



Law Offices of Mary L. Topliff

Workplace Wave



Why Meal and Rest Periods Are So Important

By Mary L. Topliff, Esq.

On April 16, 2007, the California Supreme Court decided the case of *Murphy v. Kenneth Cole Productions, Inc.*, which solidified that meal and rest periods are the next great wave of employment class actions. However, even very small employers should pay attention to this case and the underlying Labor Code requirements.

California employers are required to provide all employees with at least a thirty (30) minute unpaid, uninterrupted meal period for any shift that is five or more hours. Paid rest periods of ten (10) minutes duration must be provided for every four hours of work. For every work day in which an employee does not receive such a meal or rest period, Labor Code Section 226.7 requires the employer to pay the employee an additional hour's pay at the employee's regular rate. This Labor Code provision has been in effect since January 2001.

Mr. Murphy was a salesperson/sales manager at a small Kenneth Cole retail store for two years, during which he routinely worked as he ate lunch and

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Public Speaking

Ms. Topliff will be presenting a full-day seminar on the Essentials of Time Off and Leaves of Absence for the Human Resource Management Institute in San Francisco on May 15, 2007. For more information, contact Ms. Topliff.

On May 17, 2007, Ms. Topliff will be the featured speaker on Hot Employment Law Topics and Trends for the Biotechnology Human Resource Network in San Carlos.

only took an uninterrupted, duty-free meal period once every two weeks. He rarely took rest periods. Following his resignation, he discovered that he had not been paid correctly, given that he was paid a weekly salary, and filed a wage claim with the California Labor Commissioner, in which he alleged claims for unpaid overtime and waiting time penalties. He prevailed at the hearing and Kenneth Cole then filed an appeal with the California Superior Court, which hears the case anew per

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the statute. At this stage of the proceeding, Mr. Murphy was represented by counsel who asserted additional claims, including violations of his meal and rest period rights.

The Murphy case covers two issues: 1) whether the statute of limitations for the award of payments for missed meal and rest periods is three years or one year; and 2) whether the trial court should have adjudicated the issue of meal and rest periods since it was not raised in the Labor Commissioner proceeding. The Murphy case holds that the three-year statute of limitations, not the one-year statute of limitations, applies to claims for the additional hour's pay for each day a meal or rest period is missed. It reasoned that the additional hour's pay remedy provision is a claim for unpaid wages (with a 3-year statute of limitations) rather than a claim to recover a penalty (with a 1-year statute of limitations). The court further held that the trial court properly adjudicated the meal and rest period claim even though it had not been raised as part of the wage claim in the interest of judicial economy.

The following are highlights from the case:

- California Wage Orders have mandated meal and rest periods since 1916 and 1932, respectively.
- In October 2000, the Wage Orders added the remedy of one additional hour's pay due to the lack of employer compliance in providing meal and rest periods. This was codified in the Labor Code in January 2001.
- Labor Code provisions are to be interpreted broadly in favor of employees.
- Even if a meal period is paid, the employee is still deprived of the right to be free of the employer's control during the meal period.
- California regulations require that timekeeping records (including those establishing meal and rest periods) be retained for at least three years.
- An example based on the court's ruling -- if an employee misses a meal or rest period even once a week for three years, the employer will owe the employee 156 hours of additional pay.

Action Steps:

- Ensure that timecards for nonexempt employees track meal period time taken. Although rest period time need not be tracked since it is paid time, employers must have some record that it was taken. Consider an acknowledgment box on a timecard that is checked by the employee. Set up an audit system so that a pattern of skipped meal periods can be addressed.
- Be wary of electronic timekeeping systems that do not allow for changes to be made by employees. This leaves open the possibility of

employees later claiming that they actually missed their meal periods.

- Ensure that meal and rest periods are strictly observed. Train front-line supervisors on the rules. Remember that the only limited situation in which an employee may waive a meal period is when the total shift time is from five to six hours and then, it must be documented.
- Ensure that employees are correctly classified as overtime exempt. The meal period requirements found in the Labor Code are not limited to nonexempt employees; however, the remedy provision of one additional hour's pay clearly relates to nonexempt employees. The Murphy case arose from the misclassification of an exempt employee, which is most likely why the employer had no records of meal periods.
- Think twice before filing an appeal from a Labor Commissioner ruling. Keep in mind that an employee may raise new issues, as happened in the Murphy case. Although hindsight is 20/20, Kenneth Cole increased its risk substantially after filing the appeal. Sometimes, it is more economical to pay the award than to incur the costs of filing the appeal, especially when employees can raise new issues at that juncture.

The Latest on San Francisco's Paid Sick Leave Law

By Mary L. Topliff, Esq.

San Francisco's paid sick leave law appears very straightforward on its face, for example, it requires that all employers must provide one hour of paid sick leave for every 30 hours worked to all employees who work in San Francisco up to a maximum accrual limit (a 72-hour cap for employers with 10 or more employees and a 40-hour cap for employers with fewer than 10 employees). However, this law raises a variety of administrative issues for employers, such as whether the law applies to an employee who occasionally works in San Francisco but primarily works in another location.

San Francisco's Office of Labor Standards Enforcement (OLSE) has been busy carrying out its responsibility to administer this new law, which went into effect on February 5, 2007. It issued (and later revised several times) a set of "Frequently Asked Questions" and a "Fact Sheet." On March 7, 2007, the Board of Supervisors enacted an ordinance called, "Transition Period for Implementation of Paid Sick Leave Ordinance," which caused a fair amount of confusion since many thought that this meant the original ordinance was not going into effect until June 6, 2007. To the contrary, this "Transition Period" ordinance provides that an employer

may only delay the payment of accrued sick leave until June 6, but that the accruals must have been in place as of February 5, 2007.

The OLSE is currently undergoing a public comment period for its rules implementing the paid sick leave ordinance. The latest draft was posted on April 27. Among other things, it clarifies the following:

- Requiring advance notification from an employee of a pre-scheduled or foreseeable absence is reasonable (unless it is excessive, which is not defined). Advance notification of more than two hours for unforeseeable absences is unreasonable.
- A demand for a doctors' note or certification is deemed unreasonable if it is for three or fewer consecutive work days of absence, unless there is a pattern or clear instance of abuse (which is not defined), or the absence was for a medical appointment.
- Employers may not require employees to use more paid sick leave than actually required unless the employer can verify that it had to pay for a replacement employee for the longer period of time.
- The 90-day waiting period for new employees to accrue sick leave does not apply if the employee is rehired within one year of separation by the same employer.
- Employees paid on a piece rate or commission basis must be paid sick

leave on a pro rata earnings basis (total calendar year earnings divided by total hours worked up to two times the San Francisco minimum wage).

- In no case may employees be paid less than the San Francisco minimum wage for sick leave.
- Employees who work in San Francisco on an occasional basis are covered by the law if they perform 56 or more hours of work in San Francisco within a calendar year, whereas employees who travel through San Francisco and stop as part of their work (e.g., to make deliveries) are covered for all hours worked in the city, including travel time.

Readers are cautioned to check the OLSE website for the most updated rules and information on this law.