

Client Alert

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California Supreme Court Expands Liability for Employers Who Fail to Provide Meal and Rest Breaks

In a much anticipated decision, the California Supreme Court recently held that an employee's statutory remedy for missed meal and rest breaks was a "wage" rather than a "penalty," giving the employee a three-year, rather than a one-year, statute of limitations. The unanimous opinion in *Murphy v. Kenneth Cole Productions, Inc.*, filed on April 16, 2007, multiplies by three a California employer's possible exposure to claims for unpaid meal and rest periods, and even opens the door to employees suing under California's unfair competition statute and going back four years to tally payments for missed breaks.

California Labor Code section 226.7 provides that where an employee fails to receive a required meal or rest period, the employer "shall 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." Contrary to the employer's contention that claims pursuant to section 226.7 were subject to a one-year statute of limitations because the liability was in the nature of a "penalty," the Supreme Court held that plaintiffs can now go back three years to add up their "one additional hour of pay" for each work day they allege that they were denied a meal or rest period.

Plaintiffs can also seek waiting time penalties, interest, attorneys' fees and costs.

Background

The plaintiff, John Murphy, worked as the store manager of a Kenneth Cole Productions retail store. He regularly worked nine- to 10-hour days, and was able to take an uninterrupted, duty-free meal period on average once every two weeks. He rarely had the chance to take a rest period. Kenneth Cole treated him as an exempt employee and did not pay him overtime or monitor his meal periods.

Murphy resigned from Kenneth Cole after two years, and filed a claim with the Labor Commissioner for unpaid overtime and waiting time penalties. After a hearing, the Labor Commissioner decided in Murphy's favor.

Kenneth Cole appealed the decision to the San Francisco Superior Court. Before the Superior Court, Murphy pressed the claims he made before the Labor Commissioner, but also raised additional claims for meal and rest period violations under Labor Code section 226.7. The statute provides that if an employer fails to provide a non-exempt employee the prescribed meal

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and rest periods, "the employer shall 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."

The Superior Court decided for Murphy on both his old and his new claims, awarding him unpaid overtime, payments for missed meal and rest periods, various penalties and prejudgment interest. In determining the award payments for meal and rest periods, the Superior Court applied the three-year statute of limitations in Code of Civil Procedure section 338, which applies to a claim for unpaid wages but does not apply to a claim for a "penalty."

Kenneth Cole appealed again, this time to the Court of Appeal, arguing that the payments ordered for the meal and rest period violations were "penalties," subject to the one-year statute of limitations in Code of Civil Procedure section 340, not claims for "unpaid wages." Kenneth Cole also contended that the Superior Court erred in addressing the claims for meal and rest period violations at all, because Murphy had not previously raised those claims before the Labor Commissioner.

The Court of Appeal agreed. It held that the "additional hour of pay" imposed by Labor Code section 226.7 was a "penalty" subject to a one-year statute of limitations, and further held that those claims could not be raised for the first time on an appeal from a decision of the Labor Commissioner. The difference between a one-year and a three-year statute of limitations significantly alters the scope of the employer's liability.

The California Supreme Court's Opinion

The California Supreme Court granted review, and reversed the Court of Appeal on both holdings. Interpreting Labor Code section 226.7, the Court

ruled that "[t]he statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty."

The Court began with an analysis of the statutory language in section 226.7 and the rest of the Labor Code, but concluded that the language was "reasonably susceptible" of either interpretation. The "additional hour of pay" could be a wage to compensate employees fairly for their work, or it could be a penalty designed to punish employers who deprive their employees of meal and rest periods.

The Court turned for help to the legislative history of Labor Code section 226.7. The original version of the bill, Assembly Bill No. 2509, provided a dual strategy to deal with the lost meal and rest periods: (1) an explicit civil penalty of \$50 per employee per violation, collected by the Labor Commissioner; and (2) a separate payment to employees, similar to the current version of section 226.7. The Senate later deleted the explicit penalty provision. The Court inferred from this deletion that the remaining provision was *not* intended as a penalty.

The Court also found significant that section 226.7, which provides the sole compensation for the employee's lost meal and rest periods, is measured by the employee's rate of pay rather than an arbitrary amount, and is not labeled a penalty. The same bill that included section 226.7 also established payments that were explicitly labeled as penalties, codified elsewhere in the Labor Code.

The Court disagreed that the "additional hour of pay" required by section 226.7 was intended to shape employer conduct and should therefore be classified as a "penalty;" "whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section

226.7 first and foremost to compensate employees for their injuries.” The Court compared the payment under section 226.7 to overtime pay – a remedy that is primarily intended to compensate employees, but has a secondary purpose of shaping employer conduct.

Nor was the Court persuaded that the “additional hour of pay” is a penalty, and not a wage, because it is imposed without regard to the actual loss to the employee. There is no requirement of a one-to-one ratio between the economic injury caused by meal and rest period violations, and the remedy provided by the Legislature: “Where damages are obscure and difficult to prove, the Legislature may select a set amount of compensation without converting that remedy into a penalty.”

The California Supreme Court also agreed with *Murphy* on the separate issue of whether the trial court properly allowed *Murphy* to raise related wage claims before the Superior Court that had not been first considered by the Labor Commissioner. Describing this as an issue of first impression, the Supreme Court explained that the Superior Court hears an “appeal” from the Labor Commissioner as a *de novo* trial in a court of original jurisdiction. The Superior Court can hear new evidence, and the commissioner’s decision is not entitled to any deference. The Supreme Court concluded that the trial court had discretion to hear the entire wage dispute, including *Murphy*’s related wage claims not raised in front of the Labor Commissioner.

The Court’s decision in *Murphy* did not address whether an employee may plead a claim for unpaid meal and rest periods as statutory unfair competition under California Business and Professions Code section 17200 et seq. If so, employees would be entitled to go back *four* years, rather than three, in adding up days for which they can claim entitlement to payment. This seems a likely consequence of *Murphy*, since the

California Supreme Court has elsewhere allowed employees to use the unfair competition statute to recover earned but unpaid wages.

Meal and Rest Periods

After *Murphy*, it is more important than ever for employers to characterize employees as exempt or non-exempt accurately for wage and hour purposes, and to comply strictly with the meal and rest period requirements under California law for non-exempt employees.

The meal and rest period requirements are found in wage orders issued by the Industrial Welfare Commission (IWC), the state agency with authority to formulate wage orders governing employment in California. Although the Legislature defunded the IWC in 2004, its wage orders are still in effect. The order discussed in *Murphy*, codified in the California Code of Regulations, title 8, section 11070, subdivisions 11 and 12, provides as follows for workers employed in the mercantile industry (similar requirements apply to most other industries):

- An employee who works more than five hours per day is entitled to a meal period of at least 30 minutes. An employee who works a day of six hours or less is permitted to waive this right.
- An employee who works more than 10 hours per day is entitled to a second meal period of at least 30 minutes. An employee who works a day of 12 hours or less is permitted to waive the right to the second meal period.
- The employee must be relieved of all duty during the meal period. Otherwise, the meal period is considered “on duty,” and is counted as time worked. When the nature of the work prevents an employee from being relieved of all duty, the employee may consent by written

agreement to an “on duty” meal period, but the written agreement must state that the employee may revoke the agreement at any time.

- An employee is entitled to 10 minutes of paid rest period for every four hours worked, or a major fraction thereof. However, an employee whose total daily work time is less than three and one-half hours is not entitled to a rest break.

This IWC wage order applies only to non-exempt employees, and an employer is liable for payments under Labor Code section 226.7 only for failing to provide a meal or rest period as set forth in an IWC wage order. Separate and apart from IWC wage orders, California Labor Code section 513 requires meal breaks for all employees – without distinguishing between exempt and non-exempt employees – but the required payments under Labor Code section 226.7 do not accrue where an exempt employee misses a meal period.

There are certain narrow circumstances where an employee is permitted to waive the right to a break, or consent to an “on duty” meal period. Aside from these circumstances, an employee who works through meal or rest periods is entitled to the “additional hour of pay.” Employers have an affirmative obligation to ensure that employees are actually relieved of all duty.

Advice for Employers

A California employer that wants to limit exposure to wage and hour lawsuits based on meal and rest periods should first conduct a careful review of its labor policies to make sure those policies are fully compliant.

The next step is to see that the policies are strictly enforced. The policies should be clearly communicated both to employees and their supervisors, and an employer should have appropriate internal checks in place to ensure

compliance. When an employer discovers that an employee has been denied a meal or rest period, the employee should be promptly paid the “additional hour of pay” to which he or she is entitled. Employers are well advised not to wait for a complaint.

As a practical matter, an employer's compliance with the meal and rest period requirements is not enough. An employer should also keep careful records, pertaining not only to the meal and rest periods taken by the employee, but also to the employer's efforts to audit the administration of those meal and rest periods.

The employee is in the best position to record his or her own meal and rest breaks, and the record keeping system should include some participation from the employee, subject to appropriate oversight. An employee is less likely to contend that an employer's records are inadequate or inaccurate where the employee played a role in keeping and maintaining those records.

Conclusion

The California Supreme Court's decision in *Murphy* multiplies a California employer's potential for exposure by three, and possibly even four. In a claim brought under Labor Code section 226.7, plaintiffs can go back three years, instead of one year, to count up their “one additional hour of pay” for each work day the employer failed to comply with the meal and rest period requirements. Plaintiff may be able to go back even further, to four years, by bringing a claim for unpaid wages under California's unfair competition statute. Especially in class action lawsuits, these hours can add up.

Additionally, an employee's entitlement to “one additional hour of pay” for work done years ago increases an employer's liability for prejudgment interest. Plaintiffs can also seek

waiting time penalties, attorneys' fees and costs. Fortunately, the California Supreme Court's decision in *Murphy* did not involve the federal Fair Labor Standards Act and will have no impact on employers outside of California.

Murphy will likely give rise to an increase in lawsuits based on Labor Code section 226.7. It will also likely encourage plaintiffs who have asserted other employment claims to consider adding a claim for unpaid meal and rest periods, as well. Now is a good time for employers to make sure they are complying, and that they can prove it.

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