California Court Ushers In Sweeping Changes For Scheduling Policies

Insights
2.06.19

A California Court of Appeal just announced a sweeping change in California's reporting time pay rules which now prohibits a common scheduling practice used by employers throughout the state (*Ward v. Tilly's, Inc.*). Yesterday's decision means that California employers who require employees to call in two hours before a shift to determine whether or not they are needed, and report to work if called in, are now obligated to pay that employee, at a minimum, for two hours of work <u>even if the employee is informed that there is no need to come in to work that day</u>. Unfortunately, the case left many questions unanswered and, as a result, you should be careful to craft scheduling policies that avoid the same pitfalls seen in that case.

Background And Decision

The facts of the case are relatively straightforward. Under Tilly's scheduling policy, Skylar Ward was required to call in approximately two hours before the start of her shift to determine whether she needed to come to work. If Tilly's told her to report to work, she was required to do so and would be paid for that shift as normal. However, if Tilly's informed her that there was no need to come in, Ms. Ward would receive no compensation—after all, according to Tilly's, all she did was make a single call and never actually reported to the worksite.

Nevertheless, in a precedent-setting ruling, the court held that, under the facts of this case, merely calling in for one of these mandatory on-call shifts constitutes "report[ing] to work," which entitled Ms. Ward and her coworkers to a minimum of two hours of reporting time pay under the applicable wage order. In relevant part, the court examined the following language from the reporting time rule contained within Wage Order No. 7(A):

Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than minimum wage.

Prior to the case, various courts had disagreed about what it truly meant to "report to work" within the context of this provision, with many courts—not to mention employers—understandably believing that this required the employee to *physically* report to the workplace location in order to be eligible for reporting time pay. When an employee physically reports to work but is furnished less than half of his or her scheduled hours, providing the employee with at least two hours of pay was justified to compensate them for the inconvenience and expense of, quintessentially, showing up for nothing. According to the court, however, modern technology had advanced to the point where "reporting" could mean far more than just physical presence at the worksite.

Court's Reasoning, Explained

In short, the court ultimately reasoned that even having to place a telephone call as part of a mandatory on-call schedule fell within the ambit of this "reporting" rule for two main reasons. First, requiring reporting time pay would "require employers to internalize some of the costs of overscheduling, thus encouraging employers to accurately project their labor needs and to schedule accordingly." Second, it would also "compensate employees for the inconvenience and expense associated with making themselves available to work on-call shifts, including forgoing other employment, hiring caregivers for children or elders, and traveling to a worksite. In relying on these public policy considerations, the court aligned itself with prior California cases that tended to tie the compensability of worktime to the degree of employer control over an employee's activities.

According to the court, chief among this other supporting cases was the 2016 California Supreme Court decision in *Augustus v. ABM Securities*—a case which prohibited employers from having their employees carry radios and remain on-call during rest periods on the basis that "compelling employees to remain at the ready, tethered by time and policy to particular locations or communication devices" was inconsistent with the concept of having truly "relieved employees of all work duties and employer control." Like in *Tilly's*, the Court in *Augustus* was clear that this rule applied even if the employees were never actually called on. Along with the other recent California Supreme Court decision, *Troester v. Starbucks*, which also lauded this strict application of wage and hour laws in *Augustus*, this should signal to employers that the definition of "compensable time" in California is only continuing to increase in breadth.

Unfortunately, notwithstanding its 33-page analysis, the court in *Ward v. Tilly's, Inc.* left several key questions unanswered. Most notably, the court failed to address the issue of whether its holding would apply retroactively—potentially exposing countless employers across the state that utilize similar on-call scheduling policies to staggering class action liability. The court also neglected to address the inherent line-drawing problem contained within its decision; that is, how long before a shift could an employee call in and still have it constitute compensable reporting? If not two hours, then how long?

What Should Employers Do Now?

In light of this decision, you should be careful to avoid the pitfalls of the Tilly's scheduling policy. Specifically, the court identified several distinguishing features of the Tilly's scheduling policy that led to its downfall, including: (a) requiring the employees to call the employer; (b) independently disciplining employees for late or missed call-ins; and (c) making call-in and reporting mandatory. To mitigate against these pitfalls, you should craft alternative scheduling policies, using the following guidelines:

- You should call the employee, not require them to call you. You can do this by creating a call list of employees who might be available prior to the upcoming shift. Your managers can then make their way through the list to meet scheduling needs. This practice has been approved by various courts in related "on-call" contexts.
- Don't discipline employees for failing to respond to your call to check for availability. Without a fear of discipline, it would be much more difficult for the employee to argue that the policy truly constrained the employee's freedom and activity.
- Don't make reporting mandatory. If an employee answers and doesn't wish to report to work, simply move on to the next person on the list. This practice has also been approved by various courts in related "on-call" contexts.

Even with these guidelines, however, no policy is a sure thing, and even minor changes could affect the way a court may view it—meaning that some employers may wish to abandon such practices altogether. Nevertheless, there is hope. Unlike most decisions coming out of the Court of Appeal, *Tilly's v. Ward* is one of the rare cases that comes with a robust dissenting opinion that condemns the new rule and cautions against retroactivity. To that end, you should keep up-to-date on whether a subsequent appeal is filed and whether the California Supreme Court ultimately decides to take another look at this sweeping change in the near future.

We will continue to monitor further developments and provide updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our California offices.

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