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Court Rules On Premium Payments For Denied Meal And Rest Periods

By Colin Calvert (Irvine)

California law regulates meal and rest periods, requiring employers to provide their employees an unpaid 30-minute meal period after working for five hours, and a second meal period after 10 hours, with a 10-minute rest period for each four hours of work or major fraction thereof. Employees required to work through their breaks are entitled to a premium payment subject to a limit each day.

Although both the California Labor Commissioner's enforcement position and a federal decision interpret the law to require a maximum of one premium per day for each category of violation (maximum of two), this limit has been disputed by employers.

A California Court of Appeals decision recently concluded that state law permits up to two premium payments per work day, per employee, one each for meal period and rest period violations. The court rejected the employer's argument that the law provides no more than a single premium payment per work day, even if the employer may have failed to provide both a meal *and* rest period in a particular day. *UPS, Inc. v. Superior Court (William Allen)*.

Background

The law at issue provides that

- no employer shall require an employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission (IWC); and

- if an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

Rather than addressing the meal and rest period requirements in one section, the IWC issued Wage Orders in 2000 that address meal periods and rest periods in separate sections. Due to the ambiguity in the statute, the parties disputed whether the regulation permitted a maximum of two premium payments per work day or just one.

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New Ruling Makes It More Difficult To Avoid Seventh-Day Premium

By Grace Y. Horoupian And Matthew C. Sgnilek (Irvine)

A recent California appellate decision precludes California employers from defining workweeks under a recurring work schedule that avoids payment of the "seventh day" premium. *Seymore v. Metson Marine.*

Metson Marine provided crew members and vessel operations for offshore oil recovery. Its crews operated on two-week rotational hitches, alternating between 14 consecutive workdays and 14 consecutive rest days. Each 14 consecutive workday hitch started on a Tuesday at noon and ended 14 days later on a Tuesday at noon.

The California Labor Code requires premium compensation of time and one-half of the regular rate of compensation for the "first eight hours worked on the seventh day of work in any one workweek." All hours in excess of the first eight hours are paid at double the regular rate of pay. The Labor Code defines a "workweek" as any seven consecutive days, starting with the same calendar date each week.

To avoid paying premium compensation, Metson defined its workweek as beginning on Monday at midnight and ending at 11:59 p.m. the following Sunday. Thus, with shifts beginning on Tuesday at noon, Metson employees worked 6 days in week one, seven days in week two and two days in week three. On that basis the employees were paid a single seventh day wage premium at the end of the second week.

Metson's scheduling methods were no doubt undertaken in good faith. Previous guidance by the California Labor Commissioner had suggested that employers could, in fact, avoid the seventh-day premium by such creative scheduling from week to week. But the Metson employees argued that seventh-day-premium pay must be calculated based on the fixed and regular Tuesday schedule that they were working, and that Metson's "artificial" workweek designation completely undermined the protections of the Labor Code. The court agreed with the employees, holding that the clear intent of the Labor Code is to provide premium pay for employees who are required to work a seventh consecutive day in a fixed and regularly occurring workweek. Metson's employees should have been paid two seventh-day-premium wages when working their consecutive 14 days.

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Court Clarifies Meaning Of "Commissions"

By John K. Skousen (Irvine)

California Industrial Welfare Commission (IWC) Wage Orders exempt from California's overtime-compensation requirement "any employee whose earnings exceed one and one-half (1 ½) times the minimum wage if more than half of that employee's compensation represents commissions." State courts have looked to the Labor Code section that addresses automobile dealers, in defining "commissions," as: "compensation paid to any person for services rendered in the sale of such employer's property or services and *based proportionately upon the amount or value thereof.*" (Italics added.)

Seeking to determine whether the exemption applies in specific cases, much litigation has occurred regarding what constitutes a wage paid in proportion to the "amount or value" of a product or service sold. Some cases focused on "value," holding that this meant a percentage of the *sales price.* But the law, until recently, has remained unsettled on the issue of whether a payment based upon the "*amount"* or number of items sold, rather than the percentage of the sales price, could qualify as a "commission." To complicate the matter, the California Labor Commissioner's enforcement guidelines treated any method of payment other than "*percentage of a sale"* as a non-commission. This issue was settled finally by an appellate court decision, which flatly rejected the Labor Commissioner's internal guidelines as a misreading of the law. *Areso v. CarMax, Inc.*

In *Areso*, Car Max paid its automobile salespersons a fixed payment of $150 per vehicle sold, regardless of the price of the vehicle. Due to fear of litigation, the employer later came up with a fluctuating percentage formula, providing for approximately the same amount per vehicle sold. Leena Areso, an auto salesperson, sued, contending that she was not being paid a "commission" as defined by the law. The trial court disagreed and ruled in favor of CarMax; the appellate court affirmed.

Rejecting the employee's argument that a uniform payment per vehicle sold would violate the law's "proportionality" test, the court held that "[p]aying salespeople a uniform fee for each vehicle [sold] is proportionate – a one to one proportion. The compensation will rise and fall in direct proportion to the number of vehicles sold."

The issue in CarMax was straightforward. But due to the complexity of compensation pay plans, you should consult with legal counsel to assure that your employees' incentive compensation for sales, as structured and paid out over time, qualifies as a "commission" within the meaning of California's exemption from overtime, and that all other requirements for the exemption have been satisfied.

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A Change Of Direction

This case follows other decisions suggesting that courts may be increasingly reluctant to sanction an employer's creative scheduling of workweeks to avoid paying premium compensation. The *Metson* decision comes on the heels of another decision concerning graveyard shifts. The decision *In re Wal-Mart Stores*, held that employers cannot count hours worked before midnight as one day and all hours worked after midnight as another day solely to elude overtime compensation.

In light of these recent decisions, employers should be sure that their workweek and workday definitions are in compliance with California law. Attempting to evade premium compensation by using a workweek or workday definition that does not line up with the pattern of regular and recurrent scheduling could expose your company to liability.

Of course, defenses to workweek definitions should still exist in cases where schedules that avoid some overtime premiums are not recurrent but vary due to changing workload demands. Because these issues can be complex, you may need to seek legal counsel to determine if your company's definition for workweeks can withstand scrutiny when viewed in light of your regular schedule.

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The Appellate Court's Decision

The appellate court, in a unanimous three-judge decision, relied upon *Marlo v. United Parcel Service, Inc*., an unpublished 2009 federal court decision, addressing the same argument. The court in *Marlo* determined that two premium payments were authorized where an employee was denied a rest period *and* a meal period. The decision employed the same analysis as the court in *Marlo* and reached the same conclusion.

Conclusion

Some aspects of the meal and rest period laws still remain unsettled, including the meaning of "providing" a meal period and the timing of when meal periods should be taken during the work day. Those issues should soon be addressed by the California Supreme Court.

In the meantime, you can help avoid potential litigation by ensuring that all employees are provided with a 30-minute duty-free meal period if they work more than five hours in a day, and a second meal period if they work more than 10 hours in a day. Questions regarding timing of meal periods during the day are best directed to legal counsel.

To help avoid disputes, meal periods should be provided, where possible, before an employee works more than five hours in a typical eight-hour work day. Employers seeking to honor an employee's request for a meal-period waiver or an on-duty meal period agreement should first consult with legal counsel.

Finally, be mindful of rest period requirements, providing all employees with the opportunity to take a 10-minute paid rest period for every four hours worked.

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