

## CLIENT ALERT

### California High Court Rejects Fee Request For Rest Break Claims

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On Tuesday, April 30, 2012, the California Supreme Court decided that, in actions seeking to recover for rest break violations, parties cannot recover their attorneys' fees if they prevail on either the prosecution or defense of such a claim. What is initially novel about this case, *Kirby v. Immoos Fire Protection, Inc.*, 2012 WL 1470313, \_\_ Cal. 4th \_\_ (Apr. 30, 2012), is the context in which it was decided -- the *defendant's* motion to recover attorneys' fees.

The *Immoos* case originally included the laundry-list of claims typically seen in putative wage and hour class actions, including claims for violation of the California Unfair Competition Law, Business & Professions Code section 17200 ("UCL"), failure to pay wages each pay period and upon discharge (in violation of Labor Code sections 201, 203 and 204), failure to pay overtime, codified in sections 204.3, 510 and the applicable Industrial Welfare Commission (IWC) wage order. Plaintiffs also alleged a violation of Labor Code section 223, claiming that the only originally named defendant, Immoos Fire Protection, Inc. ("IFP"), paid wages that were less than those required by statute, regulation and contract. Also alleged was the failure to provide Plaintiffs with accurate, itemized wage statements, as required by Labor Code section 226, and a claim for violation of Labor Code section 226.7, alleging that Plaintiffs were not provided with the required rest periods. Finally, the Plaintiffs alleged that IFP and the Doe defendants violated Labor Code section 2810 by entering into contracts with IFP while knowing the contracts did not provide sufficient funds to allow IFP to comply with all applicable labor and wage laws.

After settling with certain later-named Doe defendants, the Plaintiffs' motion for class certification was denied. Plaintiffs then dismissed their complaint against the remaining defendant, IFP, with prejudice. Afterwards, IFP moved to recover its attorneys' fees under Labor Code section 218.5.

Labor Code section 218.5 provides, in relevant part: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action.... This section does not apply to any action for which attorney's fees are recoverable under Section 1194."

In the trial court, IFP was awarded its fees for its defense of the unfair competition claims, the rest periods claims, and the Labor Code section 2810 claim. The Court of Appeal affirmed the award of fees on the rest period claim, but reversed the fee award as to the UCL and section 2810 claim. The fee award under section 2810 was reversed because, according to the Court of Appeal, that section contains a one-way fee shifting provision in favor of employees. The UCL-based fee award was reversed because, according to the Court of Appeal, any fees awarded to IFP were merely duplicative of those derived from the defense of the rest period claims. As to the fees incurred in defense of the rest period claim, the Court of Appeal concluded that the award of fees was proper because Plaintiffs were seeking payment of "additional wages." The Court of Appeal rejected, however, Plaintiffs' argument that because at least some of the claims they were prosecuting fell under Labor Code section 1194 (containing a one-way fee shifting statute in favor of employees), the entire action was shielded from an award of fees under section 218.5. The Court of Appeal rejected the argument of Plaintiffs that because the rest period claim is properly construed as a claim for

statutorily mandated minimum wages, the claim for attorneys' fees is governed under the one-way fee shifting provision of Labor Code section 1194.

The first question the Supreme Court answered was whether fees can be awarded under section 1194 for section 226.7 claims. If so, IFP could not recover fees under section 218.5 because section 1194 contains a one-way fee shifting provision in favor of employees. The Supreme Court disposed of this argument, however, concluding that a claim for the failure to provide rest breaks is not one seeking statutorily prescribed minimum wages. The Supreme Court rejected Plaintiffs' claim that Section 1194's use of the phrases "legal minimum wage" and "legal overtime compensation" demonstrated that the California Legislature intended Labor Code section 226.7 to establish a minimum payment amount if an employer failed to provide the requisite rest breaks. The Court reasoned that the Legislature intended those phrases to refer to ordinary minimum wage and overtime obligations, referring extensively to the history of section 1194.

The Supreme Court then addressed whether Labor Code section 218.5 authorizes a fee award to the party prevailing on a rest break claim, given that section 218.5 contains a two-way fee shifting statute. Navigating around its holding in *Murphy v. Kenneth Cole*, the Supreme Court explained that while in *Murphy* the remedy provided for under section 226.7 was a "wage" (for purposes of calculating when the statute of limitations begins to run on such claims), a section 226.7 claim is not an "action brought for the nonpayment of wages." According to the Court:

As a textual matter, we note that section 218.5 uses the phrase "action brought for" to mean something different from what the phrase means when it is coupled with a particular remedy (e.g., "action brought for damages" or "action brought for injunctive relief"). An "action brought for damages" is an action brought to *obtain* damages. But an "action brought for nonpayment of wages" is not (absurdly) an action to *obtain* nonpayment of wages. Instead, it is an action brought *on account* of nonpayment of wages. The words "nonpayment of wages" in section 218.5 refers to an alleged legal violation not a desired remedy. In other words, the nonpayment of wages is not the gravamen of a section 226.7 violation. Rather, it is the employer's failure to provide meal and rest breaks, which is the legal violation that is the subject of an action to enforce that code section.

Coming on the heels of the Supreme Court's *Brinker* decision, *Immoos* represents yet another striking blow to the plaintiffs' wage and hour class action bar. And, coupled with the U.S. Supreme Court's opinion in *Duke*, employers are now regaining the ground vitally lost over the past several years to the plaintiffs' bar who have had a prominent run recovering exponential sums of dollar damages and fees.

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