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No Rest Period Violation for Security Guards On Call during Breaks, California Court Rules

By Susan E. Groff on February 10, 2015

Reversing a trial court's awarding of a $90 million judgment in a class action case for alleged rest period violations under California law, the California Court of Appeal has ruled that a security company had provided its security guards with proper rest periods, even though they were required to remain "on call" during those breaks. *Augustus v. ABM Sec. Services, Inc.*, Nos. B243788 & B247392 (Cal. Ct. App. Jan. 29, 2015). Significantly, the Court ruled that remaining on call during rest breaks does not "constitute performing work" under Section 226.7 of the Labor Code, which mandates that during rest breaks, an employee not be required "to work," and the corresponding wage order.

Background

Jennifer Augustus was a security guard for ABM Security Services, Inc. The responsibilities of Augustus and other ABM security guards (collectively, the "guards") included providing physical security for their assigned premises and responding appropriately to emergency or safety situations. Guards greeted visitors, raised and lowered flags on the premises, monitored traffic, patrolled the buildings, escorted employees and visitors to their cars, and controlled access to the premises. The company provided the guards with rest periods during which the guards must keep their radios and pagers on, remain vigilant, and respond when needs arose. They were otherwise permitted to engage, and did engage, in other activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet.

The guards filed a class action suit against the company, alleging that ABM's failure to completely relieve the guards of all duties during their rest periods violated Section 226.7 of the California Labor Code.

The trial court agreed and granted the guards' motion for summary judgment. It concluded that an employer must relieve its employees of all duties during rest periods, including while they are on call. The court entered a judgment of approximately $90 million in damages, interest, penalties, and attorney's fees against the company. The company appealed.

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 shall not be required "to work," every four hours of work or major fraction thereof. An employee who works at least five hours also must be given a 30-minute unpaid meal period, during which the employee must be "relieved of all duty," if the meal period is not to be counted as time worked.

On Call Not the Same as Working

Before the appeals court, the guards argued the company failed to provide lawful rest periods because they must remain on call and respond to calls at all times; thus, their rest periods were indistinguishable from the rest of their workday.

The appellate court acknowledged the guards' argument had "a certain appeal," but it rejected the argument because Section 226.7 does not require that a rest period be distinguishable from the remainder of the workday. Section 226.7 mandates only that an employee not be required "to work" during breaks. The Court observed that "even if an employee did nothing but remain on call all day, being equally idle on a rest break does not constitute working."

Further, the Court pointed out the guards did not perform the same tasks during a rest period that they performed during active duty. For example, they 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. Thus, the Court determined that "remaining available to work is not the same as performing work."

The Court also found the language in Wage Order No. 4 did not support the guards' contention. In Wage Order No. 4, the IWC directed that employees be "relieved of all duty" for meal periods in order for the meal period to be unpaid. However, the IWC did not include a similar requirement in the rest period provision, which the Court found indicated the IWC did not intend to impose such a requirement. Further, all rest periods must be paid, suggesting they normally are taken while on duty and subject to employer control. Accordingly, the Court determined that Wage Order No. 4's language did not support the guards' claim.

Last, examining the meaning of "work" as used in the Labor Code and Wage Order No. 4, the Court concluded the prohibition against requiring an employee to "work" during a rest period means an employer cannot require an employee to engage in some action for its benefit. However, as on call status is "a state of being, not an action," the Court found the prohibition does not extend to "the status of remaining available to work." Accordingly, the Court reversed the judgment in favor of the guards and returned the case to the trial court.

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It remains to be seen whether the California Supreme Court will review this case to further address on call status. Jackson Lewis will continue to monitor and report on developments in this challenging area of the law.

Jackson Lewis attorneys are available to answer inquiries about this and other workplace issues.

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