



PROBLEM PREVENTION BULLETIN ~ APRIL 2007

## California Supreme Court Issues Missed Break Ruling That Could Break Employers

The text of this article is available at the WAAG AND CO. website at [www.WaagandCo.com](http://www.WaagandCo.com) (click on "News", then click on "Bulletins").

**Applies to:** All California Employers with Non-Exempt Employees (except some public employers)

**Effective:** Immediately

**Synopsis:** On April 16, 2007, the California Supreme Court issued its long-awaited ruling in the case of *Murphy v. Kenneth Cole Productions, Inc.*, which involved whether the required payments for missed breaks would legally be considered "penalties" or "wages." Unfortunately for employers, the Court ruled that these payments constitute "wages," and that ruling is the final word from the courts.

**Basic Issue & Rules:** WAAG AND CO. has regularly reported on the rest and meal period issue in *The Strategic EMPLOYER* since November, 2000. The missed-break payments at issue involve an employer's duty to ensure that non-exempt (i.e., hourly) employees take their rest breaks and meal breaks in accordance with the Labor Code and the accompanying regulations. Briefly stated, the law requires that employers provide non-exempt employees with a ten-minute rest break for every four hours worked (or major portion thereof). So if an employee works an eight-hour day, that employee would be entitled to two such breaks. These breaks are not to be combined, and must each be taken somewhere near the middle of the four-hour time block. Non-exempt employees also must take a meal break of not less than thirty minutes, and that break must be started not later than the end of the fifth hour worked. There are some

caveats, but these are the basic rules.

If the employee misses any of these breaks, the employer must pay the employee a Missed-Break Payment ("MBP") equal to one hour of pay at the employee's regular rate for each day on which the employee missed the breaks. It is still unsettled whether there is one MBP for missing rest breaks and an additional MBP for missing meal breaks (i.e., for a possible two MBP's in a single day), or if there is only one possible MBP regardless of how many of which type of break is missed. The MBP must be paid to the employee in the same paycheck issued to cover wages earned during the pay period in which the break was missed.

**Impact of Ruling:** The distinction between whether the MBP is a "penalty" or a "wage" has a dramatic and expensive impact on employers. If the MBP is a "penalty," then an employee may only go back one year to claim unpaid MBP's. Since the employer would already be paying a penalty, no additional penalties would be added for failure to pay the MBP. Similarly, if a penalty, there would be no interest accrued on the unpaid MBP's and no recovery of attorney's fees.

All of that changes with the MBP's being treated as "wages." The employee may go back *three years* to claim unpaid MBP's. If the courts ultimately decide that there are two possible MBP's per day, that would result in a huge potential liability. For example, if an employee claimed they missed meal and rest breaks every day, that employee's claim would be worth two hours of pay per day (i.e. 25% of an 8-hour day) for three years — e.g., 75% of a year's pay. If the claim is made by or on behalf of all non-exempt employees, an employer could be

**A**ction Notes:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**R**oute to:  
 HR Dept: \_\_\_\_\_  
 Accounting Dept: \_\_\_\_\_  
 Benefits Admin: \_\_\_\_\_  
 Managers:

*This bulletin is a general overview of the subject matter, and is not meant to provide professional opinions regarding any specific case, matter, or set of facts, or to substitute for the professional advice of Waag and Co. Instead, please contact Susan S. Waag, Esq. for additional information.*

looking at a single judgment equal to 75% of one year's payroll. That is before the addition of interest accrued since the time the MBP should have been paid, and before the addition of other penalties and attorney's fees. Clearly, a claim for missed MBP's can quickly put a business in financial jeopardy. Moreover, the money involved makes MBP claims a rich and attractive target for plaintiffs' attorneys, particularly regarding class actions.

As stated, the California Supreme Court ruled that the MBP's constitute "wages." They cited various aspects of the legislative history of the law, and reasoned that the MBP's function much more like other "wage" provisions (such as premium payments for overtime, split-shift premiums, reporting pay, and other such requirements) than more clearly-stated "penalty" provisions. The Court noted that the other "penalty" laws had fixed, arbitrary amounts for violations (such as \$100 per violation) and required aggrieved workers to file actions before any penalties would be due. Conversely, other "wage" provisions, such as overtime, can be said to "punish" employers for making employees work more than eight hours in a day, but the premium due to the employee must automatically be paid in the applicable paycheck, without need for the employee to bring any claim. This latter approach is how the MBP's work, and this similarity was significant for the Court in making its decision.

□ **What This Means For Employers:** The recommended actions for employers has not really changed — it has merely become substantially more important. Employers must immediately take steps to ensure that all non-exempt employees are taking all of their required rest and meal breaks. No matter what approach you decide to take, under no circumstances may the employer tolerate any misrepresentations on time cards, nor discourage employees from reporting missed breaks.

Since the rest breaks must be on paid time, employers are not required to have employees track the exact times of these breaks, and employers must not have employees clock-out for them. Since employees must clock out for meal breaks, any missed meal periods would show up on the employee's time card. Many employers establish a procedure whereby the employees are told they are expected to take breaks, and must report when breaks are missed. Waag and Co. has assisted numerous clients with developing workable procedures for handling these issues, which can vary somewhat depending on what will be most practical for the particular workplace. Employers must be careful to

ensure that their procedures cannot be seen as punitive, such that employees could become reasonably afraid to report any missed breaks. Given the potential cost of this issue, assistance of qualified employment counsel in preparing and implementing such procedures is advised.

For the past two years, the agency responsible for enforcing the missed-break issue has been treating the MBP's as penalties. Accordingly, that agency has resolved claims based on the one-year limit, with no additional penalties or interest. Employers who currently have any claims pending against them will now face a potential tripling of those claimed MBP amounts, plus the specter of added penalties and interest. Such employers may wish to reassess their positions regarding the settlement of such claims immediately.

One change, however, involves payroll taxes. Now that the MBP is officially a "wage" as opposed to a "penalty", employers must withhold normal payroll taxes from MBPs.

□ **What is Next?** About three years ago, while the enforcement agencies still viewed MBP's as "wages," Governor Schwarzenegger recognized the problems presented by the missed-break issue. He directed that new regulations be promulgated to inject some reasonableness into the management of breaks. Soon afterwards, a number of appellate court rulings were issued that held MBP's were "penalties" (including the *Murphy* case, which the Supreme Court reversed) and the proposed regulations were withdrawn as unnecessary. This was unfortunate, since the proposed regulations addressed many more issues that would have been useful to have resolved. To the extent that the Governor still wishes to moderate the MBP situation, he will need to reinstate the regulation process, and he will face a legislature that has expressed its hostility to any such regulations. This can be expected to take at least two years, if it happens at all, and then there is a possibility that the legislature will move to reverse it.

□ **Conclusion:** The new reality is that employers cannot be complacent about breaks. It is not enough to believe that your employees are taking breaks; you need to police it. While this is a sad state of affairs, until and unless there is any change in the law (unlikely), this is the new model for the workplace.

*This bulletin is a general overview of the subject matter, and is not meant to provide professional opinions regarding any specific case, matter, or set of facts, or to substitute for the professional advice of Waag and Co. Instead, please contact Susan S. Waag, Esq. for additional information.*