

Employers beware: The stakes in wage and hour litigation have been raised. The former manager of a Kenneth Cole Productions store sued his employer on a variety of wage and hour claims, including an allegation that he regularly missed meal and rest periods. The primary issue was whether the Labor Code requirement to pay an employee one hour of wages for missed meal and rest periods was a "wage" or a "penalty." If the payment was considered wages, there was potentially a four-year statute of limitations for employees to bring claims for missed meal and rest periods; if the payment was a penalty, there was only a one-year statute of limitations.

On April 16, 2007, the California Supreme Court issued its opinion in Murphy v. Kenneth Cole Productions, Inc., holding that the payment required under Labor Code Section 226.7 is a wage. The court specifically concluded that claims for wages under Labor Code Section 226.7 would, under its ruling, be subject to a three year statute of limitations. However, plaintiffs' lawyers usually include an allegation that the failure to provide meal and rest periods is an unfair business practice. Such a claim may be brought within four years of the violation.

Thus, the effect of the Kenneth Cole case is to greatly expand the potential liability for wage and hour litigation. Employees may sue for violations of meal and rest period requirements that occurred up to four years prior to the commencement of the lawsuit or administrative claim.

What Does This Mean for Employers?

In a word, employers must be *vigilant* about making sure that their employees take meal and rest periods. If an employee misses a meal or rest period on any one day, he or she is entitled to an hour of wages. This hour of wages is due immediately, meaning that it is due at the time of the next regular payroll, much like overtime. If employees do not take their meal or rest periods and are not paid the extra hour of wages, they have up to four years in which to file a lawsuit seeking the extra wages under Labor Code 226.7.

What are the Meal and Rest Period Rules?

Employees are entitled to a 30-minute, duty-free meal period after working for five hours, and a paid 10-minute rest period for four hours of work. (For more details on the particulars of scheduling the breaks, exceptions to the breaks, and so forth, please see *The Laboring Oar* at http://rutterhobbs.com/articles/laboring_oar.pdf).

How Can I Get My Employees to Take Their Breaks?

You must make sure that your supervisors are enforcing the breaks of their staff. In some environments, such as retail or the food industry, supervisors can schedule the 10-minute breaks and the meal periods. Usually, in these workplaces, the employee

needs to leave his or her workstation to take a break, e.g., leaving the cash register or floor of the restaurant. In offices it may be harder to schedule breaks, but supervisors can check on the employees to find out if they have taken their breaks, and require them to leave their workstations for the break so that it is apparent the break has taken place.

What About Employees Who Are Not Physically Under Supervision?

This situation is much harder and requires the honor system. Employees who are on the road, at a remote location or work alone in a department, should be monitored by telephone. If a dispute were to arise, a supervisor then would have a record of having regularly checked in with the employee to assure that meal and rest periods were taken, reducing the credibility of the employee's claim that he or she forgot to take breaks.

Certification of Time Records

Employees should sign their time records, under penalty of perjury, attesting to the fact that during the payroll period reflected in the time record, they took an unpaid meal period and two paid rest periods every day (assuming they have worked eight hours). When time records are kept on paper, the certification can be added to the bottom of the page and signed for every payroll period.

If the employer uses electronic time sheets, we suggest printing out a sheet for each employee at the end of each payroll period showing the time they are being paid for during that payroll period. The certification should then be placed at the bottom of the sheet (you can use a sticker with the certification preprinted on it).

For companies that use time clocks, a sticker also can be placed at the bottom of the card for the employee to sign. The certification for all kinds of time records should also include language stating that the employee also acknowledges that the time recorded is true and accurate.

What is the Effect of the Certification?

First, if an employee does not want to sign the certification because he or she did not take all required meal or rest periods, the supervisor will know right away about the issue. The employee can then be paid the one-hour wage for the days in which meal or rest periods were missed.

Second, if the employee signs the certification, but three years later brings a lawsuit claiming that he or she did not actually take meal or rest periods, the employee will have to explain why the certification was signed. It weakens the employee's credibility in a legal proceeding.

To my knowledge, the courts have not tested the use of a certification. However, it is a tool to use in defending a wage and hour case, not only for missed meal and rest periods, but also for alleged overtime wage violations.

Conclusion

The recent court decision shows, once again, that employers in California must stay on top of the myriad of laws, including wage and hour laws and regulations, in order to avoid liability.

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Olivia Goodkin has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation. She advises on the termination of employees, wage and hour laws, employment contracts and other employment issues, and she defends companies in wrongful termination lawsuits. Olivia also creates trade secret programs for companies seeking to protect their valuable intellectual property. *Olivia can be reached at ogoodkin@rutterhobbs.com, or by telephone at 310.286.1700.*

ABOUT RUTTER HOBBS & DAVIDOFF



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