



## CALIFORNIA EMPLOYMENT AND LABOR UPDATE

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### California Supreme Court Refuses to Give Employers a “Break”

On April 16, 2007, the California Supreme Court released a unanimous opinion in *Murphy v. Kenneth Cole Productions, Inc.*, Case No. S140308. The Court considered whether the “one additional hour of pay” provided for in Labor Code Section 226.7 constitutes a “wage” or premium pay subject to a three-year statute of limitations, or a “penalty” subject to a one-year statute of limitations. Much to the dismay of California employers, the Court held that “the remedy provided in Labor Code section 226.7 constitutes a wage or premium pay and is governed by a three-year statute of limitations.”

California Labor Code Section 226.7 provides for “one additional hour of pay” for each work day that a meal or rest period is not provided in accordance with the Industrial Welfare Commission’s Wage Orders. Section 338 of the California Code of Civil Procedure provides for a three-year statute of limitations where non-penalty liability is created by statute, hence applying to statutory “wages.” Section 340 of the Code provides for a one-year statute of limitations where penalty liability is created by statute.

Though the Court seemed inclined to find that the wording of Labor Code Section 226.7 alone justified its decision that the hour of pay constituted a wage, the Court conceded that the statute could be interpreted as assessing a penalty and thus looked to administrative and legislative history for guidance. The Court found that the Legislature had intended to compensate employees for time worked, which supported the argument that the additional hour of pay is a wage. The Court also found that the Legislature had considered penalties separately and, regardless, had deleted any reference to the word “penalty” in the statutory provision, in contrast to other provisions of the Labor Code. The Court also chose to interpret references to the word “penalty” in the legislative history simply as imprecise language, similar to how some incorrectly refer to overtime pay as a “penalty.”

The Court rejected the argument advanced by Kenneth Cole and the many employer associations that filed supporting amicus briefs that a “functional” analysis revealed that the additional hour of pay is indeed a penalty. The Court acknowledged that Section 226.7 “seeks to shape employer behavior in addition to compensating the employee,”

but concluded that, similar to overtime pay and reporting-time and split-shift pay, the fact that it contains some behavior-shaping aspects does not automatically render it a penalty. The Court also rejected the argument that the additional hour of pay could not be compensatory because it does not necessarily correspond to how much time the employee actually worked. The Court reasoned that a one-to-one ratio was not necessary and that the Legislature could choose to assign different amounts to compensate employees, again pointing to overtime pay and reporting-time and split-shift pay. Finally, the Court noted that employers are required to keep records for three years and, thus, no concerns about staleness of evidence affect the statute of limitations analysis.

The case also raised a second issue, although of far less significance: “whether a trial court, conducting a de novo trial, can consider additional wage claims not presented in the administrative proceeding before the State Labor Commissioner.” The plaintiff had not brought the meal and rest period claims when he first filed a wage claim with the Labor Commissioner. It was not until after the administrative proceedings had concluded that he tacked on the meal and rest period claims. Labor Code Section 98.2 grants the courts jurisdiction to “review” the Commissioner’s decision. Nevertheless, in concluding that the trial court could consider additional claims, the Court noted that Section 98.2 reviews are not conventional “reviews” and are actually de novo trials of the wage dispute. The Court also cited trial courts’ broad discretion to hear related claims and the chilling effect denying trial courts such jurisdiction would have on the likelihood that plaintiffs would pursue the administrative process.

This decision will have a significant impact on the hundreds of pending meal and rest period class actions in the State, not to mention the numerous future actions this decision will encourage. However, the battle over meal and rest periods is nowhere near close to resolution. Now the battleground shifts to other questions left open by the Court’s decision:

- Are the meal and rest period provisions adopted by the Industrial Welfare Commission legally void?
- Is Section 226.7 limited to a total of one hour of pay per day for meal and rest period violations, regardless of the number of violations?
- Does the duty to “provide” a meal period mean only that employees must be afforded the opportunity to take a meal? Or, must the employer force the employee to eat?
- Are statutory attorneys’ fees and interest recoverable for Section 226.7 actions?
- Are late wage payment penalties triggered by a failure to make Section 226.7 payments?
- Are Unfair Competition Law claims permitted for purposes of collecting Section 226.7 payments?

Given that the Court stated no less than three times in the opinion “that statutes governing conditions of employment are to be construed broadly in favor of protecting employees” (pp. 6, 8, 17), employers should carefully review their compliance status with respect to the various requirements imposed by the Labor Code and Wage Orders. The *Kenneth Cole* decision indicates that the current California Supreme Court is not likely to give employers a “break.”