Now More Than Ever, California Employers Need To Stay Abreast Of Working Time and Control Issues

Insights
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The California appellate courts, and the California Supreme Court, continue to weigh in on significant and compelling wage and hour issues that affect employers each day.

"Hours Worked" Under The Control Test – Going Back in Time
Since 1947, California has staked its claim on distinguishing its wage and hour rules regarding what constitutes "hours worked." In its wage orders promulgated by the Industrial Welfare Commission, California defines "hours worked" for most industries as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The control test makes many activities "hours worked," and thus subject to compensation, that would not be "hours worked" under federal law.

Things really started happening beginning around the year 2000 to consolidate California's long-held position on the control issue. For example, in January 2000, California reinstated daily overtime and passed a plethora of new Labor Code provisions protecting employees subject to the employer's control. In *Morillion v. Royal Packing* (2000), the California Supreme Court cited the control test for "hours worked" when concluding that employees forced to ride company-furnished transportation to the work site had to be paid even though they were not performing any work under federal law. The *Morillion* test has been cited in a variety of landmark decisions carving out the wage and hour landscape of California.

"Hours Worked" And The De Minimis Test
Federal courts have held that employers may disregard time as *de minimis* depending on three factors: (1) the practical difficulty the employer would encounter in recording the additional time, (2) the total amount of compensable time, and (3) the regularity of the additional work. The practical application of the test resulted in some courts carving out several minutes that employees contended was compensable. The California Labor Commissioner adopted the rule in its enforcement position, but there was not a bright line due to the factor test. Courts are, and remain, free to reject the Labor Commissioner's enforcement decisions.

In any event, on July 26, 2018, the California Supreme Court issued a landmark ruling on de minimis work. In that case, an employee worked on average four to 10 minutes of off-the-clock work, and this totaled 12 hours and 50 minutes during his 17-month period of his employment. The unpaid time added up to $102.67. Noting these facts as nothing but "trivial," the court departed from federal

law's apparently more employer-friendly version of the de minimis rule, and instead ruled that the employer was required to compensate hourly employees for off-the-clock work that occurs on a daily basis and generally takes four to ten minutes after the employee clocks out at the end of their shift. The Supreme Court made clear that it was simply ensuring California law was in line with the modern technologies that have altered our daily lives. The court clarified what it believed to be trivial and what is not, and employers took note.

"Hours Worked" And Inspection Time

This trend continues. On February 13, 2020, the California Supreme Court held in *Frlekin v. Apple, Inc.* that the time spent by employees waiting for and undergoing security checks of bags and other personal items is compensable time under California law, even when the policy only applies to employees who *choose* to bring personal items to work. The court ruled that employee choice is a consideration but ruled that it was not the only consideration.

Instead, the court provided a multi-factor test within which to analyze the employee choice issue. Particularly with respect to "onsite employer-controlled activities," the court ruled that the issue of whether the time is compensable depends on a number of factors, which include:

- The mandatory nature of the activity;
- The location of the activity;
- The degree of the employer's control;
- Whether the activity primarily benefits the employee or employer; and
- Whether the activity is enforced through disciplinary measures.

Distinguishing a case where the employer provided an optional parking lot shuttle primarily benefitting employees, the court found that Apple's security check policy primarily benefitted the employer as a theft prevention measure. The court similarly distinguished a federal case which ruled that employees were not under the employer's control because they were offered a benefit or service of discounted food which required that they remain on the premises while eating the discounted food. They could, the court reasoned, choose to eat elsewhere without restriction.

The Control Test And Meal-Rest Period Compliance

On December 22, 2016, the California Supreme Court ruled *in Augustus v. ABM Security Services, Inc.* that employers must provide their workers with duty-free rest breaks or face potentially devastating financial consequences. ABM required its guards to remain on call even while taking their rest breaks, which meant that the guards needed to keep their cell phones or pagers on during their rest breaks in order to respond when certain needs arise (such as when a tenant wishes to be escorted to the parking lot, or an emergency situation occurs).

According to ABM, however, guards were rarely interrupted to perform any of these tasks and were otherwise permitted to engage in various non-work activities during this time, including smoking,

reading, making personal telephone calls, attending to personal business, and surfing the internet.

Addressing The "Control Test" Issues:

1. Review your company's pre-shift, post-shift, and similar policies and practices to ensure there is no regularly occurring off-the-clock work that you should capture as working time for which employees receive compensation.
2. Consider whether technological innovations could assist in capturing all working hours for inspection time or donning and doffing, such as electronic timekeeping methods, or practical methods such as placement of time clocks in areas that will help capture all working time.
3. Work with legal counsel to review your meal and rest break policy and practices to make sure that employees are, in fact, relieved of all duty and free of control within the meaning of the Supreme Court's interpretation of the Labor Code and Wage Orders. If the nature of the position prevents relief from all control, then consider obtaining legal counsel for guidance as to whether an exemption can be obtained from (1) the *rest period* requirements through procedures offered by the Division of Labor Standards Enforcement's (DLSE) exemption process; or (2) the *meal period* requirements through an on-duty meal period agreement if permitted by the Wage Orders (there is no on-duty rest period agreement available outside the blanket DLSE exemption).

Compensating For All "Hours Worked" Requires Maintaining Compliant Compensation Plans
Following a line of recent federal and state court cases, California employers are required to compensate employees receiving commissions and piece rates separately for "non-productive time," which includes rest periods. The definition of "non-productive time" will depend on the terms of the compensation plan and the duties of the position.

Employers have exercised various options in an attempt to comply with this standard. For example, in 2018 , the California Court of Appeal held that employers are permitted to provide a compensation system that provides a minimum base rate of pay for all hours worked exceeding the state's minimum wage, but which allows for increased hourly rate of pay for all hours worked during the pay period when certain work is performed.

The court concluded that it was sufficient that the employees were always paid by the hour and, in fixing the variable hourly rate, were credited with a percentage of revenue generated by sales which was converted to an effective hourly rate based on total hours worked each pay period. Importantly, the court said that the pay system, rather than permitting employees to receive no pay at all when falling below a minimum floor, merely imposed a lawful ceiling on compensation.

This decision, now on review, stands for the proposition that employers can devise hybrid methods for determining how to directly compensate employees for each hour of work, and that bonus plans can be devised that permit higher hourly rates of pay but which do not directly compensate by piece rate or commission. The Supreme Court may agree, disagree, or limit the reach of this decision.

In addition to the above standard articulated by the courts, on January 1, 2016, Section 226.2 of the Labor Code took effect, which requires all employees paid by piece rate to be paid separately for rest and recovery periods using a special formula: the greater of the applicable minimum wage and the average rate determined by dividing (A) compensation for all hours worked in the work week exclusive of overtime premiums and pay for legally required rest and recovery periods by (B) all hours worked for the week excusive of time allocated to legally required rest and recovery periods. Labor Code § 226.2(a)(3)(A)(i-ii).

The California Labor Commissioner has observed that the provisions of Section 226.2 do not apply to commission-paid employees, although it notes that employers should follow *Vaquero v. Stoneledge Furniture LLC* (2017), which requires commission paid employees to be paid separately for rest periods without elaboration as to the rate of pay. Decided before the enactment of Section 226.2, *Vaquero* relied on prior case law that stated that piece rate employees must be paid separately at least at the applicable minimum wage or contract hourly rate.

Addressing the "All Hours Worked" Issues

1. Review your compensation plans to assure that employees are being paid for every hour worked, including rewording compensation plans to make sure that all time is being compensated as required by law and not improperly averaged with non-paid time.
2. Consider simplifying compensation plans to distinguish between all pay elements.

Conclusion

Every aspect of "hours worked" is being scrutinized by plaintiff attorneys and the courts. Now is the time to take swift action and conduct internal audits which may prove to save your company from liability and trouble. These steps will help you assess your organization's risk of a potential crushing financial liability resulting from a relatively technical violation of California's strict requirements to compensate an employee for "all hours worked."

Contact the authors for more information here or here.

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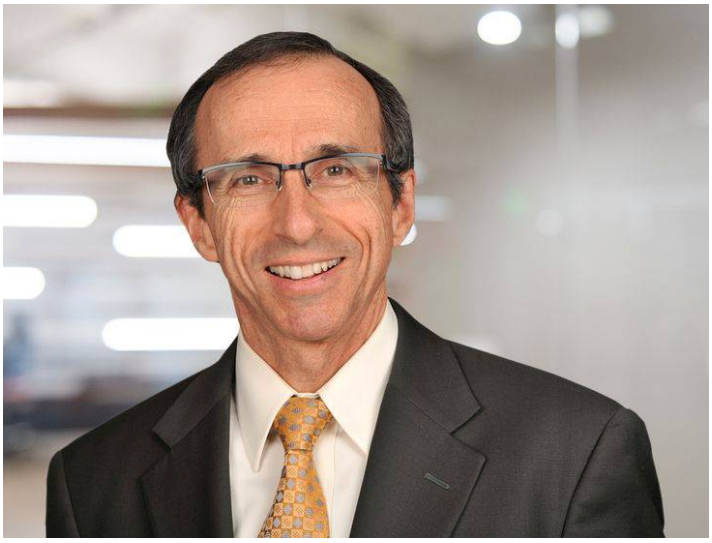

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