

Employees on Rest Breaks Must Be Off Duty, California Supreme Court Rules

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A class of security guards received an early holiday present from the California Supreme Court on December 22.

The Court ruled that California law requires employees on rest breaks be relieved of all duties. It reinstated Los Angeles Superior Court Judge John Shepard Wiley's Order granting summary judgment and awarding approximately \$90 million in damages to the plaintiffs and the class on grounds the security firm violated California law by requiring guards to carry phones/radios and remain on call during rest breaks. *Augustus v. ABM Security Services, Inc.*, No. S224853, 2016 Cal. LEXIS 9627 (Dec. 22, 2016).

Background

The company employs thousands of security guards in commercial, industrial, and office environments throughout California. In 2005, the plaintiffs filed a class action complaint in Los Angeles Superior Court alleging the employer failed to provide uninterrupted rest periods as required by law.

The company acknowledged in pretrial discovery that it required guards on rest periods to keep their radios and pagers on, "remain vigilant," and respond when needs arose, such as escorting tenants to parking lots, notifying building managers of mechanical problems, and responding to emergency situations.

The trial judge ruled the company's on-call requirement violated California Labor Code and Wage Order as a matter of law and awarded the plaintiffs damages.

The court of appeal reversed the lower court in December 2015, concluding that simply being "on-

call” — where the guards were otherwise permitted to engage, and did engage, in various non-work activities — was not “performing work” in violation of the state rest break rules. According to the court of appeal, “The issue is whether simply being on call constitutes performing ‘work.’ We conclude it does not.” The California Supreme Court saw it very differently.

Applicable Law

Under California law, employers must provide employees meal periods and rest periods. Lab. Code, §§ 226.7, 512; Industrial Welfare Commission (“IWC”) Wage Order No. 4-2001, Cal. Code Regs., tit. 8, § 11040. An employee who works more than three-and-one-half hours per day must be permitted to take a paid 10-minute rest period (during which the employee should not be required “to work”) every four hours of work or major fraction thereof.

California Supreme Court’s Decision

A 5-2 majority of the Supreme Court, based on the plain language of the relevant Wage Order, concluded the employer requirement that guards keep their radios and pagers on, remain vigilant, and respond if the need arose during rest breaks failed to satisfy the employer’s obligation to provide duty-free rest breaks. In reaching this decision, the Court gave an everyday construction to the words of the Wage Order. “California law requires employers to relieve their employees of all work-related duties and employer control during 10-minute rest periods,” the Court said. In other words, *“A rest period, in short, must be a period of rest.”*

The Court rejected the company’s argument that the guards did not perform the same tasks during a rest period that they performed during active duty. For example, the company noted, the guards did not patrol the premises, greet visitors, monitor or direct parking, raise or lower the flag, or restrict the movement of persons or property. Rather, unless specifically called to duty, the guards were free to engage in personal activities during their breaks, such as reading, surfing the internet, and attending to personal business.

The Court said:

The reference to a “rest period” in the wage order evokes, quite plainly, a period of rest.... The most reasonable inference we can draw from the wage order and its context is instead that we should give the term its most common understanding — a reading consistent with requiring that employers authorize off-duty rest periods.

The Court found support in the language of the Wage Order, which requires that the time be counted as hours worked during rest breaks. It explained, this provision makes sense only if employees are relieved of all duties. “If employers could require employees to remain on duty during breaks,” the Court observed, “there would be no reason for the IWC to prohibit deduction of wages for rest periods; time spent performing duties would plainly require payment of wages.”

The Court also found support in what it called the “practical realities” of rest periods. Although requiring employees to remain on the premises or nearby during rest breaks is insufficient to establish employer control, a policy requiring employees to carry a device or otherwise make arrangements so the employer can reach the employee during a break, respond when the employer

seeks contact with the employee, and perform other work if the employer so requests is “irreconcilable with employees’ retention of freedom to use rest periods for their own purposes.”

Dissent

Justices Leandra Kruger and Carol Corrigan dissented. They concluded the obligation to carry a phone or a pager while on call is not “work,” and thus the employer’s on-call policy did not violate rest break rules.

This decision emphasizes California employers’ obligations to provide *duty-free* rest breaks, with no exceptions. The Court explained that the exception under Wage Order 4, subdivision 11(A), for on-duty meal period is exceedingly narrow. The on-duty meal period exception applies only when (1) the nature of the work prevents an employee from being relieved of all duty and (2) the employer and employee have agreed, in writing, to the on-duty meal period. Even then, the employee retains the right to revoke the agreement at any time.

Likewise, while employees may choose to *waive* meal periods in certain circumstances, they cannot waive rest breaks.

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