CLIENT ALERT

Blame the Cell Phone: California Appellate Court Holds that Calling in Constitutes 'Reporting for Work' Under Wage Order

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A recent split decision by a California appellate court threatens to change the rules for employers trying to implement cost-effective work scheduling strategies. In *Ward v. Tilly's Inc.*, No. B280151, 2019 WL 421743 (Cal. Ct. App. Feb. 4, 2019), the court reinstated a class action filed against an Orange County retailer. The complaint alleges that the company violated a California Wage Order requiring reporting pay by not paying employees who were required to call-in two hours before a previously-scheduled "on call" shift. The dissenting judge strongly criticized the outcome, observing that it was nonsensical for California employers to face "[T]ens of millions of dollars in potential employee liability" as a result of an erroneous interpretation of a California Wage Order. *Id.* at *18.

The Company's Practices and the Lawsuit

Like many retailers, the employer in *Ward* uses on-call shifts to optimize flexible scheduling. Tilly's required its employees to call their stores two hours before the start of an on-call shift, to determine whether they would actually be needed to work the shift. If the employee was told not to come in, Tilly's did not consider the employee to have reported for work within the meaning of the relevant Wage Order.

The company was sued in a class action complaint alleging that its practices violated the Industrial Welfare Commission (IWC) Wage Order 7. The employer filed a demurrer to the complaint, arguing that Wage Order 7 did not apply to its policy because the only way an employee could "report for work" within the meaning of the Wage Order was by physically appearing at the store at the start of a shift. The trial court agreed, and dismissed the lawsuit.

The Appellate Court's Decision

On appeal, Plaintiff argued the trial court got it wrong, because Wage Order 7 is triggered by any manner of reporting, whether in person, telephonic, or otherwise. The majority agreed, and concluded that Tilly's employees were eligible for compensation under the Wage Order if, when they called in, they were told not to come into work.

Because Wage Order 7 does not define "report for work," the court analyzed the phrase's meaning in context, beginning with several dictionary definitions of the word "report." The majority concluded that those definitions do not conclusively establish whether the phrase "report for work" requires the employee's presence at a particular time and place or whether it is satisfied by an employee "presenting" himself or herself in whatever manner directed by the employer.

The opinions in *Ward* get more interesting in their review of the legislative intent of the Wage Order 7. Tilly's argued for an originalist interpretation of the phrase, to reflect the understanding of the phrase at the time of the language's adoption in the 1940s. The court acknowledged that, back in the day, the phrase would have been understood to require the employee's

physical presence at the work site. The majority cited statistics suggesting that telephones were not widely available in the 1940s. The court observed that the advent of the cell phone and other technologies has altered the way in which employees communicate with their employer. The court reasoned that the right way to interpret the relevant language was to ask how the IWC would have addressed this question had it anticipated the realities of modern technology. In what some might call an exercise in mind-reading, the court concluded that, had the IWC addressed the issue, it would have concluded that Tilly's alleged on-call system triggers the payment of reporting time pay.

The majority concluded: "[O]n-call shifts burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts—but who nonetheless receive no compensation from [the employer] unless they ultimately are called in to work. This is precisely the kind of abuse that reporting time pay was designed to discourage." *Id.* at *1.

The Dissent

Justice Egerton dissented in a robust and colorful opinion. Her review of the legislative history of the Wage Order clearly reflected "the drafters' intent that—to qualify for reporting time pay—a retail salesperson must physically appear at the workplace: the store." *Id.* at *15. Justice Egerton also rejected the majority's focus on cell phone technology. "[T]here has been no technological change pertinent to proper statutory interpretation in this case. Nothing turns on whether a cord or a cell tower connects the phone. The notion that phones were unfamiliar in the 1940s is ahistorical: spend some enjoyable time listening to Glenn Miller's 1940 hit *PEnnsylvania 6-5000*. (The Andrews Sisters' rendition is delightful.)" *Id.* at *18. If you're interested, their version of the song is available here.

While acknowledging the hardships that an on-call system may impose on employees, Justice Egerton wrote that employers do not implement on-call systems simply to "torture employees." *Id*. at *18.

Implications for California Employers

The majority's decision in *Ward* endorses the view of advocates who support employer predictive scheduling initiatives. The strong dissent makes *Ward* a good candidate for review by the California Supreme Court. And note that the majority expressly limited its holding to the specific on-call system at issue, and did not hold that *all* call-in requirements constitute "reporting for work" within the meaning of the Wage Order. Yet, pending further clarification, California retailers should be aware that *Ward* may signal how California courts will react to challenges to other types of on-call scheduling practices. And, because other Wage Orders implemented by the California IWC contain the same language regarding reporting pay, California employers in other industries should assume that advocates will seek to extend the rationale of *Ward* to their businesses.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Suzanne E. Rode
Counsel – San Francisco

Phone: +1 415.365.7276
Email: srode@crowell.com