

California Supreme Court Confirms that Labor Code Section 226.7 and IWC Wage Order No. 4 Prohibits On-Duty and On-Call Rest Periods

On December 22, 2016, in *Augustus v. ABM Security Services, Inc.*, Case No. S224853, the California Supreme Court issued a split decision on rest periods. In a decision in which four justices concurred, and two concurred and dissented, in part, the Court held that employers “must relieve their employees of all duties and relinquish any control over how employees spend their break time.”

The decision has ramifications for employers operationally and administratively as they should consider revising their Employee Handbooks to provide an affirmative statement that employee rest periods are to be uninterrupted and duty free.

Background

ABM Security Services employs thousands of security guards at sites throughout California. The company required its security guards to keep their pagers and radios on and remain responsive to calls when needs arose, even during rest periods. The plaintiff filed a class action in 2005 on behalf of all ABM security guards in California, arguing that ABM’s on-call policy unlawfully denied the security guards their statutory duty free rest periods.

The trial court granted summary judgment in favor of plaintiffs, and awarded the class \$90 million in damages. The Court of Appeal reversed the trial court, concluding that state law does not require employers to provide off-duty rest periods, and moreover, “simply being on call” does not constitute performing work. In so holding, the Court of Appeal performed an exhaustive review of the difference between California’s meal period and rest period language.

The Decision

The Supreme Court reversed the Court of Appeal, apparently disagreeing fundamentally with the appellate court’s reading of the statutory language and instead finding that ABM’s rest period policy did not comply with the California Labor Code and Wage Order No. 4. In so holding, the Supreme Court found that the practice of compelling the security guards to “remain at the ready, tethered by time and policy to particular locations or communications devices,” could not be squared with the

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requirement to relieve employees of all work duties and employer control during 10-minute rest periods.

The Supreme Court based its decision on the language of Wage Order 4, which provides, in relevant part. “Every employer shall authorize and permit all employees to take rest periods ... Authorized rest period time shall be counted, as hours worked for which there shall be no deduction from wages.” The Supreme Court interpreted this language to evoke, “quite plainly,” a period of rest, and found that this language “only makes sense if employees are relieved of duties.” In so holding, the Supreme Court distinguished this language from the language of Wage Order 5 (applicable to employees with direct responsibility for children who receive 24 hour residential care and employees of 24 hour residential care facilities for elderly, blind or developmentally disabled individuals), which allows that employees “may, without penalty, [be required] to remain on the premises and maintain general supervision of residents during rest periods if the employee is in sole charge of residents. Another rest period shall be authorized and permitted by the employer when an employee is affirmatively required to interrupt his/her break to respond to the needs of residents.” (Wage Order 5, subd. 12(C)). According to the Supreme Court, that language in Wage Order 5 “appears to authorize on-duty rest periods, but only in starkly limited circumstances.” The Court inferred from the absence of similar language in Wage Order 4 that there was no exception for employers and thus, ABM could not require its employees to be on-call. Most Wage Orders have language similar to Wage Order 4.

The Supreme Court did acknowledge that because rest periods are 10 minutes in length, they impose “practical limitations” on an employee’s movement and employees will ordinarily have to remain onsite or nearby. However, the Supreme Court concluded that the additional restraints imposed by on-call arrangements—carrying a device or otherwise making arrangements so the employer can reach the employee during a break, responding when the employer seeks contact with the employee, and performing other work if the employer so requests—are “irreconcilable” with employees’ “retention of freedom to use rest periods for their own purposes.”

ABM argued that a conclusion that on-call rest periods is impermissible under the Wage Order would be “radical” because it would categorically prohibit an employer from recalling its employees to work while they are on rest breaks, regardless of the exigency. The Supreme Court disagreed, and suggested that employers can still “reasonably reschedule” a rest break when the need arises.

The Dissent

Justices Kruger and Corrigan agreed with the Majority Opinion that an employer must provide “off-duty rest periods,” but dissented from the Majority Opinion regarding whether carrying a pager and other device violated the off-duty nature of the rest period. Both Justices believed that a “bare requirement to carry a radio, phone, pager, or other communications device in case of emergency does not constitute ‘work’ in any relevant sense of the term.” They instead urged an approach that focuses on whether the employer has imposed restrictions that interfere with the employee’s ability to use the time for his or her own purposes.

Employer Take Away

The Supreme Court decision is disappointing. The Court decided that employers must relinquish any control over how employees spend their rest period time, and relieve their employees of all duties. “A rest period, in short, must be a period of rest.” For practical purposes, this means that employers should treat paid rest periods in the same manner as off-duty unpaid meal breaks.

The *Augustus v. ABM Security Services* decision complicates how employers manage rest periods and

raises questions as to whether employers should revise the rest period language in their Employee Handbooks to address the *Augustus v. ABM Security Services* holding. Please consult your Hanson Bridgett attorney about how this decision may impact your business operations.

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