

CLIENT ALERT

California Appellate Court Approves (Finally) of Neutral Time Rounding

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Many employers round the time punches of their employees. California's Division of Labor Standards Enforcement ("DLSE"), relying on the Fair Labor Standards Act ("FLSA"), has opined for years that employers may round non-exempt employee time punches to the nearest one-tenth or quarter of an hour, provided that the rounding practice does not fail to compensate employees for all time that they worked. The DLSE's position, however, has lacked support from the California appellate courts – until now. On October 29, 2012, the Fourth Appellate District of the California Court of Appeal approved the DLSE's position on this issue in *See's Candy Shops, Inc. v. Superior Court*, D060710 (Cal. Ct. App., 4th App. Dist., Oct. 29, 2012).

The plaintiff was a See's non-exempt employee who filed a class action complaint alleging wage and hour violations, including the failure to pay for all work performed and the failure to pay overtime. These claims were based in part on the company's policy to round Kronos electronic time punches up or down to the nearest tenth of an hour. The trial court certified a class on the issue of whether non-exempt employees lost compensation as a result of this rounding procedure. The plaintiff then filed a motion for summary adjudication of issues attacking two of See's affirmative defenses – asserting that its time rounding policy was (a) consistent with state and federal law, and (b) did not deny the plaintiff or other class members full and accurate compensation. The trial court granted the plaintiff's summary adjudication motion, effectively rejecting these legal defenses. The Court of Appeal overturned that decision.

The Court of Appeal observed that "[a]lthough California employers have long engaged in employee time-rounding, there is no California statute or case law specifically authorizing or prohibiting this practice." Slip op. at 17. See's argued that in the absence of such state precedent, the standard under the FLSA, adopted by the DLSE in its Enforcement Policies and Interpretations Manual, should apply. Under the FLSA, employers may round time if employees are compensated fully "over a period of time." 29 C.F.R. § 785.48(b). The Court of Appeal agreed with See's, holding as follows: "Assuming a rounding-over-time policy is neutral, both facially and as applied, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees." *See's Candy Shops, Inc.*, slip op. at 21.

The Court of Appeal also rejected the plaintiff's argument that See's rounding policy violated California Labor Code Section 204, which requires employers to pay "all" wages, with certain exceptions, twice in each calendar month. According to the Court of Appeal, Section 204's reference to "all" wages "pertains to the timing of wage payments and not to the manner in which an employer ascertains each employee's work time." *Id.* at 23.

This decision on the law did not, however, absolve the employer of potential liability. The plaintiff argued that the difference between state and federal law regarding the payment of overtime (hours worked over 40 in the workweek under the FLSA vs. over 8 hours in the workday under California law) meant that the rounding policy could not be neutral. The Court of Appeal disagreed, concluding that "[t]here is no analytical difference between rounding in the context of daily overtime and rounding in the context of weekly overtime." *Id.* at 25. Yet the Court of Appeal recognized as well that "the issue whether California's overtime rules mean a rounding rule is biased against employees is a factual issue and not a legal one." *Id.* at 25-26. Because a

triable issue of fact existed as to whether employees would be compensated fully for daily overtime under the rounding policy, the Court of Appeal concluded that summary adjudication was not appropriate and that the trier of fact must resolve that issue.

The decision in *See's Candy Shops* is significant in California. It is the first published state appellate court decision to recognize that employers may implement neutral time rounding procedures that compensate employees fully over time. Employers should, however, be cautious in implementing such policies. If the impact of rounding deprives employees, over time, of all the wages they have earned, whether as a result of California's daily overtime requirements or other circumstances, then employers may be held liable for the shortfall. Therefore, employers should analyze critically the long-term impact of rounding and ensure that employees are not deprived of earned straight time or overtime wages.

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