

Labor Law Release

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California Employers Face Substantial Liability for Missed Meal and Rest Periods

On April 17, 2007, the California Supreme Court issued its much-awaited decision in *Murphy v. Kenneth Cole Productions, Inc.*^[1] The decision holds that the payment required for missed meal and rest periods is a wage. The Court's decision will substantially increase a California employer's potential liability for missed meal and rest period violations. This memorandum will describe the facts of the case, the court's decision and the impact this decision will have on California business.

Statement of Facts

Mr. Murphy was a store manager for Kenneth Cole (KCP), an upscale retail store in San Francisco. KCP classified Murphy and other store managers as exempt under wage order 7-2001. After two years of employment Murphy resigned his position because he felt he was being "paid wrong." Murphy's duties included ensuring the store made sales quotas, routine human resource issues (i.e. completing payroll worksheets, performance reviews and interviewing job prospects), making sure inventory was properly maintained and managed and taking the lead on the sales floor. Murphy was not allowed to hire or fire without approval, he could not discipline without approval, and was bound by the corporate operations manual which regulated how shoes were placed, how the stockroom was kept, which shoes were placed on sale, how to present shoes to the customers, how many shoes to bring out at one time and many other significant procedures.

Mr. Murphy filed a complaint with the Labor Commissioner for unpaid overtime and waiting period penalties. He was unaware he could also assert claims for missed meal and rest periods.

Concluding that Mr. Murphy was not an exempt employee, the Labor Commissioner awarded Plaintiff unpaid overtime wages and waiting period penalties.

KCP filed a notice for de novo review from the Superior Court. At this point the Division of Labor Standards Enforcement ("DLSE") and the Hastings College of Law Civil Justice Clinic stepped in as counsel for Mr. Murphy. In addition to unpaid overtime and waiting period penalties, Mr. Murphy made claims for missed meal and rest period penalties and for failing to provide an itemized wage statement.

The trial court filed a statement of decision and a judgment against KCP for unpaid overtime, missed meal and rest periods, penalties for failing to furnish itemized pay statements, waiting period penalties, prejudgment interest and attorneys fees. The trial court applied a three-year statute of limitations pursuant to Code of Civil Procedure section 338(a)^[2] awarding three years of missed meal and rest period payments.

KCP appealed the adverse judgment claiming, among other things, that the missed meal and rest period payments were penalties subject to a one-year statute of limitations under Code of Civil Procedure section 340.^[3] The Court of Appeal concluded that the payments assessed for missed meal and rest periods were penalties subject to the one-year statute of limitations. The Court further held that Mr. Murphy was precluded from raising issues not raised initially with the Labor Commissioner.

^[2] "Within three years . . . an action upon a liability created by statute, other than a penalty of forfeiture."

^[3] "Within one year . . . an action upon a statute for a penalty or forfeiture . . ."

^[1] 2007 DJDAR 4981.

California Supreme Court Decision

In 2000 the California Legislature enacted section 226.7 of the Labor Code. This section was intended to provide an enforcement mechanism for the meal and rest period rules set forth in the wage orders.^[4]

Section 226.7(a) requires an employer to provide employees with meal and rest periods as mandated in the applicable wage order.^[5] If an employer fails to provide a meal or rest period in accordance with the wage order, section 226.7(b) requires the employer to “pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.”^[6]

The issue addressed by the Supreme Court was whether this “additional hour of pay” constituted a penalty or a wage. The Court ultimately concluded that the additional pay constituted a wage.

The Court acknowledged that the payment imposed by section 226.7 could be interpreted as a wage or a penalty. However, the Court recognized that statutes should be construed broadly in favor of protecting employees. Moreover, the term “wage” is defined by the Labor Code 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”^[7] and could include the additional hour of pay. The Court also found that the legislative history of section 226.7 suggested the additional hour of pay constituted a wage. The Court was not persuaded by the argument that the additional hour of pay did not correlate to the amount of work performed by the employee.^[8]

Effect of the Court’s Decision on Business Operations

The Court’s ruling that the additional hour of pay constitutes a wage will have a substantial impact on

^[4] Wage orders require a 30-minute meal period and two 10-minute rest periods per workday. E.g., 8 C.C.R. 11040 §§11 and 12.

^[5] “No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.”

^[6] Labor Code § 226.7(b).

^[7] Labor Code § 200(a).

^[8] The Court noted that the overtime compensation is also “premium” pay.

business operations. We anticipate more claims will be filed and that the value of the claims will rise.

First, the Court’s ruling adopts a three-year statute of limitations as opposed to a one-year statute of limitations. This trebles the possible claims by employees. In a typical year, an employee works 260 days. A three-year statute allows the employee to expand that claim of unpaid meal or rest periods to 780 days. Assume the employee claimed that (s)he was never given the opportunity for a rest period. Assume further that the employee earns \$20 per hour.^[9] The total claim over the three-year period will be \$15,600.00.

Second, if the employer does not pay the additional hour at the time of the employee’s termination of employment, the employer is liable for waiting period penalties calculated at the employee’s daily rate of pay for 30 days. Assume same employee works an eight-hour shift. At \$20 per day, his/her daily wage is \$160.00. Therefore, the waiting period penalty is \$4,800.00. Adding this to the missed meal and rest period claim, the minimum exposure is \$20,400.00.

The employee who claims missed meal periods is also likely to make a claim for unpaid overtime compensation. This is extremely probable when the employee has been misclassified as an exempt employee and has worked more than a typical eight-hour workday or 40-hour workweek.

Third, because the additional hour of pay is a wage, an employee who files a civil action seeking the unpaid amount is entitled to an award of attorneys’ fees if (s)he prevails.^[10] Attorneys’ fees provisions drastically reduce the probability of settling a case for a minimal amount. The attorney recognizes that if his/her client prevails, (s)he will receive an award of fees. Therefore, plaintiffs’ attorneys are likely to take a firm position in any settlement negotiations.

Lawyers have discovered that wage and hour litigation is extremely lucrative. There are many reported cases of multi-million dollar settlements or judgments in class action cases. The Court’s decision increases the likelihood that more of these types of cases will be filed and prosecuted.

Consider, for example, the impact of the Court’s decision on a small business. Assume 10 employees

^[9] The wage could be in the form of a salary. To determine the hourly rate of pay, the employer must divide the annual salary by 2,080 hours.

^[10] Labor Code § 218.5.

make the claim of missed meal or rest periods. The value of the case jumps to \$204,000.00. Then the employer must take into account each employee's claim of unpaid overtime compensation and attorneys' fees. The potential claim can be devastating, particularly for a small business.

What California Employers Should Do?

We recommend that employers take several steps to reduce the risk of a lawsuit seeking unpaid meal and rest periods. First, it is imperative that employers properly classify their employees as exempt or non-exempt. The issue of missed meal and rest periods will always arise in the event an employee claims (s)he was misclassified as an exempt employee. Moreover, employers typically do not have any records for exempt employees documenting meal or rest periods taken.

Second, employers must ensure that they maintain appropriate time records. A daily time sheet should record, at a minimum, four entries: (1) Time in; (2) time out for a meal period; (3) time in from meal period; and (4) time out. This is your best record that a 30-minute meal period (was given on a timely basis) to the employee on each day of work. This time record also allows the employer to determine when meal periods were missed, pay the additional hour, and discipline the employee if appropriate for missing the meal period.

Meal periods must also be given on a timely basis; if not, the additional hour of pay must be given. Therefore, employers must ensure that employees do not work more than five hours before taking a meal period. Review the meal period schedules of all employees to verify that they can and do take meal periods on a timely basis.

An employer is not required to keep time records of rest periods taken. Moreover, the DLSE enforcement policy states that an employer need only "authorize and permit" employees to take rest periods.^[12] However, the lack of the record-keeping requirement is deceiving.

An employer who does not maintain records of rest periods may find it difficult to provide evidence that it did give employees the opportunity to take rest periods. This is particularly true in health-care settings, retail stores or any business with customer/client/patient contact. Employees in these industries may claim that due to the press of

business they were unable to take rest periods. Often an employer has limited evidence that the employee could have taken the rest period.

Employers must devise strategies to deal with a missed rest period claim. We recommend language on time cards for an employee to verify (s)he received an opportunity for rest periods. We also recommend reviewing current schedules to verify employees have the opportunity to take rest periods. Employers should also consider adopting a policy and procedure allowing employees to seek assistance if they have not been given a rest period. These changes will require modifications to handbooks, timecards and training materials.

All time-keeping records should be retained for at least three years.

Contact us if you have questions or need assistance in meeting these new requirements.

This is not intended as a complete analysis of the subject matter, or legal advice on any specific matter. Contact us if you have specific questions or need further assistance.

^[12] E.g., 8 C.C.R. § 11040 § 12 (A).