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CALIFORNIA SUPREME COURT EXPANDS EMPLOYEE MEAL BREAK RIGHTS

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By Tom Geidt

The California Supreme Court has issued a very important but troubling ruling on the subject of meal breaks, one that will affect all California employers. Its unanimous decision in *Donohue v. AMN Services, LLC*, while somewhat technical in nature, will have a significant practical impact on the day-to-day administration of meal break policies and the defense of meal break claims in court.

The Court's decision, authored by Justice Liu, made two holdings. First, it held that employers cannot engage in the practice of rounding time punches – for example, to the nearest quarter hour or 10 minutes – “in the meal period context,” such as at the beginning and end of each meal period. Second, the Court held that whenever an employee's time records reveal a potentially non-compliant meal break – one that was missed entirely, delayed (started after five hours) or “short” (lasted fewer than 30 minutes), this creates a rebuttable presumption of a meal break violation of the Labor Code. The burden then shifts to the employer to rebut that presumption. The latter holding applies in *all* meal break situations, not just those that involve a rounding system.

Employers have been deluged with meal break class actions and “PAGA” civil penalty suits for at least the past 10 years. This decision will result in more lawsuits and make them more difficult for employers to defend.

Meal Period Rounding Issue

The employer in the case, AMN Services, formerly maintained a timekeeping program known as Team Time, which rounded employees' time punches to the nearest 10 minutes at the beginning and end of each shift and the beginning and end of each meal period. Prior to September 2012, the Team Time system flagged an employee's time records for potentially non-compliant breaks – meals that were missed, late or short. When it found such occurrences, AMN would automatically pay the employee one hour's pay as a meal premium under California law. However, the Team Time system used the *rounded* times to determine whether to flag potential meal violations, not the actual times worked. Thus, for example, if an employee punched out for a meal break at 12:01 pm and punched back in at 12:29 – 28 minutes later – Team Time would round these times to 12:00 noon and 12:30. In such

instances, the system would not trigger a premium. Likewise, if an employee clocked in to begin a shift at 6:58 a.m. and clocked out for a meal break at 12:02 pm (more than five hours later), the system would round this time interval to 5:00 hours, again not triggering a premium for a late meal break.

AMN modified its Team Time system in September 2012 following the California Supreme Court's landmark *Brinker Restaurant* decision. *Brinker* held that employers are not obligated to "police" meal periods to ensure that no work is being performed, and employees may voluntarily choose to skip, delay, or shorten a meal break, in which case they are not entitled to a meal premium. In response to this ruling, AMN instituted a drop-down menu for potentially non-compliant meals flagged by the Team Time system, requiring employees to specify whether any late or shortened meal breaks were the employee's voluntary choice or whether an opportunity to take a compliant meal break was "not provided." However, the flagged meal breaks again were based on the rounded time, not the unrounded time. Whenever an employee's *rounded* time did not reflect a missed, late or short meal, Team Time did not activate the drop-down menu, and no premium would automatically be paid.

The Court held that AMN's pre-*Brinker* and post-*Brinker* rounding systems both failed to comport with California's meal break requirements. Both systems, the Court found, were used not only to calculate employees' wages, but also to improperly manage the Company's meal period *premium* obligations, to the detriment of employees. Because Team Time flagged potential compliance problems only on the basis of rounded times, it did not always trigger premium pay for non-compliant meal periods that were involuntarily delayed beyond five hours or shortened below 30 minutes.

The Court was unpersuaded by the fact that AMN required its employees to certify at the end of each pay period that their time entries were accurate, and that they were provided the opportunity to take all meal breaks to which they were entitled unless their timesheets reported otherwise. The Court suggested, without specifically deciding, that the biweekly certifications were inaccurate, because employees would not have known about potentially non-compliant meal periods that Team Time did not flag.

The Court emphasized that the precise meal break timing requirements of the Labor Code and Wage Orders must be strictly followed. The fact that some meal periods were only a minute or two short of 30 minutes, or started only a minute or two after the end of the fifth hour of work, does not constitute a defense; premium pay is due for "any violation, no matter how minor." For the health and well-being of employees, California's meal period provisions are designed to prevent even "minor infringements," according to the Court, and rounding of meal times is incompatible with that objective.

The Court's decision addressed only rounding in the "meal period context"; it did not address the validity of pay rounding systems generally as used to calculate wages. For that, the Court will defer to a future case. Up to now, only the lower courts in California have decided such cases. Notably, the Court hinted that modern advances in technology have made it easier for

employers to track employees' time down to the minute, which may diminish the practical efficiencies often cited in support of rounding policies.

Rebuttable Presumption Holding

In the second part of its decision, the Court held that whenever an employer's timekeeping records reflect, on their face, a missed first or second meal, a "late" meal starting after five (or ten) hours of work, or a "short" meal lasting fewer than 30 minutes, this creates a rebuttable presumption of a Labor Code violation entitling the employee to a premium payment. This does not mean that employers are automatically liable, but it means that the burden shifts to the employer to prove that the employee was provided a compliant meal on that shift during which the employee "chose to work," or that the employee was already paid a premium for that day.

This is often referred to as the "Werdegar presumption," because former California Supreme Court Justice Kathryn Werdegar argued for its adoption in her concurring opinion in the *Brinker Restaurant* case in 2012. At the time, however, only two of the seven justices joined in that view. Consequently, most courts up to now have rejected arguments by plaintiffs' lawyers that the presumption reflects California law. Now, however, the presumption has been adopted as the law of California.

The *Donohue* Court concluded that adoption of the presumption is appropriate in recognition of the fact that it is the employer's duty to maintain accurate records of meal break times; "the law does not expect or require employees to keep their own time records to uncover potential meal period violations." The Court said the presumption can be applied at the summary judgment stage as well as the class certification stage of a case.

The Court rejected AMN's argument that a rebuttable presumption would fly in the face of the *Brinker Restaurant* principle that employers are not required to police meal periods. The Court affirmed that the *Brinker* principle still stands. As the Court put it: "The rebuttable presumption does not require employers to police meal periods. Instead, it requires employers to give employees a mechanism for recording their meal periods and to ensure that employees use the mechanism properly."

Interestingly, the Court cited AMN's former drop-down-menu system as one possible mechanism that employers could lawfully use to determine whether employees voluntarily chose to skip, delay or shorten a meal period. As the Court explained, "Team Time would have ensured accurate tracking of meal period violations if it had simply omitted rounding."

Analysis and Recommendations

California's meal period rules are strict and complex. The penalties and remedies for violating those rules are draconian. The meal period rules have spawned an enormous volume of litigation over the years. *Donohue* will, unfortunately, cause more of it.

Donohue focuses attention in particular on an often-overlooked issue: the right of employees to meal premiums for late or short meal periods – not just those that are missed entirely. Employers must have in place a reliable mechanism to track and flag all potential non-compliant meal periods and either pay a premium automatically or determine from the employee whether or not the meal period was missed, late, or short by the employee’s own voluntary choice – for example, the employee freely chose to return from lunch in the 28th minute; the employee was not called back to work early or pressured by a supervisor into shortening the break. *Donohue* makes clear there is no “de minimis” defense for meal periods that last 29 minutes or that start 5:01 hours after the shift began. A premium must be paid or a violation could be found, unless (1) this timing was the employee’s choice and (2) the employer can prove it.

As a result of this decision, all employers should audit their policies and practices relating to meal periods, timekeeping, the rounding of time, and the payment of meal premiums. Employers must understand the precise meal break timing rules, train their supervisors on those rules, and take the necessary steps in designing their meal period and timekeeping policies to avoid or minimize liability. Employers should consider, for example, expanding meal periods to more than 30 minutes and scheduling meals to start well before the end of the fifth hour of work to provide a cushion.

Obviously, any practice of rounding punch times at the beginning and end of meal periods must now be discontinued. Moreover, employers who use any kind of pay rounding system to calculate wages should audit the system to ensure it is operating neutrally over a period of time and could withstand a legal challenge. Otherwise, consider discontinuing the rounding system entirely.

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If you have any questions about this case or how best to comply with its holdings, please contact any GBG attorney.

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