JANUARY 2017

COMMENTARY

California Supreme Court's Decision Regarding Employee "On Call" Rest Periods: What Does It Mean, and What Should Employers Do?

The California Supreme Court held on December 22, 2016, that California law "prohibits on duty and on call rest periods" for non-exempt employees. Almost all California employers must provide rest periods for non-exempt employees of at least 10 minutes for each four hours of work or major fraction thereof. The California Supreme Court, issuing a long-awaited opinion, stated, "during required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time."

Procedural Background

The case involved security guards employed by ABM Security Services, Inc., who claimed that ABM failed to consistently provide uninterrupted rest periods as required by California law. The trial court granted summary judgment to the plaintiffs, concluding that ABM had a policy requiring security guards, while on rest periods, to carry pagers and potentially respond to calls. The trial court held that a rest period subject to such control was indistinguishable from the rest of the work day, and thus not a break at all, and awarded the plaintiffs approximately $90 million in statutory damages, interest, and penalties. The California Court of Appeal, however, reversed, concluding that California law does not require employers to provide off-duty rest periods and that "simply being on call" did not constitute performing work.

What Constitutes a Valid Rest Period?

The California Supreme Court, in a 5–2 decision, reversed the Court of Appeal, finding that the trial court's decision was based on a correct understanding of the law. The Supreme Court's majority opinion is written in broad terms: "During rest periods, employers must relieve employees of all duties and relinquish control over how employees spend their time."

Like the trial court, the Supreme Court found that ABM had a policy relating to rest breaks, and that such policy violated California law. Specifically, that policy contained three features that the Court found, in the aggregate, violated the California Industrial Welfare Commission Order: While on a rest period, the employee was required to: (i) carry a pager or radio;

(ii) "remain vigilant"; and (iii) respond to calls if necessary. The restrictions on their face violated the law, according to the Court, even though the evidence before the trial court was that employees did not routinely receive calls or have rest periods interrupted. The judgment was based not on actual interruption of rest periods but on the fact that the policy itself was not compliant. ABM argued that an "on call" rest period is lawful as long as the employee is not interrupted. However, the Court stated, "one cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during the ten minute rest periods."

What Does the Decision Mean in the Real World?

The California Industrial Welfare Commission Wage Orders require employers in almost all industries to "authorize and permit" rest periods for non-exempt employees. The Wage Orders themselves do not speak directly to whether employer "control" is permissible. But now the California Supreme Court has answered the question: Employees must be relieved of all duties and be free from any employer control over how employees spend their rest period time.

The Court majority, recognizing the potential implications of its holding, stated that it was not prohibiting "an employer's ability to reasonably reschedule a rest period when the need arises." The Court then went on to state that employers who find the requirement "especially burdensome" could "provide employees with another rest period to replace the one that was interrupted, or pay the premium [one hour of pay] set forth in the [Wage Order]." Although positing these potential "solutions," the Court then in a footnote stated that "such options should be the exception rather than the rule, to be used when the employer—because of irregular or unexpected circumstances such as exigencies—has to summon an employee back to work."

In reality, the new standard may be awkward for many employers to apply in practice. Paying each non-exempt employee an additional hour of pay, every day, will be an extremely unattractive option. The Court also noted that employers can apply to the California Division of Labor Standards Enforcement ("Labor Commissioner") for an exception to the rest period requirement, which ABM did on two occasions. It is doubtful that such applications will be routinely granted.

A few types of employers (or categories of employees) are exempt from the usual rest period rules: Under Wage Order 15, "personal attendants" who provide care or companionship in private homes to elderly or disabled individuals or children are not entitled to rest or meal periods at all. Under Industrial Welfare Commission Wage Order 5, persons who provide care in 24-hour residential care facilities for children or elderly, blind, or developmentally disabled people may have on call rest periods under certain circumstances. But these exceptions are few and far between across the broad spectrum of employers.

What Should Employers Do?

First, employers should review their rest period policies (written and unwritten) to make sure the policy does not directly or by implication impose employer control during rest periods. Employees should not during rest periods be required to carry pagers, radios, or other communications devices with the expectation that they could be summoned back. As noted above, there were three aspects of the policy in *ABM* that, the Court concluded, together constituted impermissible employer control: (i) the requirement to carry a pager or radio; (ii) the requirement to "remain vigilant" during a rest period; and (iii) the requirement to be prepared to interrupt the rest period to respond to a call. Going forward, rest period policies should not contain any of those elements.

Employers should also train and instruct supervisors not to interrupt employees during rest periods. Ideally, such training should be documented in case there is a later allegation that supervisors, in practice, were routinely interfering with employee rest periods. Supervisors should also be trained that, if a non-exempt employee must be interrupted during a rest period, the supervisor should provide a new, uninterrupted rest period to that employee as soon as possible. If a replacement rest period cannot be provided that day, the employer should pay the one-hour penalty for the interrupted rest period. Many employers may also want to create a mechanism, if one does not already exist, for non-exempt employees to report rest periods that were interrupted or "missed" due to business demands.

If necessary, in some work places, rest periods can be staggered among employees or scheduled so that "exigencies" (to use the Court's term) can be addressed without interrupting an employee on a rest period.

Employers in the health care industry, especially those providing in-home care to children or disabled or elderly individuals, should analyze Wage Orders 5 and 15 to determine whether their employees, or some of the employees, are exempt from the rest period requirements.

One unresolved issue is whether employees may be required to remain on the employer's premises during the rest period. The Court noted in part of its opinion that the 10-minute rest period imposes "practical limitations on an employee's movement." The Court stated that "one would expect that employees will ordinarily have to remain on site or nearby." The Court did not state categorically whether an employer may require employees to remain on the premises during the rest period. The conservative approach is to say nothing in a policy concerning restrictions on leaving the premises. In most cases, an employee on a 10-minute rest period cannot leave the premises or at least cannot travel very far before the end of the period.

An additional issue concerns the retroactive effect of the *ABM* decision. Court decisions normally operate retrospectively: They apply to all cases (even those that have not yet been filed) that have not been finally adjudicated. It is possible that ABM will ask the California Supreme Court to limit its opinion to prospective effect only. Certainly the opinion came as a shock to most of the employer community. Whether the opinion will be so limited is a matter of speculation, but employers should in any event immediately review their policies and practices to minimize future exposure to potentially enormous liability.

Jones Day did not represent ABM in this litigation.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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