

# California Court Provides Additional Guidance on Timekeeping Rounding, Grace Period Claims

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Under California law, employers' policies may permit rounding of employee timecard entries to the nearest tenth of an hour (six minutes), the Fourth Appellate District of the California Court of Appeal has affirmed. *Silva v. See's Candy Shops, Inc.*, No. D068136 (Dec. 9, 2016, published Jan. 5, 2017) ("*See's Candy II*"). The Court also offered guidance on the circumstances that comply with the timekeeping standards.

In 2012, in a published opinion on these subjects in a case of first impression, the Court held time-rounding is legal under California law and suggested grace periods also are lawful. *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 ("*See's Candy I*"). *See's Candy II* provides additional guidance to employers who utilize rounding or grace periods to calculate employees' wages and to litigators and judges who have struggled to apply these rules at the summary judgment stage of a case.

Initially, *See's Candy II* was ordered to remain unpublished in official reporters, making it unavailable for reliance as precedential authority. However, in response to requests from employers' groups, including the California Employment Law Council, the U.S. Chamber of Commerce, and the California Chamber of Commerce, the Court agreed to publish the opinion.

## Background

The employer used a timekeeping software system to keep track of its employees' working hours. The system required employees to punch in at the beginning and punch out at the end of their shifts. Two company policies provided for adjustments to the timecards. Under the first, punches in and out would be round up or down to the nearest tenth of an hour ("rounding policy"). Under the second, if an employee voluntarily punched in or out up to 10 minutes prior to or after his or her scheduled work time, the employee was not permitted to work or paid during that grace period; but if the employee performed work during the grace period, a manager would be required to make the timecard adjustment so the employee would be paid ("grace period policy").

A former employee, representing a certified class of current and former employees, challenged the company's timekeeping policy of rounding to the nearest tenth of an hour. She alleged loss of compensation in violation of employees' rights under the California Labor Code to full compensation for work performed.

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### *See's Candy I*

In *See's Candy I*, the Court decided rounding is lawful under California law, provided the effect of the policy, over time, does not favor the employer or employee, and does not result in underpayment to employees for their work. Additionally, although the Court suggested “grace periods” also were legal under California law, the issue was not squarely before it in *See's Candy I*. Therefore, litigants could contend the decision was not precedential on that point. The holding in *See's Candy I* was set within the procedural context where the employer was challenging a summary adjudication dismissing its “rounding defense” because the trial court had concluded erroneously that rounding was unlawful. The Court reinstated the employer’s rounding defense based on its conclusion that rounding is lawful. *See's Candy I*, however, did not discuss whether or how an employer can obtain summary adjudication on a plaintiff’s claim by proving the employer’s rounding defense is meritorious. The Court also did not provide comprehensive guidance on how to determine if a rounding policy is “neutral over time,” or how to analyze the lawfulness of an employer’s grace period policy.

Following the Court’s remand to the trial court after deciding *See's Candy I*, the employer filed a motion for summary adjudication on the grounds that its rounding and grace period policies had been implemented lawfully. The trial court granted the employer’s motion, finding the employer had presented undisputed evidence its employees were fully paid for their work. The employee appealed.

Until now, no published opinion has expanded upon or clarified California law on rounding and grace periods since *See's Candy I*. The dearth of authority led to differing court approaches and confusion among litigants and courts on how to apply these rules when an employer moves for summary judgment based on the legality of its practices.

### *See's Candy II: Rounding*

On the issue of rounding, the Court relied on the employer’s expert reports submitted as evidence and found they were sufficient to satisfy the employer’s burden on summary adjudication.

The Court noted the expert reviewed all of the time entries at issue, including the actual times employees in the class punched in or out, as well as the rounded time entries used for payroll purposes. The expert then calculated the length of the employees’ shifts using the rounded and actual time entries. After computing the differences in the duration of the actual and rounded shifts, the expert found in two separate studies the employer’s rounding policy was statistically unbiased against employees. In other words, the differences between pay based on rounded and unrounded time over the years analyzed were statistically meaningless. In addition, the Court said the expert had properly accounted for overtime and concluded employees as a group had an aggregate *de minimis* gain in time. Therefore, the Court found summary adjudication on the plaintiff’s rounding claims was proper.

The Court also briefly addressed the employee’s failure to rebut the employer’s evidence, but it did not specifically address what evidence could have raised a triable issue of fact. The trial court had sustained objections to the expert report submitted by the employee. On appeal, the employee failed to challenge the trial court’s evidentiary rulings. As a result, the Appellate Court did not consider the employee’s contrary evidence. (The Appellate Court, however, addressed some of the report’s shortcomings.)

### *See's Candy II: Grace Periods*

The trial court granted summary adjudication on the employee’s grace period claims because the employer presented evidence in the form of declarations and exhibits showing that:

1. the employees’ use of grace periods was voluntary;
2. the employer had a policy that prohibited employees from working during grace periods;

3. the employer monitored employees during the grace period to ensure no work was performed;
4. the employer exercised no control over employees during their grace periods; and
5. if any work was performed during a grace period, the employer took reasonable steps to ensure that proper payment was made for work performed.

Many employees submitted declarations stating that during grace periods, they engaged in purely personal activities, such as leaving the premises to run errands, drinking coffee, putting on makeup, and making personal calls on their phones.

In response to the employer's evidence, the employee referred to her own deposition testimony where she testified that employees would come into the workplace and immediately begin working. However, the employee admitted she did not know if the employees were utilizing a grace period or if they had not been paid for all of their time worked. The Court found that, without this information, the employee lacked any basis to challenge the employer's evidence.

On these facts, the trial court found, and the Appellate Court agreed, the employer satisfied its burden on summary adjudication.

### Standards on Motions for Summary Adjudication

*See's Candy II* also provided additional useful guidance to litigants seeking summary adjudication. Attorneys and courts generally know that summary adjudication will be granted only if it will completely dispose of a cause of action. It is less known that summary adjudication also may be directed to part of a cause of action where that part of the cause of action states a separate theory of liability. *See's Candy II* revived a case little relied upon by attorneys and courts: *Catalano v. Superior Court*, 82 Cal.App.4th 91 (2000). *Catalano*, and now *See's Candy II*, can be cited for the proposition that a group of related paragraphs within a cause of action stating a separate theory of liability may be attacked by a motion for summary adjudication. Thus, these two decisions can be used to surgically address portions of a complaint that jumble separate claims or legal theories of liability into a single "count" or "cause of action."

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Employer rounding and grace period policies are increasingly the subject of class action and California Private Attorney General Act ("PAGA") claims. (PAGA authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for California Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.)

While *See's Candy II* provides guidance on the legality of these employer policies, employers should evaluate their practices carefully to ensure compliance and to determine whether the policies are worth the risk of litigation.

If you have any questions about *See's Candy II* or your policies, please contact the Jackson Lewis attorney with whom you regularly work.

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