

Buchalter

CLIENT ALERT

February 2019

By: Paul Bressan and Ronald J. Arias

Your “On-Call” Scheduling Policy May Trigger Reporting Time Pay For Employees In California

The California Second District Court of Appeal recently rendered a decision with respect to “reporting time pay” that significantly impacts California employers who use on-call schedules. The Court held that employees need not necessarily physically appear at the workplace to “report for work” and qualify for reporting time pay if they are sent home before working half their usual or scheduled hours. Rather, the phrase “report for work” does not have a single meaning, but instead is defined by the employer who directs the manner in which the employee is to present himself or herself for work.

In *Ward v. Tilly’s, Inc.*, the plaintiff, Skylar Ward, worked as a sales clerk in a Tilly’s retail apparel store in Torrance, California. Tilly’s required employees to work regular shifts, and the following three types of on-call shifts:

- a) Regular shift then on-call shift later the same day.
 - o The employee is required to physically show up for work at the time of the scheduled regular shift and is told during the regular shift whether he or she will also be required to work the scheduled on-call shift.
- b) On-call shift(s) then regular shift(s) later the same day.
 - o The employee is required to call in to work, physically show up to work, or otherwise establish contact with the employer two hours before the scheduled on-call shift (or, if the on-call shift is scheduled to begin before 10:00 a.m., at 9:00 p.m. the night before) to determine if he or she is required to work the scheduled on-call shift.
- c) On-call shift(s) on days they are not scheduled for regular shifts.
 - o The employee is required to call into work, physically show up to work, or otherwise establish contact with the employer two hours before the scheduled on-call shift (or, if the on-call shift is scheduled to begin before 10:00 a.m., at 9:00 p.m. the night before) to determine if he or she is required to work the scheduled on-call shift.

Tilly’s allegedly informed its employees to “consider an on-call shift a definite thing until they are actually told they do not need to come in.” Tilly’s disciplined employees if they failed to contact their stores two hours before on-call shifts, if they contacted the stores late, or if they refused to work on-call shifts. However, Tilly’s did not compensate employees for on-call shifts unless they were required to work the

on-call shifts. It did not consider an employee to have “reported for work” if the employee called the store prior to an on-call shift, but was told to not come to the store to work.

The California Industrial Welfare Commission (“IWC”) Wage Orders require employers to pay employees reporting time pay. Wage Order 7 (the Mercantile Industry Wage Order that applied to Tilly’s) provides, in part:

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee’s usual or scheduled day’s work, the employee shall be paid for half the usual or scheduled day’s work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee’s regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee’s regular rate of pay, which shall not be less than the minimum wage.

The trial court found the phrase “report to work” to mean that an employee must physically appear at the workplace to be eligible for reporting time pay, and dismissed the complaint by sustaining Tilly’s demurrer without leave to amend.

The Second District Court of Appeal reversed the trial court’s ruling and held that the Tilly’s scheduling policy requiring employees to call in via telephone two hours before the start of their “on-call” shifts to determine whether they are needed to work those shifts triggers reporting time pay under California law.¹

The Court first examined the meaning of the phrase “report for work,” and found it to be ambiguous. The Court therefore examined the history and purpose of the reporting time pay requirement. As the California Supreme Court previously had stated, the IWC’s purpose in adopting reporting time pay requirements was two-fold: to “compensate employees” and to “encourage proper notice and scheduling.”

With respect to compensating employees, the Court found that Tilly’s “on-call shifts burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts—but who nonetheless receive no compensation from Tilly’s unless they ultimately are called in to work. This is precisely the kind of abuse that reporting time pay was designed to discourage. . . . [A]t the time employees are required to call in to find out whether they will be required to work on-call shifts, they cannot do things that are incompatible with making a phone call, such as sleeping, watching a movie, taking a class, or being in an area without cell phone service.”

As for the purpose of encouraging proper notice and scheduling, the Court stated as follows: “Reporting time pay requires employers to internalize some of the costs of overscheduling, thus encouraging employers to accurately project their labor needs and to schedule accordingly.

¹ The Court noted that “Employers do not trigger reporting time pay requirements merely by expecting employees to apprise themselves of their schedules.”

. . . [I]f the employer directs employees to present themselves for work by logging on to a computer remotely, or by appearing at a client's job site, or by setting out on a trucking route, then the employee 'reports for work' by doing those things. And if, as plaintiff alleges in this case, the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact."

Judge Egerton dissented in this 2-1 decision. Relying on a federal court decision holding that reporting time pay is not available for on-call shifts, Judge Egerton found that any change to this interpretation should be addressed by the California legislature.

Finally, the Court noted that, because the issue was not before it at this early stage of the proceedings, it would not consider whether its interpretation of the Wage Order should apply prospectively only, or retroactively as well.

Although this decision by the Second District Court of Appeal may ultimately be reviewed by the California Supreme Court, it currently is law in California. California employers who use on-call schedules therefore should to audit their current policies and practices and make any necessary changes to ensure compliance with this decision.

The case is *Skylar Ward v. Tilly's Inc.*, case number B280151, before the Second Appellate District of the Court of Appeal for the State of California.



Paul Bressan is Chair and Shareholder in Buchalter's Labor & Employment Practice Group. He can be reached at pbressan@buchalter.com or 949.760.1121.



Ronald Arias is an Attorney in Buchalter's Labor & Employment Practice Group. He can be reached at riaras@buchalter.com or 213.891.5209.

This alert is published as a service to our clients and friends. The material contained here is provided for informational purposes only and is not intended to constitute advertising, solicitation or legal advice. The views expressed herein are solely those of the authors and do not necessarily reflect the views of Buchalter Nemer or its clients. For more information, visit www.buchalter.com.