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Client Alert

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California Labor Commissioner Issues Precedent Decision and Holds Payment for Missed Meal Periods is a Penalty

On May 11, 2005, the California Labor Commissioner issued a decision in *Hartwig v. Orchard Commercial, Inc.*, Case No. 12-56901RB, holding that payments made to employees for missed meal and rest periods are a penalty and not a wage. The Labor Commissioner designated *Hartwig* as a precedent decision of the Division of Labor Standards Enforcement ("DLSE") because it establishes a significant legal or policy determination of general application that is likely to recur. The designation also means that the decision is binding on any decisions made by the Deputy Labor Commissioners and Hearing Officers.

Facts

Hartwig asserted that his former employer, Orchard Commercial, Inc., did not permit him to take a significant number of meal periods. Under § 226.7 of the Labor Code, employers are prohibited from requiring employees to work during any mandated meal period, which under § 512 must be provided, in most circumstances, for a minimum of thirty minutes when an employee works for more than five hours. Section 226.7 further requires that "if an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

The Labor Commissioner awarded Hartwig payment for the missed meal periods under § 226.7 and, in doing so, determined that the "one additional hour of pay" is a penalty imposed on the employer, and not a wage owed to the employee. Based on the legislative history, the Labor Commissioner found that the payment was meant to enforce the meal period requirements of § 512 and to deter non-compliance, rather than to compensate employees for labor performed.

The Implications of *Hartwig*

Prior to the *Hartwig* decision, courts reached conflicting conclusions when deciding whether this "additional hour of pay" was a penalty or a wage. *Hartwig* now offers interpretative guidance on the issue, even though the Labor Commissioner's decision is not binding on the courts. The decision anticipates that the Labor Commission will issue, in final form, a proposed regulation which also treats as a penalty any payment made under § 226.7.

In addition to creating predictability in this area of employment law, the holding offers other critical implications. Primarily, the statute of limitations that will apply to claims for such payments depends on whether the payment is a penalty or a wage. As a penalty, the statute of limitations under § 340 of the California Code of Civil Procedure is only one year, whereas it is three years if the claim is for nonpayment of wages or four years if the claim is brought under Business & Professions Code § 17200 as an unfair business practice.

A one year statute of limitations may limit the number of claims brought by employees, and may deter the spate of class actions filed in the last 18 months seeking up to four years of damages under § 227.6. In many of those cases, employers may have faced greater uncertainty about their liability if they did not keep records proving that employees had regularly taken time off for lunch even when supervisors could testify that they did. *Hartwig* is also valuable to employers whose employees are represented by unions, in light of the recent Ninth Circuit decision *Valles v. Ivy Hill Corporation*, 2005 DJAR 6568, which held that meal period requirements may not be waived in collective bargaining agreements.

The *Hartwig* decision is likely to have an impact on the availability of waiting time penalties. Under § 203 of the Labor Code, if an employer fails to timely pay any earned wages to a terminating employee, the employer must pay the employee a waiting time penalty for each day the employee waits to receive his or her wage, up to thirty days. Provided that the employer paid for all time worked at the appropriate rate, if the missed meal period payment is imposed as a penalty, the Labor Commissioner should not also attempt to impose waiting time penalties when issuing an award based on one hour of additional pay for each day a lunch period was not provided.

Moreover, the employee's attorney's fees may not be recoverable if missed meal period payments are a penalty. Under § 218.5, attorneys fees are only recoverable for the nonpayment of wages. If an action seeking recovery for missed meal periods is one seeking a penalty rather than wages, collecting attorney's fees may be precluded in such actions.

Finally, as mentioned above, *Hartwig* is a precedent decision, which makes it publicly available and binding on future decisions made by the DLSE. Despite lack of clarity on the issue from the courts, *Hartwig* finally provides employers with guidance in this area of employment law while they eagerly await publication of a final regulation declaring that § 226.7 payments are a penalty.

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