

Beware of Rounding Meal Periods and Ensure Meal Period Practices Comply with Recordkeeping Requirements



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In the newest employment law pronouncement from the California Supreme Court, it held the practice of rounding time punches cannot be applied to meal periods and time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including for purposes of summary judgment. In a definitive decision, the Court in *Donohue v. AMN Services, LLC* held that the practice of rounding time punches for meal periods, regardless of the increment, is inconsistent with the purpose of the provisions of the Labor Code and the IWC wage orders and any recorded meal periods that do not strictly comply with those laws create a rebuttable presumption that the employer violated such provisions.

In *Donohue*, the employer had a policy in which it rounded time punches to the nearest 10-minute increment. For example, a 21-minute lunch from 12:04 p.m. to 12:25 p.m. would be recorded as a 30-minute lunch from 12:00 p.m. to 12:30 p.m. Meanwhile, a 38-minute lunch from 11:55 a.m. to 12:33 p.m. would be recorded as a 30-minute lunch from 12:00 p.m. to 12:30 p.m. The employer relied on the rounded time punches to determine whether a meal period was short or delayed. Prior to September 2012, for any noncompliant meal period (*i.e.*, missed, short or late), the employer's system assumed a Labor Code violation and paid the meal period penalty payment. In September 2012, the system began using a drop-down menu that required the employee to indicate whether a noncompliant meal period was due to the employee's choice or the employer's actions. In either case, the meal period penalty payment and/or the drop-down menu were not triggered if the rounded time punches showed a 30-minute compliant meal

period. If triggered and the employee indicated that the noncompliant meal period was due to his or her choice, then the employer did not pay the meal period penalty. If the employee indicated the noncompliant meal period resulted from the employer's actions, then the employer paid the meal period penalty. Employees also certified on their timesheets at the end of the pay period that they reviewed the time entries and confirmed that they were accurate.

The Court held that rounding in the meal period context is not neutral because it results in an asymmetry between the treatment of rounded-up minutes (*i.e.*, time not worked that is compensated with regular pay) and the treatment of rounded-down minutes (*i.e.*, time worked that may trigger premium pay). For example, the employer's rounding policy, while never triggering premium pay for compliant meal periods, did not always trigger premium pay for noncompliant meal periods that in actual time lasted less than 30-minutes. Similarly, with respect to the timing of meal periods, while the policy never triggered premium pay for early or on-time meal periods, it also did not always trigger premium pay for late meal periods. As such, the Court found that rounding did not properly account for the underpayment of premium pay that employees are entitled to under California Labor Code § 226.7 and Wage Order No. 4. Specifically, an employee must receive one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided – regardless of the extent of the violation (*i.e.*, shortened, late or no meal period provided), which serves the dual purposes of compensating employees for their injuries and incentivizing employers to comply with labor standards. The Court reasoned that “[a] premium pay scheme that discourages employers from infringing on meal periods by even a few minutes cannot be reconciled with a policy that counts those minutes as negligible rounding errors.”

The Court went on to hold that a rebuttable presumption in favor of the employee (*i.e.*, a meal period violation) arises when records show missed, short or delayed meal periods. Employers can rebut the presumption by presenting evidence that the employee was properly compensated for noncompliant meal periods or that the employee had in fact been provided compliant meal periods that the employee chose to waive in some form or fashion. However, this means a plaintiff merely needs to introduce time records showing missed, short or late meal periods with no indication of proper compensation to satisfy his or her initial burden in moving for summary judgment. The burden then shifts to the employer to establish evidence of compliance. If it cannot, a court may find in favor of the employee without a trial. In *Donohue*, the Court indicated that the employer's system with the drop-down menu would have ensured accurate tracking of meal period violations if it had simply omitted the rounding.

Employers that have rounding policies must ensure those policies are not being applied to meal periods. Employees should also have adequate procedures in place to ensure their employees are properly compensated for short, late or missed meal periods and that an employee's decision to waive a meal period premium is documented appropriately. Employers who have questions about the legality of their policies and/or meal period practices should consult with counsel.

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