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California Minimum Wage Law: Re-thinking *Armenta* and Subsequent Cases


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In 2005, the California Court of Appeal issued a revolutionary minimum wage decision in *Armenta v. Osmose, Inc.*[1] It rejected the federal Fair Labor Standards Act ("FLSA")[2] rule that calculates minimum wage compliance by dividing all compensation during a pay period by the total hours worked to arrive at an average rate of pay. *Armenta* held that California minimum wage law forbids averaging wages over the course of the pay period to determine minimum wage compliance. Instead, *Armenta* held that employers must pay the minimum wage for **each** hour worked, and that it is irrelevant if an employee's total compensation for a pay period far exceeds the minimum wage.

Armenta is a classic case of bad facts making bad law. Although the ultimate result was correct - the employer should have been liable for failing to pay the wages it promised to pay - the case should have been decided on non-minimum wage grounds. Unfortunately, the Court of Appeal relied on a poorly reasoned DLSE Opinion Letter and decided the case on minimum wage grounds. The Court thereby created an interpretation of California minimum wage law that is contrary to the language of California's Wage Orders, and necessarily results in lawful compensation structures (such as commission and piece rate pay plans) being rife with minimum wage violations. Employers need to be aware of the implications of *Armenta* and its progeny on their compensation arrangements.

The DLSE's 2002 Opinion Letter

Because *Armenta* and subsequent cases adopted the reasoning of DLSE Opinion Letter 2002.01.29, that Opinion Letter deserves careful scrutiny. The Opinion Letter concerned employees of Sacramento's light rail operator, Sacramento Regional Transit District (RTD), who worked under a collective bargaining agreement. RTD paid bus and train operators an hourly rate under the collective bargaining agreement (CBA), but paid them nothing for time spent traveling back to the starting point of their shifts after they finished working.[3] The Opinion Letter first determined that RTD had to compensate the employees for this travel time because it qualified as "hours worked" under the California Labor Code. Next, it addressed how RTD should pay for this travel time.

– The Wage Order Is Not "Equally Susceptible" To Both Interpretations

The Opinion Letter recites the minimum wage language from the Industrial Welfare Commission ("IWC") Wage Orders. The Wage Orders state that employers must pay "not less than the applicable minimum wage for **all** hours worked in the payroll period, whether the remuneration is measured by time, piece, commission or otherwise" (emphasis added).[4] Without any analysis of any kind, the Opinion Letter conclusorily asserts that this language is "equally susceptible to two divergent readings:"

(1) that minimum wage should be measured for **each** hour in isolation, or (2) that minimum wage should be based on the average wage of **all** hours cumulatively worked in a pay period.

But the Wage Orders are not "equally susceptible" to both interpretations. Whether comparing the Wage Order language with the FLSA's language, or analyzing the Wage Order language by itself, California's minimum wage language can fairly be read only to require an averaging method.

Comparing the Wage Orders with the FLSA shows that California law is *more supportive* of an averaging method than the FLSA.[5] The FLSA states that employers must pay the designated minimum wage "per hour."[6] Even though the FLSA discusses minimum wage in the singular, on a *per-hour* basis, federal courts have consistently held that wages are averaged over a pay period to determine compliance.[7] The federal approach recognizes that some compensation arrangements (such as piece rate and commission plans) cannot be broken down into hourly earnings, and avoids situations where even highly compensated employees can complain of technical minimum wage violations by focusing on narrow slivers of time within a pay period when their effective rate of pay dips.

By contrast, California's Wage Orders state that employers must pay "not less than the applicable minimum wage ***for all hours worked in the payroll period***, whether the remuneration is measured by time, piece, commission, or otherwise." The Wage Orders discuss "all hours" (plural collective) rather than the FLSA's "per hour" (singular) approach. Moreover, the Wage Orders expressly link "all hours" to the "payroll period". The "usual ordinary import" of this language is that minimum wage is based on all hours worked in the payroll period. The Wage Orders do not use the word "each", although they could easily have done so. If California had actually intended to disallow averaging over the pay period, it could have required that employers pay "not less than the applicable minimum wage for **each** hour worked," and omitted any reference to the "payroll period." But it didn't. Indeed, there is no other purpose for including the phrase "in the payroll period" than to explain that minimum wage is based on the pay period, not the hour. There is simply no textual basis for the Opinion Letter's conclusory assertion that the Wage Order language is "equally susceptible" to two meanings.[8]

Moreover, the Opinion Letter entirely ignores the remaining language of the Wage Order: that employers shall pay the minimum wage "whether the remuneration is measured by time, piece, commission, or otherwise." There is no way to square the Opinion Letter's "each hour" interpretation with piece rate or commission pay structures, and indeed this interpretation effectively renders piece rate and commission pay structures unlawful. Yet piece rate and commission plans are longstanding, indisputably lawful methods of paying California employees.[9]

If the "each hour", no-averaging-minimum-wage rule applies to piece rate and commission employees, then many of these employees necessarily experience repeated minimum wage violations because they do not make a sale or "piece" every hour, and it does not matter how much money they make by the end of the pay period. Although the Opinion Letter did not address employees who earn piece rates or commissions, there is no basis in the Wage Order's minimum wage language to distinguish between employees who earn an hourly rate versus those who earn piece rates or commissions. The Wage Order does not in any way hint that the method of determining minimum wage compliance differs based on the method of remuneration (hourly rate vs. piece rate vs. commission).

Labor Code section 200 defines "wages" to include all amounts, including hourly rates, piece rates, commissions, or otherwise. The Wage Orders similarly require employers to pay the minimum wage whether "measured by time, piece, commission, or otherwise." These provisions undisputedly contemplate that employees may lawfully be paid entirely by commissions, and indeed that the minimum wage may be satisfied under such a pay structure. It is not a mystery to the Legislature or the IWC that commissions (and piece rates) are earned unevenly. It simply cannot be the case that a pay structure that is specifically authorized by statute is also necessarily going to result in constant minimum wage violations. On the other hand, the averaging method of minimum wage compliance is entirely compatible with piece rate and commission pay structures.[10] The Opinion Letter engages in none of this analysis of Wage Order language authorizing piece rate and commission pay plans.

– Labor Code Sections 221-223 Are Irrelevant

After asserting that the language of the Wage Order is "equally susceptible" to both interpretations, the Opinion Letter then states that California law "differs dramatically from the FLSA in a crucial way," and explains that California law permits employees to sue for any regular, non-overtime wages they are owed under a contract or CBA. The Opinion Letter recites the language of Labor Code sections 221, 222 and 223 to support this proposition.[11]

So far, so good – the Opinion Letter is undoubtedly correct that the FLSA does not provide a remedy for failure to pay regular wages, since the FLSA addresses only overtime and minimum wages. It is also correct that Labor Code sections 221-223 ensure that employees get paid whatever a contract or CBA says they should be paid.

But the Opinion Letter then gets confused on the differences between contract law and statutory law, and invents requirements that have no basis in either. The Opinion Letter asserts that Labor Code sections 221-223 set forth rules about minimum wage law – specifically, that an employer cannot use wages higher than the minimum wage for certain hours worked as a "credit" against wages below the minimum wage for other hours worked, even if the contract or CBA so provides. It concludes:

> Averaging of all wages paid under a CBA or other contract, within a particular pay period, in order to determine whether the employer complied with its minimum wage obligations is not permitted under these circumstances, for to do so would result in the employer paying the employees less than the contract rate for those activities which the

> CBA or contract requires payment of a specified amount equal to or greater than the minimum wage, in violation of Labor Code sections 221-223.[12]

But none of these Labor Code sections address minimum wages. Section 222 focuses solely on CBAs, making it unlawful to pay less than a contractually agreed-upon wage. Section 221 prohibits employers from *recovering* wages already paid, and Section 223 prevents employers from "secretly" paying less than the agreed-upon wage. If there is any general principle to be distilled from these three statutes, it is that employers have to pay what they agreed to pay. But nothing in these statutes can fairly be interpreted to address **minimum wage** requirements. And they certainly do not address whether minimum wage compliance is determined hour-by-hour or averaged over the pay period.[13] Whether an averaging approach violates California minimum wage law must depend on other sources of authority. But the Opinion Letter cites no other source.

The Facts in *Armenta* and the Trial Court's Ruling

The employees in *Armenta* worked under a collective bargaining agreement. Their employer Osmose, Inc. paid them hourly to service wood utility poles owned by the major utilities. The plaintiffs alleged that Osmose paid them only for hours deemed "productive" while consistently failing to pay at all for hours deemed "unproductive." "Productive" hours included time spent actually working on utility poles, while "nonproductive" hours included time traveling between work sites in company vehicles, loading equipment, and filling out required paperwork. Osmose allegedly paid nothing for the "nonproductive" hours, but paid hourly rates between $9 and $20 for "productive" hours. Osmose's failure to pay separately for "nonproductive" hours violated the CBA.

Plaintiffs could have sued successfully for breach of contract under the CBA for failure to pay regular wages for the "nonproductive" hours, and/or for violation of California Labor Code section 222, which prohibits employers from withholding any wages agreed upon in a collective bargaining agreement. Instead, the plaintiffs filed a proposed class action for minimum wage violations under Labor Code Section 1194[14], seeking liquidated damages, penalties, and attorneys' fees. After the trial court denied class certification, the individual plaintiffs proceeded to trial.

Osmose argued that it did not violate the minimum wage laws, even if the plaintiffs' allegations were true, because the plaintiffs' average earnings in every pay period were high enough to satisfy California's minimum wage. Plaintiffs countered that unlike federal law, California does not permit averaging to determine minimum wage compliance, and cited the 2002 DLSE Opinion Letter. Plaintiffs argued that Osmose had a duty to pay at least minimum wage for **each separate hour of work**, and could not justify nonpayment for certain hours by averaging those nonpaid hours with paid hours.

The trial court found the DLSE Opinion Letter persuasive and agreed with the plaintiffs, holding that California provides greater minimum wage protections than the FLSA and that averaging is not allowed under California law. The trial court adopted the reasoning of the 2002 DLSE Opinion Letter.

The Court of Appeal in *Armenta* Rejects the Averaging Approach

Osmose urged the Court of Appeal to reject the trial court's adoption of the DLSE reasoning, arguing that averaging is an acceptable method of measuring minimum wage compliance under both federal and California law. By paying the plaintiffs enough to cover minimum wage on an average basis, it argued, it satisfied California law. In addition to federal decisions upholding the averaging approach under the FLSA, Osmose cited a district court decision holding that averaging is an appropriate method of measuring minimum wage compliance under California law.[15]

The Court of Appeal refused to follow federal decisions, stating that both the language and intent of California's minimum wage law differ significantly from federal law.

First, the Court of Appeal focused on differences between the language of the FLSA and California's minimum wage law. It observed that the FLSA requires payment of at least minimum wage to employees who "in any work week" are engaged in commerce, while California Labor Code Section 1194 simply states that "any employee receiving less than the legal minimum wage" is entitled to recover the unpaid balance. The Court of Appeal then stated:

> The minimum wage applicable to respondents is set forth in California Wage Order No. 4, section 4(A), which currently provides: "Every employer shall pay to each employee wages not less than ... [6.75] per hour *for all hours worked*." (Italics added). Wage Order No. 4, section 4(B) provides: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." (Italics added). **This language expresses the intent to ensure that employees be compensated at the minimum wage for each hour worked.**[16]

The Court of Appeal thus concluded, without any further explanation, that the same language that the DLSE found to be ambiguous in fact evinced clear legislative intent to disallow an averaging approach and require that each separate hour be paid at minimum wage, regardless of how much an employee earned for other hours within the same pay period. But the Court of Appeal does not explain how it reads "all" to mean "each." There is no textual support for reading the phrase "for all hours worked in the payroll period" to express an intent to ensure minimum wage for "each" hour worked. Nor does the Court of Appeal address the language "in the payroll period", nor the language regarding piece rates and commissions, which it omits.[17]

Next, the Court of Appeal stated that Labor Code Sections 221, 222, and 223 "articulate the principal [sic] that all hours must be

paid at the statutory or agreed rate and *no part of this rate may be used as a credit against a minimum wage violation*."[18] But the Court does not actually analyze these sections, or explain how they articulate this principle, whether individually or collectively. It merely recites the text of these sections and states a conclusion.

Finally, the Court of Appeal stated that the legislative intent behind California labor laws (including state minimum wage law) called for a rejection of the federal averaging approach. Noting that California requires a higher minimum wage than federal law, provides for higher wages for student learners in vocational training programs, and forbids tip credits allowed under federal law, the Court of Appeal concluded that an averaging approach "does not advance the policies underlying California's minimum wage law and regulations."[19]

The Supreme Court instructs that the perceived purpose of a statute should not influence a court's interpretation of its plain language. As it stated in another wage case:

> Identification of the laudable purpose of a statute alone is insufficient to construe the language of the statute. "To reason from the evils against which the statute is aimed in order to determine the scope of the statute while ignoring the language itself of the statute is to elevate substance over necessary form.... Without due attention to the statutory terms, the statute becomes an open charter, a hunting license to be used where any prosecutor, plaintiff and judge sees an evil encompassed by the statute's purpose."[20]

The *Armenta* court, following the DLSE, violated this instruction regarding statutory interpretation. *Armenta* drifts away from the actual language of the statute to conclude that an averaging approach would "not advance the policies underlying California's minimum wage law." None of the greater protections California provides, however, have anything to do with how to measure compliance with its minimum wage law. Indeed, an averaging approach does not undermine these protections in any way.

Regarding the trial court's extensive reliance on the DLSE Opinion Letter, the Court of Appeal stated that the trial court "simply found persuasive, as we do, the reasoning expressed in the letter."

Armenta's holding results from the non-existent statutory construction and faulty logic of the DLSE Opinion Letter. The language of the Wage Orders and statutes fail to support *Armenta's* holding that California minimum wage applies to each separate hour, and the statutes *Armenta* cites have no logical connection with the conclusion the Court draws. *Armenta* relies on general notions of policy instead of the actual statutory language, but California's minimum-wage policy is already fully vindicated by the state having a higher minimum wage than federal law. Nothing in California's minimum-wage policy requires rejection of an averaging approach – California's higher minimum wage rate applies regardless of how compliance is measured. Moreover, under *Armenta,* commonly used, lawful compensation arrangements are rendered unlawful.

Subsequent Cases Compound *Armenta's* Mistake

Two federal decisions have extended *Armenta* to piece rate compensation structures. In *Ontiveros v. Zamora*,[21] the plaintiff brought a class action on behalf of auto mechanics who were paid on a pure piece-rate compensation system. Plaintiff alleged that certain work incidental to fixing cars (*e.g.*, attending meetings, training, setting up workstations) was not covered by the piece rates and was thus unpaid, violating *Armenta*'s decree that each hour must be paid separately and satisfy minimum wage requirements. After uncritically accepting *Armenta's* reasoning, the court held that this was a legitimate theory of recovery. *Ontiveros* highlights the poor reasoning of *Armenta* when it summarizes *Armenta's* holding that Wage Order language directing that employees be paid not less than the minimum wage "'for all hours worked,' evince[s] the intent that employees be paid for each hour worked."[22]

Again, it is unclear how the words "for all hours worked" evince an intent to require separate minimum wage measurement for "each hour worked." The FLSA uses the words "each hour" to describe its minimum wage obligations and provides a much stronger argument against an averaging approach, but (as set forth above) numerous courts have held that averaging is allowed under the FLSA. *Ontiveros* never addresses this contradiction, instead following *Armenta* and holding that incidental work such as setting up work stations and attending meetings was "uncompensated" because time spent on these tasks could not be averaged together with time spent on piece rate work.[23] Nor does *Ontiveros* provide support for *Armenta's* holding that an averaging approach violates Labor Code sections 221-223. The auto mechanics in *Ontiveros* knew the terms of their piece rate plan and could not claim that the employer was engaging in a "secret" underpayment of wages. Nevertheless, *Ontiveros* assumes that allowing minimum-wage averaging results in an employer "secretly withholding ... a portion of an employee's agreed upon wage in order to use that wage to pay the employee for other time worked."[24]

In another case applying *Armenta*, *Cardenas v. McLane Foodservices, Inc.*,[25] the plaintiffs were 39 truck drivers who alleged that their piece rate compensation failed to pay them separately for pre - and post-shift duties (*e.g.*, vehicle safety checks, picking up keys and manifests, paperwork). The court held that the employer's piece rate structure was unlawful and that pre - and post-shift work had to be compensated separately because the piece rate structure did not explicitly compensate such work. Ironically, the court rejected the 1984 DLSE Interpretative Bulletin 84-3[26] on the ground that it has no force of law, even though it is directly on point, but considered the equally non-precedential 2002 DLSE Opinion Letter persuasive, even though it does not address piece rate compensation at all.

Cardenas expressly rejected the employer's argument that its piece-rate structure was intended to cover pre - and post-shift duties. Even though the employer submitted declarations from members of the proposed class showing that they knew and understood that the piece rates were intended to cover the additional tasks, the court rejected this showing, finding

that the piece-rate formula considered only miles driven, the number of stops and quantity of products delivered. Citing *Armenta*, the court held, "[e]ven if [the employer] communicated to its employees that this piece-rate formula was intended to compensate for pre-and post-shift duties, the fact that it did not separately compensate for those duties violates California law."[27]

As both *Ontiveros* and *Cardenas* demonstrate, *Armenta* has resulted in adverse decisions against employers who likely felt secure that they were operating under time-tested, lawful compensation arrangements.

What Can Employers Do to Avoid *Armenta*-like Claims?

The core concept of the *Armenta* line of cases is that every minute of the workday must be covered **explicitly** by a compensation arrangement that meets the California minimum wage. This concept has been carried to an extreme by *Cardenas*, which rejected the principle that tasks incidental to piece rate or commissionable activities are covered by those piece rates or commissions. The *Cardenas* court held that even if the employer intended the piece rates to cover incidental tasks, and even if the employees understood the piece rates to cover incidental tasks, the piece rates do not cover incidental tasks unless the compensation agreement explicitly says so. Employers are well advised to scrutinize their compensation arrangements for any allegedly uncompensated time.

For employees paid on an hourly rate basis, this means examining any compensation agreements, policies or other documents that purport to explain the tasks for which the employee is paid. To the extent these documents suggest that employees perform any tasks for which they are not paid, those documents should be revised to state that employees are paid for all work of any kind. If an employer pays different hourly rates for different tasks, the documents should clearly say so, and all hourly rates should be no less than the California minimum wage. Moreover, the documents should not suggest that wages for certain hours worked are intended to cover other hours that are unpaid.

For employees paid on a hybrid arrangement - *e.g.*, a base hourly rate plus piece rates or commissions - the considerations are the same. In addition, given the *Armenta* line of cases, employers should ensure that the base hourly rate (or non-recoverable draw) - by itself - satisfies California minimum wage, even if the employer can prove that the base hourly rate *plus* piece rates or commissions ends up being more than the minimum wage. It is simply an invitation to a class action lawsuit[28] to have a base hourly rate that is less than the minimum wage (currently $8.00 per hour). If this means the employer has to raise the base hourly rate, the employer can adjust the piece rates or commissions downward so the overall compensation is equivalent. Although this is not a perfect solution - a higher variable component of pay increases employee motivation to do more work and earn more money - the current state of the law makes this a prudent step.

Finally, for employees paid purely on a commission or piece rate basis, the *Armenta* line of cases is particularly troubling because there is no obvious way to reconcile it with the Labor Code. Employers should examine whether pure commission and piece rate employees perform any incidental or non-incidental tasks that do not **directly** generate commissions or piece rates, and if they do (as is almost inevitable), employers should consider paying those tasks separately at the California minimum wage rate.

Conclusion

Armenta has steered California minimum wage law onto a path that has no legal basis, and transforms what have long been regarded as lawful compensation structures into unlawful schemes. The courts should re-examine *Armenta* and its progeny. In the meantime, employers should carefully examine their compensation structures to avoid any work time that can even arguably be characterized as uncompensated.

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[1] 135 Cal. App. 4th 314, 37 Cal. Rptr. 3d 460 (2005).

[2] 29 U.S.C. § 201 *et seq.*

[3] California Department of Industrial Relations, Division of Labor Standards Enforcement, Op. Ltr. No. 2002.01.29 (Jan. 29, 2002).

[4] IWC Wage Order 4-2001, § 4(B).

[5] *See Vikco Insurance Services, Inc. v. Ohio Indemnity Company*, 70 Cal. App. 4th 55, 61 (1999) (in determining Legislature's intent, court must look to the words of the statute themselves, giving to the language its usual ordinary import and according significance, if possible).

[6] 29 U.S.C. § 206 ("except as otherwise provided in this section, not less than [$7.50] per hour")

[7] *See e.g., U.S. Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775, 780 (6th Cir. 1995); *Cuevas v. Monroe St. City Club, Inc.*, 752 F. Supp. 1405, 1416-17 (N.D. Ill. 1990); *Hensley v. MacMillan Bloedel Containers*, 786 F.2d 353, 357 (8th Cir. 1986); *Dove v. Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985); *Blankenship v. Thurston Motor Lines, Inc.*, 415 F. 2d 1993, 1198 (4th Cir. 1969).

[8] Courts are not at liberty to impute a particular intention to the Legislature when nothing in the language of the statute implies such intention. *Vikco*, 70 Cal. App. 4th at 62

[9] Piece rate and commission plans are lawful methods of paying California employees. Cal. Labor Code § 200(a); IWC Wage Order 4-2001, § 4(B). Thousands of employees in California work under pure piece rate and commission plans. Commissioned sales representatives often make only one or two large sales each week (or even less), but wind up earning well over minimum wage on an average, pay-period basis.

[10] Presumably that is why in the DLSE Operations and Procedures Manual (1989), the DLSE 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. *See* Interpretive Bulletin 84-3 attached in the Appendix to this Section." Section 10.81 (emphases in original).

[11] Cal. Labor Code §§ 221-223

[12] DLSE Opinion Letter 2002.01.29, p. 11.

[13] There is nothing in Sections 221-223 that suggests it is unlawful to have a contract that specifies, for example, that an employee will be paid $1,000/hr. for the first hour of each workday and nothing for the next seven hours of each workday. If the employer pays what this contract provides, does not secretly pay less than the contract provides, and does not recover any of the wages it paid, then it has not violated any of these statutory provisions. The point is that none of these provisions relate to whether such a compensation scheme violates California minimum wage laws. Thus, whether such a compensation scheme violates minimum wage laws must depend on other sources of authority. The Opinion Letter concludes that using the averaging method of minimum wage compliance "would result in the employer paying the employees less than the contract rate", but this is a *non sequitur*. The contract rate is whatever the contract says it is. Minimum wage is entirely a creature of statute. One can concoct pay schemes that breach a contract but comply with minimum wage statutes, or conversely comply with a contract but violate minimum wage statutes.

[14] Cal. Labor Code § 1194

[15] *See Medrano v. D'Arrigo Brothers Company of California*, 336 F. Supp. 2d 1053 (N.D. Cal. 2004).

[16] *Armenta*, 135 Cal. App. 4th at 323.

[17] To comply with *Armenta*, employers would have to record piece rate and commission earnings on an hourly basis. But there is no statute or regulation that creates this type of record-keeping obligation. For example, wage statement requirements in Labor Code Section 226(a)(3) merely obligate employers to show the applicable piece rate and total piece-rate earnings over an entire pay period. Nor is there any hour-by-hour recordkeeping requirement for commission earnings.

[18] *Id.*

[19] *Armenta,* 135 Cal.App.4th at 324.

[20] *Cortez v. Purolator Air Filtration Prods. Co.,* 23 Cal. 4th 163, 176, fn 9 (2000).

[21] No. 08-CV-567, 2009 BL 34397, (E.D. Cal. Feb. 20, 2009).

[22] *Id.* at *9 (citing *Armenta,* 135 Cal.App.4th at 323).

[23] *Id.* at *13-14.

[24] *Id.* at *13.

[25] No. 10-CV-473, 2011 BL 298843 (C.D. Cal. Jul. 8, 2011).

[26] The Bulletin states that work incidental to piece rate work does not need to be paid separately.

[27] *Id.*

[28] One saving grace of *Armenta's* minimum wage interpretation is that it makes class certification far more difficult for a plaintiff to obtain. Examining every hour of work for every putative class member is a highly individualized inquiry. The trial court in *Armenta* denied class certification, as did the court in *Ortega v. Sears, Roebuck and Company*, 2d Civ. No. B223465, 2011 BL 136651 (Cal. App. 2d Dist., May 24, 2011) (unpublished) (individual issues predominated for piece rate auto mechanics).