

## Labor and Employment Alert

### California Supreme Court Says Employers Cannot Recover Attorney's Fees for Prevailing on Break Claims

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On April 30, 2012, the California Supreme Court decided in *Kirby v. Immoos Fire Protection, Inc.* that a prevailing employer cannot recover attorney's fees on claims for failure to provide meal or rest breaks. Labor Code section 226.7 requires the payment of "one additional hour of pay" if an employer fails to provide an employee with a proper meal or rest break.

Labor Code section 218.5 permits a prevailing party (employee or employer) to recover fees "in any action brought for nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." Because the additional hour of pay has previously been determined to constitute a wage, the Court of Appeal found that section 218.5 applied to claims brought under section 226.7. The Supreme Court, however, found that the gravamen of an action for violation section 226.7 is not nonpayment of wages, but rather the failure to provide meal or rest breaks. Therefore, it concluded that section 218.5 does not apply to break claims, and overruled the Court of Appeal.

The Court also rejected the plaintiff's argument that a prevailing employee could recover fees for meal and rest break claims pursuant to Labor Code section 1194, which permits employees (but not employers) to recover fees in overtime or minimum wage cases. The effect of this ruling is that neither an employer nor an employee can recover fees under sections 218.5 or 1194 when prevailing on a meal or rest break claim. However, in class or representative actions, a prevailing plaintiff may still be able to recover fees under different provisions, such as the Private Attorney General Act (which allows an employee to bring representative actions for the recovery of penalties for certain Labor Code violations), or Code of Civil Procedure section 1021.5 (which gives a court discretion to award fees to a successful party where "a significant benefit . . . has been conferred on the general public or a large class of persons"). Nevertheless, the ruling in Kirby could still make meal and rest break cases less attractive to the plaintiff's bar, at least with respect to individual, non-class actions.

In explaining its decision, the Kirby Court also noted that there is still a violation of Labor Code section 226.7 if an employee is not provided with a meal or rest break, even if the employee is paid the additional one hour of pay. However, the Court did not address what, if any, other remedy there might be for an employee if he or she has already been paid the additional one hour.

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