

WSGR ALERT

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COURT OF APPEAL RAISES THE STAKES ON BREAKS: MEAL PERIOD AND REST BREAK LIABILITY DOUBLED

Wage and hour class action lawsuits, including those focusing on meal periods and rest breaks, continue to be a source of significant exposure for California employers. Unfortunately, the specific rules are not easily navigable and often present a moving target for employers trying to develop compliant policies. In particular, employers should be aware that a California Court of Appeal as well as the U.S. District Court for the Central District of California recently held that non-exempt employees are entitled to up to two premium payments when an employer fails to provide both a meal and a rest period. In light of the high liability potential involved in these types of matters, employers are encouraged to work closely with employment counsel to ensure that their policies reflect current best practices.

In 2007, the California Supreme Court ruled in *Murphy v. Kenneth Cole Productions, Inc.*,¹ that the one hour of pay assessed for missing a meal or rest break under California Labor Code Section 226.7 was construed as a premium payment, and thus subject to a three-year statute of limitations. Following this ruling, most employers (and even the California Chamber of Commerce) understood the potential exposure for missed meal periods and rest breaks to be a *maximum* of one hour of premium pay per workday in which one or more meal periods or rest breaks were not provided. Indeed, in *Murphy*, the California Supreme Court noted that Mr.

Murphy frequently had not received *either* a meal period or a rest break, yet nowhere did the court indicate that Mr. Murphy was entitled to anything more than “*one* additional hour of pay” for any particular workday (emphasis added). A similar conclusion was reached by a federal court in *Corder v. Houston’s Restaurants, Inc.*,² stating that the “plain wording of Section 226.7 is clear that an employer is liable per work day, rather than per break not provided.”

In an apparent departure from *Murphy* and *Corder*, the Court of Appeal in *United Parcel Services, Inc. v. Superior Court* recently ruled that employers will be responsible for up to two hours of premium pay per workday for each non-exempt employee who misses both a meal period and one or more rest breaks. While the increase in potential liability may not appear to be significant when limited to a single individual, it can be dramatic when determining potential exposure limits for class claims. For example, assume an employer is held liable for failing to properly provide meal periods and rest breaks to non-exempt employees, who each earn \$25 per hour (\$52,000 per year). Exposure in this instance under Labor Code Section 226.7 could be as high as \$39,000 per employee—a total of approximately \$1.9 million for an employer with 50 employees.³

From a policy perspective, both the Court of Appeal and the U.S. District Court for the

Central District of California in *Marlo v. United Parcel Service, Inc.* reasoned that if only one hour of premium pay was available per workday for both meal periods and rest breaks, employers would be encouraged to engage in further violations once any violation had occurred. Still, the Court of Appeal in *United Parcel Services, Inc. v. Superior Court* specified that only *one* hour of premium pay was available for missed rest breaks, notwithstanding the number of rest breaks missed during the workday. The court agreed with *Marlo* that allowing an employee to recover up to *two* additional hours of pay on a single work day for meal and rest period violations—one for failure to provide a meal period and one for failure to provide a rest period—is not contrary to Labor Code Section 226.7, subdivision (b). The Court of Appeal reheard the case and recently issued a second opinion confirming its earlier conclusions regarding the interpretation of Section 226.7.

The California Supreme Court might clarify this issue when it addresses the “provide” standard for meal periods in the much-anticipated *Brinker* decision. Still, in the interim, employers should be aware of this legal development and take steps to ensure that they are able to demonstrate that they provided employees with all applicable meal periods and rest breaks. Below are some of the steps employers should consider taking to minimize exposure in this regard:

¹ *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007).

² *Corder v. Houston’s Restaurant, Inc.*, 424 F. Supp. 2d 1205, 1207 (C.D. Cal. 2006).

³ This high exposure limit assumes that each employee missed one meal period and one rest period for each workday during the three-year statute of limitations period. While this high exposure limit may be unlikely, it is important to be aware of the extent of potential liability.

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Court of Appeal Raises the Stakes on Breaks . . .

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1) Adopt a Meal and Rest Break Policy

Employers can adopt and distribute a Meal and Rest Break Policy that informs employees of their rights to take meal and rest breaks in accordance with applicable law, as well as the circumstances under which they may take them. It would be useful to include sufficient detail in the policy to adequately advise employees of their rights. If the employer adopts such a policy, it should be properly implemented. This includes, for example:

- i) Making all applicable meal periods and rest breaks available to employees and ensuring an opportunity to take them;
- ii) Posting the applicable Wage Order of the Industrial Welfare Commission (IWC) (i.e., Wage Order 4 for Professional, Technical, Clerical, Mechanical and Similar Occupations); and
- iii) Maintaining accurate time records in accordance with the applicable Wage Order.

2) Maintain Documentary Evidence That the Meal Periods and Rest Breaks Have Been Provided

In addition to having a Meal and Rest Break Policy and maintaining time records in general, it would be useful for employers to show that their comprehensive policy actually was distributed to and received by employees. Employers also should consider posting their Meal and Rest Break Policy in the same physical location as the IWC Wage Order, as well as posting it electronically. In addition, a hard copy of the policy could also be distributed to all existing and new employees. Retaining proof of this type of posting and distribution is helpful, particularly if the distributed policy includes a written acknowledgment that the employee has received and understood the policy and is expected to bring any violations to the

company's attention. Copies of these acknowledgments could then be retained in the employees' personnel files.

3) Require Employees to Record and Certify the Provision of Meal Periods and Rest Breaks on Timesheets

Employers should carefully consider additional precautions to ensure that they have evidence that employees were provided with meal periods and rest breaks. For example, it is helpful to include a location on the timesheet for employees to record their 30-minute off-duty meal periods, and to accurately certify that they have been provided with all required meal periods and rest breaks. Copies of these timesheets could be retained as potential evidence in defending litigation related to alleged violations.

4) Train Managers and Supervisory Employees

Even when an employer has evidence of having provided meal periods and rest breaks, it is clear that the employer will remain at risk if factual evidence demonstrates that employees were not *truly* permitted to take their meal periods or rest breaks (e.g., because they were not afforded a real opportunity to take the meal period or rest break, or because they were coerced into declining to take the meal period or rest break). It is therefore important that employers take affirmative steps to communicate their commitment to actually providing all required meal periods and rest breaks. Employers should train managers and supervisors to ensure that employees are permitted to take their meal periods and rest breaks, and to ensure that employees do not suffer any adverse consequences when they exercise those rights. Employers also should retain attendance records and other documents showing that managers and

supervisors received training regarding meal and rest break compliance.

While these steps to develop proof of a compliance program with respect to meal periods and rest breaks can be cumbersome, many California employers have faced or are facing expensive class action litigation over this issue. Unfortunately, these recent court cases have doubled the incentive in the wage and hour plaintiff's bar to bring this type of lawsuit.

For additional information regarding the legal requirements related to meal periods and rest breaks, and for assistance in developing an appropriate policy and practice, please contact any attorney in Wilson Sonsini Goodrich & Rosati's employment litigation practice.



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650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsg_resource@wsg.com

www.wsg.com

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