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California Supreme Court Issues Significant Meal Period Decision

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Taking a meal break in California is no simple affair. Culminating seven years of litigation involving one California employer, on February 25, 2021, the Supreme Court of California issued its unanimous opinion in *Donohue v. AMN Services, LLC*, resolving two questions regarding California meal periods. The court's opinion also raised, but did not resolve, questions regarding meal period compliance that will likely challenge employers and litigants for years.

Rounding Time Punches

Rounding time punches has historically been a common timekeeping practice. Many employers will round time punches to the nearest five minutes, or to the nearest one-tenth or quarter of an hour. Is that practice allowed for clocking out and in from meal breaks? No. The California supreme court held that rounding may not be applied to meal periods.

The supreme court reasoned that the timing of meal periods are precise obligations, designed to ensure the welfare of workers. "The precision of the time requirements set out in Labor Code section 512 and Wage Order No. 4—'not less than 30 minutes' and 'five hours per day' or 'ten hours per day'—is at odds with the imprecise calculations that rounding involves," the court stated. "The regulatory scheme that encompasses the meal period provisions is concerned with small amounts of time."

The court illustrated the issue with an example showing how rounding could obscure a meal period violation. Under AMN's rounding policy, "a 21-minute lunch from 12:04 p.m. to 12:25 p.m." would have been rounded to "a 30-minute lunch from 12:00 p.m. to 12:30 p.m." AMN considered the rounded meal period compliant and the employee did not receive a meal period premium—even though the actual meal period was substantially less than 30 minutes. Similarly, a lunch that actually began after the end of the fifth hour of work could be rounded to start before the fifth hour ended—and no meal period premium would have been paid. As a result, the court concluded the rounding policy "[did] not always trigger premium pay when such pay is owed."

The California Labor Code "requir[es] premium pay for any violation [of the timing requirements], no matter how minor." The court concluded that "[a] premium pay scheme that discourages employers from infringing on meal periods by even a few minutes cannot be reconciled with a policy that counts those minutes as negligible rounding errors."

Rebuttable Presumption of Liability Based on Meal Period Records

In its 2012 *Brinker Restaurant Corp. v. Superior Court* decision, the supreme court held that an "employer is not obligated to police meal breaks and ensure no work thereafter is performed." The court held that an employer satisfies its obligation to provide a meal period "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break." But in litigation, this can become a problem of proof. If the time records show a 25-minute break, how does a court decide if that break was shortened at the employer's behest, or by the employee's personal choice? The supreme court addressed that question by declaring that a rebuttable presumption of liability arises.

Specifically, the court determined that time records showing noncompliant meal periods (missed, delayed, or short) raise a rebuttable presumption of meal period violations at summary judgment, borrowing from a concurring opinion in the 2012 *Brinker* decision. The employee can raise the presumption of liability for meal period violations by pointing to time records that show noncompliant meal periods. No other showing is required. The court pointed out that liability is not automatic. The employer has an opportunity to rebut this presumption. Employers may rebut the presumption by presenting evidence that (1) meal period premiums were paid or (2) employees were provided compliant meal periods during which they voluntarily chose to work (resulting in a delayed, short, or missed meal period record in the timekeeping system). The court reiterated *Brinker*'s holding that an employer is not liable if it provides a compliant meal period, but "the employee chooses to take a short or delayed meal period or no meal period at all."

Rebutting the Presumption—Payment of Meal Period Premiums

Where time punch records show a missed, short, or late meal period, one option is for the employer to provide proper compensation by paying the applicable meal period premium. Some employers program their timekeeping systems to automatically pay premiums each time a short, delayed, or missed meal period is recorded. Employers may want to verify that timekeeping systems are properly programmed to ensure that the "precise time requirements" of the California Labor Code and wage orders are reflected accurately. Even small violations might give rise to an obligation to pay the premium, in light of the court's observations that the "regulatory scheme that encompasses the meal period provisions is concerned with small amounts of time" and premium pay is due "for each workday that the meal period is not provided—regardless of the extent of the violation."

Rebutting the Presumption—Electronic Meal Period Attestations

Employers may also rebut the presumption by providing evidence that employees were provided compliant meal periods, but they voluntarily chose to work, skip, shorten, or delay the break. The court noted that "when an employee recorded a missed, short, or delayed meal period, a dropdown menu" on the company's timekeeping system "prompted the employee to choose one of three options: (1) 'I was provided an opportunity to take a 30 min break before the end of my 5th hour of work but chose not to'; (2) 'I was provided an opportunity to take a 30 min break before the end of my 5th hour of work but chose to take a shorter/later break'; (3) 'I was not provided an opportunity to

take a 30 min break before the end of my 5th hour of work.'"

The court observed that this system allows "employees to indicate whether they were provided a compliant meal period but chose to work," by selecting either the first or second option on the dropdown menu. In addition, "the system triggered premium pay for any missed, short, or delayed meal periods due to the employer's noncompliance," as indicated by the third option. The court concluded this system "would have ensured accurate tracking of meal period violations if it had simply omitted rounding." (Due to the rounding of meal period time punches, employees were not alerted by the system to some short or delayed meal periods, and therefore were not prompted to record a response option indicating whether the short or late meal period was voluntary or involuntary. As a result, no evidence was collected via the attestation system to rebut the presumption of liability.) Thus, this electronic attestation model (minus the rounding) appears to have been sanctioned by the court and the electronic responses would be sufficient to rebut the presumption of liability by showing that employees were provided compliant meal periods during which they voluntarily chose to work.

Rebutting the Presumption—Other Evidence

The court did not state that this dropdown menu approach would be the only way to rebut a presumption of liability. The court suggested that when defending meal period litigation, "[r]epresentative testimony, surveys, and statistical analysis" may also be used to show employees were provided compliant meal periods during which they voluntarily chose to work, and thereby rebut the presumption. However, the court did not provide practical guidance on how such evidence might be used or what quantity or quality of evidence would be sufficient to overcome the presumption. This is another question that will likely be litigated in the coming years. In light of this ruling, California employers will undoubtedly consider various ways to collect evidence that an employee voluntarily waived an offered meal period on any given occasion. Regardless of the approach, in light of the court's ruling, a renewed degree of diligence may be called for.

Takeaways

In light of the court's decision, California employers may want to refrain from rounding meal break time punches. The start and end times of meal periods require accurate tracking in the timekeeping system.

Employers may also want to consider implementing timekeeping systems that can flag missed, short, or late breaks, along with systems to follow up with employees to document the reasons for any deviation. Employers may decide to create multiple ways to collect evidence of each employee's compliance with company meal period policies.

The court's ruling does not offer an easy path for employers. Meal period litigation is likely to continue unabated for years to come.

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