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THERE'S NO SUCH THING AS A FREE (MISSED) LUNCH

By Paul D. Knothe and Tracy L. Cahill

California Supreme Court announces that payments for missed meals and breaks are "premium wages," not penalties, increasing extent of potential employer liability

The California Supreme Court in *Murphy v. Kenneth Cole Productions*, Case No. S140308 (April 16, 2007), unanimously decided that the payment equal to one hour of wages required under Labor Code section 226.7 for missed meals or breaks is not a "penalty" but a "premium wage," thereby substantially increasing potential liability to California employers.

Labor Code section 226.7 requires that an employer pay an employee one additional hour of pay at his or her regular rate for each day that he or she is not provided the meal and/or rest periods required by the applicable industry Wage Orders. Under most, but not all, Wage Orders, non-exempt employees must be provided (i) one off duty meal period of at least thirty minutes after working for no more than five hours and (ii) a ten-minute rest period for every four hours of work or major fraction thereof. (Some Wage Orders allow the waiver of a meal period under certain circumstances.) By its text, Section 226.7 does not indicate whether these required additional payments are a "wage" or a "penalty." The Supreme Court's holding that these payments are "premium wages," and not "penalties," is not mere semantics - it has real consequences that could greatly expand an employer's liability in a suit for missed meals or breaks, especially in the class action context.

First, while the statute of limitations for pursuing a "penalties" claim is only one year, a claim for unpaid wages has a **three-year** statute of limitations. Additionally, although not discussed by the Court, claims for unpaid wages may also be pursued under the state's unfair competition laws, which provide for a **four-year** statute of limitations.

Second, the *Murphy* decision will likely open the door to significant claims for additional "waiting time penalties." Under Section 203, an employer may be liable to an employee for up to thirty days of full pay if **any** unpaid wages willfully are not paid to the employee upon termination. (Thus, even if only a single meal or rest period were missed during the three or four year period prior to termination, an employee may argue for potential recovery of the one hour unpaid premium plus thirty days of full pay!)

Murphy also may lend support to claims for paystub violations under Labor Code section 226 if the payments for missed meal or rest periods under Section 226.7 are not made or properly recorded.

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Q: WHAT IF AN EMPLOYEE PREFERS TO WORK THROUGH LUNCH?

A: THE DLSE MANUAL STATES THAT IT IS THE EMPLOYER'S BURDEN TO COMPEL AN EMPLOYEE TO CEASE WORK DURING THE MEAL PERIOD. EMPLOYERS SHOULD BE AWARE THAT ACTIVITIES SUCH AS CHECKING COMPANY VOICE MAIL AND E-MAIL DURING LUNCH CONSTITUTE WORK, AND THESE WERE IN FACT THE VERY ACTIVITIES THE *MURPHY* PLAINTIFF ENGAGED IN DURING HIS LUNCHESES, AND WHICH THE CALIFORNIA SUPREME COURT CLEARLY HELD WERE NOT LEGALLY SUFFICIENT MEAL PERIODS.

Q: WHAT IF AN EMPLOYEE TAKES SLIGHTLY LESS THAN THE FULL ALLOTTED BREAK?

A: THIS IS AN OPEN QUESTION. NO PUBLISHED CALIFORNIA CASE HAS HELD THAT THERE IS A "DE MINIMIS" DEFENSE TO SECTION 226.7, WHICH WOULD RELIEVE EMPLOYERS OF LIABILITY FOR BREAKS THAT WERE TOO SHORT BY MARGINS TOO SMALL TO TRACK. THEREFORE, THE SAFER COURSE FOR AN EMPLOYER IS TO REQUIRE THAT EMPLOYEES TAKE THEIR FULL MEAL AND REST PERIODS.

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Employers may find one small comfort in the *Murphy* decision. It is an open question whether an employer may be held liable for only one premium payment on a day when an employee misses more than one meal and/or rest period. Although it did not expressly decide the issue, the Court seems to agree that only one premium payment is due for each day that one or more meals and/or rest periods are missed.

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Q: HOW CAN AN EMPLOYER PROVE THAT AN EMPLOYEE HAS TAKEN THE REQUIRED BREAKS?

A: EMPLOYERS MUST MAINTAIN A RECORD OF THE ACTUAL TIME THAT NON-EXEMPT EMPLOYEES START AND STOP EACH MEAL PERIOD AND EVERY MISSED MEAL SHOULD RESULT IN THE AUTOMATIC PAYMENT OF THE ADDITIONAL ONE HOUR PREMIUM. MONITORING REST PERIOD COMPLIANCE IS TRICKIER BECAUSE THESE BREAKS ARE TO BE TAKEN WHILE THE EMPLOYEE IS ON THE CLOCK AND THERE IS NO REQUIREMENT TO KEEP A TIME RECORD OF REST BREAKS. EMPLOYERS ARE ENCOURAGED TO REVIEW THEIR POLICIES AND MAKE SURE THAT THEY DESCRIBE THE MEAL AND REST PERIODS REQUIREMENTS. ADDITIONALLY, SUPERVISORS NEED TO BE TRAINED TO MAKE SURE THAT EMPLOYEES ARE TAKING MEAL AND REST PERIODS AS REQUIRED AND ARE NOT PRESSURED TO EITHER SKIP THESE BREAKS OR RECORD MEAL PERIODS INACCURATELY. EMPLOYERS ALSO SHOULD REVIEW STAFFING LEVELS TO MAKE SURE THAT THERE IS SUFFICIENT COVERAGE TO PERMIT EMPLOYEES TO TAKE REQUIRED MEAL AND REST PERIODS. EMPLOYERS ALSO SHOULD CONSIDER OBTAINING WRITTEN, SIGNED CERTIFICATIONS FROM NON-EXEMPT EMPLOYEES VERIFYING THAT THEY HAVE TAKEN ALL MEAL AND REST PERIODS IN COMPLIANCE WITH THE REQUIREMENTS.

This alert is provided as a service to our clients and friends.

While the information provided in this publication is believed to be accurate, it is general in nature and should not be construed as legal advice.

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