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good news and bad news on labor code penalties

MSK Client Alert

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While California employers continue to grapple with the onslaught of wage and hour class actions, the California Court of Appeal recently issued two decisions clarifying important issues regarding Labor Code penalties.

Employees May Be Entitled to Up to Two "Premium Payments" Per Day for Meal and Rest Period Violations: UPS v. Superior Court

It is clear that an employee who is not provided a meal or rest period is entitled to a premium payment equal to one hour of pay. However, there has been considerable debate as to whether an employee who missed both a meal and rest period on the same day is entitled to one premium payment or two. Recently, in *United Parcel Service, Inc. v. Superior Court*, a California appellate court held that Labor Code Section 226.7 authorizes the payment of two premium payments when both a meal and rest period are missed on the same day.

The decision interprets the language of Labor Code Section 226.7, which states:

1. No employer shall require an employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

2. If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, 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.

(Emphasis added.) Based on the language of the statute, employees traditionally have relied on the statute's use of the disjunctive - "meal *or* rest period" - to support their assertion that they are entitled to an additional hour of pay per day for each *type* of violation. Employers, however, have focused on the words "work day" to argue that, even where multiple violations have occurred in the same day, the statute only permits a corresponding remedy of a single additional hour of pay.

The Court relied on Section 226.7's legislative history, in conjunction with the IWC wage orders' administrative history, in its decision. The Court recognized that the structure of the IWC wage orders set out the requirements for meal and rest breaks (and their corresponding premium pay remedies) in two separate sections. The Court found it dispositive that the Legislature "clearly ... inten[ded] to match the IWC's premium payment provisions," thus making it "more reasonable to construe the statute as permitting up to two premium payments per workday - one for failure to provide one or more meal periods, and another for failure to provide one or more rest periods." Citing the federal district court decision in *Marlo v. United Parcel Service, Inc.* (C.D. Cal. May 5, 2009), the Court concluded that construing Section 226.7(b) to permit one premium payment for each type of break violation "is in accordance with and furthers the public policy behind the meal and rest break mandates."

This decision, however, may conflict with the language of the California Supreme Court in *Murphy v. Kenneth Cole Productions, Inc.*, where the Court repeatedly referred to the 226.7 premium payment as "an additional hour of pay" or "the additional hour of pay." It remains to be seen whether this case will be appealed to the California Supreme Court and, if so, whether the Court will grant review.

Employees Must Show Actual Injury to Recover Damages for Paystub Violations: Price v. Starbucks Corp.

Upon request from the California Employment Law Council, on February 17, 2011, the Court of Appeal certified for publication the previously unpublished decision in *Price v. Starbucks Corp*. In *Price*, the appeals court upheld the trial court's decision to dismiss - at the pleading stage - a plaintiff's claim for noncompliant wage statements in violation of Labor Code Section 226(a) because the plaintiff failed to allege a cognizable injury.

Labor Code Section 226(e) governs damages for wage statement violations under Section 226(a). It provides that damages are recoverable only when an employee "suffer[s] injury as a result of a knowing and intentional failure by an employer to comply" with the statute. In *Price*, the Court confirmed that this "injury requirement ... cannot be satisfied simply if one of the nine itemized requirements in section 226, subdivision (a) is missing from a wage statement." Rather, "[b]y employing the term 'suffering injury,' the statute requires that an employee may not recover ... unless he or she demonstrates an *injury* arising from the missing information." The "'deprivation of that information,' standing alone is not a cognizable injury."

Price is a significant victory for employers because it affirmatively rejects an employee's assertion that a simple "mathematical injury" (*e.g.*, the paystub required the employee to add up his overtime and regular hours and to ensure his overtime rate of pay is correct) is *not* the type of injury that is compensable under the statute. The Court distinguished such hypertechnical violations from cases where employees alleged (and presented evidence) of inaccurate or incomplete wage statements that required them to engage in discovery and mathematical computations to reconstruct time records to determine if they were correctly paid (*e.g.*, where wage statement inaccurately listed hours worked or failed to include hours worked and applicable hourly rate).

ASK MSK - Q&A Session:

Q: How does the *UPS v. Superior Court* decision affect my current meal and rest period policies, practices, and current litigation?

A: Simply put, if this decision stands, it will double employees' potential recovery of "premium payments" for missed meal and rest periods occurring on the same day. Of course, whether an employer is required to "ensure" that its employees take meal periods, or simply "provide" or "make them available" - issues at the heart of *Brinker Restaurant Corp. v. Superior Court* and *Brinkley v. Public Storage* - still remain unsettled. Until the California Supreme Court rules on these two landmark cases, it remains the best practice to ensure that your employees are taking their meal and rest periods every day within the specific time frames set forth in the wage orders.

Q: What information is an employer required to include in an employee's wage statement?

A: Labor Code 226(a) sets forth nine itemized requirements for a wage statement. They are:

- gross wages earned;
- total hours worked by the employee (except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the IWC);
- the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
- all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- net wages earned;
- the inclusive dates of the period for which the employee is paid;
- the name of the employee and his or her social security number (only the last four digits or an employee ID number may be shown);
- the name and address of the legal entity that is the employer; and
- all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

In addition, the employer is required to record (in ink or other indelible form) all deductions made from the payments of wages; they must be properly dated showing the month, day, and year. A copy of the wage statement or a record of the deductions must be kept on file by the employer for at least three years, either at the place of employment or at a central location within the State of California.