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California Superior Court, County.

Andrea SAVAGLIO, James Davis, Jerrilyn Newland, and Charlotte Johnson, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
WAL-MART STORES, INC., a Delaware corporation, Sam's West, Inc., a California corporation, George Rodriguez, Vincent Martinez, and Does 1 through 100, Defendants.

No. C-835687. | July 20, 2004.

Opinion

ORDER GRANTING PART AND DENYING IN PART THE MOTION OF DEFENDANT FOR SUMMARY ADJUDICATION ON THE MEAL PERIOD MONEY CLAIMS.

SABRAW, J.

***1** The motion of Defendant Wal-Mart for summary adjudication came on regularly for hearing on July 13, 2004, in Department 22, the Honorable Ronald M. Sabraw, presiding. Plaintiffs and Defendant appeared at the hearing through counsel of record.

IT IS HEREBY ORDERED that the Motion of Wal-Mart for summary adjudication on the Meal Period Money Claims is GRANTED in part and DENIED in part.

INTRODUCTION
By class certification order dated November 6, 2003, the Court organized the claims and ordered that the named plaintiffs could pursue certain claims on behalf of absent class members. The Meal Period Money claims consist of those claims concerning missed or shorted meal periods and seek monetary relief under the Labor Code and the UCL.

The meal period claims are based on Labor Code 226.7, Labor Code 512, and paragraph 11 of the applicable California Wage Orders.

Labor Code 226.7 (effective on January 1, 2001) states, "No employer shall require any employee to work during any meal or rest period" and "If an employer fails to provide an employee a meal period or rest period ..., the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

Labor Code 512 states, "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes...."

The applicable California Wage Orders state at paragraph 11, "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes ..." Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶ 11(A).

The Court previously held that the Labor Code and the Wage Orders require employers to ensure that employees take full 30 minute meal breaks.

Wal-Mart moves for summary adjudication of the Meal Period Money Claims on various grounds. Several of the grounds concern matters of law, whereas others concern factual issues.

INTERPRETING LABOR CODE 226.7.
Many of the matters discussed in this opinion revolve around a single unresolved issue-whether payments under Labor Code 226.7 are in the nature of wages (like overtime pay under Labor Code Labor 510) or in the nature of a penalty (like an express penalty under Labor Code 226(f)). The resolution of this issue affects the applicable statute of limitations, the existence of a private right of action, the availability of punitive damages, and other matters.

Wages are defined in Labor Code 200(a) as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." The term "wages" includes not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation, including items such as vacation pay and sick pay. *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App. 4th 1084, 1091; *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1972) 24 Cal.App.3d 35, 44.

***2** The Court considers the language of the statute, the legislative history of the statute, the effect of the statute, the applicable case law, this Court's class certification order, DLSE guidance, and collateral issues such as the ease of administration and the effect of the decision on payroll taxes.

INTERPRETING LABOR CODE 226.7-THE STATUTE.
Labor Code 226.7 states: "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." The Court focuses on (1) what is to be paid, (2) how it is to be paid, and (3) to whom.

The Legislature did not characterize what was to be paid. The payment is "one additional hour of pay at the employee's regular rate of compensation." This unit of measure is ambiguous. The Legislature did not state that the employer must "pay the employee additional compensation in an amount equal to ..." and did not say that the employer must "pay to the employee a penalty in an amount equal to...."

The Legislature did not state how the money was to be paid. The use of the mandatory "shall," however, suggests that the employer has an affirmative obligation to make the payment (like wages) and the employee does not need to make a claim for the money (like penalties).

The Legislature did state the money was to be paid to employees. Paying the money to the employees suggests that the payment is a wage. Wages are paid to employees, whereas penalties are generally paid to regulatory authorities. See Labor Code 210 and 225.5 (penalties payable to the state)and Labor Code 2699 (permitting private parties to pursue penalties, but requiring payment of 75% of the penalties to the state). See also Penal Code 1202.4(a)(3)(distinguishing between fines payable to the state and restitution payable to victims).

The Court has also compared Labor Code 226.7 with Labor Code 510. Section 510 concerns overtime pay and states, "Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." Section 510 states that employees "shall be compensated," suggesting that their overtime pay is to compensate them for work performed. In contrast, section 226.7 states "the employer shall pay the employee one additional hour of pay," but does not state that the payment is compensation for work performed.

The Court notes that in section 226.7 "pay" is a verb that refers to a "rate of compensation," whereas in section 510 "compensated" is the verb that refers to a "rate of pay." It is unclear whether the Legislature (1) meant different thing when it used different words or (2) presumed that the words "pay" and "compensation" have identical meanings and are interchangeable.

INTERPRETING LABOR CODE 226.7-LEGISLATIVE HISTORY.

***3** The legislative history of AB 2509 in the 1999-2000 session suggests that payments under Labor Code 226.7 are in the nature of penalties.

When AB 2509 was introduced in the Assembly on February 24, 2000, it included a civil penalty and what appears to be premium pay for affected employees. The Legislative Counsel's Digest dated February 24, 2000 states, "This bill would make any employer that requires any employee to work during a meal or rest period mandated by an order of the commission [1] subject to a civil penalty of $50 per violation and [2] liable to the employee for twice the employee's average hourly or piecework pay. An aggrieved employee could bring an administrative action before the Labor Commissioner or could commence a civil action for recovery of these amounts, and if the employee prevails in such a civil action, the employee would be entitled to recover attorney's fees."

Subsequent comments by legislative bodies regarding the proposed legislation vary in their emphasis. The April 12, 2000, notes of the Assembly Committee on Labor and Employment and the May 10, 2000, notes of the Assembly Committee on Appropriations refer only to "penalties." The notes of August 8, 2000, from the Senate Judiciary Committee refer to the civil penalty and to the premium pay. The August 25, 2000, notes of the Senate Rules Committee state, "Failure to provide such meal and rest periods would subject an employer to paying the worker one hour of wages for each work day when rest periods were not offered."

On August 25, 2000, the legislation was amended in the Senate. The Senate deleted the language that would have created a civil penalty (presumably enforceable by the DLSE) and a payment to the aggrieved employee to be enforced through a proceeding under Labor Code 98. The Senate replaced the distinct penalty and wage provisions with the current provision that is neither clearly a wage nor a penalty. The Senate also deleted the proposed language stating that employees could recover the payment in an administrative proceeding or civil action.

The notes of August 25, 2000, of the Assembly Committee on Labor and Employment regarding concurrence in the Senate amendments state that the legislation would "Delete the provisions related to penalties for an employer who fails to provide a meal or rest period, and instead codify the lower penalty amounts adopted by the Industrial Welfare Commission (IWC)."

In reviewing this legislative history, the Court places the greatest emphasis on the notes of August 25, 2000, for they reflect the compromise reached by the Assembly and Senate. Those notes refer to the payment as a penalty and delete the express private right of action for the payment that was clearly in the nature of a wage. The Court gives the most effect to these notes because they reflect the thinking of the Legislature at the time section 226.7 was enacted.

Court has not considered AB 1723, proposed in the 2003-2004 session, which also addresses these issues. This proposed legislation has not been enacted and the Court does not draw any inference about its progress through the Legislature.

INTERPRETING LABOR CODE 226.7-EFFECT OF THE STATUTE.

***4** Payments under Labor Code 226.7 have characteristics of both wages and penalties.

The payments are somewhat analogous to "vacation pay" that is received when an employee terminates his or her job. Employees earn vacation time proportionately as the employees labor. *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App. 4th 1595, 1599-1600. Similarly, it could be argued that employees earn the Labor Code 226 .7 payment if they work during their rest breaks or meal periods. With vacation time, meal periods, and rest breaks, if employees do not take the time off to which they are entitled, then they are compensated for their time. Once lost, time cannot be recaptured, but compensation must still be paid.

The payments are also analogous to penalties. Unlike "vacation pay," payments under section 226.7 are not earned in relation to work performed. The payments are due if an employee works during a meal period or rest break, but they do not vary in relation to the amount of work performed. In addition, the payments must be made even though the employee is already being paid for the time they work during their rest breaks and meal periods. Therefore, the payments are penal in nature because they "provide for recovery of damages additional to actual losses incurred." *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App. 4th 967, 978.

INTERPRETING LABOR CODE 226.7-CASE LAW

There is no appellate case law regarding the application of Labor Code 226.7. Trial courts have gone in different directions. See *McKinnon v. Best Buy,* Alameda County Superior Court No. RG03-082294 (March 12, 2004) (Labor Code 226.7 in nature of premium pay, so recoverable under the UCL) (petition for writ denied); *Terry v. Cigarettes Cheaper!,* Alameda County Superior Court No. C-835526 (April 18, 2003) (Labor Code 226.7 in nature of a penalty, so no private right of action under Labor Code 226.7); *Walton v. Resource Consultants, Inc.,* San Diego Superior Court, No. GIC 779465 (April 19, 2002) (Labor Code 226.7 in nature of a penalty, so one year statute of limitations) (affirmed in unpublished opinion). See also Assembly Floor Analysis of AB 1723 dated September 12, 2003 at p3-4 (noting that a trial court in Santa Barbara held that the additional hour of pay is a penalty).

INTERPRETING LABOR CODE 226.7-CONSISTENCY WITH CLASS CERTIFICATION ORDER.

The class certification order in this case held that the Labor Code and the Wage Orders require employers to ensure that employees take full 30 minute meal breaks.

Defendants argue that if (as held by this Court) employers must ensure that employees take full 30 minute meal breaks, then section 226.7 payments must be in the nature of penalties. Defendants assert that wages are payments for work that is lawfully performed whereas penalties are payments to deter unlawful practices. Defendants argue that because the Court found that employers must ensure that employees take meal periods, consistency now requires the Court to hold that the section 226.7 payments are in the nature of penalties.

***5** Defendants contrast the payment of overtime wages under section 510 with meal period payments under section 226.7. The Labor Code permits overtime work, but requires that any such work be compensated at time and a half. Because the work is permitted, the payments are in the nature of wages. In contrast, if the Labor Code prohibits employees from waiving meal periods in exchange for additional money, then Labor Code 226.7 payments could not be wages for work lawfully performed and must be in the nature of penalties to deter unlawful practices.

Under Defendant's argument, although the measure of section 226.7 payments may be "one additional hour of pay at the employee's regular rate of compensation," the nature of the payment is penal in nature because it is to deter unlawful activity rather than to compensate for lawful labor. Furthermore, if the section 226.7 payments were in the nature of wages, then employers and employees could presumably agree that employees would work through their meal and rest breaks in exchange for the section 226.7 payments.

INTERPRETING LABOR CODE 226.7-DLSE GUIDANCE.

The Court takes judicial notice of the DLSE Enforcement Policies and Interpretations Manual, an opinion letters of the DLSE dated October 17, 2003, and a Labor Commissioner Order dated April 27, 2004. These documents address the nature of Labor Code 226.7 payments. "While not controlling upon the courts by reason of their authority, [DLSE documents] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bell v. Farmers Ins. Exch.* (2001) 87 Cal.App. 4th 805, 815. But see Executive Order S-2-03 and DLSE web site (Def's Supp RJN, Exh S and T) (suggesting that policy should only be made through approved regulations and that DLSE opinion letters are advice in specific cases only).

The headings to sections 45.2.7, 45.2.8, 45.2.9, and 45.3.7, in the Manual refer to section 226.7 payments as a "Premium," but the text of section 45.2.8 refers to them as a "penalty." The October 17, 2003, opinion letter concerns whether there is a private right of action under Labor Code 226.7 and suggests that section 226.7 payments are a form of premium pay. On page 6 of the letter, the DLSE explicitly refers to "Meal period premium pay." This suggests that the DLSE considers section 226.7 payments to be in the nature of wages. The April 27, 2004, order states that a Hearing Officer considers section 226.7 payments to be in the nature of wages.

INTERPRETING LABOR CODE 226.7-COLLATERAL ISSUES.

The Court has considered the practicalities of administering any payments under section 226.7 and how the payroll process will be affected by whether the payments are wages or penalties. As noted above, section 226.7 states "the employer shall pay the employee...." This suggests that the employer has an affirmative obligation to make the payment and the employee

does not need to make a claim for the money.

***6** Monies paid to employees are generally in the form of wages. The Court speculates that it would be more practical administratively to treat section 226.7 payments as wages rather than treating them as payments in a separate category by themselves. Employers do, however, make payments to employees such as reimbursements for business related expenses, so treating the payments as non-wages would also be feasible.

The Court takes judicial notice that wages are subject to a variety of charges that do not attach to other payments made to employees. These include social security, disability insurance, and unemployment insurance. If section 226.7 payments are "wages," then employers must deduct all payroll charges from section 226.7 payments and remit them to the appropriate entities. This would reduce the payment to employees and may increase the cost to employers.

INTERPRETING LABOR CODE 226.7-CONCLUSION

The Court concludes that section 226.7 payments are in the nature of wages.

The Court starts with the relevant statues. The definition of "wages" in Labor Code 200 is broad and concerns any payments to employees related to their work for an employer. Section 226.7 states "the employer shall pay the employee," suggesting that employers have an affirmative obligation to make the payment just as they have an affirmative obligation to pay wages. In addition, the payment is made to the affected employees and not to the state or any regulatory authority. These suggest that the Legislature intended that employers make section 226.7 payments as they would pay wages and that the payments are a form of wages.

The secondary factors do not give clear guidance. The legislative history is ambiguous, but suggests that as of the enactment of section 226.7 the Legislature thought of the payment as a penalty. Likewise, this Court's class certification order suggests that the section 226.7 payments are penalties to deter unlawful actions rather than wages for lawful work. In contrast, the effect of the mandatory meal period and rest breaks is similar to a statute requiring employers to give paid vacations as compensation, suggesting that the section 226.7 payments are in the nature of wages paid for vacation time not taken. The DLSE guidance suggests that Labor Code 226.7 payments are wages.

Although administrative practicalities have no place in the formal judicial analysis, the Court speculates that the administration of Labor Code 226.7 payments would be easier if they were treated as wages and processed through normal payroll and tax withholding processes. This would also affect the payment of payroll taxes, which is not a concern of the Court but is a factor in assessing the Legislative intent. The August 25, 2000, notes of the Senate regarding AB 2509, which included Labor Code 226.7, referenced the State's loss of income taxes and state that one purpose of the legislation was to combat "a large and growing "underground economy" of employers who are chronic violators of wage and hour, safety, and tax laws." This suggests that the Legislature intended Labor Code 226.7 to both encourage compliance with the Labor Code and ensure that the state collected the appropriate tax revenues.

***7** This is an issue that would benefit from interlocutory appellate review. C.C.P. 166.1. Prompt review is appropriate because (1) resolution of this issue will materially advance the conclusion of this litigation; (2) there is substantial grounds for difference of opinion (other trial courts disagree with this court); (3) every case seeking monetary relief under Labor Code 226.7 will have to deal with this issue; and (4) resolution of the issue will inform employers how they should administratively process any payments under Labor Code 226.7.

IS MONETARY RELIEF AVAILABLE FOR THE TIME BEFORE JANUARY 1, 2004, BECAUSE THERE WAS NO PRIVATE RIGHT OF ACTION BEFORE THAT DATE?

This issue concerns whether there was a private right of action under Labor Code 226.7 before the effective date of Labor Code 2699 on January 1, 2004. Regarding this issue, the motion for summary adjudication is DENIED.

The Court holds that section 226.7 payments are in the nature of wages. Therefore, there has always been a private right of action under Labor Code 218 to recover those wage payments.

IS MONETARY RELIEF AVAILABLE FOR THE TIME BEFORE JANUARY 1, 2001, BARRED BECAUSE THERE WAS NO STATUTORY PROVISION FOR MONETARY RECOVERY BEFORE THAT DATE?

This issue concerns whether monetary relief was an available remedy for violations of Labor Code 512 before the enactment of Labor Code 226.7. Regarding this issue, the motion for summary adjudication is GRANTED in part and DENIED in part.

Plaintiffs assert that before January 1, 2001, employees could enforce Labor Code 512 through a wage claim under Labor Code 218 or through a claim under the UCL.

The motion for summary adjudication is GRANTED insofar as it concerns claims under Labor Code 218 before January 1, 2001. Labor Code 218 states that employees have a private right of action for wages and penalties. It states, "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article." Before the enactment of section 226.7 in January 1, 2001, there were no wages due for violations of section 512. Although section 512 gave employees the rights to take full meal periods, it did not include a remedy for violations in the form of wages.

This interpretation is supported by the legislative history of Labor Code 226.7, which suggests that before January 1, 2001, the only means to enforce the meal period requirement was through injunctive relief. (Defs RJN F at i-iii; RJN Q at 61, 64, 74; RJN R at 25:15-18.)

There is no indication that the Legislature intended Labor Code 226.7 to apply retroactively. Therefore, the general rule applies and the statute will be applied prospectively only. *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207 ("[it] is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.").

***8** The motion for summary adjudication is DENIED insofar as it concerns claims under the UCL before January 1, 2001. The UCL unlawful and unfair claims that borrow from and are tethered to the Labor Code and are distinct from the Labor Code claims. *People v. McKale* (1979) 25 Cal.3d 626. Therefore, the scope of relief permissible under the UCL is not limited by the scope of relief in the borrowed statute. A plaintiff alleging a UCL claim may seek and recover relief independent of that permitted under the statute that forms the basis for an unlawful business practice claim.

The Court holds that it can order any monetary relief permitted under the UCL on the UCL claims. The Court does not address whether the monetary relief sought in this case is permissible under the UCL. See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134 (discussing limits of permissible monetary relief under the UCL).

IS THE STATUTE CONCERNING MEAL PERIODS UNCONSTITUTIONALLY VAGUE REGARDING THE MEANING OF "PROVIDE"?

This issue concerns whether Labor Code 226.7 and 512 adequately informed Wal-Mart that it was required to ensure that its employees take their meal periods. Regarding this issue, the motion for summary adjudication is DENIED.

The due process arguments ultimately concern whether Wal-Mart was given fair warning that its action or inaction was unlawful. Under California law, a statute gives fair warning if it gives affected persons "a reasonable degree of certainty." *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116-1118. The Legislature is not required to anticipate the "untold and unforeseen variations in factual situations" where a statute might apply and address those situations with specificity. See also *United States v. Lanier* (1997) 520 U.S. 259, 270 (court can impose liability if the contours of the law are sufficiently clear that a reasonable person would understand that what he is doing violates the law).

There are several manifestations of the fair warning issue. *United States v. Lanier* (1997) 520 U.S. 259, 266-267. As applied to this case they are (1) the Labor Code is too vague to be enforceable; (2) the Labor Code is vague and that the Court should have resolved any ambiguity in favor of a construction that limited liability; (3) the Court's interpretation of the Labor Code is an unforeseeable judicial enlargement that should be applied prospectively only; and (4) the Court's interpretation of the Labor Code can be applied in this case.

Labor Code 226.7 and 512 and the related wage orders are not unconstitutionally vague-employers could readily discern that they were to provide employees with 30 minute meal periods. What is at issue is whether the Court's interpretation of the statutes and Wage Orders to require employees to take meal periods has subjected Wal-Mart to potential liability that it could not reasonably anticipate. The Court finds that its interpretation of the meal period requirement could have been anticipated

by Wal-Mart. Although Labor Code 226.7 and 512 are less then clear regarding the nature of an employer's obligation to ensure that employees take meal periods, the applicable California Wage Orders are clear. The Wage Orders state at paragraph 11, "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes ..." Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶ 11(A). Furthermore, the mandatory nature of meal periods is consistent with the DLSE's enforcement manual.

***9** This is one of those situations where the law may be somewhat unclear, but it is sufficiently clear to impose liability on a person or entity when a factual situation is presented for the first time. *People ex rel. Gallo v. Acuna,* 14 Cal.4th at 1116 ("Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.").

WHAT IS THE APPLICABLE STATUTE OF LIMITATIONS FOR THE MEAL PERIOD CLAIMS?
The Court holds that the statute of limitations on the Labor Code claims is three years under C.C.P. 338 for the Labor Code Claims and four years under Business and Professions Code 17208 for the UCL claims.

Wal-Mart asserts that the one year statue of limitations under C.C.P. 340(a) should apply because monetary relief under Labor Code 226.7 is in the nature of a penalty. Consistent with discussion of Labor Code 226.7 above, the Court holds that monetary relief under Labor Code 226.7 is in the nature of a wage payment and not in the nature of a penalty. Therefore C.C.P. 340(a) does not apply.

In the alternative, Wal-Mart asserts that the three year statue of limitations under C.C.P. 338 should apply because monetary relief under Labor Code 226.7 is in the nature of a liability created by statute. This makes sense and Plaintiffs agree. The Court holds that the claims for monetary relief under Labor Code 226.7 are subject to C.C.P. 338.

The UCL claims are distinct from the Labor Code claims. The statute of limitations for the UCL claims is four years under Business and Professions Code 17208. The UCL's four year statute of limitations applies to the UCL claims even if there is a different and shorter statue of limitations on the borrowed statute. *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178-179.

DO THE UNDISPUTED MATERIAL FACTS DEMONSTRATE THAT THE CLASS MEMBERS WAIVED THEIR ABILITY TO TAKE FULL MEAL PERIODS?
This issue concerns whether employees who worked on shifts of six hours or less should be conclusively presumed to have waived their meal periods. Regarding this issue, the motion for summary adjudication is DENIED.

The Labor Code and the wage orders permit employees on shift of less than six hours to waive their meal periods. Labor Code 512(a); Wage Order 7-01, para 11. Wal-Mart presents evidence that one employee waived her meal period and suggests that other employees who worked fewer than six hours likewise intended to waive their meal periods.

The Court holds that there are triable issues of material fact whether all employees who worked fewer than six hours likewise intended to waive their meal periods. The Court cannot presume that a single declarant (who is not a named plaintiff) is representative of all members of the class.

DO THE UNDISPUTED MATERIAL FACTS DEMONSTRATE THAT MEAL PERIODS "SHORTED" BY FOUR OR FEWER MINUTES ARE NOT ACTIONABLE?
This issue concerns whether meal periods shorted by a de minimis amount fail to state a claim for monetary relief. Regarding this issue, the motion for summary adjudication is DENIED.

***10** Wal-Mart argues that there is cannot be held liable for meal periods that are shorted by de minimis amounts. *Lindow v. United States* (9th Cir.1984) 738 F.2d 1057, 1062-1063. Wal-Mart suggests that the Court set four minutes as the de minimis threshold. Plaintiffs argue that when employees exceeded their rest periods by a few minutes Wal-Mart deducted the full amount from their pay, suggesting that Wal-Mart's practice has been to consider a few minutes as material and not de minimis.

The Court holds that the de minimis threshold is a matter for the trier of fact that the Court should not determine by way of summary adjudication, jury instruction or otherwise. The Court will consider jury instructions explaining the de-minimis concept and a special verdict form where the jury is asked to set a de minimis threshold.

DO THE MEAL PERIOD CLAIMS FAIL AS A MATTER OF LAW BECAUSE EMPLOYEES ARE NOT UNDER THE CONTROL OF THE EMPLOYER AS A MATTER OF LAW DURING THEIR STATUTORY MEAL PERIODS.

This issue concerns whether Plaintiff can recover monetary relief given that they are compensated for their time as soon as they return to work. Regarding this issue, the motion for summary adjudication is DENIED.

The Court finds triable issues of material fact regarding whether employees are truly not within Wal-Mart's control when they elect to return to work before the expiration of their meal periods.

DO THE MINIMUM WAGE, OVERTIME, AND WAITING TIME CLAIMS FAIL AS A MATTER OF LAW BECAUSE THERE IS NO BASIS FOR THOSE CLAIMS?

This issue concerns whether the undisputed facts demonstrate that Wal-Mart cannot be held liable for minimum wage violations related to meal periods, overtime claims related to meal periods, and waiting time claims related to meal periods when they work during their meal periods. Regarding this issue, the motion for summary adjudication is GRANTED in part and DENIED in part.

The meal period money claims concern whether Wal-Mart gave its employees the meal periods required by law. The trier of fact may award monetary relief and may calculate that relief based on "the employee's regular rate of compensation." There are no separate claims alleging that Wal-Mart failed to pay the minimum wage violations. Payments under section 226.7 are not treated as overtime pay. (P's RJN Ex 8, page 10:8-11 (IWC does nor count section 226.7 payments toward overtime).) The motion for summary adjudication is GRANTED with regard to minimum wage violations and overtime claims.

It is unclear whether waiting time penalties are appropriate where wages are paid late following litigation. The motion for summary adjudication is DENIED with regard to waiting time claims.

Plaintiffs' request for time to review recent discovery under C.C .P. 437c(h) is not pertinent to the issue presented.

DO PLAINTIFFS SEEK AND CAN PLAINTIFFS RECOVER PUNITIVE DAMAGES ON THE MEAL PERIOD MONEY CLAIMS?

The motion for summary adjudication of punitive damage claims is DENIED.

***11** Plaintiffs have not explicitly sought punitive damages on the claims that have been certified, and the Court cannot summarily adjudicate claims that have not been asserted.

The Court notes that Plaintiffs state they intend to seek leave to amend their complaint to state a claim for punitive damages. If Plaintiffs seek such an amendment, the Court can address at that time whether punitive damages might be available under the UCL, for violations of the Labor Code, under the facts of this case, and at this procedural stage in the case.

EVIDENCE

Except as stated otherwise, all evidentiary objections by the parties are OVERRULED. *Vineyard Springs Estates v. Superior Court* (2004) 2004 Cal.App. LEXIS 1100 (trial court must issue orders on evidentiary objections). The Court notes, however, that its consideration of the evidence is limited to the motion for summary adjudication only and should not be construed as an indication of admissibility in future motions or at trial.

CONCLUSION.
Plaintiffs may proceed with the meal period money claims, but the claims are focused in nature and limited somewhat in temporal scope. The meal period claims that can be presented at trial include the meal period claims (Wal-Mart did not ensure that employees took their meal periods) and waiting time claims (Wal-Mart did not pay the Labor Code 226.7 wage promptly). The meal period claims do not include claims for minimum wage violations or overtime pay. The jury can award monetary relief under the Labor Code claims for violations of section 226.7 and 512 that occurred on or after January 1, 2001. The Court can order monetary relief under the UCL claims for unlawful, unfair, or fraudulent business practices on or after February 6, 1997 (four years before the filing of the case).

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served a copy of the Order Granting in Part and Denying in Part the Motion of Defendant for Summary Adjudication on the Meal Period Money Claims by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States Mail at Alameda County, California, following standard court practices.

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