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Client Alert

A 'Break' for Employers: CA Court Reverses Multi-Million Dollar Judgment

January 12, 2015

Can employers require their employees to remain on-call during paid breaks? According to a new decision by the California Court of Appeal, the answer is yes. On December 31, 2014, in *Augustus v. ABM Security Services, Inc.*, the California Court of Appeal held that employees can be required to remain "on-call" and handle some duties during their mandatory rest breaks. While the Court acknowledged that employees must be relieved of all duties during unpaid meal breaks, it held that employers can require employees to perform *some* duties during paid rest breaks without violating the California Labor Code.

The Plaintiffs in *Augustus* were security guards employed by Defendant ABM at several locations throughout California. Plaintiffs brought a class action suit alleging that ABM failed to provide adequate rest breaks as required by California Labor Code section 226.7 because ABM required the Plaintiffs to remain on-call during breaks. In discovery, ABM admitted that it required security guards to "keep their radios and pagers on during rest breaks, to remain vigilant, and to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs."

Rest breaks for employees are mandated by Industrial Welfare Commission Wage Order No. 4-2001 (Cal. Code Regs., tit. 8 § 11040), also known as Wage Order No. 4. Wage Order No. 4 states that any employee who works more than three and a half hours per day must be permitted to take a paid, ten minute rest period for every four hours of work or major fraction thereof. Labor Code section 226.7 further states that an employer "shall not require an employee *to work* during a meal or rest or recovery period[.]" (emphasis added). Plaintiffs contended that because they were still responsible for work-related duties during their rest periods, they were still "working" and therefore ABM was in violation of Wage Order No. 4. Wage Order No. 4, subds. 11(B), 12(B); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1018 (Cal. 2012).

THE COURT'S OPINION

Plaintiffs filed a motion for summary adjudication based on ABM's admission that guards were expected to be on-call during breaks, and based on a California Division of Labor Standards Enforcement Opinion Letter stating that rest periods must be "duty-free." ABM opposed the motion, stating that rest breaks were often uninterrupted, and that even though guards remained on-call, they also engaged in leisure activities such as smoking, reading, and browsing the internet. The trial court granted Plaintiffs' motion, stressing that "[w]hat is relevant is whether the employee remains subject to the control of an employer." Plaintiffs then moved for summary judgment. The trial court granted the motion and later awarded Plaintiffs over $120,000,000 in damages and fees: $55,887,565 in statutory damages pursuant to Labor Code section 226.7 for failure to provide

rest breaks; $31,204,465 in pre-judgment interest; $2,650,096 in waiting time penalties; $27,000,000 in attorneys' fees; and $4,455,336.88 in fees.

On appeal, the Court of Appeal noted that Wage Order No. 4 fails to define what constitutes a rest period, and that section 226.7 fails to define what constitutes "work" during a rest period. Lacking other guidance, the Court sought clarification by comparing paid rest breaks to unpaid meal breaks. The Court noted that under subdivision 11(A) of Work Order No. 4, during a meal break an employee must be "relieved of all duty[.]" On the other hand, under subdivision 12(A) there is no such requirement for rest breaks. The Court reasoned that if the legislature intended for employees to be "relieved of all duty" during a rest break, it could have easily done so. Since it chose not to, it must have intended for a different standard to apply. The Court concluded that because "working" cannot mean "relieved of all duty," an employee can be assigned *some* duties without being considered "working."

Ultimately, the Court concluded that Labor Code section 226.7 "prescribes only that an employee not be required to work on a rest break, not that he or she be relieved of all duties, such as the duty to remain on call. Remaining on call does not itself constitute performing work." Accordingly, the Court reversed the orders granting summary adjudication and summary judgment, and vacated the judgment against ABM.

TAKEAWAYS

What does this mean for employers? While the Court was explicit that employees may still be assigned some duties during paid rest breaks, it noted that the Plaintiffs' duties during rest breaks were greatly reduced from their normal workload, and distinguished between an employee being passively on-call and being assigned "active duties," such as moving from one work station to another. The Court also seemed to place an emphasis on the fact that the Plaintiffs were security guards, and often the only people available to handle important safety tasks. Accordingly, without further guidance on what duties an employee can be assigned without being considered working, employers should continue to be cautious when asking employees to remain on-call during rest breaks.

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