Rounding Time: The CA Supreme Court’s Decision Regarding Meal Breaks in Donohue

April 21, 2021
Program: 5:00 PM – 6:00 PM
Via Zoom Webinar
1 CLE Hour
Lauren J. Katunich is a Partner and Chair of the Labor & Employment Law Department at Raines Feldman.

Lauren represents businesses and individuals in all types of labor and employment matters, including wage and hour class and PAGA actions, trade secret misappropriation, wrongful termination, employment discrimination and harassment, including sexual harassment, FEHA and whistleblower retaliation, as well as wage and hour claims and advice. She regularly counsels human resources professionals and business owners on navigating the complexities of California's wage and hour laws and applicable leaves of absence from the workplace. Lauren also conducts employee training classes and webinars, including biennial mandatory sexual harassment trainings, drafts employee handbooks and other personnel documents, and audits wage and hour compliance. Lauren also routinely prepares and negotiates employment and commission agreements for highly compensated executive and management-level employees, and works with businesses to anticipate potential issues in the drafting stage, thereby preventing costly disagreements down the road.

Lauren is a seasoned litigator with extensive litigation and dispute resolution experience. She has tried more than two dozen cases to their successful conclusion in front of juries, judges, arbitrators, and various state and federal administrative agencies, including the Equal Employment Opportunity Commission (EEOC), California Department of Fair Employment and Housing (DFEH), and the California Labor Commissioner. Lauren is equally adept at resolving litigation before it ever reaches a jury or judge, including through early advantageous settlements and her successful track record of getting claims dismissed by way of dispositive motion and at the class certification stage. Outside of litigation, Lauren is a regular public speaker and frequently addresses industry stakeholders on a wide range of employment law issues, and is a recurring guest lecturer at Loyola Law School on topics of trade secret litigation and successful trial advocacy strategies.

**SIGNIFICANT ENGAGEMENTS & TRANSACTIONS**

- Chaired and successfully obtained a complete defense verdict in a pregnancy discrimination and wrongful termination arbitration brought against an established insurance agency.
- Chaired and successfully obtained a complete defense verdict in a pregnancy and wrongful termination jury trial brought against a real estate owner and developer where the jury reached its decision in less than 30 minutes.
- Chaired and successfully obtained a complete defense verdict in an arbitration action brought against a prominent plastic surgeon sued for numerous claims, including pregnancy discrimination, disability discrimination, failure to accommodate, wrongful termination, intentional infliction of emotional distress and defamation.
- Chaired and successfully obtained a complete defense verdict in an arbitration brought against a restaurant client sued for misappropriation of server tips and missed meal and rest breaks.
Chaired and successfully obtained a complete defense verdict in an arbitration brought against a well-known restaurant chain sued for various wage and hour claims. Matter was initiated by a delivery driver and filed as a representative action under California Private Attorney General Act, which also included an individual claim for wrongful termination. Defeated the representative claims and had the wrongful termination claims dismissed, and the action proceeded to arbitration as a single-plaintiff wage and hour action. The arbitrator ordered claimant to pay respondent $25,000 in fees and costs as part of the final arbitration award.

Chaired and successfully obtained a complete defense verdict in an arbitration brought against a high-profile travel agency accused by the executive vice president of age discrimination and wrongful termination brought.

Chaired and successfully obtained a complete defense verdict in an arbitration brought against a popular hotel flag by its former general manager for wage and hour misclassification.

Second chaired and obtained complete defense verdict in six-week long jury trial brought against the president and general manager of a concert video production company with claims of misappropriation of trade secrets and breach of fiduciary duty. Plaintiffs sought over $13 million at trial with request for punitive damages.

Successfully defeated class certification in a claim for missed meal and rest breaks and numerous wage and hour violations against a retail establishment with 13 California locations.

Gained a $1.3 million arbitration award for business development manager on a claim for unpaid commissions.

Achieved a victorious summary judgment win for a Southern California parts manufacturer in a national origin discrimination and wrongful termination case resulting in award of costs for the employer.

Negotiated numerous speedy and advantageous class action settlements for employers across various industries in complex, multi-location wage and hour lawsuits in which hourly workers claimed failure to pay wages and overtime.

Brought appeal to the California Court of Appeal, and later to the California Supreme Court, achieving complete dismissal for law firm and attorney in an anti-SLAPP action. Vafi v. McCloskey (2011) 193 Cal. App. 4th 874.

PROFESSIONAL RECOGNITIONS

Lauren’s experience and skill has led to her selection by Super Lawyers Magazine, a reputable industry rating service of lawyers who have attained a high-degree of peer recognition and professional achievement, as a Southern California Rising Star in 2007, 2008, 2010, 2011, 2013, 2014, 2015, 2016, 2017, and 2018. Lauren was named by the same publication as one of the Up-and-Coming 50 Women (Southern California) in 2017, 2018, and 2019, and as one of the Up-and-Coming 100 Attorneys (Southern California) in 2018 and 2019. Lauren was recently rated a Top Rated Super Lawyer in 2019 and 2020.

PROFESSIONAL AFFILIATION

Order of the Coif, Cum Laude – Loyola Law School
Recipient of Michael W. Harahan Award for Outstanding Adult Volunteer to honor efforts as a coach for Special Olympics, Tri-Valley
Ahmanson Foundation Scholarship for Academic Excellence
Law Review: Loyola of Los Angeles Entertainment Law Review, Chief Note and Comment Editor
Pi Sigma Alpha Honor Society – Brigham Young University
ERIC B. KINGSLEY

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Education
LOYOLA LAW SCHOOL | J.D. | 1996
UNIVERSITY OF CALIFORNIA, SANTA BARBARA | B.A. HISTORY | 1993

Experience
MANAGING PARTNER | KINGSLEY & KINGSLEY | WITH COMPANY SINCE 1997
· Wage and hour litigation including hundreds of class actions and PAGA matters.
· Admitted to all California Courts, 3rd, 7th and 9th Cir. Court of Appeals as well as the U.S. Supreme Court.
· Argued Kim v. Reins, California Supreme Court (2020) 9 Cal. 5th 73
· Regular Speaker at Various Conferences and Symposiums

Memberships
CONSUMER ATTORNEYS OF CALIFORNIA | BOARD MEMBER | 2016-PRESENT
· Legislative and Grassroots Committees
VALLEY BETH SHALOM | CHAIRMAN OF THE BOARD | 2019-PRESENT
· Board Member (2009-2019), Past President of Day School (2009-2011)
ANTI-DEFAMATION LEAUGE | CHAIR PACIFIC SOUTH WEST REGION | 2014-2016
· Regional Board (2009-Present), National Commissioner (2012-Present)
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION | OVER 10 YEARS
· Legislative Committee
LACBA COMPLEX COURTS COMMITTEE | CO-CHAIR | 2018-2020

Selection of Published Columns in the Daily Journal (partial list – over 50 columns)

Letter to Editor "We Are a Nation of Immigrants" (05/03/2010)
The Death of Wage and Hour Class Actions (10/14/2010)
Triangle Shirtwaist Co. Fire 100 Years Later: Government Can Be The Solution (03/25/2011)
Congress Needs to Amend the Federal Arbitration Act (05/04/2011)
The End of an Era: Meal Break Case Finally Heard by State Supreme Court (11/10/2011)
Titanic: One Hundred Years Later What Has Changed? (04/09/2012)
Supreme Court: An Insider Look at Oral Arguments (Two Part Series) (04/24/2012, 04/25/2012)
Voting rights and arbitration at the US high court (3/7/13)
Amending the FAA essential to ‘effectively vindicate’ rights (7/29/13)
PAGA should reign as Gentry goes quietly into the night (4/7/2014)
Minimum wage hike: The sky is not falling (9/23/2014)
Can a Headless Class move forward (6/4/2015)
Will the Court Follow Scalia or Holmes (10/28/15)
Defend the First Amendment, even when it hurts to do so (10/17/17)
Let’s Talk about a hybrid worker (2/14/2018)
By looking at this column readers agree to arbitrate everything (11/16/18)
Lessons from the Border (7/25/19)
Uber, Lyft drivers: employees… at least until November (8/12/20)
Fall of the paper Wall: Arbitration may be curtailed in 2021 (1/11/21)
Jewish Georgia – A Century in the Making (Jewish Journal – (1/8/21))
T. Warren Jackson, Esq. brings more than 40 years of experience to his mediation practice resolving complex general litigation, labor, employment, education and civil rights matters.

**BIOGRAPHY**

Prior to joining Signature Resolution, T. Warren Jackson, Esq. served as Senior Vice President and Associate General Counsel of DIRECTV, now part of the AT&T family. He oversaw internal investigations into allegations of discrimination, retaliation and sexual harassment, and resolved highly sensitive cases, involving alleged whistleblower and executive departures.

Since joining the Signature Resolution panel, Mr. Jackson has settled wage and hour class actions, facilitated collective bargaining negotiations for a health care employer and has been appointed as an external adjudicator for Title IX matters with a private university.

Mr. Jackson began his career at O'Melveny & Myers in the Labor & Employment Law Department. Since then, he has specialized in class, collective and representative actions, counseling on all phases of the employment relationship such as employee discipline and termination, employment discrimination, wage and hour, employee benefit issues, non-compete matters, union negotiations and campaigns and internal investigations.

Mr. Jackson has counseled clients and provided strategic litigation support for labor and employment law matters. He also served as vice president of workforce diversity and chief ethics officer.

He has lectured extensively in the field and served on several legal associations: California Employment Law Council, College of Labor and Employment, and the Legal Committee of the Employers Group; and on the Boards of the Constitutional Rights Foundation, the Riordan Programs at UCLA Anderson and the Ronald Reagan UCLA Medical Center. Mr. Jackson has been consistently active in matters of importance to Los Angeles, ranging from service on the Police Commission, the Civil Service
Commission, the Webster Commission reviewing the LAPD’s response to the civil disturbance following the Rodney King trial to current service on LA County’s Economy and Efficiency Commission.

EXPERIENCE

- DIRECTV (AT&T), Senior Vice President, Associate General Counsel (1984-2016)
- O’Melveny & Myers, LLP, Associate (1976-1984)

ACHIEVEMENTS, AWARDS & MEMBERSHIPS

- Economy and Efficiency Commission, Los Angeles County (2017-Present)

EDUCATION & TRAINING

- Human Resource Executive Development Program, Cornell University
- Executive M.B.A., UCLA Anderson School of Management
- J.D., Harvard Law School
- B.A., Cornell University

PRESS

- “Mediation While Keeping Your (Social) Distance” – Daily Journal (April 7, 2020)
- "A Natural Step” – Daily Journal (March 22, 2019)

CASE ADMINISTRATOR

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Synopsis
Background: Hourly employees brought putative class action against hotel for alleged underpayment of meal and rest period premiums and underpayments caused by “rounding” of hours worked. The Superior Court, Los Angeles County, No. BC586176, Kenneth R. Freeman, J., granted hotel's motions for summary adjudication and summary judgment on stipulated facts. Employees appealed.

Holdings: The Court of Appeal, Egerton, J., held that:

[1] as a matter of first impression, “regular rate of compensation” for purposes of meal, rest, and recovery periods was not equivalent to “regular rate of pay” for overtime purposes;

[2] rounding policy was facially neutral; and

[3] records showing underpayment of small majority of employees during time window were insufficient to demonstrate systematic underpayment.

Affirmed.

Edmon, P.J., filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion for Summary Adjudication; Motion for Summary Judgment.

West Headnotes (18)

[1] Labor and Employment Damages and Amount of Recovery
The additional hour of pay required as a remedy for a violation of an employer's statutory obligation to provide meal, rest, or recovery periods is a “premium wage.” Cal. Lab. Code § 226.7(c); Cal. Code Regs. tit. 8, § 11050 subds. (11)(B), 12(B).

[2] Labor and Employment Waiting, resting, or sleeping time
Labor and Employment Meal or break periods
The Labor Code provision applying to mandated meal, rest, or recovery periods provides the only compensation for an employer's failure to provide an employee with paid rest periods and meal periods. Cal. Lab. Code § 226.7.

[3] Labor and Employment Overtime pay in general
The extra amount a worker must be paid, on top of normal pay, because certain work qualifies as overtime is called a “premium.” Cal. Lab. Code § 510.

[4] Labor and Employment Regular rate
In the overtime context, an employee's “regular rate of pay” is not the same as the employee's “straight time rate,” that is, his or her normal hourly wage rate: “regular rate of pay,” which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned. Cal. Lab. Code § 510.

1 Cases that cite this headnote
Wage orders are quasi-legislative regulations and are construed in accordance with the ordinary principles of statutory interpretation.

Courts should avoid a construction of a wage order or statute that renders any part meaningless, inoperative, or superfluous.

Statutes governing conditions of employment are to be construed broadly in favor of protecting employees.

Only when a statute's language is ambiguous or susceptible of more than one reasonable interpretation may the court turn to extrinsic aids to assist in interpretation.

Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning.

Employer's policy of rounding hourly employee's time punches to the nearest quarter hour was neutral on its face, where time rounding took place without regard to whether employer or employee would benefit from rounding up or down, and employer had grace period policy providing that employees would not be tardy if they clocked in before the end of a six-minute grace period.

“Regular rate of compensation,” as used in statute and wage order requiring an employer to pay one additional hour of pay at an employee's regular rate of compensation as a remedy for failure to provide a mandatory meal, rest, or recovery period, was not equivalent to “regular rate of pay,” as used in overtime statute, and, thus, did not include adjustments to normal hourly wage rate based on, for example, shift differentials and nonhourly compensation; legislature presumably intended different things when it used different terms in enacting meal, rest, and, recovery statute and overtime statute at the same time, and equating the two terms would elide different purposes between statutes, namely, compensating employees for loss of benefits versus paying for extra work. Cal. Lab. Code §§ 226.7, 510.
An employer is entitled to use a rounding policy if the rounding policy is fair and neutral on its face and if it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

If an employer's rounding practice does not permit both upward and downward rounding, then the system is not neutral and will result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked; such an arrangement presumably does not average out.

Records showing that, for sample of hourly hotel employees over specific time period, paid time for small majority of employees was reduced due to employer's facially neutral practice of rounding time worked to nearest quarter hour were insufficient to show that rounding policy systematically undercompensated employees; fluctuations in over- or under-payment of individual employees in a particular time window were to be expected in rounding systems.

A fair and neutral time rounding policy does not require that hourly employees be overcompensated, and a system can be fair or neutral even where a small majority loses compensation.
On October 7, 2015, Ferra filed a first amended complaint against Loews on behalf of herself and three alleged classes of hourly Loews employees extending as far back as June 26, 2011. Among other causes of action, Ferra alleged Loews improperly calculated her premium payment when Loews failed to provide her with statutorily required meal and/or rest breaks, in violation of Labor Code section 226.7, \(^1\) and Loews underpaid Ferra by unlawfully “shaving or rounding time from the hours worked by Ferra.”

\(^1\) Unless otherwise indicated, all subsequent statutory citations are to the Labor Code.

The court granted in full Loew's motion for summary judgment. Judgment was entered May 11, 2017, Loews served notice of entry of judgment on May 19, 2017, and Ferra filed this timely appeal from the summary adjudication and summary judgment.

**DISCUSSION**

If after an independent review of the record and the applicable law, we agree with the trial court that undisputed facts show there is no triable issue of material fact and Loews, as the moving party, was entitled to judgment as a matter of law, we must affirm the trial court's grant of summary adjudication and summary judgment. (Code Civ. Proc., § 437c, subds. (c), (t); Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 860, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

\[^1245\] \(^1\) “Regular rate of compensation” means the employee's base hourly wage

\[^1\] Section 226.7, subdivision (c) states: “If an employer fails to provide an employee a meal or rest recovery period in accordance with a state law,..., the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.” (Italics added.) The Industrial Welfare Commission (IWC) Wage Order that applies to Loews and its employees also states that if an employer fails to provide an employee a meal or rest period, “the employer shall pay the employee one **802** (1) hour of pay at the employee's regular rate of compensation for each workday that the [meal or rest] period is not provided.” (IWC Wage Order No. 5-2001, subs. 11(B), 12(B) (Cal. Code Regs., tit. 8, § 11050, subs. 11(B), 12(B)), italics added.) This additional hour is a “premium wage.” (Esparza v. Safeway, Inc. (2019) 36 Cal.App.5th 42, 52, 247 Cal.Rptr.3d 875.) The wage orders entitle employees “to an unpaid 30-minute, duty-free meal period after working for five hours and a paid 10-minute rest period per four hours of work. (Cal. Code Regs., tit. 8, § 11070, subs. 11, 12.) If denied two paid rest periods...
in an eight-hour workday, an employee essentially performs 20 minutes of ‘free’ work, i.e., the employee receives the same amount of compensation for working through the rest periods that the employee would have received had he or she been permitted to take the rest periods. An employee forced to forgo his or her meal period similarly loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period. [Citations.] Section 226.7 provides the only compensation for these injuries.” (Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1104, 56 Cal.Rptr.3d 880, 155 P.3d 284) (Murphy).)

[3] [4] Section 510, the statute governing overtime, states in subdivision (a): “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,” and “[a]ny work in excess of 12 hours in one day ... [and] any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.” (Italics added.) The overtime provisions in Wage Order No. 5-2001, subdivision 3(A) mirror the statutory language, stating that overtime work must be compensated at either one and one-half times or double “the employee's regular rate of pay for all hours worked.” (Italics added.) “[T]he extra amount a worker must be paid, on top of normal pay, because certain work qualifies as overtime” is also called a premium. *1246 (Alvarado v. Dart Container Corp. of California (2018) 4 Cal.5th 542, 550, 229 Cal.Rptr.3d 347, 411 P.3d 528.) In the overtime context, “[s]ignificantly, an employee's ‘regular rate of pay’ for purposes of Labor Code section 510 and the IWCA wage orders is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate). Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned.” (Id. at p. 554, 229 Cal.Rptr.3d 347, 411 P.3d 528.)

California case law does not define the meaning of “regular rate of compensation” in section 226.7, subdivision (c) and Wage Order No. 5-2001, subdivisions 11(B) and 12(B), which address rest and meal periods. The trial court agreed with Loews that “regular rate of compensation” means the additional hour premium is calculated as one hour of the employee's base hourly wage. On appeal, Ferra argues “regular rate of compensation” means the same as “regular rate of pay,” so the premium must be calculated as an additional hour at the employee's base hourly wage, plus an additional amount based on her nondiscretionary quarterly bonus. We agree with the trial court and with Loews, however, that the statutory terms “regular rate of pay” and “regular rate of compensation” are not synonymous, and the premium for missed meal and rest periods is the employee's base hourly wage.

a. The statutes’ plain language differentiates “regular rate of compensation” from “regular rate of pay”

[5] [6] [7] [8] The basic principle of statutory construction is “that we must look first to the words of the statute, ‘because they generally provide the most reliable indicator of legislative intent.’” (Murphy, supra, 40 Cal.4th at p. 1103, 56 Cal.Rptr.3d 880, 155 P.3d 284.) We must “give[ ] significance to every word, phrase, sentence and part of an act.” (Flowmaster, Inc. v. Superior Court (1993) 16 Cal.App.4th 1019, 1028, 20 Cal.Rptr.2d 666.) “‘Wage orders are quasi-legislative regulations and are construed in accordance with the ordinary principles of statutory interpretation.’” (Vaquero v. Stoneledge Furniture, LLC (2017) 9 Cal.App.5th 98, 107, 214 Cal.Rptr.3d 661.)

We should avoid a construction of the wage order or statute that renders any part meaningless, inoperative, or superfluous. (Ibid.; Shoemaker v. Myers (1990) 52 Cal.3d 1, 22, 276 Cal.Rptr. 303, 801 P.2d 1054.) “[S]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees. [Citations.] Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.” (Murphy, at p. 1103, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

2 Murphy concluded that the remedy provided in section 226.7 was a premium wage, not a penalty. (Murphy, supra, 40 Cal.4th at p. 1102, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

[9] “Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.” (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1117, 81 Cal.Rptr.2d 471, 969 P.2d 564.)

[10] Ferra argues that the two phrases have the same meaning because both include the words “regular rate.”
Ferra thus urges us to construe only the phrase “regular rate,” as used in the Labor Code and the federal Fair Labor Standards Act (FLSA), 29 United States Code section 201 et seq., and to disregard the additional language because “pay” and “compensation” are interchangeable. But that would render meaningless the Legislature’s choice to use “of compensation” in one statute and “of pay” in the other. If the Legislature had intended meal and rest breaks premiums to be calculated the same way as overtime premiums, it would not have used “regular rate of compensation” when setting premiums for missed meal and rest breaks, and “regular rate of pay” when setting premiums for overtime work. We assume the Legislature intended different meanings when it did not simply use “regular rate,” but added different qualifiers in the statutes and wage orders establishing premiums for overtime and for missed meal and rest periods.

3 For example, Ferra cites Walling v. Hardwood Co. (1945) 325 U.S. 419, 424, 65 S.Ct. 1242, 89 L.Ed. 1705, for its use of “regular rate of compensation,” but, there, the Court construed federal overtime provisions, and was not quoting statutory language. (See Walling v. Harmsworth Corp. (1945) 325 U.S. 427, 430, 65 S.Ct. 1246, 89 L.Ed. 1711 [same]; Local 246 Util. Workers Un. v. Southern Cal. Edison (9th Cir. 1996) 83 F.3d 292, 295 [same].) Ferra also cites 29 United States Code section 207(e), the federal overtime statute, for its definition of “regular rate,” and associated federal regulations. Again, these federal authorities do not answer the question of what “regular rate of compensation” means in section 226.7.

**804** [11] [12] Ferra also points out that sections 226.7 and 510 were both enacted in 2000, and both used “regular rate”; but the legislative decision to add “of compensation” to the first statute, and “of pay” to the second, works against Ferra’s argument that the words do not matter, because surely the Legislature meant something different when it used different language in two statutes enacted at the same time. 4 “[I]f the *1248 Legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately.” (Ferguson v. Workers’ Comp. Appeals Bd. (1995) 33 Cal.App.4th 1613, 1621, 39 Cal.Rptr.2d 806; see Murphy, supra, 40 Cal.4th at p. 1108, 56 Cal.Rptr.3d 880, 155 P.3d 284.) “That the Legislature chose to eliminate penalty language in section 226.7 while retaining the use of the word in other provisions of [Assem.] Bill No. 2509 is further evidence that the Legislature did not intend section 226.7 to constitute a penalty.”]

4 “‘Pay’ is defined as ‘money [given] in return for goods or services rendered.’ (American Heritage Dict. (4th ed. 2000) p. 1291.)” (Murphy, supra, 40 Cal.4th at p. 1104, 56 Cal.Rptr.3d 880, 155 P.3d 284.) “Compensation” is defined as “[s]omething, such as money, given or received as payment or reparation, as for a service or loss.” (American Heritage Dict., supra, at p. 376.) When an employee misses a meal period or a rest period, he “loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer’s control during the meal period. [Citations.] Section 226.7 provides the only compensation for these injuries.” (Murphy, at p. 1104, 56 Cal.Rptr.3d 880, 155 P.3d 284.) The “central purpose” of overtime pay is to pay employees wages for time spent working. (Id. at p. 1109, 56 Cal.Rptr.3d 880, 155 P.3d 284.) A section 226.7 action, however, is “not an action brought for nonpayment of wages; it is an action brought for nonprovision of meal or rest breaks.” (Kirby v. Immoos Fire Protection, Inc. (2012) 53 Cal.4th 1244, 1257, 140 Cal.Rptr.3d 173, 274 P.3d 1160.)

b. Legislative history does not compel the conclusion that “regular rate of compensation” and “regular rate of pay” are synonymous and interchangeable

Although we do not believe the statutes’ use of different definitions for the different premiums is ambiguous, we note that Ferra’s resort to the legislative history does not require us to conclude that “regular rate of compensation” is the same as “regular rate of pay.” Ferra acknowledges the legislative history does not define the two phrases, but points to the regulatory history of the wage order revisions in which the IWC adopted the hour premium for rest and meal period violations, quoting the use in Murphy, supra, 40 Cal.4th 1094, 56 Cal.Rptr.3d 880, 155 P.3d 284, of a commissioner’s statement at a “June 30, 2000 hearing at which the IWC adopted the ‘hour of pay’ remedy.” (Id. at pp. 1109-1110, 56 Cal.Rptr.3d 880, 155 P.3d 284.) The commissioner stated: “‘This [meal and rest pay provision applies to] an employer who says, ‘You do not get lunch today, you do not get your rest break, you must work now.’ That is—that is the intent.... And, of course, the courts have long construed overtime as a penalty, in effect, on employers for working people more than
full—you know, that is how it’s been construed, as more than the—the daily normal workday. It is viewed as a penalty and a disincentive in order to encourage employers not to. So, it is in the same authority that we provide overtime pay that we provide this extra hour of pay.” (Id. at p. 1110, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

While Ferra argues that this means the hour premium for meal and rest break violations should be calculated like overtime pay, Murphy used the commissioner’s statement to differentiate the two payments, pointing out that although the IWC used the word “‘penalty’ ” at times to refer to meal and rest period payments, “the Legislature’s occasional description of the meal and rest period remedy as a ‘penalty’ in the legislative history should be informed by the way in which the IWC was using the word; namely, that like overtime pay, the meal and rest period remedy has a corollary disincentive aspect in addition to its central compensatory purpose. [¶] We conclude that the administrative and legislative history of the statute indicates that, whatever incidental behavior-shaping purpose section 226.7 serves, the Legislature intended section 226.7 first and foremost to compensate employees for their injuries.” (Murphy, supra, 40 Cal.4th at pp. 1110-1111, 56 Cal.Rptr.3d 880, 155 P.3d 284, fn. omitted, italics added.) Section 226.7’s “‘additional hour of pay’ … is a premium wage intended to compensate employees, not a penalty.” (Murphy, at p. 1114, 56 Cal.Rptr.3d 880, 155 P.3d 284.)

Murphy recognized that the occasional use of “penalty” in the legislative history did not require the court to conclude that section 226.7 was intended to be a penalty, noting that “the Legislature chose to eliminate penalty language in section 226.7 while retaining the use of the word in other provisions … [which] is further evidence that the Legislature did not intend section 226.7 to constitute a penalty.” (Murphy, at p. 1108, 56 Cal.Rptr.3d 880, 155 P.3d 284.) Here, the occasional equating of the purpose of providing overtime premiums with the premiums for missed meal and rest breaks does not require us to conclude that the premiums must be calculated identically, especially in light of the Legislature's choice to use “regular rate of compensation” in section 226.7 and “regular rate of pay” in section 550.

6       Assembly Bill No. 60 (1999-2000 Reg. Sess.), which amended the overtime statute, used the phrase “regular rate of pay” eight times, including in its amendment to section 510 (Stats. 1999, ch. 134), without ever using “regular rate of compensation”; Assembly Bill No. 2509 (1999-2000 Reg. Sess.) section 7, which added section 226.7, does not use “regular rate of pay.”

It is the Legislature's choice to use different phrases that must be construed to mean that the statutes mean different things. Ferra and amicus California Employment Lawyers Association point out a few occasions on which the Division of Labor Standards Enforcement used the phrases interchangeably, but the Legislature and the statutes did not, and it is the Legislature's choice of different descriptions of the premiums that governs our analysis. While in common parlance “pay” and “compensation” are sometimes used interchangeably, the Legislature did not do so in choosing the language of the statutes.

c. Persuasive federal opinions favor construing the phrases differently
[13] No published California case distinguishes “regular rate of compensation” as it applies to missed meal and rest periods from “regular rate of pay” for overtime purposes. We therefore look to “analytically sound” reasoning in federal opinions, and “[a]lthough not binding precedent on our court, we may consider relevant, unpublished federal district court opinions as persuasive.” (Futrell v. Payday California, Inc. (2010) 190 Cal.App.4th 1419, 1432, fn. 6, 119 Cal.Rptr.3d 513.)

**806** A number of federal district courts have concluded that the use of “regular rate of compensation” in section 226.7 means that the premium for missed meal periods must be paid at the regular rate of compensation (the base hourly rate), rather than at the regular rate of pay applicable to overtime premiums. In Bradescu v. Hillstone Restaurant Group, Inc. (C.D.Cal., Sept. 18, 2014, SACV No. 13-1289-GW) 2014 WL 5312546, 2014 U.S. Dist. Lexis 150978 (Bradescu), the court agreed with the defendant that “payment of any meal period premium at Plaintiff's regular rate of compensation—as opposed to her regular rate of pay—was appropriate” under section 226.7, subdivision (c), and Wage Order No. 5-2001, subdivision 11(B). (Bradescu, at *14.) “[T]here is no authority supporting the view that ‘regular rate of compensation,’ for purposes of meal period compensation, is to be interpreted the same way as ‘regular

5       The court also noted that judicial references to overtime pay as a “penalty” did not transform overtime pay into a penalty for the purpose of the statute of limitations. (Murphy, supra, 40 Cal.4th at p. 1109, 56 Cal.Rptr.3d 880, 155 P.3d 284.)
rate of pay’ is for purposes of overtime compensation. The Court consequently agrees with [defendant] that the legislature’s choice of different language is meaningful, in the absence of authority to the contrary, and therefore rules in [defendant’s] favor on this point.” (Id., at *12—14., 2014 U.S. Dist. Lexis 150978 at *22.) In Wert v. United States Bancorp (S.D.Cal., Dec. 18, 2014, No. 13-cv-3130-BAS) 2014 U.S. Dist. Lexis 175735 (Wert), the court agreed with Bradescu, that the use of different language in the meal period and overtime statutes was meaningful: “The plain language of §§ 226.7 and 510 does not suggest that the phrase [ ] ‘regular rate of compensation’ is synonymous to and may be used interchangeably with ‘regular rate of pay.’ ” (Wert, at *13.) In denying the plaintiff’s motion for reconsideration, the court reiterated: “[T]he legislature’s choice of different language is meaningful, and ... the relief under § 226.7 is not necessarily or logically the same as the relief under § 510 insofar as the ‘regular rate’ language is involved.” (Wert v. U.S. Bancorp (S.D.Cal., June 9, 2015, No. 13-cv-3130-BAS) 2015 U.S. Dist. Lexis 74523, at *7; see Van v. Language Line Services, Inc. (N.D.Cal., June 6, 2016, No. 14-CV-03791-LHK) 2016 U.S. Dist. Lexis 73510, at *54.)

Two years later, Brum v. Marketsource, Inc. (E.D.Cal., June 19, 2017, No. 2:17-cv-241-JAM-ECR) 2017 WL 2633414, 2017 U.S. Dist. Lexis 94079 (Brum) agreed with Wert and Bradescu and rejected the reasoning in Studley v. Alliance Healthcare Services, Inc. (C.D.Cal., July 26, 2012, SACV No. 10-00067-CJC) 2012 U.S. Dist. Lexis 190964 (Studley, discussed below). Brum acknowledged the plaintiff’s argument that California cases have used “regular rate of pay” and “regular rate of compensation” interchangeably, but pointed out that none of these cases addresses the difference between the two terms as they appear in the statutes. (Brum at *13—14., 2017 U.S. Dist. Lexis 94079 at *13-14.) *1251 More recently, in Frausto v. Bank of America (N.D.Cal., Aug. 2, 2018, No. 18-cv-01983-MEJ) 2018 WL 3659251, 2018 U.S. Dist. Lexis 130220, the plaintiff alleged that her premiums for missed meal periods “were inadequate because they were only based on her straight time rate, not her regular rate of pay that includes all bonuses earned.” (Id. at *12.) The court cited Bradescu, Brum, and Wert to conclude “there is no legally tenable argument that section 226.7 payments should be paid at the ‘regular rate’ used for overtime purposes,” as section 226.7 “uses the employee’s rate of compensation.” (Frausto at *14., 2018 U.S. Dist. Lexis 130220 at *14.)

As Ferra points out, Studley reached a different result, reasoning that premiums for missed meal periods were like overtime pay, and like the overtime statute, section 226.7 used the term “regular rate.” Studley **807 concluded that “regular rate of compensation” in section 226.7 and “regular rate of pay” in section 510 should be interpreted the same, because “the operative word or phrase in each section is not ‘compensation’ or ‘pay’ but rather ‘regular rate,’ ” and the meanings of “compensation” and “pay” were essentially identical. (Studley, supra, 2012 U.S. Dist. Lexis 190964, at *14 & fn. 4.)

Two later cases agree. In Ibarra v. Wells Fargo Bank, N.A. (C.D.Cal., May 8, 2018, CV No. 17-4344-PA) 2018 U.S. Dist. Lexis 78513 (Ibarra), the court declined to compare the language of section 226.7 to section 510. The employees were mortgage consultants whose “normal compensation was not comprised solely or even primarily of pay calculated at an hourly rate,” “the hourly pay was stated to be only an advance on commissions,” and the employees “could receive compensation based on commissions such that the hourly rate was essentially irrelevant.” (Ibarra, at *7.) Under those circumstances, “[t]he Court is not persuaded that the ‘regular rate of compensation’ for all class members should be an hourly rate that did not actually determine the compensation received by most of the class members.” **807 (Id. at *7-8, italics added.) The court acknowledged the cases finding significant the language “regular rate of compensation” in section 226.7 and “regular rate of pay” in section 510, but agreed with Studley, that the operative language in both statutes was “regular rate.” (Ibarra, at *9-10.) Legislative history did not clearly support either side, and interpreting section 226.7 to require premiums at more than the base hourly rate comport with construing the labor laws in favor of worker protection. (Ibarra, at *12-14.) One recent district court opinion, *1252 Magadia v. Wal-Mart Associates, Inc. (2019) 384 F.Supp.3d 1058 (Magadia) required Wal-Mart to factor in a nondiscretionary quarterly bonus in calculating the “regular rate of compensation” under section 226.7, noting it had adopted Ibarra’s conclusion that the regular rate of compensation included the base rate of compensation and other forms of qualifying compensation. (Magadia, at pp. 1077-1078.)

7 Using the hourly rate to calculate the premiums would result in class-wide damages of $24,472,114.36, and calculating the premiums by including all forms of compensation, including
commissions and other nondiscretionary pay, more than quadrupled the damage award to $97,284,817.91. (Ibarra, supra, 2018 U.S. Dist. Lexis 78513, at *5 & fn. 3.) Ferra does not argue that Loews's compensation system would result in similarly disparate damages.

Both Ibarra and Magadia have been appealed to the Ninth Circuit Court of Appeals.

Most recently, and just after we heard oral argument in this case, the court in Valdez v. Fairway Independent Mortgage Corporation (S.D.Cal., July 26, 2019, No. 18-cv-2748-CAB-KSC), 2019 WL 3406912 [2019 U.S. Dist. Lexis 126013] (Valdez) stated: “The Court does not agree with the reasoning behind cases Defendant relies on that find the two terms interchangeable, as those cases either narrowly construed such a finding to the specific circumstances of that case or rejected the difference in language without explanation. [Citations.]” (Id., 2019 WL 3406912 at *5, 2019 U.S. Dist. Lexis 126013 at *14, citing Ibarra, supra, 2018 U.S. Dist. Lexis 78513, at *11 and Magadia, supra, 384 F.Supp.3d at pp. 1077-1078.) “The Court is more persuaded by the reasoning behind the cases acknowledging the distinction between the two terms and Plaintiff's assertion that the overwhelming weight of authority supports the position that ‘regular rate of compensation’ is not synonymous with ‘regular rate of pay.’” (Id., 2019 WL 3406912 at *5 & fn. 3. Valdez v. Fairway Independent Mortgage Corporation (9th Cir. 2019) 928 F.3d 728, 737.) 

“Employers use rounding policies to calculate wages efficiently; sometimes, in any given period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out in the long-term. If an employer's rounding practice does not permit both upward and downward rounding, then the system is not neutral and ‘will ... result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.’” (Donohue v. AMN Services, LLC (2018) 29 Cal.App.5th 1068, 1083, 241 Cal.Rptr.3d 111, quoting See's Candy Shops, Inc. v. Superior Court (2012) 210 Cal.App.4th 889, 907, 148 Cal.Rptr.3d 690 (See's).) In this case, Loews's “policy is neutral on its face. It ‘rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding.’” (AHMC Healthcare, Inc. v. Superior Court (2018) 24 Cal.App.5th 1014, 1027, 234 Cal.Rptr.3d 804 (AHMC), quoting Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership (9th Cir. 2016) 821 F.3d 1069, 1078-1079 (Corbin).) “Employers use rounding policies to calculate wages efficiently; sometimes, in any given period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out in the long-term. If an employer's rounding practice does not permit both upward and downward rounding, then the system is not neutral and ‘will ... result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.’” [Citation.] Such an arrangement ‘‘[p]resumably does not ‘average[ ] out.’” (Corbin, supra, 821 F.3d at p. 1077.) And **809 the grace period policy means that if the clock shows the employee clocked in before the end of the six-minute grace period, the employee is not considered tardy.

**1253 2. Loews's rounding policy and practice is lawful**

Ferra and other Loews hourly employees clocked in and out of work using an electronic timekeeping system which automatically rounded time entries either up or down to the nearest quarter-hour. In addition, the Loews Attendance Policy stated: “A seven (7) minute grace period, prior to the beginning of a shift, and a six (6) minute grace period, after the scheduled start time, is incorporated into the timekeeping system and provides the team member with a degree of flexibility when clocking in. A team member who clocks in after the (6) six minute grace period is considered tardy for work.”
Although Ferra challenges the accuracy of the data before the trial court, she also claims the data shows the rounding policy was not neutral as applied. Ferra's time records showed she lost time by rounding in 55.1% of her shifts, gained time in 22.8 percent, and the remaining shifts were not affected by rounding, during the relevant time period (June 17, 2012 through April 29, 2014). For a sample group of Loews employees, in 54.6 percent of shifts paid time was reduced, paid time was added in 26.4 percent of shifts, and the remaining shifts were not affected by rounding, during the relevant time period (June 2012 through December 2015). The rounding data did not break down the time gained or lost by employee (except for Ferra, whose time was analyzed separately).

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Ferra also used the data in her first amended complaint to allege that during approximately 50 percent of her and the class's workweeks, she and the Loews employees were not paid for all time worked. Her opposition to the motion for summary judgment relied heavily on the data (which she included as undisputed facts), and in granting summary judgment the trial court stated, “Loews’s evidence is undisputed with respect to how the rounding policy and grace period actually operated.” We therefore rely on the expert's declaration and supporting exhibits.

[17] This is not sufficient to show that the rounding policy “systematically undercompensate[s] employees.” (See's, supra, 210 Cal.App.4th at pp. 901-902, 148 Cal.Rptr.3d 690.) Although in See's the majority of employees were overcompensated, See's does not “stand[] for the proposition that a rounding policy is unlawful where a bare majority of employees lose compensation.” (AHMC, supra, 24 Cal.App.5th at p. 1024, 234 Cal.Rptr.3d 804.) AHMC described two unpublished federal district court opinions involving quarter-hour rounding systems which “concluded that the fact that a slight majority of employees lost time over a defined period was not sufficient to invalidate an otherwise neutral rounding practice.” (Ibid.) The first case showed that 53 percent of employees lost time over a five-year period, and the second showed that 55.8 percent of employees (including the plaintiff) suffered minor losses over a three-year period. (Id. at pp. 1025-1026, 234 Cal.Rptr.3d 804.) Both courts concluded that summary judgment in favor of the employer was nevertheless appropriate. (Ibid.) “[R]ounding contemplates the possibility that in any given time period, some employees will have net overcompensation and some will have net undercompensation. Given the expected fluctuations with respect to individual employees, shifting the time window even slightly could flip the figures.’” (Id. at p. 1025, 234 Cal.Rptr.3d 804; Utne v. Home Depot U.S.A., Inc. (N.D.Cal., Dec. 4, 2017, No. 16-cv-01854-RS) 2017 WL 5991863, at * — , 2017 U.S. Dist. Lexis 199184 at 11-12 (Utne).) “Although the data analyzed here—from October 22, 2012 to September 1, 2015—did not average out to 0, Defendant's expert calculations are sufficient to establish that the practice does not systematically undercompensate employees over time.” (Boone v. PrimeFlight Aviation Services, Inc. (E.D.N.Y., Feb. 20, 2018, No. 15-CV-6077-JMA-ARL), 2018 WL 1189338, 2018 U.S. Dist. Lexis 28000, at *28.)

*1255 [18] We agree with the trial court that Loew's rounding policy does not systematically undercompensate its employees over time. As AHMC states, a “fair and neutral” rounding policy does not require that employees be overcompensated, and a system can be fair or neutral even where a small majority loses compensation. (AHMC, supra, 24 Cal.App.5th at p. 1024, 234 Cal.Rptr.3d 804.) Ferra did not demonstrate that Loew's rounding policy systematically undercompensated employees over time.

Like the trial court, we therefore do not address the de minimis argument Loews made in its motion for summary judgment. (See Troester v. Starbucks Corp. (2018) 5 Cal.5th 829, 848, 235 Cal.Rptr.3d 820, 421 P.3d 1114) [California has not incorporated the de minimis rule in the FLSA and California de minimis law does not apply to rounding policy violations].
**DISPOSITION**

The judgment is affirmed. Costs are awarded to respondent Loews Hollywood Hotel, LLC.

I concur:

LA VIN, J.

EDMON, P.J., Concurring and Dissenting.

I agree that Loews's policy of rounding time entries up or down to the nearest quarter hour is lawful. However, I respectfully disagree with the majority's conclusion that “regular rate of compensation” as used in Labor Code § 226.7 means an employee's base hourly rate. Instead, I would conclude that “regular rate of compensation” has the same meaning as “regular rate of pay,” and thus that it includes nondiscretionary bonuses “that are a normal and regular part of [an employee's] income.” (Walling v. Harnischfeger Corp. (1945) 325 U.S. 427, 432, 65 S.Ct. 1246, 89 L.Ed. 1711.)

1 All subsequent undesignated statutory references are to the Labor Code.

1. Interpretive principles

“In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (Day v. City of Fontana (2001) 25 Cal.4th 268, 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) ‘We begin by examining the statutory language, giving the words their usual and ordinary meaning.’ (Ibid.; People v. Lawrence (2000) 24 Cal.4th 219, 230, 99 Cal.Rptr.2d 570, 6 P.3d 228.) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (Day v. City of Fontana, supra, 25 Cal.4th at p. 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196; People v. Lawrence, supra, 24 Cal.4th at pp. 230–231, 99 Cal.Rptr.2d 570, 6 P.3d 228.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (Day v. City of Fontana, supra, 25 Cal.4th at p. 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) In such cases, we ‘“select the *1256 construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’ ”' (Ibid.)” (Estate of Griswold (2001) 25 Cal.4th 904, 910–911, 108 Cal.Rptr.2d 165, 24 P.3d 1191.)

**811 Contrary to the majority (maj. opn. ante, at p. 804), I believe “regular rate of compensation” is ambiguous because it is susceptible of more than one interpretation. (See Jones v. Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158, 1163, 72 Cal.Rptr.3d 624, 177 P.3d 232 [statutory language is ambiguous if it “‘permits more than one reasonable interpretation’ ”].) The plain meaning of “compensation” is “payment, remuneration,” and the plain meaning of “regular” is “constituted, conducted, scheduled.” (Merriam-Webster's 11th Collegiate Dict. (2008) p. 253, col. 2, p. 1048, col. 1.) On its face, therefore, “regular rate of compensation” could mean either an hourly rate plus incentive/bonus pay or an hourly rate alone. I therefore would conclude that resort to extrinsic sources and principles of statutory construction is necessary to determine legislative intent.

As discussed below, I find three principles of statutory construction relevant to interpreting section 226.7. First, the state's labor laws are to be liberally construed in favor of worker protection. Second, courts must presume the Legislature was aware of judicial construction of existing law and intended the same construction to apply to related laws with identical or substantially similar language. And third, where statutes use synonymous words or phrases interchangeably, those words or phrases should be understood to have the same meaning. Each of these interpretive principles leads to the same conclusion: that “regular rate of compensation” and “regular rate of pay” are synonymous, and thus that section 226.7 should be interpreted consistently with section 510.

2. Liberal construction of labor laws in favor of worker protection

Our Supreme Court has directed that to determine the Legislature's intent in enacting wage and hour legislation, our analysis must be guided by “[t]wo overarching interpretive principles.” (Alvarado v. Dart Container Corp. of California (2018) 4 Cal.5th 542, 561, 229 Cal.Rptr.3d 347, 411 P.3d 528 (Alvarado).) First, the obligation to pay meal and rest break premiums reflects a state policy that meal and rest periods are essential to worker health and safety. (Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1105, 56 Cal.Rptr.3d 880, 155 P.3d 284.) Second, “the
state's labor laws are to be liberally construed in favor of worker protection.” (Alvarado, supra, 4 Cal.5th at p. 562, 229 Cal.Rptr.3d 347, 411 P.3d 528; see also ZB, N.A. v. Superior Court of San Diego County (2019) 8 Cal.5th 175, 189, 252 Cal.Rptr.3d 228, 448 P.3d 239 [“Because statutes governing *1257 employment conditions tend to have remedial purposes, we ‘liberally construe’ them ‘to favor the protection of employees.’ ”].) Therefore, in deciding whether to factor a nondiscretionary bonus into an employee's meal and rest break premium, “we are obligated to prefer an interpretation that discourages employers from [depriving employees of meal and rest breaks], and that favors the protection of the employee's interests.” (Alvarado, at p. 562, 229 Cal.Rptr.3d 347, 411 P.3d 528.)

Interpreting “regular rate of compensation” to include nondiscretionary bonuses unquestionably encourages compliance with meal and rest break requirements because it raises the cost to employers of noncompliance. Accordingly, the presumptions in favor of worker protection and enforcement of meal and rest break requirements weigh strongly in favor of construing section 226.7 consistently with section 510.

3. Consistent construction of similar statutory language on the same or analogous subjects

“‘Where ... legislation has been judicially construed and a subsequent statute **812 on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.’ (Estate of Griswold, supra, 25 Cal.4th at pp. 915–916, 108 Cal.Rptr.2d 165, 24 P.3d 1191.)” (Moran v. Murtaugh Miller Meyer & Nelson, LLP (2007) 40 Cal.4th 780, 785, 55 Cal.Rptr.3d 112, 152 P.3d 416.) In other words, “[w]e presume the Legislature ‘was aware of existing related laws’ when it enacted [section 226.7], and that it ‘intended to maintain a consistent body of rules.’ (People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 199, 96 Cal.Rptr.2d 463, 999 P.2d 686.)” We also presume the Legislature was aware of judicial construction of those laws and that it intended the same construction to apply to related laws with identical or substantially similar language. (Moran v. Murtaugh Miller Meyer & Nelson, LLP (2007) 40 Cal.4th 780, 785, 55 Cal.Rptr.3d 112, 152 P.3d 416.)” (In re R.G. (2019) 35 Cal.App.5th 141, 146, 247 Cal.Rptr.3d 24.)

When the Legislature adopted section 226.7 in 2000, it did so against the backdrop of longstanding federal law that defined overtime pay in terms of an employee's “regular rate,” and existing state law that defined overtime pay in terms of an employee's “regular rate of pay.” Both phrases had been repeatedly construed to include nondiscretionary bonuses and incentives, in addition to base hourly pay. The historical use of these terms is essential to understanding the Legislature's intent in adopting section 226.7, and thus I summarize that use in some detail here.

*1258 a. Historical use of “regular rate” in federal and state overtime provisions

i. The Fair Labor Standards Act

As adopted in 1938, section 7(a) of the federal Fair Labor Standards Act (FLSA), 29 U.S.C. section 201 et seq., required employers to compensate employees for all hours in excess of 40 at one and one-half times the “regular rate at which he is employed.” (149 Madison Ave. Corporation v. Asselta (1947) 331 U.S. 199, 200, fn. 1, 67 S.C. 1178, 91 L.Ed. 1432, italics added.) The FLSA initially did not define “regular rate,” and litigation over the meaning of the phrase ensued almost immediately. In 1944, the Supreme Court held that “‘regular rate’ ... mean[s] the hourly rate actually paid for the normal, non-overtime workweek.” (Walling v. Helmerich & Payne, Inc. 1944, 323 U.S. 37, 40, 65 S.Ct. 11, 89 L.Ed. 29, italics added; see also Walling v. Youngerman-Reynolds Hardwood Co. (1945) 325 U.S. 419, 424–425, 65 S.C. 1242, 89 L.Ed. 1705, italics added [“The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact”].) The following year, the court held that “regular rate” necessarily included not only the base hourly rate, but also nondiscretionary bonuses. It explained: **813 “Those who receive incentive bonuses in addition to their guaranteed base pay clearly receive a greater regular rate than the minimum base rate.... The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of § 7(a). We cannot sanction such a patent disregard of statutory duties.” (Walling v. Harnischfeger Corp., supra, 325 U.S. at pp. 431–432, 65 S.Ct. 1246, italics added.) 3


The court provided the following example: “An incentive worker is assigned a basic rate of $1 an hour and works 50 hours a week on 15 ‘time studied’ jobs that have each been given a ‘price’ of $5. He completes the 15 jobs in the 50 hours. He receives $50 basic pay plus $25 incentive pay (the difference between the base pay and 15 job prices). In addition, the worker receives $5 extra for the 10 overtime hours. This is computed on the basis of 50% of the $1 base rate, or 50 cents an hour premium. Actually, however, this worker receives compensation during the week at the actual rate of $1.50 an hour ($75 divided by 50 hours) and the overtime premium should be computed on that basis, giving the worker a premium of 75 cents an hour or $7.50 for the 10 overtime hours.” (Walling v. Harnischfeger Corp., supra, 325 U.S. at p. 431, fn. 3, 65 S.Ct. 1246.)

In so concluding, the court rejected the employer's contention that incentive bonuses were not part of the “regular rate” because they could not be calculated or paid contemporaneously. The court explained: “[E]mployer] also points to the fact that the incentive bonuses are often not determined or paid until weeks or even months after the semi-monthly pay-days, due to the nature of the ‘priced’ jobs. But [FLSA] Section 7(a) does not require the impossible. If the correct overtime compensation cannot be determined until some time after the regular pay period the employer is not thereby excused from making the proper computation and payment. [FLSA] Section 7(a) requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances.” (Walling v. Harnischfeger Corp., supra, 325 U.S. at pp. 432–433, 65 S.Ct. 1246.)

Interestingly, federal courts interpreting the FLSA section 7(a) have frequently described “regular rate” as an employee's “regular rate of compensation.” (E.g., Walling v. Youngerman-Reynolds Hardwood Co., supra, 325 U.S. at p. 424, 65 S.Ct. 1242 [“The keystone of § 7(a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes,” italics added]; Walling v. Harnischfeger Corp., supra, 325 U.S. at pp. 430, 432, 65 S.Ct. 1246 [in determining whether employer properly calculated overtime pay under FLSA, “[o]ur attention here is focused upon a determination of the regular rate of compensation at which the incentive workers are employed,” italics added]; United States Department of Labor v. Fire & Safety Investigation Consulting Services, LLC (4th Cir. 2019) 915 F.3d 277, 280–281 [“To determine whether [employer's] payment scheme violated the FLSA, we must first decide what constitutes the ‘regular rate’ of compensation actually paid to the Consultants, as that rate establishes the proper overtime compensation due,” italics added]; Local 246 Utility Workers Union of America v. Southern California Edison Co. (9th Cir. 1996) 83 F.3d 292, 295 [“Employees working overtime must be compensated at not less than one-and-one-half times the regular rate of compensation. 29 U.S.C. § 207(a)(1),” italics added]; Walling v. Garlock Packing Co. (2d Cir. 1947) 159 F.2d 44, 46 [“It is urged upon us ... that there is no relationship between the bonus or premium paid and the amount...

*1259 By the 1950's, Congress had amended FLSA section 7(a) to include a definition of “regular rate” consistent with that articulated by the Supreme Court, as follows: “As used in this section the ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee.” (See Mitchell v. Adams (5th Cir. 1956) 230 F.2d 527, 532, fn. 10.)

Although the FLSA has been amended many times, the statute in its current form continues to require overtime pay as a multiple of an employee's “regular rate,” and to define “regular rate” as “all remuneration for employment paid to, or on behalf of, the employee,” subject to exceptions not relevant here. (29 U.S.C., § 207, subsds. (a)(1), (e), italics added.) Federal courts interpreting this section have consistently held that “regular rate” includes, among other things, nondiscretionary bonuses and incentives. (E.g., Local 246 Utility Workers Union of America v. Southern California Edison Co. (9th Cir. 1996) 83 F.3d 292 [supplemental payments to disabled workers were part of the employees’ “regular rate”]; Featent v. City of Youngstown (6th Cir. 1995) 70 F.3d 900, 904 [shift differentials and hazardous duty pay may not be excluded from the “regular rate”; Reich v. Interstate Brands Corp. (7th Cir. 1995) 57 F.3d 574, 577 [bonus must be included in the “regular rate” unless it is entirely discretionary with the employer].)
produced or the time worked by the employee, and therefore that the bonus is not part of the regular rate of compensation. But this argument is not convincing,” italics added.]

**814  1260  ii. Pre-2000 Wage Orders**

In 1913, the California Legislature established the Industrial Welfare Commission (IWC), to which it delegated authority for setting minimum wages, maximum hours, and working conditions. (Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257, 263, 211 Cal.Rptr.3d 634, 385 P.3d 823 (Augustus).) The IWC began issuing industry- and occupation-specific wage orders in 1916. 5

The IWC has promulgated 18 wage orders: Twelve of them cover specific industries, four cover certain occupations, one is a general minimum wage order, and one applies to industries and occupations not covered by, and all employees not specifically exempted in, the wage orders in effect in 1997. (Huntington Memorial, supra, 131 Cal.App.4th at p. 902, 32 Cal.Rptr.3d 373.) Although the Legislature defunded the IWC in 2004, its wage orders remain in effect. (Mendiola v. CPS Security Solutions, Inc. (2015) 60 Cal.4th 833, 838, fn. 6, 182 Cal.Rptr.3d 124, 340 P.3d 355.) In California, wage orders “are constitutionally-authorized, quasi-legislative regulations that have the force of law.” (Dynamex Operations W. v. Superior Court (2018) 4 Cal.5th 903, 914, fn. 3, 232 Cal.Rptr.3d 1, 416 P.3d 1, citing Cal. Const., art. XIV, § 1; §§ 1173, 1178, 1178.5, 1182, 1185; Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 700–703, 166 Cal.Rptr. 331, 613 P.2d 579.)

California’s current wage orders are closely modeled after section 7(a)(1) of the FLSA. (Alcala v. Western Ag Enterprises (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453.) From the early twentieth century, the IWC’s wage orders required employers to pay employees premium wages for overtime work (California Grape, etc. League v. Industrial Welfare Com. (1969) 268 Cal.App.2d 692, 703, 74 Cal.Rptr. 313), and by at least 1968, wage orders defined the overtime premium with reference to an employee’s “regular rate of pay.” (See Rivera v. Division of Industrial Welfare (1968) 265 Cal.App.2d 576, 598, fn. 35, 71 Cal.Rptr. 739, italics added [employees could not be employed “more than eight (8) hours in any one day nor more than (5) days in any one week unless the employee receives one and one-half (1½) times her regular rate of pay for all work over forty (40) hours or the sixth (6th) day”].)

Although the California wage orders added a modifier to the federal definition—referring to an employee’s “regular rate of pay,” rather than his or her “regular rate”—California authorities consistently have concluded the two phrases are synonymous. Significantly, the Division of Labor Standards Enforcement (DLSE), the state agency that enforces wage and hour laws (Ward v. Tilly’s, Inc. (2019) 31 Cal.App.5th 1167, 1176, 243 Cal.Rptr.3d 461), has said that “the failure of the IWC to define the term ‘regular rate’ indicates the [IWC’s] intent that in determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law.” (Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., *1261 Opn. Letter No. 2001-01-29, Calculation of Regular Rate of Pay (Jan. 29, 2003) p. 2, fn. 1.) And, as specifically relevant in the present case, the DLSE has drawn on federal authorities to conclude that “regular rate of pay,” like “regular rate,” includes nondiscretionary bonuses and incentives. **815 (Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., Opn. Letter No. 1991-03-06, Calculation of Regular Rate of Pay (Mar. 6, 1991) p. 1; see also Huntington Memorial Hospital v. Superior Court (2005) 131 Cal.App.4th 893, 902–903, 32 Cal.Rptr.3d 373 (Huntington Memorial) [citing advice letter].) 6

6 In a March 1991 opinion letter, the DLSE considered whether “sporadic incentive bonus payments made to employees for the performance of work ancillary to their primary duties” were part of the “regular rate of pay” for purposes of determining overtime pay. The DLSE responded that the “answer, under both federal and California law, is, yes.” It explained: “The enforcement of the California overtime requirements follow[s] federal precedent where applicable and where the federal precedent is patterned on language which is similar in intent to the California law.... [5] Bonus payments, with certain exceptions [fn. omitted], are included in the calculation of overtime. Bonuses based on incentive must be calculated into the employee's wages to determine the ‘regular rate of pay.’ ” (Dept. of Industrial Relations, DLSE,
Chief Counsel H. Thomas Cadell, Jr., Opn. Letter No. 1991-03-06, Calculation of Regular Rate of Pay (Mar. 6, 1991) p. 1; see also Huntington Memorial, supra, 131 Cal.App.4th at pp. 902-903, 32 Cal.Rptr.3d 373 [citing opinion letter].)
The DLSE similarly opined several years later, advising that “as with federal law,” a bonus based on a piece rate “must be figured into the formula for determining the ‘regular rate of pay.’ ” (Dept. of Industrial Relations, DLSE, Chief Counsel H. Thomas Cadell, Jr., Opn. Letter No. 1994-06-17, Regular Rate of Pay (June 17, 1994) p. 2.)

b. Current law

i. Wage Order 5-2001

The IWC adopted wage orders in their current forms in 2000. Consistent with prior versions, Wage Order No. 5-2001, which governs the present case (see Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1018, 139 Cal.Rptr.3d 315, 273 P.3d 513), provides that an employer is obligated to pay an overtime premium for work in excess of eight hours in a day, 40 hours in a week, or for any work at all on a seventh consecutive day. (Wage Order No. 5-2001, subd. 3, Cal. Code Regs., tit. 8, § 11050, subd. 3(A)(1).) Such work must be compensated at 1.5 times the employee’s “regular rate of pay,” or double the “regular rate of pay” if the employee works in excess of 12 hours in a day or in excess of eight hours on a seventh consecutive working day. (Cal. Code Regs., tit. 8, § 11050, subd. 3(A)(1)(b).)

Wage Order 5-2001 also included, for the first time, a provision requiring premium pay for employees deprived of the ten-minute rest breaks or 30-minute meal breaks required by statute. Specifically, Wage Order No. 5-2001 provides that an employer who does not allow an employee a rest *1262 period or meal period “shall pay the employee one (1) hour of pay at the employee's regular rate of pay” for each workday the rest period or meal period is not provided. (Cal. Code Regs., tit. 8, § 11050, subds. 11(B), 12(B), italics added.)

Although the IWC thus used slightly different language to describe the premiums due for overtime work and for missed meal and rest breaks (“regular rate of pay” versus “regular rate of compensation”), nothing in the regulatory history suggests the IWC intended the two phrases to have different meanings. Indeed, the regulatory history suggests exactly the opposite. In its explanation of the basis for adopting meal and rest break premiums, the IWC said: “During its review ..., the IWC heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders. The IWC therefore added a provision to this section that requires an employer to pay an employee one additional hour of pay at the employee's regular rate of pay for each **816 work day that a meal period is not provided.” (IWC Statement As to the Basis, p. 20, italics added, <https://www.dir.ca.gov/iwc/statementbasis.htm> [as of Oct. 9, 2019], archived at <https://perma.cc/CN6U-HF8P>). In other words, the IWC itself appears not to have distinguished between the phrases “regular rate of pay” and “regular rate of compensation”—a telling indicator that it intended these phrases to be applied interchangeably.

ii. Sections 510 and 226.7

At about the same time the IWC enacted wage orders in their current forms, the Legislature added provisions governing overtime premiums and meal and rest break premiums to the Labor Code by adopting sections 510 and 226.7. Like the analogous provisions of the wage orders, section 510 requires overtime pay to be calculated on the basis of an employee's “regular rate of pay,” and section 226.7 requires meal and rest break premiums to be calculated on the basis of an employee's “regular rate of compensation.” 7 Section 510 does not define “regular rate of pay,” and section 226.7 does not define “regular rate of compensation.”

7 Section 510, subdivision (a) provides: “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. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. Any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.” Section 226.7, subdivision (c) provides: “If an employer fails to provide an employee a meal or
rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

Nothing in the legislative history of these enactments suggests that the Legislature intended “regular rate of pay,” as used in section 510, and “regular rate of compensation,” as used in section 226.7, to have different meanings. To the contrary, the legislative committee reports describe the proposed meal and rest break premiums—which in every version of the bill were based on an employee's “regular rate of compensation”8—in terms of rates of pay or wages. For example, the Senate Committee on Industrial Relations described an early version of the bill as requiring employers to pay an amount “twice the hourly rate of pay” (Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 2509 (1999–2000 Reg. Sess.) as amended June 26, 2000, p. 5, italics added); the Senate Judiciary Committee described the bill as creating employer liability for “twice the employee's average hourly pay” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2509 (1999–2000 Reg. Sess.) as amended Aug. 7, 2000, p. 8, italics added); and the Senate Rules Committee said failure to provide meal and rest periods would subject an employer to paying a worker an additional “hour of pay at the employee's regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned.” (E.g., Alcala v. Western Ag Enterprises (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453, fn. omitted [“California's wage orders are closely modeled after (although they do not duplicate), section 7(a)(1) of the Fair Labor Standards Act of 1938. (29 U.S.C. § 207 (a)(1).) It has been held that when California's laws are patterned on federal statutes, federal cases construing those federal statutes may be looked to for persuasive guidance.”].)

Like the DLSE, state courts have drawn on federal authorities interpreting the FLSA to inform their understanding of “regular rate of pay” within the meaning of the wage orders and section 510. (E.g., Kao v. Holiday (2017) 12 Cal.App.5th 947, 960, fn. 5, 219 Cal.Rptr.3d 580 [“California adheres to federal standards for calculating the regular rate of pay to the extent those standards are consistent with state law”]; Huntington Memorial, supra, 131 Cal.App.4th at p. 903, 32 Cal.Rptr.3d 373 [“federal authorities ... provide useful guidance in applying” section 510]; Advanced-Tech Security Services v. Superior Court (2008) 163 Cal.App.4th 700, 707, 77 Cal.Rptr.3d 757 [ adopting federal definition of “regular rate” for purposes of determining that “regular rate of pay” does not include premium holiday pay: “ ‘Our Supreme Court has “frequently referred to such federal precedent in interpreting parallel language in state labor legislation” ’ ”]; Alcala v. Western Ag Enterprises (1986) 182 Cal.App.3d 546, 550, 227 Cal.Rptr. 453, fn. omitted [“California's wage orders are closely modeled after (although they do not duplicate), section 7(a)(1) of the Fair Labor Standards Act of 1938. (29 U.S.C. § 207 (a)(1).) It has been held that when California's laws are patterned on federal statutes, federal cases construing those federal statutes may be looked to for persuasive guidance.”].)

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statutory language used to describe it was not. Instead, as I have described, in adopting section 226.7 the Legislature used a phrase—“regular rate”—that long had been part of the labor law lexicon, and which had, through many years of judicial interpretation, become a term of art. The Legislature did so, moreover, without indicating an intention to deviate from the well-understood meaning of “regular rate.” Under these circumstances, I believe the Legislature's use of “regular rate” indicates its intent that meal and rest break premiums should be calculated on the basis of an employee's base hourly rate plus bonuses—i.e., the employee's “regular rate”—not the base hourly rate alone.

**818** It is undeniably true, as the majority notes, that section 226.7 uses a modifier (“of compensation”) that does not appear in federal or state overtime provisions, and further that established rules of statutory construction suggest that courts should attempt to give meaning to every word in a statute to avoid *1265 rendering language surplusage. (E.g., Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1097, 184 Cal.Rptr.3d 643, 343 P.3d 834 [courts should avoid “interpretations that render any language surplusage”].) But although a construction that renders part of a statute surplusage generally should be avoided, “this rule is not absolute and “the rule against surplusage will be applied only if it results in a reasonable reading of the legislation” [citation].” (Park Medical Pharmacy v. San Diego Orthopedic Associates Medical Group, Inc. (2002) 99 Cal.App.4th 247, 254, fn. 5, 120 Cal.Rptr.2d 858; see Sturgeon v. County of Los Angeles (2015) 242 Cal.App.4th 1437, 1448, 195 Cal.Rptr.3d 909 [“The canon against surplusage is not absolute.”].) (MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration (2018) 28 Cal.App.5th 635, 650, 239 Cal.Rptr.3d 241.)

Here, attributing controlling significance to the modifier “of compensation” leads to an entirely unreasonable conclusion—namely, that the Legislature used the phrase “regular rate” in section 226.7 without intending the meaning “regular rate” that had acquired over the course of more than 60 years. To paraphrase our Supreme Court, I find it “highly unlikely that the Legislature would make such a significant change in the meaning of “regular rate” without so much as a passing reference to what it was doing. The Legislature “does not, one might say, hide elephants in mouseholes.”” (Jones v. Lodge at Torrey Pines Partnership, supra, 42 Cal.4th at p. 1171, 72 Cal.Rptr.3d 624, 177 P.3d 232.) I find the majority's analysis particularly unpersuasive in light of the nearly simultaneous enactment of sections 510 and 226.7. Reduced to its essentials, the majority's reasoning is as follows. In 1999, “regular rate” was widely understood to mean base hourly rate plus bonuses. Although the Legislature modified the federal language when it adopted section 510, the Legislature intended “regular rate of pay” to have the same meaning as “regular rate.” But although the Legislature modified the federal language in a similar (although not identical) manner when it adopted section 226.7, it intended an entirely different meaning—and although it nowhere articulated that intended meaning, it expected parties and the courts to infer the meaning by its use of the word “compensation,” rather than “pay.” I am not persuaded.

The majority urges that the Legislature's use of “regular rate” in section 226.7 was not a departure from established law because it added a qualifier—“of compensation”—that does not appear in the FLSA. While it is true that “of compensation” is not present in the FLSA, neither is “of pay.” Nonetheless, our Supreme Court has held that, like “regular rate,” “regular rate of pay” includes adjustments to straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned.” (Alvarado, supra, 4 Cal.5th at p. 554, 229 Cal.Rptr.3d 347, 411 P.3d 528.) I would reach the same conclusion with regard to “regular rate of compensation.”

*1266 4. The Labor Code uses “pay” and “compensation” interchangeably

Although courts sometimes attach significance to the Legislature's use of different words or phrases in related statutes, **819 where statutes appear to use synonymous words or phrases interchangeably, courts have not hesitated to attribute the same meanings to them. (See, e.g., People v. Frahs (2018) 27 Cal.App.5th 784, 793, fn. 3, 238 Cal.Rptr.3d 483, review granted Dec. 27, 2018, S252220 [defendant “attempts to draw a distinction between ‘deadly weapon’ and ‘instrument,’ but the terms are used interchangeably within the statute”]; Vector Resources, Inc. v. Baker (2015) 237 Cal.App.4th 46, 55, 187 Cal.Rptr.3d 574 [“The italicized words in Labor Code section 1773 show that the terms ‘determine’ and ‘fix’ are used interchangeably and have the same meaning in the statute”]; Alcala v. City of Corcoran (2007) 147 Cal.App.4th 666, 672, 53 Cal.Rptr.3d 908 [attributing same meaning to statute's use of “public agency” and “public entity”: “Unless the two terms are read interchangeably, the statute makes no sense”]; International
As the Supreme Court has noted, the Legislature “has frequently used the words ‘pay’ or ‘compensation’ in the Labor Code as synonyms.” (Murphy v. Kenneth Cole Productions, Inc., supra, 40 Cal.4th at pp. 1103–1104 & fn. 6, 56 Cal.Rptr.3d 880, 155 P.3d 284.) This is not surprising, as “pay” and “compensation” are synonymous as a matter of common parlance. Webster's dictionary defines “compensation” as “payment, remuneration” (Merriam-Webster's 11th Collegiate Dict. (2008) p. 253, col. 1), and it defines “pay” as “something paid for a purpose and esp. as a salary or wage; remuneration” (id., p. 910, col. 2). “Pay,” “compensate,” and “remunerate” are identified as synonyms. (Id. at p. 910, col. 2.)

The Legislature's interchangeable use of “pay” and “compensation” is evident throughout the Labor Code generally, as well in those provisions of the Labor Code that describe overtime and meal and rest break premiums specifically. For example, with regard to meal and rest breaks, section 226.7 requires an employer to “pay” an employee deprived of a meal or rest break for an additional hour at the employee’s “regular rate of compensation.” (§ 226.7, subd. (e), italics added.) The very next section sets out a limited alternative to this requirement for nonexempt employees holding safety-sensitive positions at a petroleum facility—namely, that if such an employee is required to interrupt his or her rest period to address an emergency, an additional rest period shall be provided or the employer shall pay the employee “one hour of pay at the employee's regular rate of pay.” (§ 226.75, subd. (b), italics added.) Had the Legislature intended the meal and rest break premium for employees at petroleum facilities to be calculated differently than other meal and rest break premiums, it presumably would have said so explicitly.

Similarly, with regard to overtime, section 510 provides that employees who work more than eight hours per day shall be “compensated” at the rate of one and one-half times “the regular rate of pay.” (§ 510, subd. (a), italics added.) The sections that immediately follow provide that in some circumstances employees may work alternative workweek schedules (four 10-hour days) without being entitled to “payment... of an overtime rate of compensation,” and that the IWC “may establish exemptions from the requirement that an overtime rate of compensation be paid” for certain categories of employees. (§§ 511, subd. (a), 515, subd. (a), italics added.) And, section 204.3 provides that, as an alternative to overtime pay, an employee may receive compensating time off at a rate either of not less than one and one-half times the employee's regular rate of pay.

In short, the Legislature uses “pay” and “compensation” interchangeably throughout the Labor Code, including in provisions that describe the overtime and meal and rest break premiums. I would conclude, therefore, that the principle that the same meaning should be attributed to substantially similar language in related statutes (Moran v. Murtaugh Miller Meyer & Nelson, LLP, supra, 40 Cal.4th at p. 785, 55 Cal.Rptr.3d 112, 152 P.3d 416) supports the conclusion that the Legislature intended “regular rate of compensation” to have the same meaning as “regular rate” and “regular rate of pay.”
5. The majority's reliance on a single canon of construction is unpersuasive

The majority's conclusion that “regular rate of compensation” means an employee's base hourly rate is grounded almost entirely on a single canon of statutory construction—that “[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.’” (Maj. opn. ante, at p. 803, citing Briggs v. Eden Council for Hope & Opportunity (1991) 19 Cal.4th 1106, 1117, 81 Cal.Rptr.2d 471, 969 P.2d 564.) But while canons of statutory construction are intended to “provide guidance in interpreting a statute,” they are “‘merely aids to ascertaining probable legislative intent.’” (City of Palo Alto v. Public Employment Relations Bd. (2016) 5 Cal.App.5th 1271, 1294, 211 Cal.Rptr.3d 287; see also Stone v. Superior Court (1982) 31 Cal.3d 503, 521, fn. 10, 183 Cal.Rptr. 647, 646 P.2d 809 [principles of construction “are merely aids to ascertaining probable legislative intent.”].) Accordingly, a court must “‘be careful lest invocation of a canon cause it to lose sight of **821 its objective to ascertain the Legislature's intent.’” (People v. Superior Court (Cooper) (2003) 114 Cal.App.4th 713, 720, 7 Cal.Rptr.3d 862.)

In the present case, I believe the majority's reliance on a single canon of construction has led it to a conclusion the Legislature did not intend, and that the canon does not support. As a logical matter, if the canon applies, it may suggest what section 226.7 does not mean, but it cannot give insight into what the statute does mean. In other words, if the canon applies, it might suggest that “regular rate of compensation” does not mean the same thing as “regular rate of pay”—but it does not lead logically to the conclusion that “regular rate of compensation” means straight hourly rate. 9

*1269 6. Conclusion

The majority's analysis assumes that when the Legislature adopted sections 226.7 and 510, it intended parties and the courts to understand—in the absence of any clarifying language in the statute or legislative history—that “regular rate of pay” has the same meaning as “regular rate,” but “regular rate of compensation” means something different. I cannot conclude that the Legislature “would have silently, or at best obscurely, decided so important ... a public policy matter and created a significant departure from the existing law.” (In re Christian S. (1994) 7 Cal.4th 768, 782, 30 Cal.Rptr.2d 33, 872 P.2d 574.) Instead, I would conclude that when the Legislature used the phrase “regular rate” in section 226.7, it intended the phrase to mean what it has always meant: guaranteed hourly wages plus “bonuses [that] are a normal and regular part of [an employee's] income.” (Walling v. Harnischfeger Corp., supra, 325 U.S. at p. 432, 65 S.Ct. 1246.)

All Citations

51 Cal.App.5th 653
Court of Appeal, First District, Division 5, California.

Joana DAVID, Plaintiff and Appellant,
v.
QUEEN OF the VALLEY MEDICAL CENTER, Defendant and Respondent.

A157336  
Filed 6/8/2020

Synopsis

Background: Former nurse employee brought wage and hour action against hospital employer alleging issues regarding failure to provide meal and rest periods and failure to pay minimum wages. The Superior Court, Napa County, No. 26-67321, Victoria Wood, J., granted employer's motion for summary judgment. Employee appealed.

Holdings: The Court of Appeal, Jones, Presiding Justice, held that:

[1] employer provided employee with meal breaks as required by law;

[2] employer provided employee with rest breaks as required by law; and

[3] employer's policy of rounding employee hours up or down to the nearest quarter hour was neutral on its face and without an eye towards whether hospital or employee benefited, and thus, was lawful.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (16)

[1] Judgment ➔ Existence or non-existence of fact issue
A triable issue of material fact to preclude summary judgment exists where the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. Cal. Civ. Proc. Code § 437c(p)(2).

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Summary judgment serves to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. Cal. Civ. Proc. Code § 437c(p)(2).

[4] Appeal and Error ➔ Plenary, free, or independent review
Court of Appeals reviews the grant of summary judgment independently, considering all of the evidence the parties offered in connection with the motion, except that which the trial court properly excluded, and the uncontradicted inferences the evidence reasonably supports. Cal. Civ. Proc. Code § 437c(p)(2).

[5] Appeal and Error ➔ Presumptions and Burdens as to Harmless and Reversible Error
Appellant has the burden of establishing reversible error.

[6] Labor and Employment ➔ Meal or break periods
State law obligates employers to afford nonexempt employees meal periods during the workday. Cal. Lab. Code § 512.
Labor and Employment ➞ Meal or break periods

An employer satisfies its obligation to afford nonexempt employees meal periods during the workday if it relieves its employees of all duty, relinquishes control over their activities, and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. Cal. Lab. Code § 512.

In satisfying its obligation to afford nonexempt employees meal periods during the workday, the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Cal. Lab. Code § 512.

A missed meal break does not constitute a violation of law affording nonexempt employees meal periods during the workday if the employee waived the meal break, or otherwise voluntarily shortened or postponed it. Cal. Lab. Code § 512.

An employer must authorize and permit all employees to take rest periods at the rate of 10 minutes of rest for each four hours the employee works or major fraction thereof. Cal. Lab. Code § 512.

Hospital employer provided nurse employee, who worked two 12-hour shifts per week, with meal breaks as required by law; employee always received a meal break by the end of her shift, employee could not remember a supervisor interrupting her meal periods with work-related questions or requests, supervisor never told employee to end a meal break early, and employer had a mechanism for employees to report potential meal violations. Cal. Lab. Code § 512.

Hospital employer provided nurse employee, who worked two 12-hour shifts per week, with rest breaks as required by law; employees received a 15-minute rest period for every four hours of work, employee admitted her supervisor did not discourage her from taking rest breaks and acknowledged her supervisor did not tell her to cut her breaks short, employee could not remember a supervisor interrupting her rest periods with work-related questions or requests, when employee's co-workers asked her questions she told them she was on a break and they left her alone, and if employee did miss a break she reported it and received an extra hour of pay pursuant to hospital's policy. Cal. Lab. Code § 512.

Whether a rounding policy to record hours worked will result in undercompensation over time is a factual issue.
In this wage and hour litigation, plaintiff Joana David (plaintiff) appeals from a judgment entered after the trial court granted her former employer, Queen of the Valley Medical Center's (QVMC or hospital) motion for summary judgment. Plaintiff contends the trial court “ignored” her evidence and violated California law by adjudicating her meal and rest period claims, and her time-rounding claim, in favor of QVMC.

We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff worked as a registered nurse at the hospital from 2005 to 2015. Plaintiff was an hourly employee. During the relevant time period—September 2011 to May 2015—plaintiff worked two 12-hour shifts per week. Plaintiff clocked in and out of work using an electronic timekeeping system that automatically rounded time entries up or down to the nearest quarter-hour.

After her employment ended, plaintiff filed a complaint against QVMC alleging seven causes of action, including claims for failure to provide meal and rest periods, and failure to pay minimum wages. As relevant here, plaintiff alleged she was not paid for hours worked off-the-clock, such as when she performed “‘charting’” work, and when her meal and rest periods were interrupted by co-workers and “‘charge nurses’” who asked her work-related questions. Plaintiff also claimed she was not paid all wages because of the hospital's time-rounding policy.

Motion for Summary Judgment

The factual recitation in plaintiff's opening brief is not helpful. Plaintiff does not describe QVMC's motion for summary judgment, nor summarize the evidence offered in support of the motion. Instead, plaintiff presents only the evidence favorable to her. At the summary judgment stage, the trial court liberally construes the opposing party's evidence, but the court does not consider that party's evidence in a vacuum. (Donohue v. AMN Services, LLC (2018) 29 Cal.App.5th 1068, 1088, 1084 & fn. 20, 241 Cal.Rptr.3d 111 (Donohue), review granted Mar. 27, 2019, S253677.) We summarize the...
evidence offered in support of, and opposition to, the summary judgment motion.

QVMC argued its meal and rest period policies complied with California law, and that whenever plaintiff reported a missed break, she received an extra hour of pay. The hospital also contended it could not be held liable for missed meal or rest periods of which it was unaware. In addition, QVMC argued plaintiff was paid for all time worked, and that its rounding policy was legal. The hospital offered the following supporting evidence, derived largely from plaintiff's deposition testimony:

QVMC employees are entitled to an uninterrupted meal period of at least 30 minutes within the first five hours of a shift. Employees who work more than 10 hours in a shift are entitled to a second uninterrupted meal period of at least 30 minutes. **282** Those employees, however, may waive one of the meal periods. Employees are also entitled to an uninterrupted 15-minute rest period for every four hours of work. An employee who misses a meal or rest period must complete an “edit” or “correction” sheet, so QVMC can pay the employee a one-hour premium. The hospital’s practice is to pay a premium for a missed meal or rest period “whenever ... requested.”

Under the hospital’s meal period policy, plaintiff was entitled to two meal breaks per 12-hour shift. Plaintiff waived her second meal break. Plaintiff scheduled meal breaks by writing her name next to a time slot on a whiteboard. At the appointed time, the “break nurse” relieved plaintiff. If no break nurse was available, the charge nurse relieved plaintiff. Plaintiff did not recall missing a meal period or notifying a supervisor about a missed meal period. Plaintiff’s supervisors did not interrupt her meal periods with work-related questions or requests; they never told her to end her break early. The only complaint plaintiff had regarding her meal breaks was that they sometimes happened “too late” in the shift.

*657 Plaintiff’s rest breaks operated similarly: a break nurse or charge nurse relieved plaintiff. On the few occasions when plaintiff missed a rest period, she received an extra hour of pay. Plaintiff’s supervisors did not interrupt her rest periods with work-related questions or requests. On occasion, plaintiff’s co-workers asked her questions while she was on a rest break, but when plaintiff responded that she was on a break, the co-workers left her alone. Plaintiff did not recall complaining to a supervisor about rest periods.

QVMC prohibited off-the-clock work. Plaintiff always clocked in before performing work; she did not recall working after she clocked out. Plaintiff’s time entries were rounded to the nearest quarter hour, either up or down a maximum of seven minutes, depending on when plaintiff clocked in or out. On several occasions, plaintiff benefitted from the rounding policy. Beginning in June 2013, plaintiff’s time entries contained a prompt asking her whether she received meal and rest breaks. When plaintiff clocked out, she honestly answered the prompt. Plaintiff’s supervisors never discouraged her from reporting a missed meal or rest period.

QVMC’s expert, Scott Sternberg, analyzed plaintiff’s time entries to determine whether the rounding policy favored plaintiff or the hospital. He determined the policy was facially neutral, and that the effects of the policy varied over time, “including day to day, week to week, and month to month. This indicates that the time period analyzed can alter the results, particularly considering the very small difference between the total hours recorded by the time clock and the total unrounded elapsed time between the punches. For example, when looking at a 128-day period ... from September 24, 2011, to January 29, 2012, I found that the time clock recorded 400.75 hours while the total unrounded elapsed time between the punches is 400.72 hours, indicating a difference of .03 hours in [plaintiff’s] favor.”

Sternberg determined 47 percent of plaintiff’s rounded time entries favored plaintiff or had no impact, and 53 percent favored QVMC. According to Sternberg’s review of plaintiff’s time records, the hospital paid plaintiff for 2,995.75 hours of work; had punch time entries been used, QVMC would have paid plaintiff for 3,003.5 hours, a difference of .26 percent.

**Opposition and Reply**

Plaintiff argued her meal and rest periods were “incomplete or interrupted” and that she had no obligation to report these violations to the hospital because her time **283** records reflected “short meal periods.” As to her claim for unpaid wages, plaintiff argued she was undercompensated because she worked off-the-clock and during breaks. She also contended the hospital’s **658** rounding policy systematically undercompensated her, and that any bias in favor of QVMC, “however small, may establish an illegal rounding practice.”
In a supporting declaration, plaintiff claimed she performed “charting” work after clocking out because her managers wanted hospital employees to avoid overtime. Plaintiff averred her lunch breaks were “often interrupted ... with questions about patients or work-related tasks by coworkers and Charge Nurses.” She “often took short meal periods or rest breaks because supervisors would walk into the break room and look at the clock, signaling that they expected [her] to clock-in.”

Plaintiff “felt pressured to clock-in early from rest and meal periods because of supervisor's behavior and because patients needed” care. She was “expected to put patients' needs ahead of [her] own, even if it meant not taking timely and complete rest breaks and meal periods.” According to plaintiff, break nurses often provided late coverage—or no coverage—for meal and rest periods. Plaintiff “often” reported “late, missing, incomplete or interrupted” meal and rest periods to charge nurses and “was not compensated.”

Plaintiff's expert, Aaron Woolfson, offered a supporting declaration criticizing Sternberg's methodology and conclusions. Woolfson opined the hospital's failure to pay plaintiff for 7.75 hours of work over the relevant time period—a total of 1.56 minutes per shift— “conclusively establish[ed]” the rounding policy “was biased.” Woolfson did not analyze QVMC's timekeeping policy or plaintiff's time sheets.

QVMC's reply urged the court to exclude the portions of plaintiff's self-serving declaration that contradicted her deposition testimony, and to reject much of Woolfson's declaration. Substantively, the hospital argued: (1) there was no evidence it knew or should have known plaintiff was working off-the-clock; (2) plaintiff's claim that she told charge nurses about the meal and rest period violations did not provide QVMC with notice of the alleged violations because charge nurses were not plaintiff's supervisors; (3) plaintiff's timesheets did not “prove” meal and rest period violations; and (4) the rounding policy was neutral and did not systematically disfavor plaintiff.

Order Granting Summary Judgment

In a thorough written order, the court granted QVMC's motion for summary judgment. First, it excluded portions of plaintiff's declaration that were inconsistent with her deposition testimony and/or lacked foundation. The court also excluded the portion of Woolfson's declaration describing alleged flaws in Sternberg's analysis and conclusions, determining Woolfson's opinion lacked foundation.²

² Plaintiff does not challenge these evidentiary rulings. We consider the point waived. (Cahill v. San Diego Gas & Electric Co. (2011) 194 Cal.App.4th 939, 956, 124 Cal.Rptr.3d 78; Silva v. See's Candy Shops, Inc. (2016) 7 Cal.App.5th 235, 250, 212 Cal.Rptr.3d 514 (See's Candy II) [plaintiff complained trial court “ ‘ignore[d]’ ” her evidence, but failed to explicitly challenge the court's evidentiary ruling].)

Next, the court concluded QVMC was entitled to judgment on plaintiff's meal and rest period claims. It summarized the hospital's extensive evidence that plaintiff's supervisors did not urge her to work during meal or rest periods and that she did not report missing a meal or rest break to her supervisors. As the court observed, plaintiff was asked at her deposition whether charge nurses were supervisors, she “replied, ‘I don't know,’ ” and “testified that she did not know whether any supervisor ever interrupted her with a work question during her lunch break.... She also stated she did not know whether ‘any supervisor ever knew’ she was being interrupted by her coworkers during [her] meal breaks.”

The court considered plaintiff's declaration, where she averred charge nurses and co-workers interrupted her breaks with work-related questions. It gave this statement “every reasonable inference” and determined it did not create a triable issue as to whether QVMC had actual or constructive knowledge her meal and rest breaks were being interrupted with work-related discussions. According to the court, “walking into the break room and looking at the clock, without more,” did not constitute “a direction to prematurely terminate a break.”

Third, the court held QVMC was entitled to judgment on plaintiff's claim that she was not paid for all time worked. It noted the hospital produced evidence that it did not allow employees to perform off-the-clock work and that plaintiff's evidence did not create a triable issue. The court gave “every reasonable inference” to the statement in plaintiff's declaration that she performed charting work after clocking out because managers instructed hospital employees to avoid overtime, but determined an “instruction to avoid overtime, without more, cannot reasonably be understood as an affirmative direction to perform work off-the-clock. This
is particularly true in light of Plaintiff's extensive deposition testimony” where she denied performing off-the-clock work.

Finally, the court determined QVMC was entitled to judgment on plaintiff's rounding claim. It determined QVMC made a prima facie case that its rounding policy was neutral, and that plaintiff failed to rebut this showing. The court held Woolfson's declaration, which criticized Sternberg's “approach, analysis and conclusions,” did not create a triable issue on whether *660 the rounding policy was biased. As the court explained, Woolfson did not analyze QVMC's rounding policies or plaintiff's timekeeping records, and “[w]ithout evidence of such an analysis, ... Woolfson's assertion that ‘... Sternberg's own evidence (53% of shifts rounded down) and 7.75 unpaid hours conclusively established defendant's rounding system was biased’ lacks foundation .... Moreover, it is inconsistent with the holding in Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership (9th Cir. 2016) 821 F.3d 1069 (Corbin) that a finding that some employee has lost some compensation is not sufficient evidence for a finding of bias.”

The court entered judgment for QVMC.

**DISCUSSION**

1 2 “[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493 (Aguilar).) “Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to the cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2); Aguilar, at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The party opposing summary judgment “shall set forth the specific facts showing that a triable issue of material fact exists.” (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where “the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the **285 party opposing the motion in accordance with the applicable standard of proof.” (Aguilar, at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

3 Summary judgment serves to “cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (Aguilar, supra, 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) We review the grant of summary judgment independently, “considering all of the evidence the parties offered in connection with the motion (except that which the [trial] court properly excluded) and the uncontradicted inferences the evidence reasonably supports.” (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476, 110 Cal.Rptr.2d 370, 28 P.3d 116.) Plaintiff, as the appellant, has “the burden of establishing reversible error.” (Demara v. The Raymond Corp. (2017) 13 Cal.App.5th 545, 552, 221 Cal.Rptr.3d 102.)

I.

**Meal and Rest Period Claims**

6 7 8 9 “State law obligates employers to afford their nonexempt employees meal periods ... during the workday.” ( *661 Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1018, 139 Cal.Rptr.3d 315, 273 P.3d 513.) An employer satisfies this obligation “if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.” (Id. at p. 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513.) In addition, Labor Code section 512 requires a meal period be provided “no later than the end of an employee's fifth hour of work.” (Brinker, at p. 1041, 139 Cal.Rptr.3d 315, 273 P.3d 513.) “[T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed.” (Id. at p. 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513.) “A missed meal break does not constitute a violation if the employee waived the meal break, or otherwise voluntarily shortened or postponed it.” (Lampe v. Queen of the Valley Medical Center (2018) 19 Cal.App.5th 832, 851, 228 Cal.Rptr.3d 279.)

To the extent plaintiff claims these principles do not apply to nurses, we reject the argument as undeveloped and unsupported by relevant authority. (Parisi v. Mazzaferro (2016) 5 Cal.App.5th 1219, 1226, fn. 10, 210 Cal.Rptr.3d 574.) Alberts v. Aurora Behavioral Health Care (2015) 241 Cal.App.4th 388, 193 Cal.Rptr.3d 783 (Alberts) does not stand for the proposition that different meal and rest break rules apply to nurses.

10 Similar principles apply to rest periods. (Brinker, supra, 53 Cal.4th at p. 1028, 139 Cal.Rptr.3d 315, 273 P.3d 513.)
An employer must “authorize and permit all employees to take rest periods” at the rate of 10 minutes of rest for each four hours the employee works “or major fraction thereof.” (Ibid.)

[11] The hospital provided meal breaks as required by law. QVMC provided one meal period for every five hours of work, and a second meal period for those who worked more than 10 hours. Plaintiff waived her second meal period. At her deposition, plaintiff testified a break nurse or a charge nurse relieved her for meal periods and that she always received a meal break by the end of her shift. Plaintiff did not recall missing a meal period or notifying a supervisor about a missed meal period. She could not remember a supervisor interrupting her meal periods with work-related questions or requests. Plaintiff's supervisors never told her to end a meal break early; she was never discouraged from taking a meal break. Together this evidence establishes QVMC provided **286 meal breaks required by law. (Brinker, supra, 53 Cal.4th at pp. 1004, 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513 ["employer's obligation is to relieve its employee of all duty" during meal period, but “need not ensure that no work is done”]; Donohue, supra, 29 Cal.App.5th at p. 1092, 241 Cal.Rptr.3d 111 [employer had a “complete defense” to meal period violation claim].)

[12] QVMC also provided rest breaks as required by law. Hospital employees received a 15-minute rest period for every four hours of work. At her deposition, plaintiff admitted her supervisors did not discourage her from taking rest breaks; she acknowledged her supervisors did not tell her to cut her breaks short. Plaintiff could not remember a supervisor interrupting her *662 rest periods with work-related questions or requests. When plaintiff’s co-workers asked her questions, plaintiff told them she was on a break, and they left her alone. Plaintiff did not recall complaining to a supervisor about rest periods.

For a portion of the relevant time period, plaintiff affirmed she was provided with her meal and rest breaks when she clocked out of her shift. The few times that plaintiff did miss a break, she reported it and received an extra hour of pay pursuant to the hospital's practice of paying a premium for a missed break “whenever ... requested.” Viewed as a whole, this evidence demonstrates QVMC provided rest periods as required by law. (See Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257, 264, 211 Cal.Rptr.3d 634, 385 P.3d 823 [discussing scope of employer's obligation to provide off-duty rest periods].) As she did in the trial court, plaintiff relies on her declaration in an effort to establish a triable issue of fact. The trial court was not persuaded, and neither are we. The gist of plaintiff's declaration is charge nurses looked at the clock while plaintiff was on her breaks, which she interpreted as a signal to cut her breaks short. Assuming for the sake of argument charge nurses are supervisors—an issue we need not decide—this evidence does not support a reasonable inference plaintiff was pressured to end her breaks early. Plaintiff's generic comment does not create a triable issue of fact regarding interrupted or insufficient breaks, particularly in light of her specific deposition testimony that a supervisor never told her to end her break early, never discouraged her from taking a break, and never told her to work while she was taking a break. (D’Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 21, 112 Cal.Rptr. 786, 520 P.2d 10 [party cannot create triable issue of fact by relying on a declaration contrary to deposition testimony].)

Notably absent from plaintiff's briefing is a single case where a supervisor's glance at a clock constituted coercion or pressure sufficient to undermine a formal policy of providing meal and rest breaks. This case bears no resemblance to the cases cited by our high court in Brinker, supra, 53 Cal.4th at page 1040, 139 Cal.Rptr.3d 315, 273 P.3d 513, such as Dilts v. Penske Logistics, LLC (S.D.Cal. 2010) 267 F.R.D. 625, 638, where employees had no way to report missed meal breaks and the employer enforced an informal anti-meal-break policy through “‘ridicule’ or ‘reprimand.’” Plaintiff's opening brief does not cite Donohue, supra, 29 Cal.App.5th 1068, 241 Cal.Rptr.3d 111, which is on point. There, the trial court granted summary adjudication for the employer on the plaintiff's meal period claim. (Id. at p. 1086, 241 Cal.Rptr.3d 111.) In urging the appellate court to reverse, the plaintiff relied on her deposition testimony, where she suggested she was denied a full meal period because *663 she was pressured to keep working. ( **287 Id. at p. 1091, 241 Cal.Rptr.3d 111.) The Donohue court held this testimony did not defeat the employer's motion for at least two reasons. First, Donohue determined the deposition testimony did not address the undisputed evidence that the employer had a procedure for employees to report potential meal period violations, and that the plaintiff failed to inform the employer “of any such violation.” (Ibid.) Second, Donohue determined the plaintiff's testimony failed to create a triable issue because it was inconsistent with the certified statement she submitted
with each timesheet stating she either received an opportunity to take meal breaks or reported the missing break.

*664 II.

Rounding Claim

Donohue applies here. As in Donohue, QVMC had a mechanism for employees to report potential meal and rest period violations. And with the exception of a few isolated instances, plaintiff failed to report any such violation. (Donohue, supra, 29 Cal.App.5th at p. 1091, 241 Cal.Rptr.3d 111.) She also affirmatively stated in her time correction sheets that she received breaks. Like Donohue, plaintiff's declaration does not create a triable issue of fact because, as discussed above, it is inconsistent with her deposition testimony, where she could not remember missing a meal or rest period; could not remember having a supervisor interrupt her meal or rest breaks or being discouraged by a supervisor from taking a meal or rest period; and could not remember raising any concerns about meal periods with her supervisor. Plaintiff's cursory attempt to distinguish Donohue in her reply brief is not persuasive.

Plaintiff's reliance on Alberts, supra, 241 Cal.App.4th 388, 193 Cal.Rptr.3d 783 does not persuade us the court erred by adjudicating the meal and rest period claims in QVMC's favor. In that case, plaintiffs alleged a hospital systematically discouraged nurses from taking meal and rest breaks, covered up missed meal periods, and forced nursing staff to work after their shifts ended. (Id. at pp. 415–417, 193 Cal.Rptr.3d 783.) Alberts held the trial court erred by failing to certify meal and rest break subclasses because plaintiffs' theory of liability presented a common question suitable for class treatment, and because plaintiffs offered substantial common evidence to support that theory. (Id. at pp. 401, 412, 414, 193 Cal.Rptr.3d 783.)

Alberts—a class certification case—has no application in this appeal from a grant of summary judgment. Class certification is a procedural question that does not ask whether an action is legally or factually meritorious. Summary judgment, in contrast, is a merits question. (Donohue, supra, 29 Cal.App.5th at p. 1087, 241 Cal.Rptr.3d 111 [rejecting reliance on class certification case in a summary judgment appeal].) Alberts is also factually distinguishable.

[13] In California, an employer may use a rounding policy if it “is fair and neutral on its face and ‘... is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.’” (See's Candy Shops, Inc. v. Superior Court (2012) 210 Cal.App.4th 889, 907, 148 Cal.Rptr.3d 690.) “[C]ourts have upheld an employer's rounding policy if ‘ ‘on average, [it] favors neither overpayment nor underpayment,’ ” but have rejected timekeeping policies that “ ‘systematically undercompensate[ ] employees’ ” such as where the employer's rounding policy “ ‘encompasses only rounding down.’” (See's Candy II, supra, 7 Cal.App.5th at p. 249, 212 Cal.Rptr.3d 514.)

[14] [15] Whether a rounding policy will “result in undercompensation over time is **288 a factual” issue. (See's Candy Shops, Inc. v. Superior Court, supra, 210 Cal.App.4th at p. 912, 148 Cal.Rptr.3d 690.) Summary adjudication on a rounding claim may be appropriate where the employer can show the rounding policy does not systematically underpay the employee, even if the employee loses some compensation over time. (Corbin, supra, 821 F.3d at pp. 1076–1077 [upholding summary judgment for employer and rejecting argument that any loss of employee compensation invalidated rounding policy]; Ferra v. Loews Hollywood Hotel, LLC (2019) 40 Cal.App.5th 1239, 1255, 253 Cal.Rptr.3d 798, review granted Jan. 22, 2020, S259172 [affirming summary adjudication on rounding claim and holding a rounding “system can be fair or neutral even where a small majority loses compensation”]; AHMC Healthcare, Inc. v. Superior Court (2018) 24 Cal.App.5th 1014, 1026, 234 Cal.Rptr.3d 804 [summary adjudication for employer proper despite evidence some employees “suffered minor losses in compensated time”].)

[16] Here, QVMC's rounding policy “is neutral on its face. It ‘rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or employee is benefitting from the rounding.’ ” (AHMC Healthcare, Inc. v. Superior Court, supra, 24 Cal.App.5th at p. 1027, 234 Cal.Rptr.3d 804.) It is also neutral in practice. (Corbin, supra, 821 F.3d at p. 1079.) The rounding policy did not systematically undercompensate plaintiff: sometimes, in a given pay period, she gained minutes and compensation; sometimes she lost minutes and compensation. (Ibid.) The overall loss of .26 percent in compensation over the relevant time period is statistically meaningless. (Ferra v. Loews Hollywood Hotel, LLC, supra, 40 Cal.App.5th at pp. 1253–1254, 253 Cal.Rptr.3d 798 [rounding system neutral even
where the plaintiff lost time in

55.1 percent of shifts]; AHMC Healthcare, Inc. v. Superior Court, supra, at p. 1028, 234 Cal.Rptr.3d 804 [rounding system neutral, even though some employees lost 2.33 minutes per shift]; See's Candy II, supra, 7 Cal.App.5th at p. 250, 212 Cal.Rptr.3d 514 [evidence that the plaintiff had a shortfall and a surplus demonstrated rounding policy was “mathematically neutral over time”].)

Under the authorities discussed above, QVMC satisfied its burden of establishing the rounding policy is lawful. (See's Candy II, supra, 7 Cal.App.5th at p. 250, 212 Cal.Rptr.3d 514.) Plaintiff's bare assertion she is “owed 7.75 hours of wages” does not create a triable issue of fact, 4 and her brief argument to the contrary is not persuasive because it is premised on the mistaken assumption that the trial court applied the federal Fair Labor Standards Act of 1938's de minimis doctrine (29 U.S.C. § 201 et seq.) when adjudicating her rounding claim. The de minimis doctrine does not apply to wage and hour claims brought under California law (Troester v. Starbucks Corp. (2018) 5 Cal.5th 829, 834, 848, 235 Cal.Rptr.3d 820, 421 P.3d 1114) and the trial court did not apply that doctrine when granting QVMC's summary judgment motion.

４The court excluded a portion of plaintiff's expert declaration, a ruling plaintiff does not challenge on appeal. Assuming for the sake of argument Woolfson's opinion was admissible, it does not create a triable issue of fact because Woolfson did not analyze the rounding policy or plaintiff's timesheets and did not consider evidence that plaintiff may have gained compensable work time under the rounding policy. (Donohue, supra, 29 Cal.App.5th at p. 1085, 241 Cal.Rptr.3d 111.)

DISPOSITION

The judgment is affirmed. QVMC is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

WE CONCUR:

Simons, J.
Burns, J.

All Citations

AHMC HEALTHCARE, INC. et al., Petitioners, v. The SUPERIOR COURT of Los Angeles County, Respondent; Emilio Letona et al., Real Parties in Interest.

Synopsis

Background: Employees brought action against employer for failure to pay wages and for penalties under Private Attorneys General Act (PAGA). The Superior Court, Los Angeles County, No. BC629297, Elihu M. Berle, J., denied cross motions for summary judgment. Employer filed petition for writ of mandate.

[1] Parties ⇒ Consideration of merits

Trial courts should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action in order to prevent one-way intervention which occurs when potential plaintiffs elect to stay in a class after favorable merits rulings but opt out after unfavorable ones.


In determining employee wage claims, State courts may look to federal authorities for guidance in interpreting state labor provisions.

[3] Labor and Employment ⇒ Working Time

Employer's policy of rounding employee hours up or down to the nearest quarter hour was neutral on its face and without an eye toward whether employer or employee benefited from the rounding, and thus rounding did not violate federal labor regulation governing rounding of employee hours, although slight majority at one location lost time due to rounding, where, overall, employees were compensated for more hours than they worked, and slight majority who lost time lost only minor sum of wages during discrete period. 29 C.F.R. § 785.48.


5 Cases that cite this headnote

Petition granted.

Procedural Posture(s): On Appeal; Petition for Writ of Mandate; Motion for Summary Judgment.

West Headnotes (3)

**805** ORIGINAL PROCEEDINGS in mandate. Elihu M. Berle, Judge. Petition granted. (Los Angeles County Super. Ct. No. BC629297)

Attorneys and Law Firms

Ballard Rosenberg Golper & Savitt, Jeffrey P. Fuchsman, Glendale, and Zareh A. Jaltorossian for Petitioners.


No appearance for Respondent.
Opinion

MANELLA, J.

*1016 State law requires employers to pay their employees for all time the employees are at work and subject to the employers’ control. (Mendiola v. CPS Security Solutions, Inc. (2015) 60 Cal.4th 833, 839, 182 Cal.Rptr.3d 124, 340 P.3d 355.) The issue in this case is whether an employer's use of a payroll system that automatically rounds employee time up or down to the nearest quarter hour, and thus provides a less than exact measure of employee worktime, violates California law. In the underlying matter, both employers and employees moved for summary adjudication on the issue, and the trial court denied both motions. Petitioners AHMC Healthcare, Inc., AHMC, Inc., AHMC Anaheim Regional Medical Center, L.P. (Anaheim), and AHMC San Gabriel Valley Medical Center, L.P. (San Gabriel) sought a writ of mandate directing the trial court to grant its motion, contending they had established as a matter of undisputed fact that their system was neutral on *1017 its face and as applied. We agree the undisputed facts established that petitioners’ system was in compliance with California law. Accordingly, we grant the writ.

FACTUAL AND PROCEDURAL BACKGROUND

Real parties in interest Emilio Letona and Jacquelyn Abeyta, acting on behalf of themselves and others similarly situated, brought suit against petitioners for failure to pay wages, failure to provide meal periods, failure to provide rest periods, failure to furnish timely and accurate wage statements, failure to pay wages to discharged employees, and unfair business practices. The operative complaint also sought penalties under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.).

**806 [1] Real party in interest Letona was employed by San Gabriel as a part-time respiratory care technician from 2009 to 2016. Real party in interest Abeyta was employed by Anaheim as an R.N. from November 2015 to August 2016. Both real parties in interest were employed in hourly positions, requiring them to clock in and out, which they did by swiping their ID badges at the beginning and end of their shifts. Real parties’ primary contention was that petitioners’ method of calculating employee hours violated the Labor Code because the system rounded employees’ hours up or down to the nearest quarter hour prior to calculating wages and issuing paychecks, rather than using the employees’ exact check-in and check-out times. 1 Both sides moved for summary adjudication to establish whether petitioners’ method of calculation passed muster under California law. 2

1 The original plaintiff was Ernesto Fajardo, an R.N. employed by AHMC Garfield Medical Center, L.P. However, as it was determined that Fajardo’s hours and wages had been increased as a result of the rounding procedures, he was substituted out for Letona and Abeyta. AHMC Garfield Medical Center L.P., AHMC Monterey Park Hospital, L.P., AHMC Greater El Monte Community Hospital, L.P. and AHMC Whittier Hospital Medical Center, L.P. were named as defendants in the original complaint, but dismissed when the complaint was amended. Real parties acknowledged that the evidence did not show that employees at these medical facilities were undercompensated by the rounding system.

2 The trial court has not yet decided whether to certify the proposed class. It is well settled that “trial courts ... should decide whether a class is proper and, if so, order class notice before ruling on the substantive merits of the action” in order to prevent “‘one-way intervention’” which occurs when potential plaintiffs “elect to stay in a class after favorable merits rulings but opt out after unfavorable ones.” (Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1074, 56 Cal.Rptr.3d 861, 155 P.3d 268.) The parties entered into a stipulation waiving this rule. In the stipulation, the parties asked the court to proceed under Code of Civil Procedure section 437c, subdivision (t), which permits the parties to stipulate to adjudication of “a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty ....” The parties stipulated to the following facts. Petitioners have a policy that rounds employees’ time clock swipes up or down to the nearest quarter hour. *1018 For example, if an employee clocks in between 6:53 and 7:07, he or she is paid as if he or she had clocked in at 7:00; if an employee clocks in from 7:23 to 7:37, he or she is paid as if he or she had clocked
in at 7:30. In addition, meal breaks that last between 23 and 37 minutes are rounded to 30 minutes.

The time records for San Gabriel and Anaheim for the period August 2, 2012 through June 30, 2016 were examined by Deborah K. Foster, Ph. D., an economic and statistics expert. During this period, employee shifts totaled 527,472 at San Gabriel, and 766,573 at Anaheim. Dr. Foster examined the data over the four-year period from three perspectives: (1) the percentage of employees who gained by having minutes added to their time, compared to the percentage who lost by having minutes deducted; (2) the percentage of employee shifts in which time was rounded up, compared to the percentage in which time was rounded down; and (3) whether the employees as a whole benefitted by being paid for minutes or hours they did not work, or the petitioners benefitted by paying for fewer minutes or hours than actually worked. The parties stipulated to the accuracy of her findings, discussed below.

At San Gabriel, petitioners’ rounding procedure added time (9,476 hours) to the pay of 49.3% of the workforce (709 employees) and left 1.2 percent of the workforce 807 (17 employees) unaffected; 49.5 percent of the workforce (713 employees) lost time (a total of 8,097 hours). On a day-by-day analysis, the procedure added time to 45.2 percent of the employee shifts, averaging 4.96 minutes per day; it reduced time from 43.3 percent of employee shifts, averaging 4.82 minutes per employee shift; it had no effect on 11.6 percent of employee shifts. Overall, the number of minutes added to employee time by the rounding policy exceeded the number of minutes subtracted, adding 1,378 hours to the employees’ total compensable time.

For those employees whose time was reduced, the average net reduction was 2.04 minutes per employee shift.

At Anaheim, the rounding procedure added time (17,464 hours) to the pay of 47.1 percent of the workforce (861 employees), and had no effect on 0.8 percent of the workforce (14 employees); 52.1 percent of the workforce (953 employees) lost time (a total of 13,588 hours). On a day-by-day analysis, the procedure added time to 46.6 percent of the employee shifts examined, reduced time from 42.3 percent of the employee shifts examined, and had no effect on 11 percent. Overall, the rounding policy added 3,875 hours to the employees’ total compensable time.

For those employees whose time was reduced, the average net reduction was 2.33 minutes per employee shift.

The parties stipulated that the two medical facilities should be considered separately. Nonetheless, petitioners combined the figures for certain purposes, and sometimes referred to the combined figures in their argument. Although real parties asked the court to disregard the combined figures, they too referred to them in their argument. To clarify the record, we note that according to the parties, combining the San Gabriel and Anaheim figures leads to the following results: for the 1,294,045 total employee shifts at the two facilities; 26,938 hours were added to the time of 1,568 employees (48% of the combined total number of employees); 21,685 hours were taken from 1,666 employees (51% of the combined total number of employees); there was no effect on 31 employees (0.9% of the combined total number of employees). The effect of the rounding procedure on San Gabriel and Anaheim employees combined was a net increase of 5,254 in compensated hours.

*1019 The parties also stipulated to the net effect of rounding on the two named plaintiffs: Over the nearly four-year period examined, Letona lost 3.7 hours, an average of 0.86 of a minute per shift, for a total dollar loss of $118.41. Abeyta, who worked at San Gabriel for only nine months during the examined period, lost 1.6 hours, an average of 1.85 minutes per shift, for a total dollar loss of $63.70.

Based on these facts, petitioners contended the rounding procedure was lawful, as it was facially neutral, applied fairly, and provided a net benefit to employees considered as a whole. As proof of its tilt toward employees, petitioners pointed to the stipulated facts that at both facilities, the majority of employee shifts either had time added or were unaffected, and the number of minutes added to employee time from rounding up exceeded the number of minutes subtracted from rounding down. The result was a net loss to petitioners and net gain for their employees, who were paid for 1,378 additional hours at San Gabriel and 3,875 additional hours at Anaheim. Moreover, with respect to the employees who lost time, the total amount was small per employee, particularly when calculated on a daily basis. For example, Letona’s loss of 3.7 hours, worked out to less than a minute per shift. Abeyta’s loss of 1.6 hours worked out to less than two minutes per shift. Petitioners contended this negligible
amount of lost time was not compensable, under a de minimis theory.

Real parties opposed petitioners’ motion, and asked the court to grant summary **808 adjudication in their favor on the rounding issue. They contended that an employer's rounding practice is unlawful if it systematically undercompensates employees, and that such systematic undercompensation occurs whenever “the average employee suffers a loss of income due to rounding.” According to real parties in interest, petitioners’ rounding procedure was unlawful because it resulted in undercompensation for a slight majority of petitioners’ employees. 6 Real parties in interest further maintained that a rounding policy that resulted in any loss to any employee, no matter how minimal, violates California employment law.

As we have seen, the majority of employees at San Gabriel did not lose any compensation as the result of rounding. Real parties used the combined numbers to support the argument that the majority of employees at petitioners’ facilities suffered a loss.

*1020 The trial court denied both petitioners’ and real parties in interest's motions for summary adjudication. At the hearing, the court explained that an employer may be permitted to use a rounding procedure “as long as [it] does not consistently result in a failure to pay employees per time worked,” and that “a rounding policy is lawful if it is fair and neutral on its face and it's used in such a manner that would not result over a period of time in failure to compensate the employees properly for all the time that they have worked.” The court further explained that determining whether a rounding policy is slanted against employees “is a factual issue and not a legal one,” and that “the analysis turns on whether the policy is used in such a manner that will not result over a period of time in failure to compensate employees properly for all the time that they've actually worked.” The court cited Shiferaw v. Sunrise Senior Living Mgmt., Inc. (C.D.Cal., Mar. 21, 2016, CV-13-02171-JAK (PLAX) ), 2016 WL 6571270, 2016 U.S. Dist. Lexis 187548 (Shiferaw) for the proposition that “a plaintiff may establish [that] the employ[er]'s facially-neutral policy is unlawful using either a net effect approach or an employee percentage approach.” The court expressed concern that an employer could manipulate the system by “consistently overcompensat[ing]” low wage earners and “consistently undercompensat[ing]” high wage earners in order to “serve the company's whims at the expense of the employees.” The court concluded that the evidence that 49.5 percent of the employees at San Gabriel and 52.1 percent of the employees at Anaheim had their hours reduced supported a finding that the rounding policy “consistently favored the employer.” Thus, the court concluded, the evidence “raise[d] triable issues as to whether the rounding policies systematically under-compensate employees.”

Petitioners filed a petition for writ of mandate, seeking reversal of the order denying their motion for summary adjudication. On February 8, 2018, this court issued an alternative writ of mandate, instructing the trial court either to vacate the order insofar as it denied petitioners’ motion and make a new and different order granting the motion or, in the alternative, to show cause why a peremptory writ of mandate should not issue. The trial court did not vacate its original order.

**DISCUSSION**

Section 785.48 of title 29 of the Code of Federal Regulations (section 785.48), promulgated many decades ago, allows employers to compute employee worktime by rounding “to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour,” provided that the rounding system adopted by the employer “is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (29 C.F.R. § 785.48(b)). Federal district courts interpreting the provision have almost universally concluded that a rounding system is valid if it “average[s] out sufficiently,” rejecting claims that minor discrepancies in individual employee's wage calculations establish that the employee is entitled to assert a claim for underpayment of wages. (East v. Bullock's Inc. (D. Ariz. 1998) 34 F.Supp.2d 1176, 1184 [employee presented evidence of 24 occasions of time reductions of less than 15 minutes]; accord, Alonzo v. Maximus, Inc. (C.D. Cal. 2011) 832 F.Supp.2d 1122, 1126-1127 [“[A]n employer's rounding practices comply with § 785.48(b) if the employer applies a consistent rounding policy that, on average, favors neither overpayment nor underpayment. ... [¶] An employer's rounding practices violate § 785.48(b) if they systematically undercompensate employees”]; Mendez v. H.J. Heinz Co., L.P. (C.D. Cal., Nov. 13, 2012, No. CV-12-5652-GHK (DTBx) ), 2012 WL 12888526, p. *2, 2012 U.S. Dist. Lexis 170785, p. *6 [“Rounding policies may be permissible if they, ‘on average,
favor neither overpayment nor underpayment’ of wages”];


7 Section 785.48 is part of section 785, title 29 of the Code of Federal Regulations, the regulations that define “what constitutes working time” for purposes of determining whether employees are receiving the minimum wage or are entitled to overtime. (29 C.F.R., § 785.1.)


In *Corbin v. Time Warner Entm’t-Advance/Newhouse Pship.* (9th Cir. 2016) 821 F.3d 1069 (*Corbin* ), the first federal appellate court to interpret the regulation “join[ed] the consensus of district courts that have analyzed this issue...” (Id. at p. 1079.) The plaintiff there had lost $15.02 in total compensation over a one-year period, and contended that “if an employee loses any compensation due to the operation of a company’s rounding policy, that policy should be found to violate the federal rounding regulation.” (Id. at pp. 1076-1077.) “In other words, ... unless every employee gains or breaks even over every pay period or set of pay periods analyzed, an employer's rounding policy violate[s] the federal rounding regulation ....” (Id. at p. 1077, italics omitted.) The Ninth Circuit rejected that contention for multiple reasons. First, the court observed, the plaintiff's interpretation “read into the federal rounding regulation an ‘individual employee’ requirement that does not exist. The regulation instead explicitly notes that it applies to ‘employees’ and contemplates wages for the time ‘they’ actually worked.” (*Ibid.,* quoting 29 C.F.R. § 785.48(b).) “If the rounding policy was meant to be applied individually to each employee to ensure that no employee ever lost a single cent over a pay period, the regulation would have said as much.” (*Corbin, supra,* at p. 1077.)

The court further found that interpreting the regulation to require the rounding to work out neutrally for every employee “would undercut the purpose” and “gut the effectiveness” of the typical rounding policy. (*Corbin, supra, 821 F.3d at p. 1077.*) “Employers use rounding policies to calculate wages efficiently; sometimes, in any given pay period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out in the long-term. If an employer's rounding practice does not permit both upward and downward rounding, then the system is not neutral ....” (*Ibid.*) The plaintiff's interpretation “would require employers to engage in the very mathematical calculations that the federal rounding regulation serves to avoid,” requiring employers to “‘un-round’ every employee's time stamps for every pay period to verify that the rounding policy had benefitted every employee.” (*Ibid.*) “The proper interpretation of the federal rounding regulation cannot be one that renders it entirely useless.” (*Ibid.*)

Finally, the court expressed concern that the plaintiff's interpretation of the regulation would “reward[ ] strategic pleading, permitting plaintiffs to selectively edit their relevant employment windows to include only pay periods in which they may have come out behind while chopping off pay periods in which they may have come out ahead.” (*Corbin, supra, 821 F.3d at p. 1077.*) The court did not believe that “the legality of an employer's rounding policy” should “turn[ ] on the vagaries of clever pleading.” (Id. at p. 1078.)
Applying its reasoning to the facts presented, the Corbin court found that the rounding policy at issue “pas[se]d muster.” The policy was “facially neutral,” the court observed, as the employer “rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding.” (Corbin, supra, 821 F.3d at pp. 1078-1079.) Moreover, the plaintiff's own compensation records demonstrated that the rounding policy was “neutral in application”: “[s]ometimes [he] gained minutes and compensation, and sometimes [he] lost minutes and compensation.” (Id. at p. 1079.) Although the plaintiff was able to show an aggregate loss of $15.02, “[the] numbers ... fluctuated from pay period to pay period, and ... a few more pay periods of employment may have tilted the total time/compensation tally in the other direction ....” (Id. at p. 1079.)

[2] Because California's wage laws are patterned on federal statutes, in determining employee wage claims, California courts may look to federal authorities for guidance in interpreting state labor provisions. (Bell v. Farmers Ins. Exchange (2001) 87 Cal.App.4th 805, 817, 105 Cal.Rptr.2d 59; accord, Huntington Memorial Hospital v. Superior Court (2005) 131 Cal.App.4th 893, 903, 32 Cal.Rptr.3d 373.) In See's Candy Shops, Inc. v. Superior Court (2012) 210 Cal.App.4th 889, 903, 148 Cal.Rptr.3d 690 (See's I), the court agreed with the federal courts' interpretation of **811 section 785.48.9 There, See's Candy used a timekeeping system that automatically rounded employee punches up or down to the nearest tenth of an hour. (Id. at p. 892, 148 Cal.Rptr.3d 690.) The plaintiff brought a class action for unpaid wages, and moved for summary adjudication that the rounding policy was inconsistent with federal and state law. (Id. at pp. 893-894, 148 Cal.Rptr.3d 690.) The defense expert's analysis showed that 59.1 percent of the affected employees had a net gain in time; 33 percent had a net loss; and 7.9 percent had no difference. (Id. at p. 896, 148 Cal.Rptr.3d 690.) The plaintiff herself received a net benefit of five seconds per shift, but lost 3.6 seconds of overtime. (Id. at pp. 896-897, 148 Cal.Rptr.3d 690.)

9 Real parties do not dispute that section 785.48 is applicable to claims made under state law. We note that California's Division of Labor Standards Enforcement (DLSE) adopted the federal regulation in its Enforcement Policies and Interpretations Manual (DLSE Manual or Manual): “The Division utilizes the practice of the U.S. Department of Labor of 'rounding' employee's hours to the nearest five minute, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions.” (DLSE Manual (Revised, June 2002 Update), ¶ 47.1, “Rounding.”) The court in See's I agreed with the DLSE and the federal courts in concluding that section 785.48 and the policies underlying it “apply equally to the employee-protective policies embodied in California labor law.” (See's I, supra, 210 Cal.App.4th at p. 903, 148 Cal.Rptr.3d 690.) The court observed that “the rounding practice has long been adopted by employers throughout the country.” (Ibid.) To construe the requirements of California's wage laws in a manner inconsistent with federal law, “would preclude [California] employers from adopting and maintaining rounding practices that are available to employers throughout the rest of the United States.” (Ibid., quoting East v. Bullock's Inc., supra, 34 F.Supp.2d at p. 1184.)

The court held that “a rounding-over-time policy” does not systematically undercompensate employees if it is “neutral, both facially and as applied,” because “its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees. [Citation.]” (See's I, supra, 210 Cal.App.4th at p. 903, 148 Cal.Rptr.3d 690.) Having found that an employer is *1024 entitled to use rounding if the system is “fair and neutral” on its face and in practice (id. at pp. 903, 907, 148 Cal.Rptr.3d 690), the court went on to consider whether a reasonable trier of fact could find that See's Candy's policy was consistent with part 785.48 under the evidence presented. Because the defense expert's analysis established that the rounding resulted in a total gain of thousands of hours for the employee class members as a whole, that most of the class member were fully compensated for every minute of their time, and that “the majority was paid for more time than their actual working time,” the court found that See's Candy had met its burden to show a triable issue of fact regarding whether its nearest-tenth rounding policy was proper under California law.10 (Id. at p. 908, 148 Cal.Rptr.3d 690.)

10 In See's I, the appellate court reviewed the trial court's order granting the plaintiff's motion for summary adjudication. In a subsequent decision, Silva v. See's Candy Stores, Inc. (2016) 7 Cal.App.5th 235, 212 Cal.Rptr.3d 514 (See's II ), the appellate court affirmed a grant of summary
**812** Focusing on the evidence that “the majority” of See's Candy employees were overcompensated under the system at issue in See's I, real parties in interest contend that the case stands for the proposition that a rounding policy is unlawful where a bare majority of employees lose compensation. 11 We do not read the holding in See's I to create such rule. Because the expert analysis established that the class as a whole gained time and compensation and that the majority of See's Candy's employees gained time and compensation, the court had no basis to resolve whether either factor was decisive. However, two recent federal district courts have considered the issue and, relying on Corbin and See's I, concluded that the fact that a slight majority of employees lost time over a defined period was not sufficient to invalidate an otherwise neutral rounding practice. (Utne v. Home Depot U.S.A., Inc. (N.D. Cal., Dec. 4, 2017, Case No. 16-cv-01854-RS), 2017 WL 5991863, 2017 U.S. Dist. LEXIS 199184 (Utne); Boone v. PrimeFlight Aviation Services, Inc. (E.D.N.Y., Feb. 20, 2018, No. 15-CV-6077 (JMA) (ARL)), 2018 WL 1189338, 2018 U.S. Dist. Lexis 28000 (Boone).)

11 As real parties acknowledge, the majority of employees at San Gabriel either had time added to their shifts and received compensation for time they did not work, or broke even. A slight majority (52.1 percent) of Anaheim employees had time (an average of 2.33 minutes) subtracted. Only by combining the data for the two facilities can real parties assert that the majority of employees suffered a loss.

*1025* In Utne, the timekeeping system was programmed to round either up or down to the nearest quarter of an hour for purposes of calculating employee compensation. (Utne, supra, 2017 WL 5991863 at p. *2, 2017 U.S. Dist. LEXIS 199184 at p. *5.) The employer's expert performed an analysis of a representative sample of the potential class over a five-year period and found that: 51.3 percent of shifts had minutes added rather than subtracted; in more than half of all analyzed pay periods, employees were credited with extra minutes; the average potential class member was paid for an additional 11.3 minutes; and overall, the employer paid for an additional 339,331 minutes (5,656 hours) when compared to the actual minutes employees worked. (Id. at p. *7.) However, the plaintiff had lost time—an average of 36 seconds per shift—and of the 13,387 employees analyzed, 53 percent were negatively impacted by the rounding, an average of 141.7 minutes per employee over the five-year period. (Id. at p. *9.) The court nonetheless granted summary judgment in favor of the employer: “The rounding policy rounds both up and down, and is thus facially neutral. There is no evidence that the rounding policy is applied differently to [the plaintiff] or to any of the proposed class members. [The employer's] expert calculations are sufficient to establish that the practice does not systematically undercompensate employees over time.” (Id. at p. *3, 2017 U.S. Dist. LEXIS 199184 at p. *11, italics omitted.) The court observed that the figures were “consistent with [the employer’s] contention that rounding contemplates the possibility that in any given time period, some employees will have net overcompensation and some will have net undercompensation. Given the expected fluctuations with **813** respect to individual employees, shifting the time window even slightly could flip the figures.” (Id. at p. *3, 2017 U.S. Dist. LEXIS 199184 at pp. *11-12.)

12 The Utne court rejected the plaintiff's request to certify as a class those employees who lost time as “expressly foreclosed by Corbin, which explained that the federal rounding regulation was not meant to apply individually to each employee.” (Utne, supra, 2017 WL 5991863 at p. *4, 2017 U.S. Dist. LEXIS 199184 at p. *14, citing Corbin, supra, 821 F.3d at p. 1077.) "Provided [the] rounding policy does not systematically undercompensate employees over time, [the plaintiff] cannot defeat
summary judgment on his rounding claims by limiting his proposed class to only those employees who happen to come out behind during the class period. As the Ninth Circuit explained in Corbin, the federal regulation did not intend to direct strategic pleading where a plaintiff includes only pay periods during which he or she came out behind a few minutes.” (Id. at p. *4, 2017 U.S. Dist. LEXIS 199184 at p. *15.) The court also rejected the plaintiff’s contention that See’s I “goes too far under California law and does not reflect how the California Supreme Court would treat rounding”: “Because California law does not address rounding one way or another, courts must ask whether the federal rule is consistent with California wage and hour law. The California Court of Appeal [in See’s I] carefully studied the issue and answered that question in the affirmative. [Citation.]” (Ume, supra, at p. *4, 2017 U.S. Dist. LEXIS 199184 at pp. *13-14.)

Boone also involved a quarter-hour rounding system. As in Ume, expert evaluation of employee compensation during the relevant period resulted in evidence that a majority (58.5 percent) of all time entries were either neutral or rounded in favor of the employee and that the employer suffered a loss overall, but that the majority of employees (55.8 percent), including the *1026 plaintiff, suffered minor losses in compensated time. (Boone, supra, 2018 WL 1189338 at pp. *2–3, 8–9, 2018 U.S. Dist. Lexis 28000 at pp. *6-7, 26.) Relying on the Ninth Circuit’s conclusion in Corbin that “‘the rounding policy is not meant to be “to ensure that no employee ever lost a single cent over a pay period”’” (Boone, supra, at p. *9, 2018 U.S. Dist. LEXIS 28000 at p. *27, quoting Corbin, supra, 821 F.3d at p. 1077), the court granted summary judgment in favor of the employer, finding that the plaintiff “failed to raise a genuine issue of material fact on whether [the employer’s] timekeeping system did not ‘result over a period of time, in failure to compensate the employees properly for all the time they have actually worked.’” (Boone, supra, at p. *9, 2018 U.S. Dist. LEXIS 28000 at p. *28, quoting 29 C.F.R. § 785.48(b).) The court explained: “[A]n analysis of the putative class as a whole demonstrates that the rounding policy was neutral. It is undisputed that (1) 58.5% of all time entries resulted in either neutral rounding or rounding in favor of the employee; (2) the 138 putative class members gained compensation or broke even on approximately 54.5% of their shifts; and (3) 42% of the putative class members gained compensation from rounding over the entire length of the class period analyzed. Further, ... Plaintiff does not refute that [when employees lost time] the 138 putative class members lost on average 15.67 seconds per shift. Although the data analyzed here ... did not average out to 0, Defendant’s expert calculations are sufficient to establish that the practice does not systematically undercompensate employees over time.” (Id. at p. *9, 2018 U.S. Dist. LEXIS 28000 at pp. *27-28, italics omitted.)

Real parties in interest contend that two federal cases—Eddings, supra, 2012 WL 994617, 2012 U.S. Dist. Lexis 51158 and Shiferaw, supra, 2016 WL 6571270, 2016 U.S. Dist. Lexis 187548—support the position that section 785.48 is violated where the majority of the employees suffer a minor loss in compensation. In Eddings, one of **814 the two systems challenged in the complaint required the employees to round their own time up or down, rather than input their time and leave it to an impartial system to round up or down according to a fixed formula. The employer claimed to have communicated to the employees that time was always to be rounded in their favor, but some employees submitted declarations stating they were told to round down. Accordingly, the court found the existence of a genuine issue of material fact “both as to the facial neutrality of the [system] and to the effects of its application ....” (Eddings, supra, at p. *4, 2012 U.S. Dist. LEXIS 51158 at pp. *15-16.) Because the policy “could have been interpreted differently by different associates,” and it was “at best ambiguous as to whether employees are ever allowed to round up,” the fact that the majority of employees gained time was not determinative. (Id. at p. *4, 2012 U.S. Dist. LEXIS 51158 at pp. *15-16.)

In Shiferaw, which involved a system that automatically rounded time to the nearest quarter hour, the court stated that “two pragmatic approaches” could be used “to gather data” in determining whether a rounding system, neutral in its face, was neutral in application: “(1) compare all rounded punches with the actual punch times to determine the overall net effect—in *1027 hours, minutes, and/or seconds—of the rounding; and (2) compare the percentage of employees for whom the rounding resulted in a net loss of time—those who were undercompensated—with the percentage of employees for whom the rounding resulted in overcompensation.” (Shiferaw, supra, 2016 WL 6571270 at p. *28, 2016 U.S. Dist. Lexis 187548 at pp. *6, 81.) The plaintiffs’ expert provided data establishing that the rounding policy resulted in net undercompensation of the employees in the amount of 1,783 hours and that the majority of employee (53.3 percent) lost time due to rounding. (Id. at p. *30-31, 2016 U.S. Dist. LEXIS 187548 at p. 83.) Contrary to real
parties in interest's assertion that “the ... court concluded [the] ... expert created a triable issue of fact under either the net effect or percentage methodology,” the court considered both assumptions in finding “[the] evidence ... sufficient to show the existence of a genuine dispute as to whether [the employer's] challenged rounding policy results in a ‘failure to compensate the employees properly for all the time they have actually worked.’” (Id. at p. *30, 2016 U.S. Dist. LEXIS 187548 at p. 85, italics omitted.) As the plaintiffs introduced evidence that both the net effect and percentage effect analysis supported their claims, the court had no cause to consider whether a difference in either datapoint would have led to a different result. Moreover, Shiferaw was decided before the Ninth Circuit issued its decision in Corbin. To the extent it conflicts with that decision, it is no longer good law.

[3] Here, the rounding system is neutral on its face. It “rounds all employee time punches to the nearest quarter-hour without an eye towards whether the employer or the employee is benefitting from the rounding.” (Corbin, supra, 821 F.3d at pp. 1078-1079.) It also proved neutral in practice. At San Gabriel, a minority of employees lost time, the remainder either gained time or broke even, and overall it caused the employer to compensate employees for 1,378 hours not worked. At Anaheim, although a slight majority of employees (52.1 percent) lost time, overall, employees were compensated for 3,875 more hours than they worked. Because petitioners presented undisputed evidence that the rounding system was neutral on its face, and that employees as a whole were significantly overcompensated, the evidence established that petitioners’ rounding system did not systematically undercompensate **815 employees over time. The fact that a bare majority at one hospital lost minor sums during a discrete period did not create an issue of fact as to the validity of the system. We agree with the court in Corbin that the regulation does not require that every employee gain or break even over every pay period or set of pay periods analyzed; fluctuations from pay period to pay period are to be expected under a neutral system. (See also Ume, supra, 2017 WL 5991863 at p. *3, 2017 U.S. Dist. Lexis 199184 at p. *11-*12 [“[R]ounding contemplates the possibility that in any given time period some employees will have net overcompensation and some will have net undercompensation”]; Boone, supra, 2018 WL 1189338 at pp. *9, 2018 U.S. Dist. Lexis 28000 at pp. *27-28 [rounding policy was neutral as applied where majority of time entries resulted in *1028 rounding in favor of employees, class members broke even or gained compensation on their shifts, and bare majority of class members lost time, but only an average of 15.67 seconds per shift].) We further agree with the court in See's I and See's II that a system is fair and neutral and does not systematically undercompensate employees where it results in a net surplus of compensated hours and a net economic benefit to employees viewed as a whole.

Nothing in our analysis precludes a trial court from looking at multiple datapoints to determine whether the rounding system at issue is neutral as applied. Such analysis could uncover bias in the system that unfairly singles out certain employees. For example, as the trial court discussed, a system that in practice overcompensates lower paid employees at the expense of higher paid employees could unfairly benefit the employer. However, real parties in interest presented no evidence of a bias in the system or that the policy was applied differently to different employees. Dr. Foster analyzed the data on an overall basis, a per shift basis and a per employee basis. Her analysis established that overall, at both hospitals, the rounding policy benefitted employees and caused petitioners to overcompensate them. Her per shift analysis established that for the majority of shifts, the employees at both facilities gained compensable time. Moreover, at San Gabriel, the majority of employees gained time and compensation or broke even during the approximately four years of the study. The sole discrepancy was at Anaheim where a slight majority (52.1 percent) lost an average of 2.33 minutes per employee shift. But where the system is neutral on its face and overcompensates employees overall by a significant amount to the detriment of the employer, the plaintiff must do more to establish systematic undercompensation than show that a bare majority of employees lost minor amounts of time over a particular period. Because petitioners’ employees benefited overall from the rounding policy, the fact that a bare majority lost a minimal amount of time was not sufficient to create a triable issue of a fact. Petitioners’ motion for summary adjudication should have been granted. 13

13 Because we conclude petitioners’ rounding system complies with section 785.48, we do not consider whether the de minimus rule, which permits “insubstantial or insignificant periods of time beyond the scheduled working hours to be disregarded” (29 C.F.R. § 785.47)—applies in California. That issue is currently before the Supreme Court in Troester v. Starbucks Corp., rev. granted Aug. 17, 2016, S234969.
The petition is granted. Let a peremptory writ of mandate issue directing respondent superior court to set aside that portion of its order of September 26, 2017 denying petitioners’ motion for summary **816 adjudication of issues, *1029 and issue a new order granting such motion. Petitioners are awarded their costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

All Citations

210 Cal.App.4th 889
Court of Appeal, Fourth District, Division 1, California.

SEE'S CANDY SHOPS, INC., Petitioner,
v.
The SUPERIOR COURT of San Diego County, Respondent;
Pamela Silva, Real Party in Interest.

No. D060710.

Synopsis

Background: Employees brought class action against employer alleging wage and hour violations. The Superior Court, San Diego County, No. 37-2009-00100692-CU-OE-CTL, Joel M. Pressman, J., granted employee's motion for summary adjudication on employer's affirmative defense that its policy of rounding time worked to the nearest six minutes was consistent with state and federal laws. Employer petitioned for writ of mandate. The Court of Appeal denied the petition. The Supreme Court granted employer's petition for review and ordered the Court of Appeal to issue an order to show cause.

Holdings: The Court of Appeal, Haller, J., held that:

[1] California law allows rounding of employee work time if the employees are fully compensated “over a period of time”;

[2] fact issue existed as to whether rounding work time to nearest six minutes undercompensated employees; and

[3] disputing alleged fact that records of time worked were “accurate” was not an admission that employer violated California law on maintaining time records.

Petition granted.

West Headnotes (13)


Judgment ⇔ Presumptions and burden of proof
Summary adjudication is a drastic remedy and any doubts about the propriety of summary adjudication must be resolved in favor of the party opposing the motion.
5 Cases that cite this headnote

[2] Labor and Employment ⇔ Working Time
The federal regulatory standard which allows rounding of employee work time if the employees are fully compensated “over a period of time” is the appropriate standard under state law, assuming the rounding-over-time policy is neutral both facially and as applied. West's Ann.Cal.Labor Code § 204; 29 C.F.R. § 785.48(b).
42 Cases that cite this headnote

[3] Labor and Employment ⇔ Working Time
An employer's rounding practices for recording employee work time comply with the Department of Labor (DOL) rounding regulation if the employer applies a consistent rounding policy that, on average, favors neither overpayment nor underpayment, but an employer's rounding policy violates the DOL rounding regulation if it systematically undercompensates employees, such as where the defendant's rounding policy encompasses only rounding down. 29 C.F.R. § 785.48(b).
38 Cases that cite this headnote

[4] Labor and Employment ⇔ Rules and regulations
Statements in the Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual were not binding on the courts but could be considered for their

148 Cal.Rptr.3d 690, 19 Wage & Hour Cas.2d (BNA) 1587...

persuasive value, where the statements were rules not adopted under the Administrative Procedure Act (APA). West's Ann.Cal.Gov.Code § 11340 et seq.

4 Cases that cite this headnote

[5] Labor and Employment ⇔ Rules and regulations
In the absence of controlling or conflicting California law, California courts generally look to federal regulations under the Fair Labor Standards Act (FLSA) for guidance. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

6 Cases that cite this headnote

[6] Labor and Employment ⇔ Time of Payment
Labor and Employment ⇔ Working Time
The statute generally providing that all wages are due and payable twice during each calendar month pertains to the timing of wage payments and not to the manner in which an employer ascertains each employee's work time. West's Ann.Cal.Labor Code § 204.

4 Cases that cite this headnote

[7] Statutes ⇔ Statute as a Whole; Relation of Parts to Whole and to One Another
The meaning of a statute may not be determined from a single word or sentence.

[8] Labor and Employment ⇔ Working Time
The statute requiring overtime pay for “any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek” has nothing to do with rounding or calculating employee work time. West's Ann.Cal.Labor Code § 204.

4 Cases that cite this headnote

[9] Judgment ⇔ Employees, cases involving
Genuine issue of material fact existed as to whether employer's practice of rounding employee work time to the nearest six minutes was biased against employees under California overtime law, thus precluding summary adjudication for employee on employer's affirmative defense that the practice was protected by federal and state law authorizing rounding if the employees are fully compensated “over a period of time.” West's Ann.Cal.Labor Code § 204; 29 C.F.R. § 785.48(b).

31 Cases that cite this headnote

[10] Courts ⇔ Previous Decisions as Controlling or as Precedents
Courts ⇔ Operation and effect in general
Language used in any opinion is to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.

If a cause of action contained within an affirmative defense is not shown to be barred in its entirety, the court cannot grant a plaintiff's summary adjudication motion. West's Ann.Cal.C.C.P. § 437c(f)(1).

2 Cases that cite this headnote

[12] Labor and Employment ⇔ Duty to keep records
Generally, employers are required to keep accurate information regarding when an employee begins and ends each work period.

Employer's response to employee's statement of undisputed facts, disputing the alleged fact that employer's records of time worked were “accurate,” was not an admission that employer violated California law by maintaining inaccurate time records, for purposes of employee's motion for summary adjudication of
employer's affirmative defenses that its rounding policy was consistent with state and federal laws permitting employers to use rounding for purposes of computing and paying wages and overtime, where employer's response explained that employer only disputed whether the records accurately reflected the amount of compensable time, not whether the records accurately reflected the times employees punched in and out. West's Ann.Cal.Labor Code § 204; 29 C.F.R. § 785.48(b).


2 Cases that cite this headnote

Attorneys and Law Firms

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No appearance for Respondent.


Marlin & Saltzman, Louis M. Marlin, Stephen P. O'Dell, Lynn Pierce Whitlock, Irvine, as Amicus Curiae on behalf of Real Party in Interest.

Opinion

**891** Pamela Silva brought a wage and hour class action complaint against her former employer, See's Candy Shops, Inc. After certifying a class of current and former California employees, the trial court granted Silva's summary adjudication motion on four of See's Candy's affirmative defenses and entered an order dismissing the four defenses. In a writ petition, See's **892** Candy challenged the dismissal of two of the affirmative defenses. These defenses pertained to See's Candy's timekeeping policy that rounds employee punch in/out times to the nearest one-tenth of an hour (nearest-tenth rounding policy).

After we summarily denied the petition, the California Supreme Court granted See's Candy's petition for review and ordered this court to vacate its prior order and issue an order to show cause in the matter. We thereafter issued the order to show cause and the parties filed extensive writ briefing. We also granted requests by several amici curiae to file briefs in the matter.

We conclude See's Candy's petition has merit. Based on the factual record before it, the trial court erred in granting summary adjudication on the two affirmative defenses pertaining to See's Candy's nearest-tenth rounding policy. We order the court to vacate the summary adjudication order and enter a new order denying summary adjudication on See's Candy's 39th and 40th affirmative defenses. Our ruling leaves open the issue whether the parties will prevail in proving their various claims and defenses relating to See's Candy's nearest-tenth rounding policy and a related grace period policy.

**FACTUAL AND PROCEDURAL BACKGROUND**

See's Candy uses a timekeeping software system, known as Kronos, to record its employee work hours. Employees are required to “punch” into the system (located in the back room of each See's Candy store) at the beginning and end of their **693** shifts, as well as for lunch breaks. A Kronos punch shows the actual time (to the minute) when the employee punched into the system. During the relevant times, See's Candy calculated an employee's pay based on his or her Kronos punch times, subject to adjustment under two policies: (1) the nearest-tenth rounding policy and (2) the grace period policy.

Under the nearest-tenth rounding policy, in and out punches are rounded (up or down) to the nearest tenth of an hour (every six minutes beginning with the hour mark). The Kronos time
punches are thus rounded to the nearest three-minute mark. For example, if an employee clocks in at 7:58 a.m., the system rounds up the time to 8:00 a.m. If the employee clocks in at 8:02 a.m., the system rounds down the entry to 8:00 a.m.

Under the separate grace period policy, employees whose schedules have been programmed into the Kronos system may voluntarily punch in up to 10 minutes before their scheduled start time and 10 minutes after their scheduled end time. Under See's Candy's rules, employees are not permitted to work during the grace period, but they are permitted to punch in early (or punch out late) and use the time for their own personal activities. Because See's Candy assumes the employees are not working during the 10-minute grace period, if an employee punches into the system during the grace period, the employee is paid based on his or her scheduled start/stop time, rather than the punch time. In other words, Kronos time punches made during the grace period accurately show when the employee punched in or out, but they do not show the beginning or end of the employee's work shift, i.e., compensable time. If the employee performs work during that time, the manager must make a timekeeping adjustment. Generally, if the grace period rule is applied, the nearest-tenth rounding policy becomes irrelevant because the start and/or stop time will be exactly the employee's scheduled time and there will be no need to round down or up to the nearest tenth of an hour.

See's Candy employed Silva in a nonexempt hourly position from about 1993 to 2010. In October 2009, Silva filed a class action complaint. As amended, the complaint alleged See's Candy violated various California wage and hour laws, including by failing to: (1) pay for all work performed; (2) pay overtime compensation; (3) maintain lawful meal and rest period policies; (4) pay for each meal or rest period that was not provided; and (5) provide accurate itemized wage statements. Silva also alleged See's Candy's labor practices constituted an unfair business practice under Business and Professions Code section 17200 and violated Labor Code section 2698 et seq. 1

1 All further statutory references are to the Labor Code unless otherwise specified.

The court thereafter certified a class of “All persons employed by See's Candy ... in ... California as non-exempt, non-union employees at any time ... from ... October 20, 2005 to the present, with respect to Plaintiff's claims that See's timestamping policies (rounding policy and grace period policy) are illegal under California law.” The court certified the class on two separate issues: (1) “Whether class members suffered a loss of compensation when they clocked in and out on the Kronos timekeeping system utilized by See's Candy which rounded time to the nearest six minutes” (the nearest-tenth rounding policy), and (2) “Whether class members suffered a loss of compensation when they clocked in or out on the Kronos timekeeping system utilized by See's Candy during the ‘grace period,’ defined as up to **694 ten minutes before their scheduled start times and up to ten minutes after their scheduled quitting times” (the grace-period policy).

In its amended answer, See's Candy denied Silva's allegations and asserted 62 affirmative defenses, including defenses based on See's Candy's claim that: (1) any unpaid amounts are de minimis; (2) the nearest-tenth rounding policy is consistent with federal and state law; and (3) the grace period policy is lawful under federal and state law.

*894 Silva then moved for summary adjudication on four of See's Candy's affirmative defenses. Two of these defenses (10th and 41st) concerned See's Candy's claim that any unpaid wages based on off-the-clock claims or its rounding policies were “de minimis.” 2 The other two challenged defenses (39th and 40th) encompassed See's Candy's claim that its nearest-tenth rounding policy is consistent with state and federal laws “permitting employers to use rounding for purposes of computing and paying wages and overtime” and that the nearest-tenth rounding policy did not deny Silva or the class members “full and accurate compensation.” Silva did not move for summary adjudication on See's Candy's affirmative defense that its grace period policy is “lawful under both federal and California law.”

Because these defenses are not at issue in this writ proceeding, we do not discuss them further in this opinion.

In moving for summary adjudication on the nearest-tenth rounding defenses, Silva argued there is no California statutory or case authority allowing See's Candy to use a rounding policy, and its policy violates section 204, which generally requires an employer to pay an employee “All wages” every two weeks, and section 510, which requires an employer to pay an employee premium wages for “Any work” after eight hours per day or 40 hours per workweek.

To show the defenses lacked factual merit, Silva relied primarily on three paragraphs in a 2010 report by See's
Candy's expert, Dr. Ali Saad, a labor economist and statistician, who was initially retained to analyze the impact of See's Candy's nearest-tenth rounding policy for purposes of the earlier class certification motion. Because the proposed class at that point consisted only of retail (and not administrative) employees, Dr. Saad analyzed only the retail employee time records.

In the portions of Dr. Saad's declaration relied upon by Silva, Dr. Saad concluded: “[From] October 2005 through March 2010 for all hourly [See's Candy] employees in California, ... [*] [t]he total impact of rounding actual time punches to the nearest tenth of an hour for all shifts worked ... produced a net surplus of rounded over actual shifts of 2,230 employee work hours [which] ... resulted in a net economic benefit to the employees as a group.... Per shift the rounded shifts exceeded actual shifts by on average .002 hours, which is equal to 0.12 minutes, or 7 seconds per employee, per shift.” (Italics added.) However, for plaintiff Silva, Dr. Saad found an “aggregate shortfall” of .47 hours or 28 minutes, which he said “equates to a shortfall in the average rounded relative to actual shift of 2 seconds.” Silva also relied on Dr. Saad's graph depicting the distribution of the difference in shift lengths calculated based on the original time punches and on the *895 rounded time punches. Dr. Saad concluded that the total difference “across the more than 860,000 shifts studied is 2,230 hours in favor of employees.” (Italics added.)

**695** Silva additionally relied on the deposition testimony of Mary Ann Mazelin, designated by See's Candy as the person most knowledgeable. When asked whether See's Candy had performed any investigation to determine whether, using the rounding rules, the employees are paid for all the time they actually work, including overtime, Mazelin responded: “I am not aware. I do not believe See's has made any investigation, using your term, for that. However, I have done my own analysis for Pam Silva for the last year comparing actual time clocked in recorded by See's to what Kronos calculates and therefore she ends up being paid.”

Silva also relied on exhibit N, which consisted of a series of charts which Silva said reflected that See's Candy's rounding practices resulted in her loss of $725 in wages. Silva did not include any foundational or authentication evidence explaining the nature of the charts, including who prepared them and/or the manner in which they were prepared.

In opposing the motion, See's Candy urged the court to adopt a federal regulation utilized by California's Division of Labor Standards Enforcement (DLSE) that allows employers to compute employee worktime by using a nearest-tenth rounding method “provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (29 C.F.R. § 785.48(b) (2012), italics added.) See's Candy argued that Silva had not met her summary adjudication burden under this rule, noting that Silva had not presented any competent evidence that the rounding method prevented the class members from being fully compensated for their work.

See's Candy alternatively argued that even if the court found Silva presented sufficient evidence to shift the burden of proof, the summary adjudication motion should be denied because there are triable issues of fact on its nearest-tenth rounding policy affirmative defenses. In support, See's Candy relied on Dr. Saad's 2010 report, in which Dr. Saad concluded that a majority of the employees had a small net gain from the nearest-tenth rounding policy and that “mathematically, over a period of time, rounded times and actual times would even out.” See's Candy also presented Dr. Saad's updated report, which was consistent with his 2010 report, but expanded the period of coverage to April 2011 and also included hourly employees who worked in See's Candy's administrative office locations. In the report Dr. Saad included additional analysis supporting his finding that the nearest-tenth rounding policy was neutral over time, even when taking into *896 consideration California law providing a worker had the right to overtime pay after working an eight-hour day.

In his 2011 report, Dr. Saad stated that in analyzing the Kronos time records, he first applied See's Candy's grace period policy if the time records showed the employee punched in within 10 minutes before or after his or her scheduled start/stop times. In other words, if an employee punched in during this 10–minute period, Dr. Saad would assume the employee was not working during this time and instead was working from the scheduled start time or until the scheduled end time. In this circumstance, Dr. Saad assumed the employee would be paid from the scheduled start/end time and thus See's Candy would have no need to apply the nearest-tenth rounding policy because the employee's worktime would have started and/or ended precisely at the scheduled start/stop time.

Dr. Saad then computed the hours worked for each employee shift by comparing **696 the actual (unrounded) time stamps and the rounded time stamps, and then determining the
difference for each of the shifts. Based on this mathematical analysis, Dr. Saad found that with respect to the entire class, See's Candy's nearest-tenth rounding policy: (1) “is both mathematically and empirically unbiased”; (2) resulted in a total gain of 2,749 hours for the class members as a whole; and (3) “did not negatively impact employees' overtime compensation” as neither employer nor employee benefited with respect to overtime pay.

Breaking down the 2,749–hour net gain for the class members as a whole, Dr. Saad prepared a chart showing that as a result of See's Candy's nearest-tenth rounding policy: 59.1 percent of the class (5,335 employees) had a net gain; 33 percent of the class (2,982 employees) had a net loss; and 7.9 percent of the class (717 employees) had no change. Based on his analysis, Dr. Saad concluded that See's Candy's nearest-tenth rounding policy is not “biased against employees in any way.... From a mathematical perspective ... the methodology of rounding to the nearest tenth of an hour for pairs of punches is exactly neutral. The fact that the results came out in favor of the employees in this data is meaningless—the extremely small excess amount could have been a minutely small shortfall with a different sample of data.” (Italics omitted.)

In his 2011 report, Dr. Saad also modified his earlier conclusion with respect to plaintiff Silva based on his analysis of her entire employment period and not just the class period, and found that Silva was fully compensated for all of her worktime. Specifically, Dr. Saad found: (1) Silva received a net benefit of five seconds per shift because of the nearest-tenth rounding policy for a total net benefit of 111 minutes, which out of 10,000 hours is *897 essentially equivalent to zero; and (2) Silva had a net negative of 3.6 seconds of overtime credited, which Dr. Saad said effectively equals zero.

In addition to Dr. Saad's reports, See's Candy presented evidence that it maintained a policy prohibiting employees from performing any work during the grace period, the employees were periodically reminded of this policy, and employees were told that if they worked during this time they must notify the manager who would manually add time to the employee's Kronos records. See's Candy also presented declarations from numerous employees, each of whom explained that he or she was aware of the grace period policy, understood that the decision to use the policy is “always voluntary,” and described the types of personal activities in which he or she engaged during this period, including using the restroom “to do my makeup or hair,” going to the post office to drop off personal mail, “go[ing] across the street to the [drugstore],” and “play [ing] games on my cell phone.”

See's Candy also asserted numerous objections to Silva's evidence, including to exhibit N, claiming the exhibit lacked foundation and authentication and was hearsay.

In reply, Silva argued primarily that the trial court should grant summary adjudication on the nearest-tenth rounding affirmative defenses because See's Candy has now admitted that its time records are “inaccurate.” In support, she directed the court to one of See's Candy's responses to her statement of undisputed facts. Specifically, Silva's undisputed fact No. 18 stated: “Kronos time records are accurate,” citing the deposition testimony of See's Candy's human resources director, who said that Kronos time records are accurate. In its response, See's Candy wrote: “Disputed. Clockings made during the **697 grace period accurately show when the employee punched in or out, but do not show the beginning and end of the employee's shift, i.e., compensable time. Hours worked are not necessarily reflected in the time between two punches.” Based on this response explaining See's Candy's grace period policy, Silva argued that See's Candy's time records were “inaccurate” and See's Candy has now admitted violating California law because it is a violation of California law to maintain “inaccurate Time Records.”

The court issued a tentative ruling in Silva's favor based in part on the court's view that See's Candy had admitted its time records were “inaccurate” and that See's Candy did not show the class members were compensated for all time subject to its control.

At the hearing, See's Candy's counsel argued that it never admitted the time records were inaccurate—it had merely acknowledged that employee compensation was calculated based on grace period policies rather than actual *898 punch in/out times. Counsel also reminded the court that Silva had presented no evidence showing the class members had worked during the grace period, and See's Candy had presented evidence showing that the employees did not work and were not under the employer's control during the grace periods.

In its final ruling, the court found in See's Candy's favor, concluding that Silva did not meet her summary adjudication burden and stating that Silva failed to establish that employee time was rounded or how it was rounded, and if so whether
Silva and other class members were not compensated for all worktime. The court alternatively found that even if the burden shifted, See's Candy met its burden to show triable issues of fact with respect to its nearest-tenth rounding affirmative defenses.

Silva thereafter moved for reconsideration based on claimed “New Law” and “New Facts.” With respect to the new law, Silva relied primarily on the recently filed decision in Sullivan v. Oracle Corp. (2011) 51 Cal.4th 1191, 127 Cal.Rptr.3d 185, 254 P.3d 237, in which the high court (in response to a certified question from the Ninth Circuit) held that California's overtime provisions apply to nonresident plaintiffs' claims for compensation for work performed in California for California employers. Plaintiffs also relied on Securitas Security Services USA, Inc. v. Superior Court (2011) 197 Cal.App.4th 115, 127 Cal.Rptr.3d 883, for its discussion of well-settled statutory interpretation principles. (Id. at p. 121, 127 Cal.Rptr.3d 883.)

With respect to the new facts, Silva produced an expert declaration based on alleged newly produced employee time records. In the declaration, Dr. Thomas Thompson, a research engineer, stated that based on his analysis of See's Candy's time records from approximately October 20, 2005, through March 2010, class members lost a total of $1,411,595.54 based on the nearest-tenth rounding policy and the grace period policy. In reaching this conclusion, Dr. Thompson, unlike Dr. Saad, did not separate out the grace period time adjustments, and instead apparently assumed each and every employee was working during the grace period and was not paid for that time. Thus, if an employee punched in at 7:55 a.m. and spent the next five minutes solely on personal activities under the grace period rules, Dr. Thompson would have calculated this time as five minutes of unpaid earned wages.

See's Candy argued there was no legal or factual basis for a reconsideration, and objected to Dr. Thompson's declaration on numerous substantive and evidentiary grounds, including that Dr. Thompson failed to analyze the nearest-tenth policy separately from the grace period policy.

During the hearing on the reconsideration motion, Silva's counsel reasserted that See's Candy had admitted its records were “inaccurate” and argued “an employer cannot benefit from breaking the law here.” Silva's counsel also argued that rounding is permitted under California law as long as the employer “perform[s] a mini actuarial process” every two weeks to ensure that every employee received compensation for his or her unrounded time. But with respect to See's Candy's grace period policy, Silva's counsel acknowledged that the grace period rules raised separate issues, and See's Candy's grace period policy was not before the court on the summary adjudication motion. 3

3 In this regard, Silva's counsel said: “There was some reference to grace periods. That's not at issue, Your Honor. This is [a motion for summary adjudication on certain] affirmative defenses. [¶] I'll state for the record that See's [Candy] still has the ability to raise a grace period issue. I don't think it's controlling. I think it goes against the operative California law.... But we're not asking this court to take out any argument regarding grace periods. That's not at issue.”

The court then entered its final order granting Silva's reconsideration motion and granting summary adjudication in Silva's favor on each of the four challenged affirmative defenses. With respect to the 39th and 40th (nearest-tenth rounding policy) affirmative defenses, the court gave several reasons for its ruling. First, the court stated “that based on See's admission that its time records are inaccurate, See's has violated California law and summary adjudication is appropriate.” The court explained that “California law requires See's to retain accurate time records” and the “United States Supreme Court has long held that [an] employer may not benefit from inaccurate time records.” Second, the court stated it “agrees with [Silva] that [See's Candy] failed to sufficiently address the plain language of Labor Code section 204. [¶] As See's has not rebutted the ‘plain language’ of the statute—Labor Code section 204 requiring the payment of all wages every two weeks—the 39th [and 40th] affirmative defenses are not proper defenses.” Third, the court found that “See's does not (and cannot) dispute that the federal rounding standard requires payment for all work time” and “[Silva] establish[ed] that See's does not dispute that they have provided no proof of ‘Full payment’ as to Class members.”

See's Candy filed a writ of mandate petition challenging the trial court's summary adjudication order with respect to its 39th and 40th affirmative defenses.

DISCUSSION
I. Summary Adjudication Standard

When a plaintiff moves for summary adjudication on an affirmative defense, the court shall grant the motion “only if it completely disposes” of *900 the defense. (Code Civ. Proc., § 437c, subd. (f)(1), italics added.) The plaintiff bears the initial burden to show there is no triable issue of material fact as to the defense and that he or she is entitled to judgment on the defense as a matter of law. In so doing, the plaintiff must negate an essential element of the defense, or establish the defendant does not possess and cannot reasonably obtain evidence needed to support the defense. (See Securitas Security Services USA, Inc. v. Superior Court, supra, 197 Cal.App.4th at pp. 119–120, 127 Cal.Rptr.3d 883; Code Civ. Proc., § 437c, subd. (f); see also Westlye v. Look Sports, **699 Inc. (1993) 17 Cal.App.4th 1715, 1726–1727, 22 Cal.Rptr.2d 781.)

If the plaintiff does not make this showing, “‘it is unnecessary to examine the [defendant’s] opposing evidence and the motion must be denied.’” (Rehmani v. Superior Court (2012) 204 Cal.App.4th 945, 950, 139 Cal.Rptr.3d 464.) “‘However, if the moving papers establish a prima facie showing that justifies a [ruling] in the [plaintiff’s] favor, the burden then shifts to the [defendant] to make a prima facie showing of the existence of a triable material factual issue.’” (Ibid.)

[1] On appeal we conduct a de novo review, applying the same standard as the trial court. (AARTS Productions, Inc. v. Crocker Nat. Bank (1986) 179 Cal.App.3d 1061, 1064, 225 Cal.Rptr. 203.) Our obligation is “ ‘to determine whether issues of fact exist, not to decide the merits of the issues themselves.” ’ ” (Wright v. Stang Manufacturing Co. (1997) 54 Cal.App.4th 1218, 1228, 63 Cal.Rptr.2d 422.) We must “ ‘consider all of the evidence’ and ‘all’ of the ‘inferences’ reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party.” (Agular v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493; see Rehmani v. Superior Court, supra, 204 Cal.App.4th at p. 951, 139 Cal.Rptr.3d 464.) Summary adjudication is a drastic remedy and any doubts about the propriety of summary adjudication must be resolved in favor of the party opposing the motion. (See Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 304, 49 Cal.Rptr.3d 52.)

II. Legal Standard for Evaluating a Rounding Claim Under California Law

The court certified a class on Silva's claim that See's Candy's nearest-tenth rounding policy violated the employees' rights to full compensation for work performed. In its 39th and 40th affirmative defenses, See's Candy alleged this policy was consistent with federal and state law permitting employers to use rounding for purposes of computing and paying wages and that it complied with state and federal requirements for rounding employee worktime. In moving for summary adjudication on these defenses, Silva argued that the nearest-tenth rounding policy violated California law because the evidence *901 showed it precluded employees from obtaining full compensation in their biweekly/monthly paychecks. In countering this argument, See's Candy presented evidence to show that during the relevant class period the employees were fully compensated for all of their work.

[2] Before addressing the parties' specific factual contentions, it is necessary to determine the appropriate legal standard under which to analyze these facts. Although California employers have long engaged in employee time-rounding, there is no California statute or case law specifically authorizing or prohibiting this practice. Absent specific binding authority under California law, See's Candy argues that it is appropriate for this court to adopt the federal regulatory standard, which is also used by the DLSE (the state agency charged with enforcing wage and hour laws), and allows rounding if the employees are fully compensated “over a period of time.” (29 C.F.R. § 785.48(b) (2012).) Silva counters that this federal/DLSE rule violates California statutes and rounding should be permitted only if the employer “unrounds” every two weeks to ensure full compensation. For the reasons explained below, we conclude the federal/DLSE standard is the appropriate standard.

About 50 years ago, the United States Department of Labor (DOL) adopted a **700 regulation under the Fair Labor Standards Act (FLSA); 29 U.S.C. § 201 et seq. permitting employers to use time-rounding policies under certain circumstances (DOL rounding regulation). (29 C.F.R. § 785.48(b) (2012); see Alonzo v. Maximus, Inc. (C.D.Cal.2011) 832 F.Supp.2d 1122, 1126 (Alonzo ).) The regulation states: “It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping
time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (29 C.F.R. § 785.48(b) (2012), italics added.)


Although there are no California reported decisions holding the federal standard applies under California law, the agency empowered to enforce California's labor laws (DLSE) has adopted the federal regulation in its manual (DLSE Enforcement Policies and Interpretations Manual (2002 rev.) (DLSE Manual)). Specifically, the DLSE Manual provides: “The Division utilizes the practice of the [DOL] of ‘rounding’ employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions.... [¶] ... There has been [a] practice in industry for many years to follow this practice, recording the employees’ starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted by DLSE, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (29 C.F.R. § 785.48(b) (2012), italics added.)

4 The DLSE Manual also contains separate provisions authorizing employers to use voluntary grace periods unless the employee is either performing work during the period or has been directed by the employer to be on the premises. (See DLSE Manual, §§ 47.2.2, 47.2.2.1.)

[4] Statements in the DLSE Manual are not binding on the courts because the rules were not adopted under the Administrative Procedure Act (Gov. Code, § 11340 et seq.). (Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 568–577, 59 Cal.Rptr.2d 186, 927 P.2d 296; see Marin v. Costco Wholesale Corp. (2008) 169 Cal.App.4th 804, 815, 87 Cal.Rptr.3d 161.) However, the statements in the manual may be considered for their persuasive value. (See United Parcel Service Wage & Hour Cases (2010) 190 Cal.App.4th 1001, 1011, 118 Cal.Rptr.3d 834; *903 Isner v. Falkenberg/Gilliam & Assoc., Inc. (2008) 160 Cal.App.4th 1393, 1399, 73 Cal.Rptr.3d 433; see also Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1029, fn. 11, 139 Cal.Rptr.3d 315, 273 P.3d 513 (Brinker ).)

Citing the DLSE Manual, one federal district court recently found that the DOL rounding standard applied to an employee's time-rounding challenge brought under California law. (See Alonzo, supra, 832 F.Supp.2d. at pp. 1126–1127.) Although the parties stipulated that the DOL rounding regulation governs the case, the court also indicated its agreement that the federal regulation is the applicable standard under California law. (Id. at p. 1127 & fn. 3.) The Alonzo court explained that the federal standard has been expressly adopted by the DLSE and the adoption of the federal standard is “consistent with ... the practice of California courts to look to [federal law] as guidance for interpreting analogous provisions of California law....” (Id. at p. 1127, fn. 3; accord, Gillings v. Time Warner Cable LLC, supra, 2012 WL 1656937, at *5 [rounding practices neutral over time “do not violate California labor law since their net effect does not withhold wages”].)
We agree with the Alonzo court. In the absence of controlling or conflicting California law, California courts generally look to federal regulations under the FLSA for guidance. (Huntington Memorial Hospital v. Superior Court (2005) 131 Cal.App.4th 893, 903, 32 Cal.Rptr.3d 373.) The policies underlying the federal regulation—recognizing that time-rounding is a practical method for calculating worktime and can be a neutral calculation tool for providing full payment to employees—apply equally to the employee-protective policies embodied in California labor law. Assuming a rounding-over-time policy is neutral, both facially and as applied, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees. (See Gillings v. Time Warner Cable, LLC, supra, 2012 WL 1656937, at *5.)

Moreover, as the DLSE and several amici curiae have noted, the rounding practice has long been adopted by employers throughout the country. Under these circumstances, “it is reasonable for the court to construe the requirements of the [California] wage law in a manner consistent with [the] FLSA. To hold otherwise would preclude [California] employers from adopting and maintaining rounding practices that are available to employers throughout the rest of the United States.” (East v. Bullock's Inc., supra, 34 F.Supp.2d at p. 1184 [applying DOL regulation to Arizona law that is silent on rounding issue].)

As her main argument opposing the federal standard, Silva argues that the federal regulation is inconsistent with section 204 and thus violates California law.

Section 204 states: “(a) All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. However, salaries of executive, administrative, and professional employees of employers covered by the Fair Labor Standards Act, as set forth pursuant to Section 13(a)(1) of the Fair Labor Standards Act, as amended through March 1, 1969, in Part 541 of Title 29 of the Code of Federal Regulations, as that part now reads or may be amended to read at any time hereafter, may be paid once a month on or before the 26th day of the month during which the labor was performed if the entire month’s salaries, including the unearned portion between the date of payment and the last day of the month, are paid at that time. [¶] (b)(1) Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period. [¶] (2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked. [¶] (c) However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall apply to the covered employees. [¶] (d) The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.”
Silva claims that “most employers” who use a rounding method engage in this reconciliation practice every two weeks. There is no evidence in the record supporting this claim. Moreover, as See's Candy points out, requiring an employer to engage in such a process would essentially make rounding unnecessary.

Silva's argument is unpersuasive under the plain language of section 204. Read in context, the reference to “All wages” in section 204, subdivision (a) pertains to the timing of wage payments and not to the manner in which an employer ascertains each employee's worktime. (See Hadiani v. CVS Pharmacy (C.D.Cal., Sept. 22, 2010) No. CV 10–04886 SJO (R(Cx)), 2010 WL 7695383, at *2 [section 204 “deals solely with the timing of wages and not whether these wages were paid”). As observed by the *905 California Supreme Court more than 70 years ago, “the sole purpose of [section 204] is to require an employer of labor who comes within its terms to maintain two regular pay days each month, within the dates required in **703 that section.” (In re Moffett (1937) 19 Cal.App.2d 7, 14, 64 P.2d 1190.) “Despite section 204's use of the word ‘wages,’ section 204 does not provide for the payment of any wages nor create any substantive right to wages. The only right furthered by the section is the timely payment of wages.” (Singer v. Becton, Dickinson & Co. (S.D.Cal., July 25, 2008) No. 08–cv–821–IEG (BLM), 2008 WL 2899825, at *3.) In asserting her argument, Silva improperly isolates the phrase “All wages” and fails to read it within the statutory context. “’The meaning of a statute may not be determined from a single word or sentence ....’” (People ex rel. Allstate Ins. Co. v. Weitzman (2003) 107 Cal.App.4th 534, 544–545, 132 Cal.Rptr.2d 165.)

Moreover, Silva's contention has a false premise—that using unrounded figures within a finite time period is the only way to measure “All” earned wages. (§ 204, subd. (a).) Fundamentally, the question whether all wages have been paid is different from the issue of how an employer calculates the number of hours worked and thus what wages are owed. Section 204 does not address the measurement issue. The Legislature has amended section 204 since the DLSE adopted the federal rounding regulation, and has never indicated that the state agency's adoption of the federal rounding rule is inconsistent with its statutory provision.

Additionally, the notion that the rounding regulation is consistent with federal law but inconsistent with state law because of California's twice-monthly wage timing statute ignores the fact that under federal law—as well as most state laws—the employer is subject to some form of a payment deadline. (See Rogers v. City of Troy (2d Cir.1998) 148 F.3d 52, 55 [“Although the FLSA does not explicitly require that wages be paid on time, the courts have long interpreted the statute to include a prompt payment requirement”]; see also 29 C.F.R. § 778.106 (2012) [requiring that all overtime wages be paid on the employee's regular payday].)

In urging us to reject the DOL rounding regulation, Silva also relies on section 510, subdivision (a), which provides: “Any work in excess of eight hours in one workday and any work in excess of 40 hours 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.” (Italics added.) However, as with section 204, this code section has nothing to do with rounding or calculating time. Rather this provision sets the multiplier for the rate at which “Any” overtime work must be paid. (§ 510, subd. (a).)

Silva contends that because under California law—and not federal law—the rate of compensation increases past the eight-hour mark, the DOL *906 rounding standard can never be neutral because “a gain of 3 minutes of Regular Time is valued less than a loss of 3 minutes of Overtime.”

Under California's overtime law, an employer must pay the overtime pay rate for workday in excess of eight hours in one work day and in excess of 40 hours in one workweek; whereas the federal rule generally imposes the overtime pay rate only for work in excess of 40 hours in a workweek, and not for the amount of work performed per day. (§ 510, subd. (a); 29 U.S.C. § 207(a)(1), (2); see Huntington Memorial Hospital v. Superior Court, supra, 131 Cal.App.4th at p. 899 & fn. 1, 32 Cal.Rptr.3d 373.) However, this difference does not show that rounding under the DOL rounding regulation will always burden the employee under California law. Even under the FLSA's 40-hour overtime rule, the rounding rules have an impact on overtime—it is merely a different degree of impact. There is no analytical difference **704 between rounding in the context of daily overtime and rounding in the context of weekly overtime. Additionally, the FLSA contains various daily overtime rules applicable to certain industries, and none of these contain any restriction on rounding. (See 29 U.S.C. § 207(j), (m)(1)). Moreover, as reflected in Dr. Saad's expert declaration, rounding will not necessarily affect an employee's wages in the long run even when considering California overtime pay rules. As discussed below, the issue whether California's overtime rules mean a rounding rule is biased against employees is a factual issue and not a legal one.
In this regard, Silva's reliance on language in *Sullivan v. Oracle Corp.*, supra, 51 Cal.4th 1191, 127 Cal.Rptr.3d 185, 254 P.3d 237 is misplaced. *Sullivan* resolved issues concerning the scope of California overtime and statutory unfair competition laws as applied to work performed by nonresidents for a California-based employer within and outside the state. (*Id.* at p. 1194, 127 Cal.Rptr.3d 185, 254 P.3d 237.) In addressing these certified issues, the high court noted that California's overtime law (§ 510, subd. (a)) "declares simply that ‘[a]ny work ’ in excess of the statutory time period must be compensated at the premium rate and the overtime laws apply to ‘all individuals ’ employed in this state.” (*Sullivan*, supra, at p. 1197, 127 Cal.Rptr.3d 185, 254 P.3d 237, italics in *Sullivan.*) The *Sullivan* court also emphasized the important public policies served by our state's overtime laws. (*Id.* at p. 1198, 127 Cal.Rptr.3d 185, 254 P.3d 237.)

[10] We agree with Silva that under *Sullivan* a California employer generally must pay all employees, including nonresident employees working in California, state overtime wages unless the employee is exempt. But the specific issue raised by Silva is whether sections 204 and 510 prohibit rounding unless all unrounded sums are paid to the employees on a two-week basis. *Sullivan* did not address this issue. “Language used in any opinion is of course to be understood in the light of the facts and the issue then before the 907 court, and an opinion is not authority for a proposition not therein considered.” (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689.)

Silva also relies on two other recent California Supreme Court decisions that are fully consistent with our conclusion. (See *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 140 Cal.Rptr.3d 173, 274 P.3d 1160; *Brinker*, supra, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513.) Silva cites *Kirby* for its discussion of long-established statutory construction rules requiring a focus on a statute's “‘plain’ ” meaning and the application of a “‘commonsense’ ” statutory interpretation. (*Kirby*, supra, at p. 1250, 140 Cal.Rptr.3d 173, 274 P.3d 1160.) She cites *Brinker* for its reaffirmation of well-settled principles that wage and hour rules must be interpreted to promote employee rights and protect their interests, wage orders are entitled to “‘extraordinary deference,’ ” and an employer has an important obligation to keep accurate time records. (*Brinker*, supra, at pp. 1026, 1027, 139 Cal.Rptr.3d 315, 273 P.3d 513; *id.* at p. 1053, fn. 1, 139 Cal.Rptr.3d 315, 273 P.3d 513 (conc. opn. of Werdergar, J.).) We agree with the principles expressed in *Kirby* and *Brinker*, and to the extent they are relevant here, we have applied them in this case.

III. Analysis

Relying on the DOL rounding standard, we have concluded that the rule in California is that an employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and “it is used in such a manner that **705** it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.” (29 C.F.R. § 785.48; see DLSE Manual, *supra*, §§ 47.1, 47.2.) Applying this legal standard, we turn to address whether the parties met their summary adjudication burdens with respect to the 39th and 40th affirmative defenses alleging that See's Candy's nearest-tenth rounding policy was consistent with California law.

Silva had the initial burden. To show no triable issues of fact and that she was entitled to judgment as a matter of law, Silva relied primarily on Dr. Saad's 2010 report (which evaluated only retail shop employees). However, in that report Dr. Saad determined that rounding to the nearest tenth of an hour was neutral over time and that shop employees were in fact overpaid by seven seconds per shift. As the trial court initially found, this evidence did not meet Silva's burden to show the rounding policy did not fully compensate the employees over time. In moving for reconsideration, plaintiff produced her expert's report, in which Dr. Thompson concluded that the employees lost a total of $1,411,595.54 from 2005 through 2010 based on See's Candy's rounding policy. However, this conclusion was based on the assumption that **908** each and every employee who punched in or out during the grace period was working but was not paid for that time. Because Silva presented no evidence to support this assumption, Dr. Thompson's conclusions were invalid to show whether the parties met their summary adjudication burdens with respect to the 39th and 40th affirmative defenses alleging that See's Candy's nearest-tenth rounding policy was consistent with California law.

[11] Moreover, even if Dr. Thompson's report satisfied Silva's burden to show she and all the other class members were not paid fully for their work because of the nearest-tenth rounding policy, See's Candy presented evidence creating a triable issue of fact. As detailed in the factual part, in his 2011 report, Dr. Saad concluded the nearest-tenth rounding
rule was “both mathematically and empirically unbiased” and actually resulted in a total gain of 2,749 hours for the class members as a whole. Under this analysis, most of the class members, including Silva, were fully compensated for every minute of their time (including for overtime pay) and the majority was paid for more time than their actual working time. 7

Although a minority of the employees (33 percent) had a net loss of a minimal amount during the class period, it is questionable whether those employees would be entitled to a recovery for these wages if See's Candy establishes that over time the rounding policy is neutral. However, we need not address this legal issue because even assuming there was a basis for recovery for a portion of the class on these facts, a court cannot grant summary adjudication on part of a defense. (Code Civ. Proc., § 437c, subd. (f)(1).) If a cause of action contained within an affirmative defense is not shown to be barred in its entirety, the court cannot grant a plaintiff's summary adjudication motion. (See McCaskey v. California State Auto. Assn. (2010) 189 Cal.App.4th 947, 975, 118 Cal.Rptr.3d 34; Catalano v. Superior Court (2000) 82 Cal.App.4th 91, 95–97, 97 Cal.Rptr.2d 842.)

Based on Dr. Saad's report, See's Candy met its burden to show triable issues of fact regarding whether its nearest-tenth rounding policy was proper under California law because it was used in a manner that did not result over a period of time in the failure to compensate the employees for all the time they actually worked. (See 29 C.F.R. 785.48(b).)

In her brief opposing the writ petition, Silva does not focus on the issue whether **706** the parties met their summary adjudication burdens regarding whether the class members suffered a loss from See's Candy's rounding policy. Instead, she devotes most of her brief to several related arguments, each of which we address below.

First, Silva strenuously argues, and the trial court found, that summary adjudication was proper because See's Candy admitted its time records were “inaccurate.” This argument is unsupported on the factual record before us.

[12] *909* Generally, employers are required to keep accurate information regarding when an employee begins and ends each work period. (See Hernandez v. Mendoza (1988) 199 Cal.App.3d 721, 727, 245 Cal.Rptr. 36.) In this case, the person designated by See's Candy as the most knowledgeable confirmed that See's Candy maintains accurate timekeeping information. In moving for summary adjudication, Silva relied on this testimony to assert that See's Candy's time records were accurate. However, in response to Silva's assertion, See's Candy wrote: “Disputed. Clockings made during the grace period accurately show when the employee punched in or out, but do not show the beginning and end of the employee's shift, i.e., compensable time. Hours worked are not necessarily reflected in the time between two punches.”

[13] Based solely on this response in which See's Candy referred to its grace period policy, Silva argues (and the trial court found) that summary adjudication was proper because See's Candy has now admitted violating California law by maintaining inaccurate time records. The argument is without merit.

See's Candy's grace period policy allows employees who have work schedules programmed into Kronos to clock in up to 10 minutes early and clock out up to 10 minutes late. With respect to those time punches, the scheduled time—and not the punch time—determines the employee's pay because the employer assumes (based on its formal policy) that the employee is not working and not under its control during this time.

But this difference between the punch time and the pay-calculation time during the grace period does not show See's Candy's time records are inaccurate for purposes of the summary adjudication motion. The parties agree (at least for purposes of this writ petition) that under California law a grace period (the time during which an employee punches in before his or her compensable pay is triggered) is allowed if the employee is not working or is not under the employer's control. To the extent an employee claims that he or she was not properly paid under this grace period rule, this claim raises factual questions involving whether the employee was in fact working and/or whether the employee was under the employer's control during the grace period.

In moving for summary adjudication, Silva did not produce any evidence showing the class members who clocked in during the grace period were working or were under the employer's control. In responding to the motion, See's Candy produced facts showing the employees were not working and were engaged in their own personal activities. Silva made no attempt to rebut these facts in her reply. Instead, Silva's
counsel confirmed at the reconsideration motion hearing that Silva was not challenging See's Candy's grace period policy in the pending motion and that the issue of the propriety of the policy would be litigated at a later time. (See fn. 3, ante.) This concession was consistent with the fact that the trial court had earlier certified the class on two separate and independent issues: (1) whether See's nearest-tenth rounding policy violated California law and (2) whether See's Candy's grace period policy violated California law.

Based on Silva's counsel's admission that Silva was not moving for summary adjudication on the grace period issue and based on the record showing a triable issue of fact as to whether the employees were working or were under the employer's control during the grace period, See's Candy's reference to its grace period policy in response to Silva's undisputed statement of facts does not constitute See's Candy's admission that its time records are “inaccurate” for purposes of evaluating the nearest-tenth rounding policy.

Silva has nonetheless devoted most of her briefing in this court to the inaccuracy/grace period issues. For example, she asserts that evidence of inaccurate time records “was (and is) overwhelming” because the grace period and rounding practices are “inextricably entwined” and See's Candy “failed to investigate whether its employees were actually ‘under control’ after being required to ‘punch in.’ ” (Capitalization omitted.) In support, she discusses authority providing that employees who are in the mercantile industry must be paid if they are working or if they are “subject to the control of” an employer. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582, 94 Cal.Rptr.2d 3, 995 P.2d 139.) In defining “control,” the *Morillion* court held employees were subject to the control of their employers when they are prevented from using “the time effectively for [their] own purposes.” (Id. at p. 586, 94 Cal.Rptr.2d 3, 995 P.2d 139.) Applying this rule, the California Supreme Court determined that agricultural employees who were “required” to ride an employer's buses to travel to and from the fields must be paid during the transportation time. (Id. at p. 578, 94 Cal.Rptr.2d 3, 995 P.2d 139, italics added.)

Silva argues that as in *Morillion*, the See's Candy employees should have been paid during the grace period after they clocked in. However, she presented no evidence on whether the employees were prevented from using “the time effectively for [their] own purposes” (Morillion, supra, 22 Cal.4th at p. 586, 94 Cal.Rptr.2d 3, 995 P.2d 139), and See's Candy presented evidence that the employees did not work and were not under the employer's control during this time. This is a grace period issue. If the evidence later shows that the employees were working or “under the control” of See's Candy during the grace period and they were not paid for this time, they may be entitled to recover those amounts in the litigation and any applicable penalties. But for purposes of this writ petition and based on the manner in which Silva presented her summary adjudication motion, the matter at issue is solely whether the nearest-tenth rounding policy was a potentially valid affirmative defense under the facts presented.

At oral argument, Silva's counsel repeatedly asserted that summary adjudication was proper because of the impact of See's Candy's “unique” grace period policy on its rounding policy and, when viewing both policies together, employees were not fully compensated for their work over time. The undisputed evidentiary record does not support this argument for purposes of Silva's summary adjudication motion.

Silva alternatively argues the court properly granted summary adjudication because an employee is “subject to a ‘progressive discipline policy’ ” when he or she is tardy. Silva relies on a provision in See's Candy's employee manual stating: “Regular attendance is expected of every employee. Each employee is expected to be in the shop and ready to work at his or her starting time. Repeated tardiness or absences will not be tolerated.” Under this policy, an employee's tardiness may be “subject to discipline,” which can “in some instances” involve termination.

These rules do not show See's Candy's rounding policies result in an employee being unfairly disciplined. There was no evidence the discipline policy was ever applied to any employee because he or she was a few minutes late. Moreover, there is no evidence that See's Candy uses the rounded time (as opposed to the clocked-in time) when applying its tardiness policy. If the nearest-tenth rounding policy is neutral, and the tardiness policy is based solely on the actual punch time, on the record before us there is no basis for finding that See's Candy unfairly benefits from the rounding policy because of the discipline policy.

In support of her argument, Silva cites *Austin v. Amazon.Com Inc.*, supra, 2010 WL 1875811. However, *Austin* was a pleading case in which the district court found the plaintiff stated a cause of action by alleging that the employer's rounding policy was unfair as applied because the employer
used the rounding method in a manner that did “not ‘average[ ] out so that the employees are fully compensated for all the time they actually work.’ ” (Id. at *3.) The Austin court noted that the plaintiff's allegations show that the employer's discipline policy allows rounding when it benefits the employer, *912 but permits the employer to discipline the employee when the rounding does not work to the employer's advantage. (Id. at *2.)

The case before us is a summary adjudication and not a pleading case. Although the tardiness policy may be an issue in the litigation, there is no factual basis on the record before us supporting a legal conclusion that See's Candy's tardiness and related discipline policy necessarily means that the nearest-tenth rounding policy is unfair to, or biased against, the employees in the class.

Silva next argues that See's Candy's rounding practice “cannot be ‘neutral’ in that California possesses the ‘8–hour Overtime Rule’ (as opposed to the [‘]40–hour Overtime Rule’ under the FLSA).” We agree that California's overtime rules may mean that under a nearest-tenth rounding policy, an employee will not be fully compensated for the premium time if an employee works more than eight hours in one day. However, the issue whether this will result in undercompensation over time is a factual one. Silva did not present evidence showing the overtime rules meant that she and the other class members did not receive their full compensation. On the other hand, See's Candy presented a statistical study from its expert showing that in this case “the nearest tenth rounding policy did not negatively impact employees' overtime compensation.” According to Dr. Saad, it was “virtually a wash” with respect to overtime pay, and “neither the employees nor See's [Candy] benefited from this rounding practice.”

In this regard, Silva's reliance on Alonzo, supra, 832 F.Supp.2d 1122 and Russell v. Ill. Bell Tel. Co. (N.D.Ill.2010) 721 F.Supp.2d 804 is misplaced. In Alonzo, the court granted the employer's summary judgment motion on the plaintiff's claim that the rounding policy did not fully compensate the employees for time worked. (Alonzo, supra, 832 F.Supp.2d at pp. 1126–1129.) In Russell, the sole matter before the court was the defendant's motion to decertify the class. In ruling on this motion, the district court noted that “If, as plaintiffs allege, [the employer's] time rounding and log out policies often caused plaintiffs to work unpaid overtime ... then these company-wide practices may have **709 resulted in unpaid overtime work.” (Russell, supra, at p. 820.) However, the court specifically declined to “decide the merits of plaintiffs' [rounding] claim.” (Ibid.)

Silva's reliance on Eyles, supra, 2009 WL 2868447 is likewise unhelpful. In Eyles, the employer moved for summary judgment on the plaintiff's claim *913 for unpaid wages based on the employer's rounding policy. (Id. at *1.) The evidence showed that the DOL had concluded the plaintiff was entitled to be compensated for unpaid overtime in the amount of $71.67. However, the employer argued it was nonetheless entitled to judgment as a matter of law because the DOL regulation permitted rounding. The district court found the defendant did not meet its burden on this issue, noting the federal regulation allows rounding only when the rounding “‘averages out so that employees are fully compensated for all the time they actually work’ ” and the “summary judgment evidence shows that defendant's practice encompasses only rounding down, so that over time, plaintiff was not paid for all the time actually worked.” (Id. at *4.)

In this case, See's Candy's nearest-tenth rounding policy rounded both up and down from the midpoint, and See's Candy specifically presented evidence that over time the rounding policy did not result in a loss to the employees. Moreover, unlike Eyles, the employer here is not asking the court to find its policy was lawful as a matter of law; instead it is merely opposing plaintiff's motion for summary adjudication and asking the court to permit it to litigate its affirmative defense at trial.

Silva argues that this case is the same as Eyles because the grace period policy “is an ‘automatic round down’ ” because it moves the clock back to the scheduled end time “with no corresponding ‘round-up.’ ” However, as discussed, Silva did not move for summary adjudication based on the grace period defense, and instead sought only to eliminate See's Candy's affirmative defense based on its nearest-tenth rounding policy. This rounding policy does have an automatic rounding up and down from the midpoint. Moreover, the grace period policy is not a rounding policy per se; it is a policy under which an employer seeks to accurately pay employees from the time they begin and end work. The issue whether reciprocal rules are required to ensure fairness under a grace period policy is not before us.

For purposes of this summary adjudication motion, we reject Silva's unsupported suggestion that the federal regulation applies only to “‘time clocks’ ” and not to a software system such as Kronos.
DISPOSITION

Let a writ of mandate issue commanding the superior court to vacate the portion of its summary adjudication order to the extent it granted summary *914 adjudication in plaintiff's favor on See's Candy's 39th and 40th affirmative defenses. See's Candy is entitled to recover its costs incurred in this writ proceeding.

WE CONCUR: BENKE, Acting P.J., and AARON, J.

All Citations