



# A Step-By-Step Guide To Defeating Class Certification In California

Insights

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As any experienced class action litigator knows, the main issue driving the direction of a case is not always the merits of the claims themselves. Instead, the central question is often whether the claims can be *certified* as a class action; that is, whether the court will permit the plaintiff to represent other workers on the same claims. For example, while individual wage and hour claims can appear at first glance to be insignificant, they have proven to reach monumental proportions when certified as class claims. This was illustrated recently in the California Supreme Court decision of *Augustus v. ABM Security Services, Inc.*, upholding an award of over \$90 million for rest period violations.

Due to the potential for being tagged with such a massive judgment in cases involving off-the-clock and meal and rest period allegations, employers need to tread cautiously and take affirmative steps to defeat class certification at the early stages of litigation. The good news for California employers: many courts have denied certification in these types of cases. By following the guidance provided by one such case decided recently in the U.S. District Court for the Central District of California, you can prepare a step-by-step blueprint for success.

## Latest Example Of Class Certification Success

Peter Zayerz was an hourly journeyman laborer for Kiewit Infrastructure West Co., a construction and engineering firm specializing in public works projects throughout California. He was employed at the company for approximately four months in 2015, working on several projects in Newport Beach and Huntington Beach. During his short stint there, he alleged Kiewit committed a variety of wage-and-hour violations.

For example, despite the company's written policy promising a second meal period to employees who worked more than 10 hours in a given shift in compliance with state law, Zayerz alleged that, as a practical matter, supervisors wouldn't allow them. Similarly, he claimed that Kiewit did not provide third rest periods to employees who worked shifts in excess of 10 hours. Moreover, with respect to both missed meals and breaks, Zayerz further alleged that he and others were not consistently paid a "wage premium" – which should consist of one hour's pay at the regular rate – when such meal and rest periods were denied. And when Kiewit did pay the wage premium for missed meal and rest breaks, Zayerz alleged the company mislabeled those wages on pay stubs as "double time" in violation of California's strict standards.

Finally, he alleged Kiewit's supervisors were aware that employees were regularly working off the clock, and were reporting only scheduled work hours to payroll despite workers coming in early. Such a practice would arguably violate several state laws, including the requirement to pay a minimum hourly rate for all time worked. Zayerz filed suit against the company and sought class status on behalf of all others similarly situated.

### **Court Rejects Class Status Regardless Of Potential Merits**

Kiewit – and all California employers – received good news from Judge Philip Gutierrez on October 26, 2017, when the court denied Zayerz's motion to certify his wage claims. Regardless of whether the claims had merit, Judge Gutierrez noted that the plaintiff bears the burden of proving that common legal and factual issues predominate over individual ones in order to maintain class status. He found that the following facts and evidence doomed certification:

#### *Meal And Rest Periods*

Under the California Supreme Court's decision in *Brinker Restaurant v. Superior Court*, an employer need only "provide" meal and rest periods and not "ensure" that they are taken. Therefore, Zayerz needed to prove that Kiewit "provided no such opportunity to each and every class member" – but he could not do so. He admittedly did not know what happened at work sites other than his own and could not refute the fact that many coworkers chose to voluntarily forego a second meal break, preferring to get home as soon as possible rather than take another 30-minute unpaid break.

Moreover, Zayerz acknowledged that Kiewit's time sheets included form language directing employees to confirm they received all meal and rest breaks, and could not himself identify any specific occasion when he was not given an opportunity to take a meal break. The judge would not base certification on Zayerz's generalized claim that employees were "too busy" to take such breaks, because this would require inquiry as to working conditions at each work site and for each shift.

#### *Wage Premiums*

Zayerz admitted that, on occasion, Kiewit did pay him "premium" wages for late meal breaks.

#### *Pay Stub Violations*

As for the claims of mislabeled wage statements, the judge said Zayerz would be required to present individualized evidence as to whether other employees were harmed by such a practice in order to maintain class status, which he could not do.

#### *Off-The-Clock Work*

Finally, with regard to Zayerz's off-the-clock allegations, the court ruled that Zayerz's own testimony was ambiguous and could not support his role as a representative for the class. In fact, the judge

found that sworn declarations from other Kiewit workers that refuted many of Zayerz's statements and clarified that they were never required to work off the clock.

### **Roadmap To Class Certification Victory**

The *Zayerz* decision presents a roadmap to class certification success. The work, however, begins before a class claim is even threatened. To begin, ensure you have proper documentation on all of your compensation practices, including verification statements on each and every time sheet. You should also review your handbook policies to ensure they facially comply with the latest legal standards. If you discover occasional missed meal or rest breaks, understand that payment of premium wages can significantly undermine class claims.

During litigation, work with your experienced class counsel to be certain a thorough deposition of the lead plaintiff takes place. This testimony, when coupled with comprehensive witness statements and sworn declarations from other employees, will play a crucial role in your defense.

Finally, if a reasonable settlement is not feasible, this case is a good reminder that many judges are willing to deny certification of class claims even when presented with some evidence demonstrating noncompliance. The key is developing persuasive evidence showing that, after a rigorous analysis of the evidence and issues, class certification does not satisfy the strict legal requirements.

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