

Consequences for employers that get employee breaks wrong

By Dan Eaton

June 20, 2022 | 6:00 AM PT

The California Supreme Court recently ruled that premium pay owed to employees whom an employer requires to work during their breaks is a form of “hardship” pay that generally must be paid upon termination of employment and recorded on an employee’s wage statement. If not, an employer is subject to statutory penalties. Those premium payments are a form of wages, said the court, “subject to the same timing and reporting rules as other forms of compensation for work.”

Basics of California breaks

Non-exempt California employees — that is, not exempt from overtime pay rules — generally must be provided breaks during their shifts.

Employers must authorize and permit their employees to take paid ten-minute rest periods for every four hours worked or major fraction thereof. Such rest periods should be, if practical, in the middle of each work period. An employer need not authorize a rest period for workers working fewer than 3½ hours in a day.

Non-exempt employees are entitled to an off-duty, unpaid, uninterrupted 30-minute meal period for shifts over five hours. California law allows on-duty meal periods if “the nature of the work prevents an employee from being relieved of all duty,” but only if the employer and employee agree in writing to an on-the-job meal period. The agreement must state that the employee may, in writing, revoke their consent.

Where an employer requires an employee to work through all or part of their breaks, Labor Code section 226.7 requires the employer to pay an additional one hour of premium pay at the employee’s regular hourly rate.

Issues California Supreme Court addressed

An employee must receive all their unpaid earned wages immediately upon discharge. An at-will employee who resigns without notice must receive their final wages within 72 hours. Where an employer “willfully” fails to pay the amount due, the employee is owed continued daily wages as a penalty for up to 30 more days under Labor Code section 203.

Labor Code section 226 requires employers to include detailed information on wage statements, including wages earned. The statute makes an employer liable for damages for knowingly and intentionally failing to include required information on the wage statement, at least \$50 for the initial violation and \$100 per employee for each subsequent pay period violation, not to exceed a total penalty of \$4,000, plus the employee’s costs and reasonable attorney’s fees. Such a penalty is not authorized for an “isolated and unintentional payroll error due to a clerical or inadvertent mistake.”



(San Diego Union-Tribune)

In *Naranjo v. Spectrum Security Services, Inc.*, the California Supreme Court considered two questions. First, may an employer be liable for waiting time penalties under section 203 if it denies one or more break periods and fails to pay the premium pay promptly upon discharge? Second, may an employer be liable under section 226 if it fails to report premium pay on the employee's wage statement?

The California Supreme Court answered both questions "yes" because the court concluded the premium pay for missed breaks constitutes earned wages. "An employee who remains on duty during lunch is providing the employer services; so too the employee who works without relief past the point when permission to stop to eat or rest was legally required. Section 226.7 reflects a determination that work in such circumstances is worth more – or should cost the employer more – than other work, and so requires payment of a premium."

The court compared premium pay for missed breaks to overtime pay for extra hours. Both are "forms of payment for working under conditions of hardship."

The court continued: "It stands to reason that, just like other forms of wages, any unpaid premium pay must be paid promptly once an employee leaves the job. And when an employer willfully fails to comply with this obligation," an employer must pay statutory waiting time penalties.

The same reasoning requires employers to record premium pay it owes on employee wage statements. A wage statement that does not include earned premium pay is not "an accurate itemized statement reflecting an employee's gross wages earned, net wages earned, and credited hours worked."

Unresolved defenses

The Supreme Court underscored that its ruling only addressed whether such penalties *could* be imposed for incorrectly paying or reporting premium payments. An employer that did not act willfully may avoid waiting time penalties for not making such payments at time of discharge. An employer may avoid penalties for failing to record such payments on wage statements if it did not act knowingly and intentionally. Those issues will have to be resolved when this case goes back to the lower courts for further consideration. The prudent employer, however, will ensure that its break policies are lawful so that it does not have to rely on these defenses.

Dan Eaton is a partner with the San Diego law firm of Seltzer Caplan McMahon Vitek where his practice focuses on defending and advising employers. He also is an instructor at the San Diego State University Fowler College of Business where he teaches classes in business ethics and employment law. He may be reached at eaton@scmv.com. His Twitter handle is [@DanEatonlaw](https://twitter.com/DanEatonlaw).