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Dialing for Dollars: California Court Rewrites Reporting Time Pay Rules

Volume 42

Issue 27

March 11, 2019

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A California Court of Appeal recently ruled that requiring employees to call in to find out whether they had to report for work triggered the employer's reporting time pay obligation. The ruling, which substantially broadens the pay requirement under Wage Order 7, is expected to have a significant effect on California's retail and restaurant industries, among others. Companies that use call-in or on-call scheduling policies should carefully consider what impact this ruling may have on their policies.

Background

The California Industrial Welfare Commission (IWC) has issued a series of wage orders that regulate wages, hours, and employee working conditions in certain industries and occupations. IWC Wage Order 7 regulates the wages, hours, and working conditions in California's mercantile industry. The order generally applies to individuals employed in the industry, regardless of whether they are paid on a time, piece rate, commission, or other basis. However, those employed in the industry in administrative, executive or professional capacities are exempt from most of its provisions.

Section 5 of the order establishes reporting time pay requirements for the mercantile industry — the minimum amount an employee generally must be paid when the employee is required to report for work but is either not put to work or is given less than half of his or her usual or scheduled day's work. Employees who are required to report for work twice in the same workday but are given less than two hours of work on the second reporting are also entitled to reporting time pay. However, the reporting time pay requirements do not apply where operations cannot continue due to circumstances beyond the employer's control (such as threats to employees or property, public utility failures, or an act of God) or when an employee on paid standby status is called to work other than his or her scheduled reporting time.

> **Buck comment.** While IWC Wage Orders have included reporting time pay requirements since 1943, they have not been the subject of much interpretation or litigation.

Expanded reporting time pay requirement

On February 4, 2019, the California Court of Appeal significantly broadened the scope of the order's reporting time pay requirement and expanded the types of circumstances in which it will be found to apply. In *Ward v. Tilly's, Inc.*, the appellate court held that employees are entitled to reporting time pay when their employer requires them to call in two hours before a shift to learn whether to report to work that day and they are told not to come in.

The on-call arrangement

Tilly's, a California-based retail store chain, required its on-call employees to call into their stores two hours prior to a potential shift to learn whether they would be needed. The plaintiff, a sales clerk, claimed that Tilly's told employees to assume that they would be needed unless told otherwise. Employees were subject to discipline if they did not contact their stores before on-call shifts, contacted the stores late, or refused to work on-call shifts. For pay purposes, Tilly's did not include on-call shifts as part of a "scheduled day's work" unless the employee was actually required to work, and did not consider an employee to have "reported to work" simply for calling in.

A Tilly's employee filed a putative class action against the retailer, alleging its policy violated Wage Order 7 by failing to compensate employees who called in for on-call shifts. Tilly's maintained that the order only applied when an employee physically reports to the workplace at the start of a shift. The trial court agreed, and dismissed the case.

The appellate court's decision

On appeal, the employee argued that the order is triggered by reporting, regardless of whether in person, by phone, or in any other manner. Acknowledging that the order did not define the term "report for work," the Court of Appeal sought to do so. After finding dictionary definitions of "report" inconclusive, the court turned to the legislative history. While granting that the IWC's understanding in the 1940s would have required the employee's physical presence, the court noted that times have changed largely due to technological advances such as the cell phone.

In a 2-1 decision, the court concluded that the IWC — defunded in 2004 — would have found that Tilly's on-call system triggers reporting time pay if it had confronted today's realities. Further, the court noted that Tilly's system provides it with a constant labor pool without providing a system that assures employees steady work, and is inconsistent with being off-duty. Citing policy considerations, it also emphasized how on-call shifts burden employees who receive no pay unless they are called into work, including: (1) the employee's inability to schedule other jobs, school, or social plans; (2) childcare or elder care costs; and (3) inability to commit to other activities (such as sleeping) that would interfere with the employee's ability to call into the employer two hours ahead of a potential shift. The court said that this is "precisely the kind of abuse that reporting time pay was designed to discourage."

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The two-justice majority suggested that the meaning of “report for work” is defined by the employer. Thus, how the employer directs employees to present themselves for work in particular circumstances would be dispositive of its potential reporting pay liability. The employer could trigger the reporting time pay requirement in various ways, including by directing employees to: physically appear at the workplace; log on to a computer remotely; appear at a client’s job site; set out on a trucking route; or, as in *Ward*, phone in.

In dissent, Judge Egerton noted that telephones were available in the 1940s and cell phones were in use when the legislature defunded the IWC. She also noted that California’s Division of Labor Standards Enforcement, which is responsible for enforcing IWC wage orders, has interpreted “report for work” to mean actually showing up and a federal district court similarly ruled that call-in shifts do not trigger reporting time penalties under Wage Order 7. Reasoning that employers have legitimate business reasons for flexible scheduling and do not “maintain on-call policies just to torture employees,” Judge Egerton concluded that it is up to the legislature — not the courts — to balance the competing needs of employees and employers.

Notably, the court did not decide whether its new standard would apply retroactively or whether there was an amount of time that employees could call in pre-shift that would not trigger reporting time pay. While the court limited its holding to Wage Order 7 and Tilly’s on-call system, its interpretation of the term “report to work” may have much broader application in California as most of the IWC orders contain similar reporting time language. Whether the *Ward* decision will be reviewed by the California Supreme Court remains to be seen.

In closing

Companies — whether in the mercantile industry or in other industries — that utilize call-in or on-call scheduling policies in California should carefully consider their use and structure in light of this ruling.

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