

December 27, 2016

On-Call Rest Periods Violate Wage Order

In a much-watched case the California Supreme Court held that “on-call” rest periods are impermissible under Labor Code Section 226.7 and Industrial Welfare Commission (IWC) wage order no. 4-2001 (Wage Order 4).

In *Augustus v. ABM Security Services, Inc.* plaintiffs worked as security guards for defendant ABM Security Services, Inc. (ABM). ABM employs security guards at residential, retail, office, and industrial sites. ABM guards’ primary responsibilities are to respond to emergency and life and safety situations; provide physical security for the building, its tenants, and their employees; and observe and report unusual activities.

Plaintiffs alleged that a requirement of employment at ABM was for guards to keep their pagers and radio phones on even during rest periods and to remain vigilant and responsive to calls when needs arose. Thus a guard might be required to escort tenants to parking lots, notify building managers of mechanical problems, and respond to emergency situations.

Rest Period Requirement

The Court first affirmed that Wage Order 4 requires that employers authorize and

permit employees to take off-duty rest periods of 10 minutes for every four hours worked. This is consistent with Labor Code section 226.7 which prohibits employers from “require[ing] any employee to work during any meal or rest period.” If either the requisite meal period or rest period is not provided, an employer is required to furnish the employee with premium pay.

The Court explained that the applicable standard for rest periods is the same for meal periods: employers must relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time, citing its own decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-1039. Therefore, that employees must be relieved of all duties now clearly applies to both meal and rest periods.

On-Call Rest Period Not Allowed

While acknowledging that neither Wage Order 4 nor section 226.7 offers clear guidance on whether on-call rest periods are permissible, the Court found it difficult to reconcile the practice of compelling employees to remain on call with the requirement to relieve employees of work duties and employer control during rest periods. It found that the duties expected

of ABM guards during rest periods are substantially similar to their ordinary job duties.

The Court noted that employers have the option to provide employees with another rest period to replace one that was interrupted, or pay the premium pay. Such options, it noted, should be the exception rather than the rule to be used in unexpected circumstances.

As Justice Kruger argued in her dissent, with which Justice Corrigan concurred, the majority took an unnecessarily harsh stance: “a bare requirement to carry a radio, phone, pager, or other communications device in case of emergency does not constitute work” and does not justify a \$90 million judgment. She noted that the record contains no evidence that the rest period of any of the plaintiffs was actually interrupted by a call to return to duty. And if any guard’s rest period was, in fact, interrupted, he or she would have been permitted to take a full rest period after the situation was resolved.

Justice Kruger also noted that the Department of Labor Standards Enforcement has held in an opinion letter that an employee required to carry a pager is not deprived of a duty free meal period unless he or she is called upon to respond to the pager.¹

¹ DLSE Opinion Letter No. 1992.01.28 (January 28, 1992), accord, DLSE Opinion Letter No. 1996.07.12 (July 12, 1996).

The lesson from this decision is that employers may not, as a rule, require employees to be on call during rest periods. But if the employer finds it necessary to interrupt an employee’s rest period the remedy is to make the premium payment or provide another rest period. The majority decision also notes that wage orders allow employers to request exemptions from the obligation to provide rest periods.

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