

**LF-1**  
**RESOLUTION 10-09-2007**

**DIGEST**

Labor and Employment: Penalty for Violation of Break Requirement

Amends Labor Code section 226.7 to characterize the one extra hour of pay due to an employee who is deprived of a meal or rest break as a penalty rather than wages.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Labor Code section 226.7 to characterize the one hour of extra pay due to an employee who is deprived of a meal or rest break as a penalty rather than wages. This resolution should be approved in principle because it would restore the intent of the statute and would remove an ambiguity that extends the limitations period for claims for such amounts.

Section 226.7 provides that an employee who works through his or her statutorily mandated meal or rest break is entitled to an additional hour of pay. As presently written, the statute does not indicate whether the additional hour of pay is in the nature of wages or a penalty. If the additional hour is characterized as wages, the employee has three years in which to make a claim for that additional pay. (Code Civ. Proc., § 338, subd. (a).) If the hour is counted as a penalty, however, the employee has only one year in which to sue. (Code Civ. Proc., § 340, subd. (a).)

A recent decision held that the additional hour of pay is to be treated as wages, not a penalty, and is therefore subject to the three-year statute of limitations. (*Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094.) That holding resulted in an unintended windfall for the employee. If the employee works through a break, he or she earns pay for that time. The additional hour for the missed break is to be paid *in addition to* the employee's regular pay for the extra time worked. Since the employee has already been compensated for his or her work, the additional hour mandated by section 226.7 is clearly a penalty. Yet *Murphy* held that the additional hour was compensation and thus the longer statute of limitations should apply.

The plain purpose of section 226.7 is to ensure that employees are entitled to regular breaks during their shift, and to provide a negative incentive for employers to provide those breaks consistently. The decision in *Murphy*, while well-reasoned under the present form and legislative history of section 226.7, has resulted in an unintended bonus for employees who may even choose to work through their breaks, and an unfair penalty against their employers. Moreover, the decision extends the statute of limitations for claims against those employers, subjecting them to additional liability to employees who have already been compensated for the time they actually worked. This resolution would correct those inconsistencies.

## TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend California Labor Code Section 226.7 to read as follows:

- 1 §226.7
- 2 (a) No employer shall require any employee to work during any meal or rest period
- 3 mandated by an applicable order of the Industrial Welfare Commission.
- 4 (b) If an employer fails to provide an employee a meal period or rest period in accordance
- 5 with an applicable order of the Industrial Welfare Commission, the employer shall pay the
- 6 employee one additional hour of pay at the employee's regular rate of compensation for
- 7 each work day that the meal or rest period was not provided, as a penalty for failing to
- 8 provide the meal or rest period.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Helene Wasserman, John Leonard, Larry Liebenbaum, Donna Hollingsworth, Mark Harvis, Ralph Perry, Danette Meyers, John Hoag, Joel Douglas, Connie Kim

### STATEMENT OF REASONS:

Existing Law: Based upon the April 16, 2007 decision in *Murphy v. Kenneth Cole Productions*, \_\_\_ Cal.4<sup>th</sup> \_\_\_, (Cal. April 16, 2007) , the money paid to employees if they do not take their meal or rest break, regardless of the reason, is considered “wages.” This is despite the fact that, even though the employee may miss the meal or rest break, ***they are paid for the time they work, including the time they are working through their meal period. The one hour of pay is in addition to the amount the employee earns by working.***

This Resolution: Would add language to Labor Code 226.7 to accurately characterize the money paid to the employee as being a penalty against the employer for failing to provide the meal and/or rest break. It would legislatively overrule *Murphy v. Kenneth Cole Productions*.

The Problem: Employers are required by law to ensure that all employees are afforded the opportunity to take a 10 minute, paid, rest break for every four hours worked. Employers are also required by law, with certain limited exceptions, to ensure that all employees *actually take* a 30-minute, uninterrupted, unpaid, meal period for every five hours worked. Even if the employee asks if he or she can “work through lunch” to be able to leave earlier, the employer may not permit that, because permitting so would be a violation of the law, and the employer would be required to pay the employee an additional hour at the employee's regular rate of pay for each occurrence. If the employee “works through” lunch, ***the employee is being paid for that time.*** Labor Code Section 226.7 requires that the employee be paid ***an additional hour.***

The issue of whether that “extra hour” is properly characterized as a “wage” to the employee or a “penalty” against the employer has been hotly contested. In *Murphy v. Kenneth Cole Productions*, the California Supreme Court decided that it was a “wage.” There is no real

explanation as to exactly what the employee is being compensated for under the circumstances, since the employee is being compensated for his or her time working through lunch.

Numerous articles were written in the days that followed the rendition of the *Murphy* decision. In one article, a reputed *employee*-side employment attorney was quoted as saying “This sends a clear message to employers that they have to take these rules seriously.” That is exactly why *Murphy* was wrongly decided. The entire purpose of Labor Code Section 226.7 is to provide a penalty, a hammer, against employers who do not provide employees with their meal and rest breaks. It is not intended to provide wages, since the wages are already being paid for the time the employee worked through lunch. The goal is to ensure that employers follow the law and provide the legally-mandated meal and rest breaks. If they do not follow the law, they should be penalized. That is what Labor Code Section 226.7 does. This resolution clarifies the purpose of Labor Code Section 226.7.

### **IMPACT STATEMENT**

This proposed resolution does not affect any other law, statute or rule.

**AUTHOR AND/OR PERMANENT CONTACT:** Helene Wasserman, Ford & Harrison, 350 S. Grand Avenue, Suite 2300, Los Angeles, California 90071 (213) 237-2403 (o); (213) 237-2401 (f); HWasserman@fordharrison.com

**RESPONSIBLE FLOOR DELEGATE:** Helene Wasserman