

California's Reporting Time Pay Applies to Telephone Calls to Confirm Scheduled Shifts

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For more than 75 years, California's Wage Order No. 7 has required employers to compensate employees with reporting time pay if employees are required to report for work and in fact show up, but are then provided less than an established minimum number of hours of work or are provided with no work at all. Instead of actually requiring appearance at the workplace, suppose employees are merely required to call in advance to confirm whether they are needed for a scheduled shift: have employees "reported for work," such that they are entitled to reporting time pay if the employer tells them they do not need to come in? The answer is yes, according to the California Court of Appeal, Second Appellate District. *Ward v. Tilly's Inc.*, 2019 Cal. App. LEXIS 95 (Cal. Ct. App. Feb. 4, 2019).

The History of Wage Order No. 7

In 1943, California's Industrial Wage Commission issued Wage Order No. 7, governing employees in the "mercantile industry," broadly defined as businesses that operate for the purpose of purchasing, selling or distributing goods or commodities at wholesale or retail, or for the purpose of renting goods or commodities. As originally established, Wage Order No. 7 mandated that employees receive reporting time pay if they were required to appear for work and in fact arrived at work, only to be provided four or less hours of work or no work at all. Under current terms, Wage Order No. 7 requires covered employers (a) to pay at least two, but no more than four, hours' worth of reporting pay at an employee's regular rate of pay if the employee is required to report for work and does report, and is given less than half of the employee's usual or scheduled day's work, or (b) to pay for at least two hours of work, at the employee's regular rate of pay, if the employee is required to report for work a second time in any workday and is provided less than two hours of work on the second reporting.

For example, if a store cashier is scheduled to report to work for an eight-hour shift, but only works for two hours before being sent home due to low store coverage needs, the employer is obligated to pay the employee four hours of pay at her regular rate of pay – two hours for the time actually worked and an additional two hours as reporting pay. Since Wage Order No. 7's inception, employers, employees and the courts routinely have interpreted reporting time pay to require that, for an employee to be deemed as having "reported for work", she must physically appear at the workplace. Prior to its defunding and corresponding shutdown in 2004, the Industrial Wage Commission never expressly defined what constituted "reporting to work."

The Tilly's Lawsuit

The plaintiff was a sales clerk at Tilly's, a retail clothing company, at the store in Torrance, California. During her employment, the plaintiff and other store employees were scheduled for a combination of regular and "on call" (or "call-in") shifts. Employees were required to call or otherwise contact the store two hours before the start of a scheduled call-in shift to

confirm whether they would be needed. Such call-in shifts might be scheduled immediately following a regular shift, immediately preceding a regular shift, or on a day when no regular shift was scheduled. In the first instance, the employee would be informed during the regular shift if she had to stay. In the other two instances, the employee had to call, or otherwise contact, the store two hours before, or at 9:00 p.m. the evening before, the beginning of the call-in shift, depending on what time that shift was scheduled to start. If an employee was informed prior to the beginning of a call-in shift that she would not be needed for the shift, Tilly's did not consider that employee to have "reported for" the shift and did not provide reporting time pay.

In 2015, the plaintiff filed a putative class action, alleging Tilly's violated Wage Order No. 7 by failing to provide her and others reporting time pay when, in accordance with the Company's policy, they telephoned the store prior to a shift and were told they would not be needed. Tilly's moved to dismiss the lawsuit, asserting that calling in to ask whether to report for work did not constitute "reporting for work" within the meaning of the Wage Order. The trial court agreed, concluding that "reporting for work" required a physical appearance in the workplace, and dismissed the case.

The Appellate Court Decision

The plaintiff appealed and the Court of Appeal, Second Appellate District, reversed. First, given the ambiguity of the phrase "reporting to work," the Court of Appeal concluded that it was bound to "adopt the construction [of the Wage Order] that best gives effect to the purpose of the Legislature and the IWC [Industrial Wage Commission] – that is, the protection of employees." The Court of Appeal then assessed the plain language of the Wage Order itself and its history, and concluded that the phrase "reporting for work" did not necessarily equate to physical appearance at the workplace, despite the fact such a physical presence certainly was the norm in the 1940s and what the IWC envisioned at the time.

Nevertheless, in light of the dual purpose of the Wage Order – to compensate employees for their inconvenience, expense and lost opportunities in reporting for work that never materialized, and to encourage employers to engage in proper notice and scheduling practices – the Court of Appeal held "that had the IWC confronted the issue, it would have determined, as we do, that the telephonic call-in requirements alleged in the operative complaint trigger reporting time pay." As the Court noted:

Like requiring employees to come to a workplace at the start of a shift without a guarantee of work, unpaid on-call shifts are enormously beneficial to employers: They create a large pool of contingent workers whom the employer can call on if a store's foot traffic warrants it, or can tell [employees] not to come in if it does not, without any financial consequences.

[Conversely], unpaid on-call shifts impose tremendous costs on employees. Because [of the on-call policy, employees] cannot commit to other jobs or schedule classes during those shifts. If they have children or care for elders, they must make contingent childcare or elder care arrangements, which they may have to pay for even if they are not called to work. And they cannot commit to social plans with friends or family because they will not know until two hours before a shift's start whether they will be available to keep those plans.

Further, [due to the two-hour call-in requirement], their activities are constrained not only during the on-call shift, but two hours before it as well [At the call-in time], they cannot do things that are incompatible with making a phone call, such as sleeping, watching a movie, taking a class or being in an area without cell phone service.

In light of this significant change in reporting time pay obligations, employers should promptly review their call-in and on-call policies to ensure they are properly compensating employees. For additional assistance, please contact the Jackson Lewis attorney with whom you work.

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