

**Ninth Circuit Holds that Employers Who Use Facially Neutral
“Rounding” Timekeeping Policies Do Not Have to Guarantee that
an Individual Employee Gains or Breaks Even on Wages Each Pay Period**
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On May 2, 2016, the Ninth Circuit issued its decision in *Corbin v. Time Warner Entertainment – Advance/Newhouse Partnership* and affirmed the district court’s summary judgment in favor of employer, Time Warner Entertainment-Advance/Newhouse Partnership (“TWEAN”) in a putative class action brought by a TWEAN employee seeking lost compensation based on TWEAN’s timekeeping policy.

Summary of the Claim.

The case turned on \$15.02 and one minute. Seriously – it did! The amount of \$15.02 represented the total amount of compensation that plaintiff, Andre Corbin (“Corbin” or “Plaintiff”) alleged he has lost due to TWEAN’s compensation policy that rounds all employee time stamps to the nearest quarter-hour. The one minute claim represented the total amount of time for which Corbin alleges he was not compensated as he once mistakenly opened an auxiliary computer program before clocking into TWEAN’s timekeeping software platform. Corbin argued that \$15.02 in lost wages and one minute of uncompensated time entitled him to relief under the Fair Labor Standards Act of 1938 (“FLSA”), 29 U.S.C. § 201, et seq., and various California state employment laws. The trial court and the 9th Circuit Court of Appeal disagreed.

Relevant Facts Re: TWEAN’s Timekeeping System and Corbin’s Employment.

TWEAN operates a call center in San Diego, California where its employees field telephone calls from customers. Until May of 2010, non-exempt employees at the facility recorded their work hours by swiping their employment badges through a wall clock mounted at the entrance to the call center. After May 4, 2010, TWEAN transitioned to an online timekeeping platform, implementing a recording system known as Kronos Connect. Kronos Connect directly links an employee’s time stamps to a program called Avaya, a “soft-phone system” that must be activated before employees can begin taking customer phone calls. When an employee logs into Avaya to begin work, he is automatically clocked into Kronos. Similarly, when an employee logs out of Avaya, he is automatically clocked out of Kronos. The “Avaya/Kronos” system was designed to help prevent off-the-clock work, blocking employees from answering customer calls unless they are properly clocked into TWEAN’s timekeeping software.

TWEAN’s compensation policies incorporate a “rounding” procedure that relies on the time stamps recorded by the Avaya/Kronos system. When an employee uses Avaya/Kronos to clock in for work, to clock in and out for lunch, and to clock out at the end of the day, the system rounds each time stamp recorded to the nearest quarter-hour. For example, an employee who clocks in at 8:07 a.m. to begin his workday would see his wage statement reflect a clock-in of 8:00 a.m., rounding his time to the nearest quarter-hour and crediting him with seven minutes of work time for which he was not actually on the clock. Similarly, an employee who clocks out at 5:05 p.m. to end her workday would see her wage statement reflect a clock-out of 5:00 p.m., again rounding her time

to the nearest quarter-hour and deducting five minutes of work time for which she was actually on the clock. At the end of each pay period, TWEAN's non-exempt employees are paid in accordance with these rounded figures.

Corbin worked for TWEAN at the San Diego call center from July 20, 2007 to June 15, 2011. He was hired as a "technical support agent," a non-exempt position paid on an hourly basis. Like all of TWEAN's non-exempt employees, Corbin's Avaya/Kronos clock-ins and clock-outs were rounded to the nearest quarter-hour. Since the implementation of the Avaya/Kronos timekeeping system in May of 2010, Corbin worked 269 shifts subject to TWEAN's rounding policy; he gained compensation or broke even in 58% of them.

However, as a result of TWEAN's rounding policy, Corbin lost \$15.02 in aggregate compensation over the period stretching from May 5, 2010 to his resignation on June 15, 2011. Additionally, Corbin once logged onto an auxiliary computer program before logging into Avaya/Kronos. Swapping this order of operations cost him one minute of compensable time, as the minute spent logging into the auxiliary program was not captured by the Avaya/Kronos timekeeping system.

The Ninth Circuit Found that TWEAN's Rounding Policy is Enforceable.

The 9th Circuit rejected Corbin's argument that TWEAN's rounding policy violated the federal rounding regulation under the FLSA, *because it is not facially neutral or neutral as applied to him*. The court pointed out that for more than fifty years, the federal regulation has endorsed the use of "Rounding' practices." Specifically 29 C.F.R. § 785.48(b) reads as follows:

"Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."

The Court also pointed out that California case law confirmed years ago that the federal rounding rule also applies to California state labor claims, so long as a company's "rounding-over-time policy is neutral, both facially and as applied."

In his lawsuit, Corbin argued that unless every employee gains or breaks even over every pay period [or set of pay periods being analyzed], an employer's rounding policy violates the federal rounding regulation. The Court disagreed and found that if this were true, the rounding method would be wholly invalidated as an acceptable form of timekeeping. The Court also said that Corbin incorrectly reads into the regulation an "individual employee" requirement and explained that "[i]f the rounding policy was meant to be applied individually to each employee to ensure that no employee ever lost a single cent over a pay period, the regulation would have said as much."

The 9th Circuit also pointed out how Corbin’s reading of the regulation completely misunderstands the purpose of a rounding policy. The Court explained that “[e]mployers use rounding policies to calculate wages efficiently; sometimes, in any given pay period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out in the long-term.” According to the Court, if Corbin’s interpretation of the statute were adopted, it would require employers to engage in the very mathematical calculations that the federal rounding regulation serves to avoid.

The Court also addressed how Corbin’s interpretation of the federal rounding regulation allowed for unfair and strategic pleading practices by plaintiffs in wage and hour claims. Essentially plaintiffs could selectively edit their relevant “employment windows” to include only pay periods in which they may have come out behind while chopping off pay periods in which they may have come out ahead. The Court gave the following example:

Hypothetical employee who came out behind in January by ten minutes and fifteen dollars, but came out ahead in February by twelve minutes and eighteen dollars. Even though, “over [this full] period of time,” this employee gained two minutes and three dollars, under Corbin’s theory, the employee could include only the month of January in his wage and hour complaint and claim that his employer’s policy deprived him of full compensation.

The court dismissed this out of hand stating that the legality of an employer’s rounding policy do not turn on “*the vagaries of clever pleading.*”

Finally, Corbin argued that because overtime minutes are compensated at a higher rate than regular-time minutes (and on a daily basis in California), the district court improperly characterized the rounding statute as neutral. The 9th Circuit rejected this argument for a number of reasons, including the fact that TWEAN’s rounding policy allows employees to gain overtime compensation just as easily as it causes them to lose it. For example, an employee who clocks in for eight hours and eight minutes of work in a day, will see those eight minutes rounded up to fifteen minutes—all of which will be compensated at the overtime rate.

Ultimately the 9th Circuit found that TWEAN’s rounding policy was facially neutral, as TWEAN rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding.

As for Corbin’s claim that he also was not paid for one minute of “log in” time, the Court found that the amount of compensable time was *de minimis* per se and thus the district court’s grant of summary judgment was proper.

Take Away.

While this appears to be a good result for employers who utilize a time clock and have a rounding timekeeping policy, that is only the case if the policy is neutral on its face and, as applied, it does not have a negative impact on employee compensation “over the long run.” Employers are advised to: a) have their rounding policy reviewed to ensure it is in fact neutral on its face; and b) conduct periodic audits to see how the rounding policy is impacting employee compensation and, if necessary, take action to ensure that employees are not being denied compensation over the long run. For assistance with this and other employment law matters, contact any of the attorneys in Weintraub Tobin’s Labor & Employment Law Group.