



Washington Court Affirms \$2.1 Million Judgment in Meal and Rest Period Class Action

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Finding no error in the trial court's ruling that plaintiff-armored car employees "were always engaged in active work duties when on the armored vehicles," the Washington Court of Appeals has affirmed a \$2.1 million judgment against an employer for failing to comply with Washington's meal and rest period law. *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 2011 Wash. App. LEXIS 2541 (Wash. Ct. App., Div. I, Nov. 7, 2011), *recons. denied* (Dec. 22, 2011). In addition, the Court agreed that the company engaged in a class-wide pattern or practice of failing to provide sufficient meal and rest period time also in violation of Washington state law.

The Law

Washington state's regulation requires that non-exempt employees be allowed to take a 30-minute meal period (either paid or unpaid) starting no later than five hours after their workday begins. Employees also must be allowed to take one 10-minute paid rest period for each four-hour work period on either a scheduled or an "intermittent" basis.

The Facts

Brink's Incorporated provides armored vehicle security for transporting currency, negotiable instruments, and other valuables for its customers. Each armored car is staffed by a driver and a messenger. They are not exempt from overtime pay. These employees were paid for all meal and rest period time, and did not have any scheduled breaks. During their workdays, they were prohibited from engaging in any personal activities. Employees were forbidden from carrying any personal items, such as reading material, listening devices, cell phones, and computers, and company policy stated they were subject to the same security and operational rules during their breaks as during all on-duty times.

The company's rules required employees to "be vigilant and alert at all times and . . . guard the cash and other valuables entrusted to Brink's by its customers continuously while on their runs." Employees had to:

"continuously observe their surroundings for potential threats";

"take every possible precaution" against possible attack, and be constantly suspicious of other vehicles and persons, regardless of their appearance;

"be alert for hazards that may endanger the security of fellow-employees and customer shipments";

fulfill their "duty . . . to protect the property of Brink's or its customers or to protect the safety of persons through the use of force up to and including deadly force";

"not only be alert" but also "look alert."

A class of 182 armored car employees who worked for the company from April 26, 2004, through October 31, 2007, alleged they did not receive meal and rest breaks as required by Washington law. The case was tried without a jury, and the trial judge's factual findings were not challenged on appeal.

Active Observation and Mental Alertness

The trial court concluded, and the appellate court agreed, that the vigilance required by the company amounted to "active observation and mental exertion at all times," and so was compensable. On appeal, citing a federal case brought by border agents for support, the company argued that vigilance is not work and not compensable. The Court of Appeals distinguished the border agents case because those workers were merely being passively "vigilant" during their commuting time, which just "meant turning on the border patrol radio and keeping a lookout for immigration infractions."

Route Designs and Performance Expectations Prevented Breaks

The plaintiffs claimed that any breaks they received were not legally sufficient because they were required to remain on active duty and on guard during any break. The trial and the appellate courts agreed, concluding that the employees did not receive any "break from mental and physical exertion" nor did they have any "opportunity for personal relaxation, activities or choice." The company required them to follow specific routes, to make stops determined by management on a daily basis, and to complete routes by certain times so that customers' banking deadlines could be met. Management expected each armored car to make about 12 stops per hour, and crews were trained to stop only long enough to complete the stop, both for security reasons and for profitability. The trial court found that "[t]he length of the routes and the number of stops . . . precluded crews from taking rest stops or meal breaks," and that crews "were always engaged in active work duties when on the armored vehicles."

Washington Employers Need to "Make Sure" Meal and Rest Breaks are Taken

Washington's break regulation (WAC 296-126-092) states that employees "shall be allowed" specific amounts of meal and rest period time. Arguing on appeal that the trial court misinterpreted the regulation, the company contended it complied by "allowing" employees to take self-directed meal and rest breaks.

The Court of Appeals disagreed. It found the regulation requires employers to "make sure" meal and rest periods were both provided and taken. Relying extensively on the state's "administrative policy" informally discussing the break regulation, the Court ruled that when a Washington employer uses *paid* meal and rest periods, "the paid break time may be interrupted, but the employee is entitled to a full 30 minutes of paid meal time and a full 10 minutes for a rest break without performing work duties on behalf of the employer." Because the unchallenged factual findings supported the conclusion that the plaintiffs *always* were engaged in work duties, the Court concluded they did not receive breaks that complied with Washington law.

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Employers are reminded that non-exempt employees in Washington are entitled to meal and rest periods and non-compliance with this regulation may present significant exposure. Washington employers should consider reviewing their meal and rest period practices to confirm they meet the state regulation's detailed requirements. Jackson Lewis attorneys are available to assist employers in conducting this review.

practices

Wage and Hour Compliance

contact

Karen P. Kruse

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