

CAN EMPLOYERS REQUIRE THEIR EMPLOYEES TO REMAIN ON CALL DURING REST BREAKS?

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Can Employers Require Their Employees to Remain On Call During Rest Breaks?

Written by Devin Rauchwerger – 2/22/17

In another important decision regarding an employer's obligation to provide rest breaks, the California Supreme Court in *Jennifer Augustus et al. v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, dealt with two issues related to employee rest breaks: 1) whether employers are required to permit their employees to take off-duty rest periods pursuant to Labor Code 226.7 and Wage Order 4; and 2) whether employers may require their employees to remain "on call" during rest periods.

Plaintiff worked as a security guard for defendant ABM Security Services. ABM required its guards to keep their pagers and radio phones on during rest periods and to remain vigilant and responsive to calls when needs arose. Plaintiff moved for summary judgment on its rest break claim.

The trial court granted summary judgment for Plaintiff, awarding approximately \$90 million in statutory damages, interest and penalties. The Court of Appeals reversed, noting that Wage Order 4, subdivision 12(A) contained no mention of an "off duty" rest period while subdivision 11(A) specifically mentioned that employees were to be "relieved of all duty" during the meal period. Based on this distinction, the Court of Appeals concluded that employers were not required to provide off-duty rest periods.

The California Supreme Court reversed, finding that employers are required to provide off-duty rest periods. In reaching this conclusion, the Supreme Court relied on the following points: 1) Labor Code section 226.7 treats meal and rest breaks the same, which would be difficult to reconcile if Wage Order 4 treated them differently; 2) Wage Order 4, subdivision 12(A)'s language authorizing that rest periods are counted as hours worked without deduction of wages is unnecessary if an employee was permitted to work during rest breaks; 3) there is no language authorizing on-duty rest periods under Wage Order 4, subdivision 12 similar to language authorizing on-duty meal periods under Wage Order 4, subdivision 11; and 4) language included in other wage orders, such as Wage Order 5, specifically provide for limited exceptions when on-duty rest breaks are authorized, which would be superfluous if the default was to permit on-duty rest breaks. The Supreme Court concluded that during rest periods, employers must relieve employees of all duties and relinquish control over how employees spend their time.

The second question was whether an employer could satisfy its obligation to provide an off-duty rest period while still requiring its employees to remain on call. The Court concluded the answer was no. Forcing employees to remain on call requires them to carry a device or make arrangements so that the employee is reachable during the break, responding when the employer seeks contact with the employee, and performing other work if the employer requests. The Court found these obligations irreconcilable with an employee's ability to use their rest break for their own purposes.

Takeaway

Pursuant to Labor Code section 226.7 and Wage Order 4, employers should be mindful that they are required to relinquish **all** control over how employees spend their break time and must relieve their employees of **all** duties, including the obligation that an employee remain on call. While the case specifically dealt with Wage Order 4, the reasoning is equally applicable to the other Wage Orders.

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