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## California Court Empowers Employers To Collect Attorneys' Fees From Unsuccessful Claimants For Unpaid Wages or Missed Breaks

In California, employees have been able to assert claims for unpaid wages without any consequences for an unsuccessful – or even frivolous – claim. Employees often extracted settlements from employers who knew that they would have to spend more money fighting a claim than paying it outright. Worse yet, if an employer lost, not only would it have to pay the judgment, it would be required to pay its own lawyer, as well as the employee's lawyer. This menu of bad choices frequently resulted in the payment of money to undeserving former employee claimants.

A recent decision by the California Court of Appeal has dramatically changed this landscape and created a gateway for employers to recover attorneys' fees from employees who do not prevail on claims for unpaid wages. In *Kirby v. Immoos Fire Protection, Inc.* (Cal. Ct. of Appeal July 27, 2010), the Court held that an employer is entitled to its attorneys' fees when it prevails on a claim for missed breaks or unpaid wages (other than minimum wage or overtime). This development should make an employee think twice before filing such a claim.

### Factual Background

The plaintiffs in *Kirby* were two former employees who sued their employer for failure to pay all wages at each pay period and at discharge, failure to pay overtime wages, and failure to provide rest periods. Plaintiffs moved for class certification, which the trial court denied. In the subsequent month, plaintiffs dismissed the entire action with prejudice against all parties. Following dismissal, the employer moved to recover its attorneys' fees from plaintiffs under Cal. Labor Code § 218.5. The trial court granted the employer's motion for attorneys' fees and awarded it \$49,846.05. Plaintiffs appealed.

### Fee-Shifting Under Cal. Labor Code 218.5

At issue in *Kirby* was Cal. Labor Code § 218.5's fee-shifting provision, which provides that in an "action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorneys' fees and costs to the prevailing party. . . ." Section 218.5, however, contains a carve-out exception for "an action for which attorneys' fees are recoverable under Section 1194". Section 1194 is a unilateral fee-shifting provision that entitles only employees to recover attorneys' fees and costs against employers. Thus, § 218.5 does not apply to claims for unpaid overtime wages and a failure to pay the minimum wage.

The central issue on appeal was whether the employer's attorneys' fees were recoverable under § 218.5. The court held that the employer may recover attorneys' fees for successfully defending against individual causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds under the fee-shifting provisions of § 218.5. Even if a complaint also alleges failure to pay minimum wage and unpaid overtime wages under § 1194, an employer that prevails on other causes of action for nonpayment of regular wages is still entitled to its attorneys' fees. The court expressly found that this entitled employers to attorneys' fees for prevailing on causes of action for missed meal breaks or rest breaks.

### Future Implications for Employers

California employers are no longer subject to claims for unpaid wages and missed breaks without any firepower of their own. Most importantly, employees no longer get a "free whack" to see if their claim for allegedly unpaid wages will force a settlement, because employees no longer have nothing to lose by filing such a claim. Now, employers can credibly threaten to obtain a sizable judgment against employees that should cause them to abandon frivolous or weak wage claims. Although many such awards may not ultimately become collectible in full, the prospect of such a recovery materially swings the balance of power in disputes over unpaid wages and missed breaks and gives employers important leverage that they should use wisely.

For any questions regarding how this case may affect your business, or to learn more about labor and employment claims applicable under Cal. Labor Code §§ 218.5 and 1194, please contact partner Daniel Chammas or associate Christin Kim of Venable's Labor and Employment group in Los Angeles.

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