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Imperfect or Unlawful Meal and Rest Break Policies Don't Necessarily Support Class Certification in California

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In a favorable opinion for employers, the California Court of Appeal for the Second District concluded the following on December 4, 2019, in *David Cacho v. Eurostar, Inc.*:

1. An employer's meal break policy that is silent as to certain requirements but is otherwise compliant with California law *does not* support class certification in the absence of evidence of a uniform unlawful policy or practice.

2. A claim for failure to provide rest breaks is *not* suitable for class certification where the employer has a uniform written rest break policy that is unlawful on its face but has not been applied to employees in practice.

Written Policies Alone Did Not Support Class Certification

On October 19, 2016, plaintiffs David Cacho and Regina Silva moved to certify eight subclasses on behalf of allegedly similarly situated current and former nonexempt Eurostar employees in California. In pertinent part, this included four meal break subclasses and a rest break subclass, as well as an off-the-clock subclass. In large part, the plaintiffs supported their motion in this respect by relying on certain versions of Eurostar's employee handbook, which included the company's written policies on meal and rest breaks.

The plaintiffs argued that Eurostar's 2007 and 2013 meal break policies did not include language confirming that employees were entitled to take their first meal period within their first five hours of work and a second meal period before their tenth hour of work, as required under the Supreme Court of California's 2012 *Brinker* decision and California law.

The plaintiffs also argued that Eurostar's 2007 rest break policy was unlawful on its face because it said employees were entitled to a first rest break after four hours (instead of three-and-a-half hours) and because it did not explicitly authorize a third rest break for shifts over ten hours. The rest break policy also stated that if a rest break was taken at a work station, "a professional atmosphere must

be maintained at all times." The plaintiffs argued that this condoned rest break interruptions.

No Common Evidence of Policy Application in Practice

The trial court denied class certification, finding that the plaintiffs had not demonstrated that common questions of law or fact predominated over individual inquiries. In sum, the trial court found that Eurostar's written policies, *without additional evidence of their application to the putative class in practice*, did not evidence a uniform policy that violated California law, rendering class treatment inappropriate. Additionally, although Eurostar's 2007 rest break policy was facially defective, the trial court observed that the plaintiffs had failed to present evidence that Eurostar, which had corrected the rest break policy in its 2013 handbook, actually applied the unlawful written policy in a manner that resulted in failing to provide legally compliant rest breaks on a class-wide basis.

On appeal, the appellate court affirmed the lower court's decision.

Trial Courts May Consider Evidence of Wage and Hour Violations at Class Certification

In affirming the trial court's decision, the Court of Appeal noted that, following *Brinker*, appellate courts have emphasized that in assessing whether common issues predominate for purposes of class certification, the focus of a trial court should be on a plaintiff's theory of liability, rather than on the case's merits or defenses. It noted, however, that "[i]n cases where there is a dispute as to whether there is a uniform unlawful policy . . . it may be necessary for the trial court to weigh the evidence at the certification stage for the purpose of making the threshold determination whether there is substantial evidence of a uniform policy or practice for the purpose of determining whether common issues predominate." This is true "[e]ven if the existence of a uniform policy is not in dispute," because a "trial court may consider the evidence to determine whether a defendant's liability under the policy is susceptible to common proof."

As such, the Court of Appeal concluded that the trial court did not improperly reach its determination by prematurely considering the merits of the case. Instead, the trial court acted properly when it considered evidence, such as the parties' "testimony and statistical evidence," to determine whether the plaintiffs' attempt to prove Eurostar's liability at trial would involve either "common or individual issues." Because the evidence submitted by the plaintiffs to support their motion for class certification showed that individual questions predominated when considering liability, class certification was not appropriate.

The Allegations of Off-the-Clock Work Were Not Suited for Class Treatment

Aside from the meal and rest break issues that formed the heart of the Court of Appeal's ruling, the court also held that the plaintiffs' off-the-clock subclass was not suitable for class treatment. Unlike the meal and rest break claims, Eurostar's employee handbooks expressly prohibited off-the-clock work, and the plaintiffs acknowledged that they were aware of this policy. Instead, the plaintiffs based their off-the-clock claim on an alleged practice by Eurostar of chronic understaffing and resistance to authorizing overtime—allegations that were not corroborated by other witnesses or evidence. In light of the employer's compliant written policy and the evidence submitted by the parties, the trial court determined that the plaintiffs had failed to present substantial evidence that off-the-clock liability could be established through common proof, rendering class treatment inappropriate. The Court of Appeal affirmed, finding that individual issues predominated over common issues for the purposes of class

certification.

Key Takeaways

While regularly auditing policies to ensure compliance with California and federal laws may be helpful, employers may want to keep in mind that meal and rest break policies that are silent as to certain legal strictures, or even contravene the law in some respects, are not, in and of themselves, sufficient to certify a class of current and former employees, in the absence of common evidence showing that the policies have actually been *implemented* in an unlawful manner. Thus, the onus will be placed more heavily on plaintiffs to demonstrate, based on common evidence, that the employer actually applied these policies unlawfully in practice to satisfy the commonality and predominance requirements for class certification.

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