*PENNSYLVANIA EMPLOYMENT LAW ALERT*

January 7, 2016

# GIVE ME A BREAK (AND PAY FOR IT)

***Jason E. Murtagh***

As we reported in November 2015, the U.S. Court of Appeals for the Third Circuit held that under the Fair Labor Standards Act ("FLSA"), an employer need not pay employees during meal breaks that predominantly benefit the employee. See Babcock v. Butler Co., N. 14-1467 (3d Cir. Nov. 24, 2015). The next month, the U.S. District Court for the Eastern District of Pennsylvania addressed a similar issue: does the FLSA require an employer to pay employees for short breaks from work? Perez v. American Future Systems, Inc., No. 12-6171 (E.D.P.A. Dec. 16, 2015).

The answer was a resounding "yes." The Court adopted a "bright line rule" in holding that employers must pay for "short workday rest periods of 20 minutes or less . . . ." Id. at p. 9. Moreover, the Court found the President of the company to be a joint employer and therefore personally liable for the company's failure to pay employees for those breaks.

The facts of the case were extreme, but illustrative. American Future Systems sold publications through sales representatives at one of several call centers, under the name "Progressive Business Publications." Id. at p. 2. Progressive used a computer system that tracked when employees logged in and were actively making calls, documenting the results of the calls, receiving training, or doing other approved tasks. Id. at 3-4. However, beginning in 2009, Progressive adopted a policy providing that while employees could take breaks at any time, they would not be paid for those breaks. Therefore, employees were paid only for that time that the computer showed them as logged in, as well as a 90-second grace period between tasks. Id. and n.5.

The Department of Labor's Wage & Hour Division challenged the policy. The government argued that under 29 C.F.R. § 785.18,[1] all workday breaks of 20 minutes or less must be paid. The defendant, by contrast, argued that the appropriate provision was 29 C.F.R. § 785.16, which does not require an employer to pay for time which employees are able to use for their own purpose and not for the benefit of the employer.[2]

---

[1] That provision says, in part: "Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked."

[2] "Periods during which an employee is completely relieved of duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. . . . Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case."

The Court first discussed the history of § 785.18, which dates back to 1961 (and its predecessor dates to June 10, 1940). In light of the 75-year history of this provision, the Court found that it was entitled to substantial deference.

Then, lacking any precedent from the Third Circuit discussing whether § 785.18 should be applied as a "bright line rule," the District Court reviewed and discussed eleven cases from around the country that had interpreted the provision in that way. The Court noted that other courts had applied § 785.18 in all stages of litigation, including post-trial proceedings, summary judgment, and cases with multiple plaintiffs. It further explained that because § 785.18 is specific (it mentions breaks of up to 20 minutes), there was no need to apply the less-specific analysis of § 785.16. Accordingly, the Court found that the obligation to pay for short breaks applied in all types of working environments, regardless of the specific "facts and circumstances" of the break.[3]

The Court then turned to whether the CEO was liable for the company's violations. Applying the "economic reality" test from In re Enter. Rent-A-Car Wage & Hour Practices Litig., 683 F.3d 462, 467 (3d. Cir. 2012),[4] the Court found that the CEO owned 98 percent of the company, and was responsible for "primarily strategy, overview of the company, [and] . . . all of the people and all activities within the company." Slip op. at 25. Furthermore, he retained final hiring and firing authority, met with the COO daily regarding operations, made major policy decisions, and had final say in compensation, break policy, and budgetary control. Id. at 25-26. Based on these facts, the Court determined that the CEO was a "joint employer" and personally liable for damages. Id. at 26.

What does this all mean? After Babcock, you may not have to pay employees for certain meal breaks. But after Perez, use common sense for shorter breaks. Let your employees go to the bathroom, get a cup of coffee, or take a short walk without docking their pay.

Give your employees a break, and you'll be less likely to be on the hook down the road. Please contact us with any questions regarding this case or any other issues you may face.[5]

---

[3] The Court noted that section 785.18 has two specific exceptions – employers do not need to pay for short break times where: (1) there are unauthorized extensions of authorized breaks, and (2) the breaks are taken for the purpose of expressing breast milk.

[4] There are four factors in the Enterprise test: (1) authority to hire & fire relevant employees, (2) authority to create rules, assign work and determine the employee's employment conditions (i.e. schedules, rate and method of pay, and benefits), (3) daily involvement in supervising of employees, including discipline, (4) actual control of records (i.e. payroll, taxes, and insurance). Beyond these factors, whether there are other indicators of "significant control" may be considered. Id.at 469-70.

[5] Mr. Murtagh is a Shareholder at Rubin, Fortunato & Harbison P.C. in Paoli, Pennsylvania. He is admitted to practice in Pennsylvania and California. He may be reached via email at jmurtagh@rubinfortunato.com or at 610-408-2000.