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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

16 CE CG 02107

NISEI FARMERS LEAGUE,

Plaintiff,

v.

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

Defendants.

CASE NO.: _____

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

(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

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

I. INTRODUCTION AND SUMMARY OF ALLEGATIONS

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

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

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[1] The California Labor Code expressly authorizes the use of piece rate pay: It provides that "'[w]ages' includes all amounts for labor performed by employees of every description, whether 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).)

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

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

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

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[2] The two 2013 California Court of Appeal decisions, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36 ("*Gonzalez*") and *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864 ("*Bluford*"), have been read broadly by Defendants in a way that erroneously 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

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

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

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

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

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addition to the piece rate. And although both decisions were expressly limited to the facts 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.

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

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

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

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

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

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

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

16. Section 226.2(b) purportedly creates an affirmative defense to current and future litigation and enforcement actions that may be filed for back pay that is ostensibly owed to piece-rate employees for rest and recovery periods and other nonproductive time. But to take advantage of this "affirmative defense," employers must sign up by July 1, 2016 and retroactively pay any "actual sums due" for a 3½ year period from July 1, 2012 through December 21, 2015.[3] The list of employers who sign up is made publicly available on the DLSE's website.

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

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[3] Alternatively, the employer can agree to pay four percent of an employee's gross earnings to 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as applied, and Defendants' enforcement of those provisions, violates due process under state and federal law because it arbitrarily deprives Nisei Farmers League and its members of property.

c. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as applied, and Defendants' enforcement of those provisions, violates due process under state and federal law because Nisei Farmers League and its members lack fair or adequate notice of what the law requires or forbids.

d. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as applied, and Defendants' enforcement of those provisions, violates due process under state and federal law because it constitutes an impermissible retroactive punishment.

e. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as applied, and Defendants' enforcement of those provisions, violates the Takings Clause of the Fifth Amendment to the U.S. Constitution because it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

f. Section 226.2 of the California Labor Code, enacted by AB 1513, on its face and as applied, and Defendants' enforcement of those provisions, violates the Contract Clause of the U.S. Constitution because it substantially and illegitimately interferes with prior and existing contracts between Nisei Farmer League members and their employees.

g. An employer that paid piece-rate compensation that ensured that the compensation for all work performed met or exceeded the hourly minimum wage—regardless of whether the time is characterized as productive time or non-productive time—need not make additional payments to satisfy the "actual sums due" provision of the affirmative defense in Section 226.2(b) because that employer has already properly and lawfully compensated the employee in accordance with the applicable minimum wage requirement.

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

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

a. Preserve the status quo by extending the safe harbor period created by Section 226.2 until at least six months after adequate and clear direction on lawful piece rate compensation under Section 226.2 is provided for under California law or the statute is deemed unconstitutional;

b. Declare that the current version of Labor Code section 226.2 is unconstitutional, including, but not limited to, the terms "other nonproductive time," "directly related," and "actual sums due";

c. Declare "actual sums due" from 2012 through the present—and until a new law that is sufficiently clear is passed—to be those in which the piece-rate compensation equaled or was "trued up" to at least minimum wage;

d. Preliminarily enjoin the enforcement of Section 226.2 and toll the Section 226.2(b) deadlines;

e. Permanently enjoin enforcement of Section 226.2 to the extent it is unconstitutional or unlawful;

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

II. PARTIES

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

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

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

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

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

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

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

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

37. Defendant DIVISION OF LABOR STANDARDS ENFORCEMENT ("DLSE") is an agency within the DIR. The DLSE is vested by the California Labor Code to enforce all of the labor, employment, safety and wage-and-hour laws contained in the California Labor Code, the IWC wage orders, and related laws set forth in the California Labor Code. Its powers and enforcement authorities are set forth in the Labor Code at Section 79, *et seq.* The DLSE has offices throughout California, including in Fresno, California. The DLSE is responsible for administering and enforcing the law at issue in this case.

38. Defendant JULIE A. SU is the Labor Commissioner of the State of California. In that capacity, she is the highest administrative official of the DLSE. Commissioner Su is sued solely in her official capacity. The DLSE and Commissioner Su shall be referred to hereafter collectively as "DLSE."

39. Plaintiff is ignorant of the true names of Defendants sued herein as DOE 1 through DOE 10, inclusive, and therefore sues said defendants by those fictitious names. Plaintiff will amend the complaint to allege their true names and capacities when the same have been ascertained. Plaintiff is informed and believes and based thereon alleges that each of these fictitiously named defendants is in some manner responsible for the wrongful conduct alleged in this complaint. Plaintiff is informed and believes and based thereon alleges that these fictitiously named defendants were, at all times mentioned in this complaint, the agents, servants, and employees of their co-defendants and were acting within their legal authority as such with the consent and permission of their co-defendants.

40. Defendants, and those subject to their supervision, direction, and control, are responsible for the enforcement of the statute challenged herein. Except where otherwise specified, the relief requested in this action is sought against each Defendant, as well as against each Defendant's officers, employees, and agents, and against all persons acting in cooperation with Defendants, under their supervision, at their direction, or under their control.

III. JURISDICTION AND VENUE

41. This case raises questions under the Constitution of the State of California and the United States Constitution. Thus, this Court has jurisdiction over all of Plaintiff's claims. This Court

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

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

IV. FACTUAL ALLEGATIONS

A. Legal Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59. The 2002 DLSE's Enforcement Policies and Interpretations Manual, last revised in March 2006 ("DLSE Manual"), contains a slightly different description of the requirements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. AB 1513 Changes Piece-Rate Law Further

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

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

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

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

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

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

(3)

> (A) Employees shall be compensated for rest and recovery periods at a regular hourly rate that is no less than the higher of:
>
> > (i) An average hourly rate determined by dividing the total compensation for the workweek, exclusive of compensation for rest and recovery periods and any premium compensation for overtime, by the total hours worked during the workweek, exclusive of rest and recovery periods.
> >
> > (ii) The applicable minimum wage.
>
> (B) For employers who pay on a semimonthly basis, employees shall be compensated at least at the applicable minimum wage rate for the rest and recovery periods together with other wages for the payroll period during which the rest and recovery periods occurred. Any additional compensation required for those employees pursuant to clause (i) of subparagraph (A) is payable no later than the payday for the next regular payroll period.
>
> . . . .

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

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

(6) An employer who is found to have made a good faith error in determining the total or estimated amount of other nonproductive time worked during the pay period shall remain liable for the payment of compensation for all hours worked in other nonproductive time, but shall not be liable for statutory civil penalties, including, but not limited to, penalties

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

> (A) The employer has provided the wage statement information required by subparagraph (B) of paragraph (2) and paid the compensation due for the amount of other nonproductive time determined by the employer in accordance with the requirements of paragraphs (4) and (5).
>
> (B) The total compensation paid for any day in the pay period is no less than what is due under the applicable minimum wage and any required overtime compensation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. "Other Nonproductive Time"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. "Actual Sums Due"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FIRST CAUSE OF ACTION

(Due Process – Vagueness)

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

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

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

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

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

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

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

138. The possible civil damages and penalties and criminal penalties that can be arbitrarily and punitively levied for a failure to follow an impossibly vague law, including through Defendants' actions to enforce the law, further demonstrate the unconstitutionality of the provisions.

SECOND CAUSE OF ACTION

(Due Process – Arbitrary Deprivation of Property)

139. Nisei Farmers League realleges and incorporates herein by reference Paragraphs 1 through 130 above.

140. Certain phrases of provisions of Labor Code section 226.2 and Defendants' enforcement of those phrases—including, but not limited to, the requirement to pay "other nonproductive time," the requirement to pay "actual sums due" to obtain the affirmative defense, the alternative requirement to pay four percent of previous compensation to obtain the affirmative defense, and the damage and penalty provisions that can be triggered by a violation of Section 226.2—violate the Due Process Clauses of the California Constitution (art. I, § 7) and the Fifth and Fourteenth Amendments to the U.S. Constitution, both on their face and as applied to Nisei Farmers League and its members, because the provisions constitute an arbitrary deprivation of property.

141. Those provisions of Section 226.2, and Defendants' actions to enforce them, arbitrarily deprive Nisei Farmers League members of their property because the provisions are unreasonable, arbitrary, and capricious, without a real or substantial relation to the object sought to be attained, and violate basic concepts of fairness.

142. Assessing civil damages or penalties and criminal penalties against employers who fail to follow a law that is too vague to understand—including, but not limited to, the phrases "nonproductive time," "directly related," and "actual sums due"—constitutes an arbitrary deprivation of property in violation of due process.

143. Defendants' interpretation of "actual sums due," to the extent they contend the term requires payment for nonproductive time or rest or recovery periods before 2016, violates due process because it arbitrarily deprives Nisei Farmers League members of their property. Prior to the enactment of AB 1513, no such payment was required when employees were fully compensated

under the piece-rate system as implemented by the employer and agreed to by the employee. Insistence by Defendants to the contrary is unsupported by law in violation of due process.

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

THIRD CAUSE OF ACTION

(Due Process – Lack of Fair Notice)

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

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

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

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

FOURTH CAUSE OF ACTION

(Due Process – Retroactive Punishment)

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

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

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

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

FIFTH CAUSE OF ACTION

(Takings Clause)

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

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

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

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

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

SIXTH CAUSE OF ACTION

(Contract Clause)

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

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

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

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

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

SEVENTH CAUSE OF ACTION

(Declaratory Relief)

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

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

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

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

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

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

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

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

EIGHTH CAUSE OF ACTION

(Injunctive Relief)

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

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

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

171. Nisei Farmers League lacks an adequate remedy at law for the harm that will result from its members being subjected to subsequent investigations or lawsuits, with or without the affirmative defense, based on the vagueness of the law and the conflicting interpretations of actual sums due.

172. Pursuant to California Civil Code sections 3420 and 3422, and Code of Civil Procedure section 526, subdivisions (a)(1), (a)(4), (a)(5), and/or (b)(4), Nisei Farmers League is therefore entitled to a preliminary injunction staying enforcement of and tolling the July 1, 2016 and December 15, 2016 statutory deadlines, and prohibiting Defendants from enforcing Labor Code section 226.2 until this Court has reached a final determination regarding the validity and meaning of the provisions of Section 226.2 at issue. Nisei Farmers League is further entitled to a preliminary and permanent injunction enjoining the operation of Labor Code section 226.2 to the extent it is void for vagueness and violates due process, the Takings Clause, and the Contract Clause, and prohibiting Defendants from applying their interpretation of *Gonzalez*, *Bluford*, or the 2013 Memorandum to calculating "actual sums due" before 2016.

PRAYER FOR RELIEF

WHEREFORE, Nisei Farmers League hereby prays for judgment as follows:

A. For a judicial declaration that:

i. The phrases "other nonproductive time," "directly related," and "actual sums due" are unconstitutional, facially and as applied; and

ii. "Actual sums due" requires payments be based on pre-2016 law, which, properly interpreted, does not require separate payment for nonproductive time or rest periods when an employer has paid an employee piece-rate compensation for the time that he or she worked that equated to at least the minimum wage. There was no requirement in the Labor Code or otherwise that a piece rate could only cover items "directly related" to the piece or only "productive time"—the employer could set the piece rate to cover whatever tasks or activities it wanted the piece rate to cover so long as the employee was paid the equivalent of minimum wage for all hours worked;

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

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

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

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

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

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

DATED: June 27, 2016

GIBSON, DUNN & CRUTCHER LLP
JESSE A. CRIPPS
PERLETTE MICHÈLE JURA
JOSEPH C. HANSEN
THEODORE M. KIDER

By: _____
Jesse A. Cripps

Attorneys for Plaintiff Nisei Farmers League

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.