

# EMPLOYMENT LAW UPDATE

*Relationship-Driven Results*

*April 2019*

## JUDICIAL

### California

#### **Employer's Failure to Keep Accurate Work Hour Records Opens Door for Employee's Overtime Claim**

In *Furry v. East Bay Publishing*, a California court of appeal held that imprecise evidence by an employee can provide a sufficient basis for damages when the employer fails to keep accurate records of the employee's work hours.

Plaintiff Terry Furry ("the Employee") sued his former employers, East Bay Express and East Bay Publishing, LLC (collectively, "the Employer") for unpaid overtime wages, meal and rest break compensation, and statutory penalties for inaccurate wage statements. The Employee's compensation was a base salary, plus commissions, bonuses, and vacation pay. Each employee received a commission breakdown for each pay period. The Employee's wage statements, however, did not itemize the information in terms of hours worked, his hourly rate, his overtime rate, his double time rate, or the amount of any overtime worked. In addition, the Employer did not record the hours the Employee worked.

The Employee's typical work day was from 8:30 or 9:00 a.m. until 5:30 or 6:00 p.m. Meal breaks were left to the Employee's discretion, and he typically did not take lunch breaks on Mondays or Tuesdays. The Employee also performed work in the evenings, on weekends, and at various events and promotions sponsored by the Employer. Finally, the Employee created original artwork and advertising that were used at the Employer's events.

During a bench trial, the trial court found that the Employer did not maintain detailed records of the hours worked by the Employee and failed to meet its burden of proof that the Employee was exempt from the laws pertaining to overtime, minimum wage, and meal and rest breaks. The trial court, however, concluded that the Employee was not entitled to unpaid and overtime pay because he "failed to present sufficient evidence regarding the amount and extent of his work to allow the court to draw a just and reasonable inference that he engaged in any work for which he was not paid." The court characterized the Employee's testimony as "uncertain, speculative, vague and unclear."

The appellate court held that the trial court erred in refusing to award damages for unpaid overtime. The Employee argued that a relaxed standard of proof applied due to the Employer's failure to keep records of his hours, and his

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testimony regarding work performed was sufficient to meet that relaxed burden. The court of appeal agreed, reasoning that the assertion of an exemption from the overtime laws is considered to be an affirmative defense; therefore, an employer bears the burden of proving an employee's exemption. The appellate court also found that the consequences of an employer's failure to keep records required by statute should fall on an employer, not an employee. In such a situation, imprecise evidence by an employee can provide a sufficient basis for damages.

The Employee's performance of additional work beyond his regular 40-hour workweek was established through his own testimony as well as two other witnesses. Thus, a wage and hour violation occurred, and the Employee was therefore damaged. The only uncertainty was the amount of damage, which may be proven by imprecise evidence by the Employee. The Employee provided estimates of hours of uncompensated work based on his recollection of his workload over the years, as well as the duties and tasks he performed for specific events. The court of appeal found that the detail provided in the Employee's testimony was sufficient to shift the burden to the Employer to provide specific detail on the amount of overtime or to disprove what was not correct with the Employee's figures.

However, the court of appeal also held that the trial court did not err in denying relief on the meal break claim. The Employee did not deny that he was provided with the opportunity to take meal breaks, but chose to take meals at his desk. Instead, he argued that even if he is not entitled to premium pay under Labor Code section 226.7(c), he is entitled to regular compensation for the hours when the Employer knew or had reason to know he was working through meal breaks. The appellate court found that the Employee failed to demonstrate that the Employer knew or reasonably should have known that he worked during some of his meal breaks. Thus, the trial court correctly denied the Employee relief on his meal break claim.

Given the court's findings, employers are reminded of their obligation to record and maintain accurate time records under California law.

### **Trial Judge Must Articulate Reasons for Denial of Class Certification**

In *Myers v. Raley's*, a California court of appeal reversed and remanded a trial court's denial of class certification of wage and hour claims for failing to articulate its reasons for finding that common issues did not predominate.

Plaintiffs Roger Myers, Dave Billings, Greg Neyhart, and Jim Mestas (collectively, the "Plaintiffs") were non-exempt technicians of different types (maintenance, food equipment, refrigeration, service and construction electricians) that sued former employer Raley's grocery stores ("Raley's") for violations of California wage and hour laws, including maintaining uniform policies and/or practices denying travel time while under Raley's control, compensation for working during meal time, and reimbursement for personal tools they were required to purchase and replace.

Plaintiffs asserted that Raley's maintained common policies regarding travel time, meal time, and personal tools. Raley's asserted that there were no

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common policies, but rather the practices depended on the supervisor, position, employee, and daily nuances that came with the job.

After two hearings and extensive discovery, the trial court denied the Plaintiffs' request for class certification because they failed to establish that a well-defined community of interest existed among the proposed putative class members, and therefore the commonality requirement was not met for class certification.

Upon review, the appellate court clarified that while the standard of review in most appellate cases are deferential to the trial court, the standard of review for class certification is unique in that it only reviews the *reasons* given by the trial court for denial of class certification. In this case, the trial court failed to provide any reasoning for why it denied class certification, thereby rendering the court of appeal's task of review "impossible." The appellate court reversed and remanded back to the trial court for "a statement of reasons for approving or denying class certification."

### **Court of Appeal Rules that Religious School Employees are Subject to Wage and Hour Laws**

In *Su v. Stephen S. Wise Temple*, a California court of appeal ruled that a Jewish Temple's teachers were subject to state wage and hour laws, overturning a lower court finding that the ministerial exception applies. The ministerial exception "operates to exempt from the coverage of various employment laws the employment relationships between religious institutions and their ministers" and serves as a complete defense to some employment claims brought against religious institutions by or on behalf of persons classified as ministerial employees. Plaintiff Labor Commissioner Julie Su ("Plaintiff"), brought the case on behalf of preschool teachers employed by defendant Stephen S. Wise Temple ("Temple"). The Temple has an Early Childhood Center ("ECC") that employs approximately 40 teachers and is an on-site preschool for children five years old and under. Plaintiff claimed that the Temple violated wage and hour provisions of the Labor Code by failing to provide its preschool teachers with rest breaks, uninterrupted meal breaks, and overtime pay.

After Plaintiff's complaint was filed, the Temple filed a motion for summary judgment arguing that the ECC was a religious school and that its preschool teachers were ministerial employees as defined by the U.S. Supreme Court in *Hosanna-Tabor Evangelical v. E.E.O.C.*, (2012) 565 U.S. 171. Plaintiff argued that there was no evidence that the wage and hour laws at issue burdened the Temple's religious beliefs in a way that violated the First Amendment. The trial court granted the Temple's motion for summary judgment and concluded the teachers were "ministers" within the meaning of the ministerial exception, explaining that the exception is not limited to the heads of religious congregations, and also noted that prior decisions had recognized that preschool teachers in religious schools could serve ministerial functions. Plaintiff filed a timely appeal.

The court of appeal reversed the trial court's determination that the ECC's teachers are to be considered "ministers" as defined by *Hosanna-Tabor*. First, it pointed out that unlike the plaintiff in *Hosanna-Tabor*, the ECC teachers are not given religious titles, and they are not ordained or otherwise recognized as spiritual

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leaders. In contrast, the court held, the ECC teachers are not even required to adhere to the Temple's religious philosophy, to be Temple members, or to be Jewish. Second, the court held that the Temple does not require its teachers to have any formal Jewish education or training, unlike the plaintiff in *Hosanna-Tabor* who was required to take several college-level courses on faith-based subjects and pass an oral examination. Third, there was no evidence that any of the ECC's teachers hold themselves out as ministers and only describe themselves as "teachers." The fourth consideration from *Hosanna-Tabor*, pertaining to teaching religion in the classroom, was the only factor that applied, as ECC teachers teach Jewish rituals, values, and holidays, and participated in weekly Shabbat services. However, the fact that the ECC teachers provide some religious instruction was not enough to meet the required bar for the ministerial exception to apply.

In reaching its conclusion, the court ruled that it was compelled to distinguish between those church or synagogue employees who are sufficiently central to a religious institution's mission that they are exempt from the protection of the state's generally applicable employment laws, and those who are not. Relying on the analysis in *Hosanna-Tabor*, the court pointed out that for the exception to apply, it is central that a minister not merely be a teacher of religious doctrine but that he or she "personif[ies] a church's (or synagogue's) beliefs and minister[s] to the faithful." The ECC's teachers do not play such a role in synagogue life.

As this case shows, the ministerial exception is an important legal concept that dramatically impacts employers in the religious sector. Properly managing and identifying those employees who are ministerial in their job duties from those who merely work for a religious entity is important and should be analyzed very carefully to minimize potential liability.

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