term “actual sums due.”

22 114. Take the simple example described above, of an employee who earned \$70 through
23 piece-rate payments and was “trued up” to \$80 for the day. Before *Bluford* and *Gonzalez*, there was
24 no question that that was a proper and lawful payment structure. Thus, before at least March 6, 2013
25 (when *Gonzalez* was issued), there was no question that *no* actual sums would be due to that
26 employee, who had been paid in compliance with the law. In the wake of *Bluford* and *Gonzalez*, and
27 before January 1, 2016, employers still had a supportable position that that payment structure was
28 appropriate and legal on the basis that *Bluford* and *Gonzalez* were wrongly decided with no basis in

1 law and in the absence of a California Supreme Court opinion or statute on the issue, or at least
2 should be limited to their specific facts. Thus, if that employee had been paid in that manner in 2014
3 for that day of work, the employer could now take the legally supportable position that no actual
4 sums are due to that worker, who had been paid in accordance with the law as it existed before
5 January 1, 2016. But whether that fully supported position would be accepted by a court is unclear
6 and, by taking that position, an employer could open itself to investigation and lawsuits along with
7 civil and criminal penalties.

8 115. The next real-world example further demonstrates the difficulty with determining
9 “actual sums due.” In an hour, Worker A puts on safety gear for two minutes, sharpens a tool for one
10 minute, walks for three minutes over to a blueberry patch, quickly harvests three buckets of
11 blueberries at \$5 per bucket and takes a 10-minute break. Worker A is paid \$15 for the three buckets
12 of blueberries. Worker B is already in the field and spends the entire hour slowly harvesting one
13 bucket of blueberries. Worker B is paid \$10 for that one bucket because the employer has “trued up”
14 the compensation by \$5 to reach minimum wage. What “actual sums” are due to these two workers?

15 116. The DLSE Manual, in place to this day, suggests that \$0 would be owed to either
16 worker because at no point in either worker’s hour did the employer preclude the employee from
17 earning piece-rate compensation. The DIR’s Farm Labor Contractor Training Manual also counsels
18 the same result because the payment each employee received was at least equal to the payment he
19 would have received had he been paid hourly at the minimum wage. Nisei Farmers League maintains
20 that the correct answer under this hypothetical is \$0 for both workers because both were fully
21 compensated at or above minimum wage for all hours worked. But the 2013 Memorandum would
22 suggest that Worker A should have been paid separately for the 10-minute break in addition to the
23 \$15 he earned. Worker A also spent time putting on gear, sharpening a tool, and walking to the field.
24 Should any of that time be considered “non piece-rate work,” as described in the 2013 Memorandum,
25 that needed to be separately compensated? And why should the employer pay Worker A more—on
26 top of the piece-rate structure, which already compensates for efficient working—for the time he
27 spent sitting down after he quickly harvested three baskets?

28

1 117. Under this scenario, the Nisei Farmers League takes the position that no actual sums
2 are due to Worker A, who was compensated at a rate higher than the minimum wage and in
3 compliance with long-established practice, law, and Defendants’ own guidance. But the DLSE or a
4 private litigant might take the position that Worker A was still owed actual wages for the 10-minute
5 rest period or, for example, the time spent sharpening a knife.

6 118. Flipping certain facts in the same example further demonstrates the problems with the
7 “actual sums due” requirement. Say that Worker A spends an hour harvesting two buckets at \$5 per
8 bucket and receives payment of \$10 for that hour. Worker B, in comparison, harvests one bucket
9 over the course of 50 minutes and then takes a ten-minute rest period. The employer pays Worker B
10 \$10 by truing up the \$5 piece-rate compensation to reach minimum wage. Under this scenario, what
11 actual sums are due to these workers?

12 119. Here again, the DLSE Manual, DIR training materials, and Nisei Farmer League agree
13 that no actual sums are due because those workers were paid at least minimum wage for all hours
14 worked. But the 2013 Memorandum would suggest that Worker B is owed additional money for the
15 rest break he took. That result is illogical. Worker B worked less than Worker A and accomplished
16 less, yet the 2013 Memorandum suggests that the employer would have to compensate Worker B for
17 the time spent on the rest period, even though the employer already trued up Worker B’s
18 compensation to ensure that Worker B earned at least minimum wage during that hour.

19 120. The proper interpretation of “actual sums due” to employees from July 2012 through
20 December 2015, based on pre-2016 statutes, regulations, and law, is that an employer owes no
21 additional sums when that employer compensated an employee on a piece-rate basis and ensured that
22 the employee received at least the equivalent of minimum wage for all hours worked.

23 121. To the extent Defendants contend that any sums are now due for such employees, by
24 relying on the 2013 Memorandum or current law, such reasoning is unsupported and contrary to law.
25 The 2013 Memorandum was an unsupportable and improper interpretation of *Gonzalez* and *Bluford*,
26 which, in turn, were improper and erroneously reasoned opinions, and, at minimum, limited to their
27 facts and not applicable to Nisei Farmers League members. Additionally, were Defendants to
28 contend that “actual sums due” requires employers to pay separately for rest breaks and non-piece-

1 rate time for July 2012 through December 2015, that position would violate Nisei Farmers League’s
2 members’ due process rights by arbitrarily depriving them of their property, failing to provide fair
3 notice of the required conduct, and working as an impermissible retroactive punishment. It would
4 also be an impermissible interpretation of Labor Code section 226.2(b). That law purports only to
5 change piece-rate compensation prospectively, not retroactively. As Director Baker explained herself
6 in a presentation given on behalf of the DIR: AB 1513 “[c]larifies pay requirements for rest and
7 recovery breaks and other nonproductive time *going forward.*” (Italics added.)

8 122. This situation creates an untenable situation for employers. Nisei Farmers League
9 members contend they paid employees all sums due based on a proper interpretation of the governing
10 law pre-2016. But a court could decide otherwise. Thus, Nisei Farmers League members wish to
11 sign up for the affirmative defense by July 1, 2016 as a precautionary measure, but to assert that the
12 actual sums due for the prior years are zero. But if they do sign up, their name will be posted
13 publicly, which will effectively put a target on their back for DLSE investigations or civil lawsuits by
14 plaintiffs eager to challenge whether the payments made or not made were the “actual sums due.”
15 Nisei Farmers League members therefore must choose whether to risk publicly identifying
16 themselves and thereby potentially subject themselves to investigation and suit over an uncertain
17 legal requirement or to forgo the affirmative defense to which they are entitled under AB 1513 and
18 risk facing investigation or suit without any such defense.

19 123. The above discussion also illustrates the fatal vagueness of the phrase “actual sums
20 due.” The phrase is also unconstitutionally void for vagueness because it does not define the conduct
21 with sufficient definiteness and it allows for arbitrary and discriminatory enforcement.

22 124. The alternative in Subsection (b)(1)(B) is no alternative at all. Paying out four percent
23 of all employees’ gross earnings for a 3½-year period is such a significant sum of money that it
24 would bankrupt many Nisei Farmers League members and constitute an arbitrary deprivation of
25 property in violation of due process because no such money is owed to the employees. The
26 Legislature recognized that the amount was both “significant” and arbitrary—“an estimation” derived
27 from preexisting cases that have nothing to do with the individual situations of Nisei Farmers League
28 members. (S. Comm. on Labor and Indus. Relations, August 27, 2015 analysis of AB 1513, at p. 6.)

1 125. The four percent alternative also suffers from the same vagueness problems described
2 above because it requires determining and paying based on “other nonproductive time.”

3 126. Subdivision (b)(4) of Section 226.2 creates additional problems. If an “employer
4 cannot locate” the employee to pay the ostensible “actual sums due,” then the employer must pay the
5 money “to the Labor Commissioner pursuant to Section 96.7 instead.” (Lab. Code, § 226.2, subd.
6 (b)(4).) Section 96.7 is the Industrial Relations Unpaid Wage Fund, which ultimately allows the
7 Labor Commissioner to use the money for public use if the employee cannot be found. (Lab. Code,
8 § 96.7.) It will be very difficult, and likely impossible, for Nisei Farmers League members to locate
9 every former employee to whom actual sums may be due, depending on how the term “actual sums
10 due” is defined. For example, employees in the agricultural industry can be transient and some work
11 only one day for their employer. They may not even be in the country anymore. Yet, to qualify for
12 the affirmative defense, Subdivision (b)(4) requires the employer to pay the Labor Commissioner
13 even if the employee cannot be found.

14 127. Such payment constitutes a taking for public use within the meaning of the Fifth and
15 Fourteenth Amendments to the U.S. Constitution. It is an unconstitutional taking because it causes a
16 significant impact on Nisei Farmers League members, interfering with their reasonable expectations
17 regarding paying their employees, and constitutes an unjustified and unwarranted government action.

18 128. At bottom, Section 226.2 poses a grave threat to employers that have long relied on
19 piece-rate compensation for their business model and that simply cannot get the production they
20 need—and, thus, risk not meeting their harvest schedule—by paying an hourly rate. Under
21 Defendants’ interpretation of the law, Nisei Farmers League members face imminent and potentially
22 business-ending financial distress, including having to lay off thousands of employees or even
23 declare bankruptcy because of the new law.

24 129. Nisei Farmers League members face a difficult decision and irreparable harm. Some of
25 these employers will guess wrong as to the meaning of the various phrases and pay employees sums
26 that were not required; these employers will then have no way to recover these excess payments.
27 Other employers will guess wrong and fail to provide employees what the government thinks was
28 required under its own interpretation of this vague law; these employers will be subject to

1 investigations by the DLSE, related actions, criminal sanctions, and lawsuits from private parties that
2 have been authorized by the government's labor laws.

3 130. The exponential damages and penalties that can result from a misstep under this
4 unconstitutionally vague law act as a punishment and effectively constitute punitive damages by
5 allowing the recovery of damages far beyond those serving any compensatory purpose, and do so
6 without any of the protections governing the imposition of punitive damages.

7 **FIRST CAUSE OF ACTION**

8 **(Due Process – Vagueness)**

9 131. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1
10 through 130 above.

11 132. Certain phrases of Labor Code section 226.2 and Defendants' enforcement of those
12 phrases, including, but not limited to, "other nonproductive time," "directly related," and "actual
13 sums due," violate the Due Process Clauses of the California Constitution (art. I, § 7) and the Fifth
14 and Fourteenth Amendments to the U.S. Constitution, both on their face and as applied to Nisei
15 Farmers League and its members, because the phrases are void for vagueness.

16 133. The phrases do not define the regulated conduct with sufficient definiteness to allow a
17 person of common intelligence to understand what the law requires, and Defendants' enforcement of
18 such phrases therefore violates due process.

19 134. Defendants' enforcement of such hopelessly vague phrases unconstitutionally allows
20 for arbitrary and discriminatory enforcement.

21 135. The vagueness of the law is not hypothetical because the law already has taken effect,
22 thereby directly impacting Nisei Farmers League members, who are now ostensibly required to
23 compensate and keep records for "other nonproductive time."

24 136. Additionally, the vagueness is not hypothetical because the July 1, 2016 and December
25 15, 2016 statutory deadlines are impending and, unless stayed and tolled, will cause irreparable harm
26 to Nisei Farmers League members who do not know what the term "actual sums due" requires.

27 137. The law is so vague that it impermissibly, unlawfully, and unconstitutionally guts
28 piece-rate compensation even though Labor Code section 200 has not been abrogated.

1 under the piece-rate system as implemented by the employer and agreed to by the employee.

2 Insistence by Defendants to the contrary is unsupported by law in violation of due process.

3 144. Requiring employers to pay four percent of all employees' gross earnings for a 3½-year
4 period to obtain an affirmative defense when no such sums are owed and the figure is based on an
5 arbitrary estimate arbitrarily deprives employers of their property in violation of due process.

6 **THIRD CAUSE OF ACTION**

7 **(Due Process – Lack of Fair Notice)**

8 145. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1
9 through 130 above.

10 146. Certain phrases in Section 226.2 and Defendants' enforcement of those phrases—
11 including but not limited to the phrases “nonproductive time,” “directly related,” and “actual sums
12 due”—violate the Due Process Clauses of the California Constitution (art. I, § 7) and the Fifth and
13 Fourteenth Amendments to the U.S. Constitution, both on their face and as applied to Nisei Farmers
14 League and its members, because they fail to provide adequate or fair notice to Nisei Farmers League
15 of the conduct that is required or forbidden.

16 147. The phrases are so vague that Nisei Farmers League and its members do not know the
17 requirements of the law such that the law, and Defendants' enforcement of that law, fails to provide
18 adequate or fair notice. Defendants and private litigants may seek civil damages and penalties and
19 criminal penalties when there is no adequate notice of what is required or forbidden.

20 148. Further, Defendants' interpretation of “actual sums due,” which seeks to retroactively
21 require payment for wages where no such requirements were clearly established at the time, fails to
22 provide adequate or fair notice of the required conduct.

23 **FOURTH CAUSE OF ACTION**

24 **(Due Process – Retroactive Punishment)**

25 149. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1
26 through 130 above.

27 150. Defendants' interpretation of “actual sums due” violates the Due Process Clauses of the
28 California Constitution (art. I, § 7) and the Fifth and Fourteenth Amendments to the U.S. Constitution,

1 both on their face and as applied to Nisei Farmers League and its members, because it constitutes an
2 impermissible retroactive punishment.

3 151. Neither existing statute nor prior judicial decision fairly disclosed that Nisei Farmers
4 League members had to pay further sums than those they did from 2012 through 2015. Defendants'
5 interpretation to the contrary, and any enforcement based on that interpretation, is unfair, disrupts
6 settled expectations, and constitutes an unconstitutional retroactive punishment.

7 **FIFTH CAUSE OF ACTION**

8 **(Takings Clause)**

9 152. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1
10 through 130 above.

11 153. Certain phrases in Section 226.2 and Defendants' interpretation and enforcement of
12 those phrases—including but not limited to the phrases “nonproductive time,” “directly related,” and
13 “actual sums due”—violate the Takings Clause of the Fifth Amendment to the U.S. Constitution,
14 incorporated through the Fourteenth Amendment, both on their face and as applied to Nisei Farmers
15 League and its members, because they impose severe retroactive liability on a limited class of parties
16 that could not have anticipated the liability, and the extent of that liability is substantially
17 disproportionate to the parties' experience.

18 154. Defendants' interpretation of “actual sums due,” to the extent they contend the term
19 requires payment for nonproductive time or rest or recovery periods before 2016, imposes retroactive
20 liability on Nisei Farmers League members who could not have anticipated such liability, and the
21 extent of that liability is substantially disproportionate, including because it is significant enough in
22 some cases to bankrupt Nisei Farmers League members. That provision of the law, and Defendants'
23 interpretation and enforcement of it, causes a significant and even devastating impact on Nisei
24 Farmers League members, interfering with their reasonable expectations regarding paying their
25 employees, and constitutes an unjustified and unwarranted government action. Such a taking is not
26 supported by justice or fairness, and is disproportionately concentrated on employers that
27 compensated employees on a piece-rate basis. The requirement in Subdivision (b)(4) to pay the
28 Labor Commissioner when an employee cannot be located before Nisei Farmers League members

1 can satisfy the criteria of the affirmative defense is an unconstitutional taking for public use. The
2 harms caused by these takings lack an essential nexus and are not roughly proportional.

3 155. The requirement to pay “other nonproductive time,” and Defendants’ interpretation and
4 enforcement of it, causes a significant and devastating impact on Nisei Farmers League members,
5 interfering with their reasonable expectations regarding paying their employees, and constitutes an
6 unjustified and unwarranted government action. Such a taking is not supported by justice or fairness,
7 and is disproportionately concentrated on employers that compensated employees on a piece-rate
8 basis. The harms caused by these takings lack an essential nexus and are not roughly proportional.

9 **SIXTH CAUSE OF ACTION**

10 **(Contract Clause)**

11 156. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1
12 through 130 above.

13 157. The phrase “actual sums due” and the requirement to pay for “other nonproductive
14 time,” and Defendants’ enforcement of those phrases, violate the Contract Clause of the U.S.
15 Constitution (art. I, § 10, clause 1) because they substantially impair prior and existing contractual
16 relationships between Nisei Farmers League members and their employees. There is no significant
17 and legitimate purpose for doing so, nor is any such impairment reasonable or appropriate for the
18 law’s intended purpose.

19 158. Nisei Farmers League members and their employees had and have contracts of
20 employment, whether written, oral, or implied, in which the employees agree to work at a piece rate
21 and further agree to what activities the piece-rate payment will cover.

22 159. The phrase “actual sums due” and the requirement to pay for “other nonproductive time”
23 unconstitutionally interferes with those contracts by requiring payment in excess of or contrary to
24 what was contractually agreed upon.

25 160. Defendants’ enforcement of the law substantially impairs that contractual relationship.
26 There is no significant or legitimate purpose behind the law that justifies such impairment, and any
27 such purpose is not a reasonable or appropriate justification for such impairment.

28

1 **SEVENTH CAUSE OF ACTION**

2 **(Declaratory Relief)**

3 161. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1
4 through 130 above.

5 162. An actual controversy has arisen and now exists between Nisei Farmers League and
6 Defendants concerning the requirements and constitutionality of Labor Code section 226.2, including
7 the meaning of “actual sums due,” “other nonproductive time,” and “directly related.”

8 163. Nisei Farmers League contends, and Defendants dispute, that the phrases “other
9 nonproductive time,” “directly related,” and “actual sums due” are unconstitutionally void for
10 vagueness under the California Constitution and U.S. Constitution because Nisei Farmers League
11 members cannot structure their conduct to comply with the law and the terms allow for arbitrary and
12 discriminatory enforcement by Defendants.

13 164. Nisei Farmers League further contends, and Defendants dispute, that “actual sums due”
14 does not require any additional payment if Nisei Farmers League members compensated employees
15 on a piece-rate basis that equaled at least the minimum wage for all hours worked, such that Nisei
16 Farmers League members may take advantage of the affirmative defense in Section 226.2(b) without
17 paying additional sums because they already have paid actual sums due.

18 165. Nisei Farmers League further contends, and Defendants dispute, that *Gonzalez* and
19 *Bluford* were erroneously decided, or at minimum limited to their facts.

20 166. If Defendants are allowed to enforce the above phrases without any judicial
21 clarification, Nisei Farmers League’s members will be irreparably harmed because they will be
22 subject to a law that they cannot understand and that invites arbitrary and discriminatory enforcement
23 leading to damages, civil penalties, and criminal penalties. They will be further harmed because,
24 even though they properly paid all sums due based on the law as it existed, they will be forced into
25 the untenable situation of having to decide between signing up for the affirmative defense, thereby
26 declaring they owe “actual sums,” and becoming the target of investigation and lawsuits subject to
27 subsequent judicial interpretations, or not signing up for the affirmative defense granted by statute
28 because the phrase “actual sums due” is too uncertain and vague, thereby foregoing a defense to

1 which they may be entitled. This means, among other things, that Nisei Farmers League members
2 may suffer significant financial loss and face civil and criminal penalties.

3 167. Nisei Farmers League is therefore entitled to a judicial declaration of its rights and
4 Defendants' duties under Code of Civil Procedure section 1060. The meaning and validity of the law
5 will be subject to judicial interpretation at some point and it makes sense to address it now. Nisei
6 Farmers League seeks a declaration that the phrases "other nonproductive time," "directly related,"
7 and "actual sums due" are unconstitutionally void for vagueness, facially and as applied, or otherwise
8 suffer from constitutional defects; that "actual sums due" requires only that piece-rate compensation
9 have been paid in a manner predating the erroneous suggestions in *Bluford* and *Gonzalez* and in
10 accordance with the long-settled practice, which was fair and simple for employers and employees;
11 and that *Bluford* and *Gonzalez* were wrongly decided or at least limited to their specific facts.

12 EIGHTH CAUSE OF ACTION

13 (Injunctive Relief)

14 168. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1
15 through 130 above.

16 169. Nisei Farmers League members will be irreparably harmed by (1) having to choose to
17 sign up by July 1, 2016 for the affirmative defense when, on the one hand, the statute is too vague to
18 follow and Defendants or litigants may seek payments beyond those required by law, and, on the
19 other hand, not signing up may lead to subsequent investigations or lawsuits without being able to
20 raise the affirmative defense; (2) making payments to employees by December 15, 2016 based on
21 conflicting interpretations of what the law required before 2016; and (3) having to follow a law that
22 contains provisions so vague that it is impossible to structure one's conduct, thereby inviting arbitrary
23 enforcement leading to civil and criminal penalties.

24 170. Allowing the July 1, 2016 deadline to remain in place and allowing Defendants to
25 enforce Section 226.2 will also have an immediate, serious, and adverse effect on many industries
26 and the public because certain phrases in the law are unconstitutionally vague, yet carry significant
27 civil and criminal consequences.

28

1 B. That the Court issue a temporary restraining order restraining operation of the July 1,
2 2016 deadline and restraining Defendants from enforcing Labor Code section 226.2, and toll the
3 deadline in the meantime, until the Court has an opportunity to hear Nisei Farmers League's Motion
4 for Preliminary Injunction;

5 C. That the Court preliminarily enjoin Defendants from enforcing Labor Code section
6 226.2, including the July 1, 2016 and December 15, 2016 statutory deadlines, and toll such deadlines
7 in the meantime, and enjoin Defendants from enforcing any requirements in Section 226.2 dependent
8 on the phrases "other nonproductive time" or "directly related";

9 D. That the Court permanently enjoin the operation of Labor Code section 226.2 to the
10 extent it is unlawful, void for vagueness, and violates due process, the Takings Clause, and the
11 Contract Clause, and enjoin Defendants from applying the reasoning of *Gonzalez, Bluford*, or the
12 2013 Memorandum when calculating "actual sums due";

13 E. That the Court award reasonable attorney fees incurred in this matter pursuant to Code
14 of Civil Procedure 1021.5 and/or other pertinent law;

15 F. That the Court award costs of suit incurred herein; and

16 G. That the Court grant such other and further relief as the Court shall deem just and
17 proper.

18
19 DATED: June 27, 2016

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23 JOSEPH C. HANSEN
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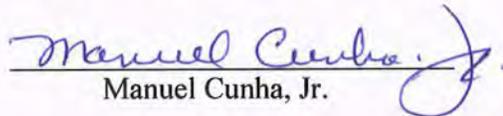
27 Attorneys for Plaintiff Nisei Farmers League
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VERIFICATION

I, Manuel Cunha, Jr., am the President of Plaintiff Nisei Farmers League, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing Verified Complaint for Preliminary and Permanent Injunctive and Declaratory Relief and know its contents. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that this verification is true and correct and was executed by me on June 24, 2016, at Fresno, Ca.


Manuel Cunha, Jr.

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14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF FRESNO

17
18 NISEI FARMERS LEAGUE,

19 Plaintiff,

20 v.

21 CALIFORNIA LABOR AND WORKFORCE
22 DEVELOPMENT AGENCY; DAVID M.
LANIER, in his official capacity as Secretary
23 of California Labor and Workforce
Development Agency; DEPARTMENT OF
24 INDUSTRIAL RELATIONS; CHRISTINE
BAKER, in her official capacity as Director of
25 the Department of Industrial Relations;
DIVISION OF LABOR STANDARDS
26 ENFORCEMENT; JULIE A. SU, in her
official capacity as California Labor
27 Commissioner; and DOES 1 to 10, inclusive,

28 Defendants.

CASE NO.: 16CECG02107

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF NISEI FARMERS
LEAGUE'S EX PARTE APPLICATION
FOR AN ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION AND A
TEMPORARY RESTRAINING ORDER**

*[Ex Parte Application; Declaration of
Manuel Cunha, Jr.; Declaration of Theodore
M. Kider; Declaration of Joseph C. Hansen;
Request for Judicial Notice; [Proposed]
Order re RJN; [Proposed] Order re
OSC/TRO filed concurrently herewith]*

Hearing Place: Dept. 402 (Judge Hamilton)
Hearing Date: June 30, 2016
Hearing Time: 3:30 p.m.
Action Filed: June 27, 2016

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I. INTRODUCTION

Plaintiff Nisei Farmers League seeks the urgent aid of this Court to temporarily suspend and toll a statutory deadline at the end of this week that, if enforced, will devastate Plaintiff's members and cause several to file for bankruptcy.

Defendants' practices and newly enacted Section 226.2 of the Labor Code have eviscerated piece-rate compensation, making it impossible for employers to know with any reasonable degree of certainty how to have a piece-rate compensation system in California that will not subject them to civil liability, and civil and criminal penalties. Recognizing the uncertainty in the law, Section 226.2 offers employers a "safe harbor" by creating an affirmative defense to such piece-rate-related litigation, but only if employers commit by or before July 1, 2016, to execute a series of actions that are equally vague and uncertain. Plaintiff's members cannot afford to be targeted with piece-rate litigation and governmental investigations if they do not sign up for the July 1 safe harbor, but the provision creating the safe harbor and the commitments that come with it are so vague and ambiguous that Plaintiffs cannot reasonably know what they need to do to comply with them.

Put simply, Plaintiffs cannot know with any reasonable certainty what they are committing to if they sign up for the safe harbor on Friday, and they run the risk of civil and criminal proceedings if they misinterpret their safe-harbor obligations. But if they fail to sign up for the safe harbor, they likewise risk civil damages and civil and criminal penalties. Plaintiff needs this Court to step in immediately to avoid the destructive impact of the July 1 deadline.

Piece-rate compensation has been widely used and heavily relied-upon by many of California's industries. It is fair and simple: Employers incentivize efficient production by paying employees by the piece, rather than the hour. For example, in farming, an employer could pay a set rate for every bushel of produce harvested. To comply with minimum wage laws, employers paying a piece rate divide the overall compensation earned by an employee in one day by the hours worked that day, and then "true up" the compensation to match the minimum wage rate for those hours if it is not met. Employees whose daily earnings surpassed the minimum wage keep whatever they earned, thus being rewarded for their high productivity.

1 Following two misguided Court of Appeal decisions that were limited to their facts, the
2 Legislature enacted Labor Code section 226.2, which took effect on January 1, 2016, and created new
3 requirements for piece-rate compensation. Section 226.2(a) requires employers to compensate
4 employees separately from a piece rate for “rest and recovery periods” and “other nonproductive
5 time,” defined as “time under the employer’s control, exclusive of rest and recovery periods, that is
6 not directly related to the activity being compensated on a piece-rate basis.” Section 226.2(b) creates
7 an affirmative defense in litigation for employers willing to make back payments to piece-rate
8 employees for “actual sums due” from July 1, 2012 to December 31, 2015.

9 Plaintiff represents more than 1,000 agricultural entities that have long relied on piece-rate
10 compensation and whose businesses have been upended by the new law. Neither Plaintiff nor its
11 members have any way of knowing the meaning of vague phrases in Section 226.2 such as “actual
12 sums due,” “other nonproductive time,” and whether an activity is “directly related” to the piece-rate
13 activity. Defendants themselves have admitted that Section 226.2 is confusing, and the legislative
14 history explicitly recognized that the statute’s phrasing would lead to “significant conflicts.” To
15 make matters worse, Defendants have continued to provide arbitrary, conflicting, and, at times,
16 incorrect guidance on how piece-rate compensation should work. Thus, certain key provisions in
17 Section 226.2 are unconstitutionally vague and violate the due process rights of Plaintiff’s members.

18 Plaintiff’s members face the July 1 deadline of deciding whether to notify the State in writing
19 that they will be availing themselves of the affirmative defense in Section 226.2(b) and committing to
20 pay “actual sums due,” even though, as of today, they have no way of knowing what that phrase
21 requires. The next critical statutory deadline is December 15, 2016, by which time those who have
22 signed up for the affirmative defense must provide a detailed accounting and make all back payments
23 based on the undefined “actual sums due.” Plaintiff’s members also face an ongoing, everyday
24 guessing game of determining which activities carried out by employees are “other nonproductive
25 time” that must be tracked, recorded, paid, and itemized. Any misstep on this incomprehensible
26 requirement exposes Plaintiff’s members to significant civil damages, exponential civil penalties, and
27 criminal penalties.

1 **B. Labor Code Section 226.2**

2 Labor Code section 226.2 took effect January 1, 2016. Under subdivision (a)(1), employers
3 are required to compensate piece-rate employees “for rest and recovery periods and other
4 nonproductive time separate from any piece-rate compensation.” Section 226.2 defines “other
5 nonproductive time” as “time under the employer’s control, exclusive of rest and recovery periods,
6 that is not directly related to the activity being compensated on a piece-rate basis.”

7 The law also offers a safe harbor from the uncertainty created by the State, if employers are
8 willing to make certain commitments. Under subdivision (b), employers may obtain an “affirmative
9 defense” in litigation based on the employer’s alleged “failure to timely pay the employee the
10 compensation due for rest and recovery periods and other nonproductive time for time periods prior
11 to and including December 31, 2015.” But to take advantage of this safe harbor, an employer must
12 make back payments to current and former employees “for previously uncompensated or
13 undercompensated rest and recovery periods and other nonproductive time from July 1, 2012, to
14 December 31, 2015,” using one of two formulas. (Lab. Code § 226.2, subd. (b)(1).)

15 One formula states that “[t]he employer determines and pays the actual sums due together
16 with accrued interest.” (*Id.* § 226.2, subd. (b)(1)(A).) The other allows an employer to pay “each
17 employee an amount equal to 4 percent of that employee’s gross earnings in pay periods in which any
18 work was performed on a piece-rate basis from July 1, 2012, to December 31, 2015.” (*Id.* § 226.2,
19 subd. (b)(1)(B).) Employers have until July 1, 2016 to notify the State that they will be opting in to
20 the affirmative defense, and then they have until December 15, 2016 to pay the “actual sums due.”
21 (*Id.* § 226.2, subd. (b).) Employers who avail themselves of the safe harbor also obligate themselves
22 to engage in detailed record-keeping and accounting that is itself left unexplained.

23 The legislative history explains that the Legislature created the 4-percent option, which many
24 of Plaintiff’s members cannot afford, because it would be difficult to calculate “actual sums due” and
25 determine “nonproductive time”: “[S]ignificant conflicts between workers and employers on what
26 constitutes . . . nonproductive time and productive time can exist. . . . Therefore, AB 1513 creates a
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28

1 second method for calculating unpaid or underpaid nonproductive time” (See RJN, Exh. 1 at 5
2 (S. Comm. on Labor and Indus. Relations, August 27, 2015 analysis of AB 1513, at p. 5).)²

3 As predicted by the Legislature itself, Section 226.2 has created several significant problems
4 for thousands of employers, including Plaintiff’s members. *First*, Section 226.2(a) largely defeats the
5 purpose of piece-rate compensation. Activities such as rest breaks and “other nonproductive time”
6 were traditionally compensated under the actual piece rate paid to employees, not separate from it.

7 *Second*, there is no way to discern what employee conduct falls under Section 226.2(a)’s
8 “other nonproductive time,” including which activities are “directly related” to the piece-rate activity.
9 Plaintiff’s members do not know whether everyday employee activities—such as putting on
10 protective gear, traveling between a farmer’s fields, waiting for a bin to put produce in, or taking a
11 bathroom break, to name just a few—are considered “nonproductive” and not “directly related” to the
12 activity covered by piece-rate compensation. (See Cunha Decl., ¶ 12.)

13 *Third*, it is impossible to determine “actual sums due” to employees in order to obtain the
14 affirmative defense under Section 226.2(b). (See Cunha Decl., ¶¶ 17-18.) Plaintiff’s members
15 maintain that if they provided employees with a piece rate that met minimum wage requirements for
16 the period leading up to the enactment of Section 226.2(a), no additional sums are due to employees
17 for that time. (See Cunha Decl., ¶ 18.) But there is inadequate guidance on this, including in the
18 statute itself. Meanwhile, the statute requires that Plaintiff’s members sign up to pay the unknown
19 “actual sums due” by *this Friday*, and then make those payments by December 15.

20 **C. Lack Of Judicial And Administrative Guidance**

21 The disruption to settled piece-rate compensation requirements began with a Court of Appeal
22 decision that had nothing to do with piece-rate compensation, *Armenta v. Osmose, Inc.* (2005) 135
23 Cal.App.4th 314. In *Armenta*, employees were required to be paid certain hourly wages under a
24 collective bargaining agreement, but the employer deliberately refused to pay employees for certain
25 work by contending that on average, across the week, the employees received at least a minimum
26

27
28 ² The 4-percent option “is, by definition, an estimation of the unpaid rest and recovery periods and
nonproductive time,” and “can be a significant figure.” (See RJN, Exh. 1 at 6 (S. Comm. on
Labor and Indus. Relations, August 27, 2015 analysis of AB 1513, at p. 6).)

1 wage when the hours worked were divided by the compensation. (*Id.* at p. 317.) The court rejected
2 such subterfuge, holding that the “model of averaging all hours worked ‘in any work week’ to
3 compute an employer’s minimum wage obligation under California law [wa]s inappropriate” and an
4 employer could not use this averaging method to say that it had compensated an employee when the
5 employer deliberately refused to pay for certain hours worked. (*Id.* at p. 324.)

6 In 2013, two decisions from the Court of Appeal erroneously applied *Armenta*’s holding to
7 matters related to piece-rate compensation, at least with respect to the narrow facts before them.
8 First, in *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 40-41, the court
9 determined that mechanics should be paid separately from a piece rate for time spent waiting for cars
10 to repair and performing “non-repair tasks directed by the employer.” The court extrapolated the
11 requirement from *Armenta* (*id.* at p. 40), but also tried to limit its holding, noting that “[t]he instant
12 case concerns only automotive service technicians compensated on a piece-rate basis” (*id.* at p. 54).
13 Then, in *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 872, with little analysis, the
14 court similarly decided that “rest periods must be separately compensated in a piece-rate system.”

15 Defendants have expressed conflicting positions on piece-rate compensation requirements.
16 The most recent Division of Labor Standards Enforcement (“DLSE”)’s Enforcement Manual states
17 that “employees must be paid at least the minimum wage for all hours they are employed.” (Exh. D
18 at 3 (DLSE Manual, § 47.7).) It further states that “if, as a result of the directions of the employer,
19 the compensation received by piece rate . . . workers is reduced because they are precluded, by such
20 directions of the employer, from earning . . . piece rate compensation during a period of time, the
21 employee must be paid at least the minimum wage (or contract hourly rate if one exists) for the
22 period of time the employee’s opportunity to earn commissions or piece rate.” (*Id.*) The Manual
23 notes, as an example, that a worker required to attend a meeting during which she “would not be able
24 to earn compensation at the piece rate” should be paid at least minimum wage, or an applicable
25 contract hourly wage, for that period. (*Id.* § 47.7.1).)

26 On November 1, 2013, Defendant Commissioner Su released an internal memorandum to
27 DLSE staff taking an extremely broad and unsupported view of the effect of *Gonzalez* and *Bluford* on
28 piece-rate compensation. The memorandum concluded that “[t]he case law now establishes that

1 piece-rate wages cannot be used to satisfy the employer’s obligation to pay the minimum wage for
2 non piece-rate work, and that each hour of non piece-rate work must be separately compensated by an
3 additional payment equal to or exceeding the minimum wage.” (Exh. E at 7 (DLSE Memo at 7).) It
4 concluded the same for “rest periods.” (*Id.*) Though the DLSE released this memorandum to its
5 staff, it did not revise its Manual to reflect these policy updates.

6 The Department of Industrial Relations (“DIR”) has articulated a different—and simpler—
7 position regarding the requirements to lawfully pay at a piece rate, pursuant to its statutory
8 obligations to prepare training materials for farm labor contractors. The July 2014 and September
9 2015 versions of the DIR’s Farm Labor Contractor License Examination Study Guide, which were
10 released post-*Gonzalez* and *Bluford*, stated: “Workers may also be paid a piece rate, but the rate must
11 be at least equal to the minimum wage, including overtime. That means, for example, that the total
12 wage earned by an employee who worked 8 hours on a piece rate must be paid at least equal to the
13 wages he or she would have received if they had been paid \$9 per hour for that 8 hours. In other
14 words, piece rates may not be used to pay employees less than the minimum wage established by
15 law.” (Exh. F at 2 (7/14 DIR Guide at 31); Exh. G at 2 (9/15 DIR Guide at 31).) Those Guides also
16 stated: “Workers paid on a piece rate must be paid at least the minimum wage. A piece rate cannot
17 be used to pay less than the minimum wage.” (Exh. F at 3 (7/14 DIR Guide at 35); Exh. G at 3 (9/15
18 DIR Guide at 35).) The most recent, June 2016 version similarly states: “Workers may also be paid
19 a piece rate, but the rate must be at least equal to the minimum wage, including any overtime. For
20 example, an employee who worked 8 hours must be paid at least \$80 (8 x 10\$/hr.) even if he/she is
21 paid a piece rate.” (Exh. H at 2 (6/16 DIR Guide at 11).)

22 The DIR has also admitted confusion about piece-rate compensation, noting in December
23 2015 that there are “unsettled controversies over how to compensate piece-rate workers during
24 mandated rest and recovery periods and other work time that does not generate piece-rate earnings”
25 and that “the holdings in *Gonzalez* and *Bluford* remain in dispute.” (Exh. I (DIR Fact Sheet).)

26 **III. IMMEDIATE RELIEF IS NECESSARY TO PREVENT IRREPERABLE HARM.**

27 A TRO is necessary to maintain the status quo until the Court holds a preliminary injunction
28 hearing, specifically with respect to the July 1 sign-up deadline, which falls at the end of this week.

1 Plaintiff's members will suffer severe, immediate, and irreparable harm if they are forced to decide
2 by Friday whether to sign up for the Section 226.2(b) safe harbor without knowing what that
3 obligates them to do. A misstep under either approach could result in damages, penalties both civil
4 and criminal, and the bankruptcy and closure of businesses and agricultural operations, with layoffs
5 and lost jobs. Plaintiff's members stand to suffer harm despite their best efforts to follow the law.

6 The Court should also grant Plaintiff's application for an order to show cause, because
7 Plaintiff is likely to ultimately prevail on the merits, and Plaintiff and its members will suffer
8 significant, immediate, and irreparable harm without temporary relief, whereas Defendants will suffer
9 no harm if Plaintiff's request is granted.

10 **A. Legal Standard**

11 A TRO should be issued when the applicant stands to suffer significant, immediate, and
12 irreparable harm. (See Code Civ. Proc., § 527, subd. (c).) "The issuance of a TRO is not a
13 determination of the merits of the controversy." (*Landmark Holding Group, Inc. v. Superior Court*
14 (1987) 193 Cal.App.3d 525, 528.) Instead, the purpose of a TRO is "to maintain the status quo
15 pending the noticed hearing on the application for preliminary injunction." (*Id.*)

16 A preliminary injunction should be issued when (1) there is a "likelihood that the plaintiff will
17 prevail on the merits," and (2) "the relative balance of harms that is likely to result from the granting
18 or denial of interim injunctive relief" favors the plaintiff. (*White v. Davis* (2003) 30 Cal.4th 528,
19 554.) The purpose "is the preservation of the status quo until a final determination of the merits of
20 the action." (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.)

21 **B. Plaintiff's Members Face Significant, Immediate, And Irreparable Harm.**

22 Under Section 226.2(b)(3), employers—including Plaintiff's members—have until Friday,
23 July 1, 2016, to notify the State in writing that they intend to avail themselves of the affirmative
24 defense by paying "actual sums due" or 4 percent of employees' gross earnings to current and former
25 employees for work from July 2012 through December 2015. But, just as the Legislature itself
26 anticipated, they cannot know the meaning of "actual sums due" because the sums due pre-2016 for
27 piece-rate employees were very much in dispute. This deadline is just days away, and without
28 judicial intervention, Plaintiff's members face unconstitutional threats to their liberty and property,

1 and will be put in an intractable Catch-22, likely to be targeted with unfair civil and criminal
2 penalties regardless of how they proceed. A TRO is necessary to prevent this irreparable injury and
3 judicial intervention required to clarify this unconstitutionally vague and ambiguous state of law.

4 Defendants have provided confusing and inconsistent statements regarding what “actual sums
5 due” means for the covered period, July 1, 2012 to December 31, 2015. (See Cunha Decl., ¶ 19.)
6 Internally, the DLSE implemented a policy change after *Gonzalez* and *Bluford* were decided, during
7 the covered period (Exh. E at 7 (DLSE Memo at 7)); externally, the DLSE had suggested that certain
8 limited work-related activities may not be covered by piece-rate compensation (Exh. D at 3 (DLSE
9 Manual, §§ 47.7 & 47.7.1)). Yet the DIR, which oversees the DLSE, has stated throughout the
10 relevant timeframe that a piece rate must average out to at least minimum wage. (Exh. F at 2 (7/14
11 DIR Guide at 31); Exh. G at 2 (9/15 DIR Guide at 31); Exh. H at 2 (6/16 DIR Guide at 11).) The
12 DIR also has acknowledged that *Gonzalez* and *Bluford* created “unsettled controversies” over piece-
13 rate compensation that “remain in dispute.” (Exh. I (DIR Fact Sheet).)

14 Thus, Plaintiff’s members—who believe that no additional sums are due for the covered
15 period if they provided a piece rate matching or exceeding minimum wage—have no way of knowing
16 what Defendants expect them to pay in order to qualify for the affirmative defense, or how to make
17 proper payments that will insulate them from government investigation and civil lawsuits, the very
18 purpose of the affirmative defense. (See Cunha Decl., ¶¶ 18, 24.) Defendants might expect
19 Plaintiff’s members to pay sums that the employers reasonably believe are not legally owed. But to
20 take advantage of the safe harbor, an employer has to sign up by July 1 and thereby commit to paying
21 “actual sums due” – and put oneself on a publicly available list of those employers that have made
22 the commitment – without any way of knowing if the State will agree with the employer’s
23 interpretation of what sums are due, and subject oneself to Defendants’ post-hoc judgment over what
24 sums were due. If Defendants apply the extreme and legally unsupported position set forth in the
25 DLSE’s 2013 memorandum, they would, in effect, be applying Section 226.2(a) to a period of time
26 from *before* it was enacted. Under these circumstances an employer could pay unfair back payments
27 far beyond what is legally required or else invite an onslaught of investigations and lawsuits for
28 paying only the amount the employer believes was legally required—actions that could result in the

1 imposition of exponential civil and criminal penalties. (See Cunha Decl., ¶ 25.) Under either
2 scenario, employers face irreversible—and, in some cases, business-closing—hardship. (See *id.*)

3 Without a TRO, employers that choose to try to avoid these pitfalls by not providing written
4 notice to the State by July 1 face at least two irreparable consequences. First, they will forgo the safe
5 harbor, which the Legislature created for the very purpose of shielding them. (See Cunha Decl.,
6 ¶ 26.) Second, they will have intentionally omitted themselves from the publicly available list of
7 employers who have provided written notice that will appear on the DIR’s website. (See Lab. Code,
8 § 226.2(b)(3)(B).) Attorneys, and Defendants, can review this list for wage-based investigations or
9 lawsuits, including large class actions, by identifying employers not on the list. Those targeted
10 employers will be exposed to potentially devastating investigations and lawsuits over whether they
11 owe sums pre-2016, and they will not have the Section 226.2(b) affirmative defense. (See Cunha
12 Decl., ¶ 26.) Without clarity regarding the meaning and validity of Section 226.2(b), Plaintiff’s
13 members face an untenable decision on July 1 with irreparable harm no matter their choice.

14 Defendants, on the other hand, will not suffer any harm as a result of a TRO suspending and
15 tolling the July 1 deadline. The statute does not affect or protect Defendants. Without that deadline,
16 the status quo remains, and employers who want to sign up for the safe harbor without added clarity
17 may do so. Similarly, the public will not suffer any harm from a TRO. To the contrary, the public
18 would *benefit* from a TRO because it would conserve resources and maintain order for all parties,
19 including employers *and* employees, to get clarity regarding the requirements of Section 226.2 before
20 payments are made, investigations are instituted, lawsuits are filed, workers are laid off, and
21 businesses are closed. Plaintiff and its members, as well as employers around the State, are the only
22 parties that stand to suffer irreparable harm without a TRO. This Court should therefore issue a TRO,
23 suspending the July 1 deadline pending the outcome of a preliminary injunction hearing and tolling
24 the deadline until 10 days after the TRO expires if a preliminary injunction does not issue.

25 **C. Plaintiff Is Likely To Succeed On The Merits.**

26 **1. “Other Nonproductive Time” Is Unconstitutionally Vague.**

27 Since the Legislature enacted Section 226.2, Plaintiff’s members have struggled hopelessly to
28 decipher the phrase “other nonproductive time.” The statute requires an employer to separately track,

1 record, and pay for “other nonproductive time”—or else face significant civil and even criminal
2 penalties³—yet it offers a definition of “other nonproductive time” that is so vague it provides no
3 guidance as to what the law requires and opens an employer to punishments without fair notice.

4 It is well established that “[a] statute is void for vagueness if persons of common intelligence
5 must guess as to its meaning and differ as to its applications.” (*Schweitzer v. Westminster*
6 *Investments* (2007) 157 Cal.App.4th 1195, 1206.) To survive a void-for-vagueness challenge, “[a]
7 statute must provide a standard of conduct to be followed and one by which the courts and agencies
8 can measure the conduct after the fact.” (*Wingfield v. Fielder* (1972) 29 Cal.App.3d 209, 218.)
9 California courts, applying state due process, have set forth two principles: First, legal language must
10 be considered in context, and, second, “a statute will not be held void for vagueness if any reasonable
11 and practical construction can be given its language or if its terms may be made reasonably certain by
12 reference to other definable sources.” (*People v. North* (2003) 112 Cal.App.4th 621, 628 [internal
13 quotation marks omitted].) The U.S. Supreme Court, applying federal due process, has required that
14 a law “give ordinary people fair notice of the conduct it punishes” and have sufficient standards to
15 prevent “arbitrary enforcement.” (*Johnson v. United States* (2015) 135 S.Ct. 2551, 2556, 2561.)

16 The phrase “other nonproductive time,” and the requirement of “directly related” in its
17 definition, fail both state and federal standards. Plaintiff’s members simply cannot determine
18 whether conduct is “other nonproductive time.” (See Cunha Decl., ¶ 11.) Employers wonder, for
19 instance, whether training sessions for employees are covered under this language. (See *id.* ¶ 12.)
20 The sessions are essential to the employees’ work, and they certainly are related to the activity being
21 compensated on a piece-rate basis, but are they “directly related” to the activity being compensated?
22 Similarly, employers wonder about myriad other activities, such as traveling from one farm to
23 another (for a single employer), preparing and sharpening tools, or putting on smocks and other
24 protective gear. Or walking to a work site, or waiting for a bin in which to place produce, or taking a
25 bathroom break, or waiting for weather to clear, or waiting for a truck to arrive, or pausing while
26 harvesting, and so on. (See *id.* ¶ 12; Complaint, ¶¶ 11, 99.) How long does a pause have to last

27
28 ³ See, e.g., Lab. Code, § 1194.2; *id.* § 203; *id.* § 226, subd. (e); *id.* § 2698, *et seq.*; *id.* § 1197.1; *id.* § 1199.

1 before it turns into “other nonproductive time”? No person of common intelligence—or of any
2 intelligence—can do anything but guess as to what “other nonproductive time” means in any context,
3 and as to whether these common activities qualify in this specific agricultural context.

4 The phrases also invite arbitrary enforcement. The DIR has stated that “[w]hat constitutes
5 ‘other nonproductive time’ under this definition *will obviously vary* depending upon the nature of the
6 work and the ‘activity being compensated on a piece-rate basis.’” (Exh. C at 4 (DIR FAQ at 4)
7 [italics added].) That provides no standard of conduct at all.

8 Thus, the phrases “other nonproductive time” and “directly related” are constitutionally vague
9 and invalid, both facially and as applied to Plaintiff’s members, under both the U.S. and California
10 Constitutions. Additionally, the “other nonproductive time” language in Section 226.2(a) is
11 unconstitutional because it violates the “fundamental principle . . . that laws which regulate persons
12 or entities must give fair notice of conduct that is forbidden or required” (*Federal Communications*
13 *Commission v. Fox Television Stations, Inc.* (2012) 132 S.Ct. 2307, 2317); it also violates the U.S.
14 Constitution’s Contract Clause by substantially impairing contractual relationships (*Energy Reserves*
15 *Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411; see Cunha Decl., ¶ 28). Plaintiff
16 is likely to succeed on the merits of its claims concerning Section 226.2(a).

17 2. “Actual Sums Due” Is Unconstitutionally Vague.

18 Section 226.2(b) contains another critical but vague phrase for which an understandable
19 definition cannot be ascertained. To qualify for the affirmative defense, employers must pay “actual
20 sums due” for “previously uncompensated or undercompensated rest and recovery periods and other
21 nonproductive time from July 1, 2012, to December 31, 2015.” (Lab. Code, § 226.2, subd. (b).) But
22 the pre-2016 law was unsettled, and an employer has no way to determine what actual sums are due.
23 At best, the Court can clarify the requirements to allow Plaintiff’s members to make an informed
24 decision based on an understanding of the meaning of the phrase. At worst, the phrase is so
25 hopelessly vague that it violates Plaintiff’s members’ due process rights. Either way, Plaintiff is
26 likely to succeed on the merits of its position that either its members do not owe additional sums or
27 the requirement is unconstitutional.

1 Plaintiff maintains that if its members paid a piece-rate compensation for all hours worked
2 that equaled at least the minimum wage, they do not owe additional sums in order to take advantage
3 of the affirmative defense. That position is supported by decades of law and practice, as well as
4 certain public positions taken by Defendants even to this day. Yet Defendants may take a different
5 position and argue that “actual sums due” requires additional separate payment for non-piece-rate
6 work and rest periods, by relying on *Gonzalez* and *Bluford*. But those decisions were poorly
7 reasoned and, if not wrong, at least limited to their facts. The pre-2016 law, properly interpreted,
8 supports Plaintiff’s position, and Plaintiff is likely to prevail on the merits of this argument.

9 Additionally, the phrase “actual sums due” is also void for vagueness because Plaintiff’s
10 members do not know how to apply it and it allows for arbitrary enforcement. Here, Plaintiff’s
11 members are baffled by the meaning of the phrase “actual sums due,” even as they look to “other
12 definable sources” (*North, supra*, 112 Cal.App.4th at p. 628). (See Cunha Decl., ¶¶ 17-22.) For
13 example, a DLSE memorandum indicated that *Gonzalez* and *Bluford* changed DLSE policy, but the
14 DLSE’s Manual has remained the same on this issue for more than a decade. (See Exh. E at 7 (DLSE
15 Memo at 7); Exh. D at 3 (DLSE Manual, §§ 47.7 & 47.7.1).) The DIR, meanwhile, has taken a
16 different stance from the DLSE, but admitted that the law pre-2016 was “unsettled” and “in dispute.”
17 (See Exh. H at 2 (6/16 DIR Guide at 11); Exh. I (DIR Fact Sheet).) Thus, *inter alia*, “the Legislature
18 . . . [has] failed to provide enough specificity for either the [employers] or the authorities to
19 understand what the statute demands.” (*North, supra*, 112 Cal.App.4th at p. 634.)

20 3. The Law Is Unconstitutional For Several Other Reasons.

21 The phrase “actual sums due” also suffers from additional constitutional defects because it
22 fails to give fair notice of what the law requires and could cause a retroactive punishment and
23 arbitrary deprivation of property. Before 2016, there was no clear standard beyond that piece-rate
24 compensation should meet minimum wage requirements, and the new statute does not “provide a
25 standard of conduct to be followed and one by which the courts and agencies can measure the
26 conduct after the fact.” (*Wingfield, supra*, 29 Cal.App.3d at p. 218.) But seeking pre-2016 payments
27 based on current law, as Defendants may require, would violate the due process rights of Plaintiff’s
28 members by: (1) failing to provide fair notice (see *Fox Television, supra*, 132 S.Ct. at p. 2317); (2)

1 imposing a retroactive punishment (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 271 [“The
2 largest category of cases in which we have applied the presumption against statutory retroactivity has
3 involved new provisions affecting contractual or property rights, matters in which predictability and
4 stability are of prime importance.”]); and (3) arbitrarily depriving Plaintiff’s members of their
5 property in order to qualify for the defense (see, e.g., *ibid.*). Additionally, the phrase “actual sums
6 due” is unconstitutional because it violates the Contract Clause (see *Energy Reserves*, 459 U.S. at
7 411; *Cunha Decl.*, ¶ 28) and the Takings Clause (see *Eastern Enterprises v. Apfel* (1998) 524 U.S.
8 498, 522-524 (plurality op.)).

9 A key purpose of Section 226.2(b) was to provide employers with “relief from statutory
10 penalties and other damages.” (Exh. I (DIR Fact Sheet).) Instead, the Legislature has used a vague
11 term that leaves employers incapable of structuring their conduct to obtain this relief. The phrase is
12 unconstitutionally vague and invalid, both facially and as applied to Plaintiff’s members, under both
13 the U.S. and California Constitutions. Thus, Plaintiff is likely to succeed on the merits of its claims.

14 **D. Equity Requires Temporary Relief.**

15 Plaintiff’s request for an order to show cause why a preliminary injunction should not issue
16 seeks specific injunctive relief pending trial in this action, including that this Court enjoin Defendants
17 from enforcing: (1) the July 1 safe harbor deadline, thereby tolling it until 30 days after the
18 preliminary injunction expires; (2) the December 15 payment deadline, thereby tolling it until 197
19 days after the preliminary injunction expires; and (3) any requirements in Section 226.2 dependent on
20 “other nonproductive time” or “directly related.” While Defendants will not be harmed by this relief,
21 without it, Plaintiff’s members will suffer significant, irreparable harm.

22 A trial in this action is likely not to be complete until after December 2016. If this Court does
23 not grant a preliminary injunction staying the July 1 and December 15 deadlines, employers will
24 suffer substantial and irreparable harm based on two untenable options. First, an employer could wait
25 for the end of the trial before taking any action under Section 226.2(b), in order to properly
26 understand the meaning of “actual sums due” and whether any such payment is owed. By that time,
27 however, the employer already will have missed both deadlines. That employer will be unable to
28 avail itself of the affirmative defense, and would then face costly and, in some cases, door-shuttering,

1 litigation or investigations. (See Cunha Decl., ¶ 27.) Second, if she could afford it, an employer
2 could choose to abide by the deadlines in Section 226.2(b) and attempt to make back payments of
3 “actual sums due” based on the employer’s reasonable interpretation of that phrase. Judicial
4 hindsight would then reveal whether the sums paid were in fact the actual sums due. Such an
5 employer therefore will similarly be subjected to irreparable harm in the form of either paying unfair
6 and unnecessarily high sums, with no recourse for recovering those funds that it should never have
7 been required to pay, or in the form of being subjected to subsequent suits or investigations for failing
8 to pay the actual sums due (which would then disqualify the employer from the affirmative defense it
9 sought). (See Cunha Decl., ¶ 27.) Either option is extremely harmful to Plaintiff’s members, and that
10 harm cannot be avoided in the absence of a judicial determination regarding the meaning of “actual
11 sums due” and whether it is even a constitutional requirement. Staying the deadlines related to the
12 affirmative defense is a reasonable and necessary step to prevent such irreparable harm.

13 Similarly, if this Court does not grant a preliminary injunction as to Section 226.2(a)’s “other
14 nonproductive time” language, employers will be forced to track, record, and pay employees for
15 “other nonproductive time” without any clarity or guidance as to what that phrase means. If an
16 employer guesses wrong and pays an employee when it was not required, she will have no way to
17 recover later for the incorrect payment. (See Cunha Decl., ¶ 14.) If an employer guesses wrong and
18 fails to pay an employee when it was required, she risks DLSE investigations, related actions,
19 criminal sanctions, and lawsuits from private parties. (See *id.* ¶¶ 14-15.)

20 An injunction staying enforcement of Section 226.2 would prevent such harm and would
21 serve the desirable and logical purpose of clarifying the law’s requirements before Plaintiff’s
22 members are subjected to suit or investigation under a law too vague to meaningfully follow, without
23 subjecting Defendants to any harm.

24 In short, the irreparable harm that Plaintiff’s members would suffer without preliminary relief
25 far outweighs any impact that such relief would have on Defendants.

26 **IV. CONCLUSION**

27 Plaintiff respectfully requests a TRO and an order to show cause why a preliminary injunction
28 should not issue.

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DATED: June 27, 2016

GIBSON, DUNN & CRUTCHER LLP

By: Jesse A. Cripps /TMC
Jesse A. Cripps

Attorneys for Plaintiff Nisei Farmers League

1 **PROOF OF SERVICE**

2 I, Theodore M. Kider, declare as follows:
3 I am employed in the County of Los Angeles, State of California, I am over the age of
4 eighteen years and am not a party to this action; my business address is 333 South Grand Avenue,
5 Los Angeles, California 90071-3197, in said County and State. On June 27, 2016, I served the
6 following document(s):

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
8 PLAINTIFF NISEI FARMERS LEAGUE'S EX PARTE APPLICATION FOR
9 AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND A
10 TEMPORARY RESTRAINING ORDER**

11 on the parties stated below, by the following means of service:

12 Labor And Workforce Development Agency David M. Lanier
13 Attn: David M. Lanier Labor and Workforce Development Agency
14 800 Capitol Mall, Suite 5000 800 Capitol Mall, Suite 5000
15 Sacramento, CA 95814 Sacramento, CA 95814
16 Phone: (916) 653-9900 Phone: (916) 653-9900
17 david.lanier@labor.ca.gov david.lanier@labor.ca.gov

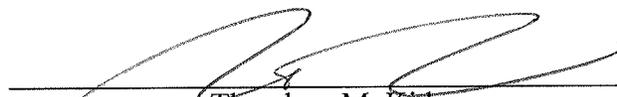
18 Department of Industrial Relations Christine Baker
19 Attn: Christine Baker Department of Industrial Relations
20 1515 Clay Street 1515 Clay Street
21 Oakland, CA 94612 Oakland, CA 94612
22 Phone: (844) 522-6734 Phone: (844) 522-6734
23 cbaker@dir.ca.gov cbaker@dir.ca.gov

24 Division of Labor Standards Enforcement Julie A. Su
25 Attn: Julie A. Su Division of Labor Standards Enforcement
26 1515 Clay Street, Room 401 1515 Clay Street, Room 401
27 Oakland, CA 94612 Oakland, CA 94612
28 Phone: (415) 703-5300 Phone: (415) 703-5300
jsu@dir.ca.gov jsu@dir.ca.gov

Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919
[By Overnight Delivery Only]

- 20 **BY OVERNIGHT DELIVERY:** I placed a true copy in a sealed envelope addressed as indicated above, on
21 the date shown below. I am familiar with the firm's practice of collection and processing correspondence for
22 delivery by Federal Express, UPS, and/or U.S. Postal Service Overnight Mail; pursuant to that practice,
23 envelopes placed for collection at designated locations during designated hours are deposited at the respective
24 office that same day in the ordinary course of business.
- 25 **BY ELECTRONIC SERVICE:** On the above-mentioned date I caused the documents to be sent to the
26 persons and agencies at the electronic notification addresses as shown above.
- 27 I am employed in the office of Jesse A. Cripps, a member of the bar of this court, and that the foregoing
28 document(s) was(were) printed on recycled paper.
- (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is
true and correct.

Executed on June 27, 2016.


Theodore M. Kider