No. S 140308

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN PAUL MURPHY,

Plaintiff/Respondent

v.

KENNETH COLE PRODUCTIONS, INC.,

Defendant/Appellant

On Review from Decision of:
Court of Appeal, First District, Division 1
Consolidated Case Nos. A107219 & A108346

Appeal from the Superior Court of San Francisco County
Case No. CGC-03-423260
Honorable Anne Bouliane

AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT JOHN PAUL MURPHY

MICHAEL D. SINGER, ESQ. (SBN 115301)
COHELAN & KHOURY
605 "C" Street, Suite 200
San Diego, CA 92101-5305
Tel: (619) 595-3001
Fax: (619) 595-3000
Attorney for Amicus Curiae
California Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

FEDERAL CASES

CALIFORNIA STATUTES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

California Employment Lawyers Association (CELA) submits this amicus curiae brief supporting the trial court decision finding a three-year liability period for recovery of the hour of pay owed under Labor Code section 226.7[1] for failing to provide rest and meal periods in accordance with applicable IWC wage orders.

Rather than re-state the arguments in the principal briefing in support of plaintiff, CELA's brief provides two areas of supplementary analysis: (1) the Legislature's deletion of Section 226.7, subdivision (c) [Subdivision (c)], in the legislative history of AB 2509 and IWC proceedings demonstrate the intention that the hour of pay function as a self-operating remedy providing direct compensation to employees without legal proceedings, rather than a penalty requiring enforcement; and (2) the gravamen of an action to recover unpaid sums owed under Section 226.7, and harmonizing Section 226.7 with reference to the whole system of law and statutory scheme of which it is a part, supports its characterization as a compensatory remedy.

First, the Legislature's deletion of Subdivision (c) in revising the remedy from a statutory penalty to an hour of pay is critical to finding the pay is compensation rather than a penalty. By removing the provisions for enforcing the prior penalty through a Berman hearing under Section 92 (subdivision (c)(1)) or private suit (subdivision (c)(2)), the Legislature intended the statute to function as a self-operating remedy requiring the employer to pay the hour of pay directly to the employee, independent of legal proceedings. Similarly, the IWC expressly described the remedy which the

---

[1] CELA refers to Labor Code section 226.7 as "Section 226.7," the Industrial Welfare Commission as "IWC," the Department of Industrial Relations as "DIR," the Division of Labor Standards Enforcement as "DLSE," and the Unfair Competition Law under Business & Professions Code section 17200 et seq. as "UCL." Unspecified section references are to the Labor Code.

Legislature ultimately adopted November 5, 2006 in AB 2509 as an hour of "premium pay" intended to be, in its words, "self-enforcing."

The upshot of these developments is that employees deprived of rest or meal periods are owed the hour of pay automatically to be included in the next paycheck. The hour of pay is paid and taxed as wages. This functionality is consistent with a compensatory remedy to the employee rather than a penalty on the employer, which requires separate enforcement by the employee.

Second, the relief provided under Section 226.7, whether characterized as compensatory or penal, is not determinative; the nature of the right sued upon dictates the statute of limitations. Here, it is the employer's failure to comply with regulations requiring rest or meal periods, and the employer's failure to pay the hour of pay for non-compliance, that constitute the rights sued upon. Where the gravamen is to compel compliance with a statute, the statute of limitations is dictated by the underlying rights sued upon, rather than the remedy provided. Therefore, the applicable statute of limitations would be for statutory liabilities, not penalties.

Harmonizing the various statutes and regulations governing rest and meal period requirements with existing penalties for non-compliance with payment obligations to employees also supports a finding that the hour of pay is compensatory. As acknowledged by the IWC, an employer is subject to penalties under Section 558 for underpaying employees by failing to pay the hour of pay. It is unlikely that the Legislature would create *two* penalties against an employer for failing to provide rest or meal periods and *no* compensatory remedy for the employee. That would leave the employee solely with the injunctive relief possessed prior to the enactment of Section 226.7, meaning the Legislature failed in its effort to provide an additional remedy.

Accordingly, CELA urges reversal of the decision of the Court of Appeal.

II.

DISCUSSION

A. THE DELETION OF SUBDIVISION (C) IN THE LEGISLATIVE HISTORY CONFIRMS SECTION 226.7 FUNCTIONS AS COMPENSATION DIRECTLY TO EMPLOYEES

1. The Deletion of Subdivision (c) Created a Self-Operating Direct Payment Obligation Characteristic of Compensation

(a) The Legislature Abandoned a Penalty in Favor of an Hour of Wages

The critical moment in the legislative history of AB 2509 occurred when the Senate changed the Section 226.7 remedy from a statutory penalty to the IWC procedure of a self-enforcing hour of pay.

The Legislature had first proposed a true penalty scheme, with a statutory "civil penalty" of $50 to be paid to the Labor Commissioner per employee, per violation, plus twice the hourly rate of compensation to be paid to the worker for the full length of the meal or rest periods during which the employee was required to work. The Senate deleted the civil penalty scheme and instead amended the bill so that "failure to provide meal and rest periods would subject an employer to paying the worker ***one hour of wages*** for each work day when rest periods were not offered." (Emphasis added; see Exhibit 1 to CMJN, Third Reading, Senate Floor Analysis, August 25, 2000, p. 4; Exhibit 2 to CMJN, Bill AB 2509, p. 107).

The deleted section, Labor Code section 226.7, subdivision (c), read as follows:

> (c) Any employee aggrieved by a violation of this section may do either of the following: (1) Seek recovery of payments under Paragraph (2) of subdivision (b) through a complaint filed pursuant to subdivision (a) of Section 98; or (2) Seek recovery of payments under paragraph (2) of subdivision (b) in a civil action. The court shall award a prevailing plaintiff in such an

action reasonable attorney's fees.

(see Exhibit 2 to CMJN at pp. 107; 126-127)

The Senate amendments effectuated two revisions:

1. Changing the previous remedy from a civil penalty to an hour of pay (which the legislative history refers to as "wages"); and
2. Deleting Subdivision (c), which had provided that employees could sue to enforce the statutory penalty either by Berman hearing or private suit.

Three consequences resulted:

1. The remedy shifted from one in which employers were only "subject to" paying the penalty upon private enforcement by an employee to a self-operating, direct payment obligation to the employee as part of the bi-weekly pay pursuant to Section 204 (see, e.g., Exhibit 3 to CMJN, an example of a company's instructions provided to store managers demonstrating that the hour of pay is owed to the employee when it is incurred and is intended to be self-operating ["For each workday you fail to provide an employee a meal break as required, you owe the employee one additional hour of pay at the employee's regular rate"]);
2. The right of an employee to commence an action for non-payment inhered under Section 218[2] and pursuant to *Cuadra v. Millan* (1988) 17 Cal.4th 855, 858 ,

[2] Section 218 provides as follows: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

disapproved in part on different grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, obviating the need for a private enforcement provision; and

3. The self-operational functionality transmuted the remedy from a statutory penalty on the employer to a statutory obligation requiring direct compensation to the employee.

The use of the term "wages"in the legislative history is no accident. It explains both the nature of the compensatory remedy and the mechanism for enforcement for non-payment under Section 218. Section 226.7, subdivision (b), provides that an employer shall pay an hour of pay to an employee for failing to provide rest and meal periods in accordance with applicable IWC wage orders. The employer has an affirmative obligation to render direct payment to the employee. The hour of pay is paid as wages in an employee's bi-weekly paycheck. It is also taxable as wages. (See Exhibit 4 to CMJN, IRS Determination Letter.)

Nor did the Senate's deletion of private remedies in Subdivision (c) at the time the remedy was changed from "penalties" to "wages" indicate an intention for enforcement solely by the Labor Commissioner with no avenue for an employee to seek direct relief. At least two cases confirm an employee's private right to sue for violations of Section 226.7. (See *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 386 [private right of action for Section 226.7 claims pre-existed Private Attorney General Act (PAGA)] [*Caliber*][3]; (*Bender v. Darden Rests., Inc.* (9th Cir. 2002) 26 Fed.Appx. 726,

---

[3] CELA requests that the Court disapprove dicta in *Caliber* concluding that the hour of pay is a "statutory penalty" but not ruling on the statute of limitations (*Caliber,* 134 Cal.App.4th at 381, n. 16.). Once *Caliber* determined that exhaustion of administrative prerequisites under PAGA was not required for Section 226.7 claims by virtue of an independent private right of action, further discussion of whether the

729[4] ["Appellants had a cause of action under California Labor Code sections 226.7(b) (mandating payment of 'one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided') and 218 (authorizing employees to 'sue directly . . . for any wages or penalty due him under [the Labor Code]'"].) This Court has denied review of at least one trial court decision finding a private right of action for Section 226.7 claims. (*Home Depot v. S.C.(Ferguson)* (2006 Cal.LEXIS 8183).)

The alternative–that only the Labor Commissioner could pursue claims

---

remedy was compensatory or a penalty constitutes dicta. (See *People v. Jiminez* (1979) 94 Cal.App.3d 707, 711 [court's statement about juveniles unnecessary to resolution of equal protection issue regarding adults constituted dicta that need not be followed]; see, also *Krupnick v. Hartford Accident & Indemnity Co.* (1994) 28 Cal. App. 4th 185, 249 n. 27, defining dicta by reference to Black's Law Dictionary (6th ed. 1990) page 454, column a ["Opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent."] As Murphy has previously pointed out (Murphy Opening Brief at p.26 n.26), *Caliber* relied on a DLSE administrative "precedent decision" used internally for Berman proceedings. That decision "flatly contradicts" DLSE's earlier position that Section 226.7 payments constitute wages subject to a three-year statute of limitations; thus, it should be given little deference. (*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1278 [agency construction of statute which "flatly contradicts" previous position "cannot command significant deference"].)

[4] Citation of this federal opinion does not contravene Rule 977(a), California Rules of Court, as it is not an unpublished decision of a state Court of Appeal or superior court appellate department. This Court has cited to unpublished Ninth Circuit cases (see, e.g., *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 828, [citing to *Harding v. Summit Med. Ctr.* (9th Cir. 2002) 41 Fed. Appx. 83]), and at least one Court of Appeal supports citation to unpublished federal case law (see *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn.6 [indicating it is appropriate to cite unpublished federal authority]).

under Section 226.7–is untenable. First, it would make no sense for a statute to provide for payment directly to an employee but not afford the employee an independent right to recovery for non-payment. Second, an employee's inability to obtain recovery would mean the Legislature failed in what it set out to do in enacting AB 2509. The express purpose of the provision was to provide a remedy where one did not exist before. (See Exhibit 5 to CMJN, Enrolled Bill Report, p. 9.) (*Barquis v. Merchs. Collection Assn.* (1972) 7 Cal.3d 94, 112 ["there is a maxim as old as law that there can be no right without a remedy"].) If Section 226.7 provided no employee remedy for meal and rest period violations, employees would be left just as they were prior to the enactment of the statute–with no compensatory remedy for past non-compliance and only an injunction remedy available to prevent future violations. Any statutory construction tending to frustrate the legislative purpose cannot be supported.

(b) The IWC Remedy Referenced by the Legislature Was a Self-Executing Employer Obligation to Pay an Hour of "Premium Pay"

The subsequent description of the hour of pay in the legislative history as codifying the "lower penalty amounts adopted by the IWC" is not determinative. (See Exhibit 6 to CMJN, Concurrence in Senate Amendments, August 25, 2000, p. 2) There is no indication that the Assembly substantively analyzed and re-characterized the hour of wages to an hour of penalty pay for purposes of the statute of limitations.

It is assumed the Legislature was aware the statute of limitations for certain "penalties" is one year but for obligations created by statute *other* than such penalties the limitations period is three years. When the Legislature deleted the dedicated "penalty" under Section 226.7 and elected not to include the word "penalty" in the final description of the remedy, a reasonable inference arises that the intention was to create a statutory obligation other

than a penalty. To characterize the "hour of pay" as an "hour of penalty pay" essentially asks the Court to re-insert a word the Legislature omitted from the statute or to otherwise rewrite the law to conform to an intention that has not been expressed by the Legislature. This is not permitted under accepted principles of statutory construction. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

All parties to the instant action seem to agree that the wording of a remedy does not in itself dictate its statute of limitations.[5] The suggestion by amici California Employment Law Council, *et al.* [CELC] (CELC Amicus Brief, pp. 32-33, n.13) that the Court should disregard the Senate's specific reference to "wages" simply because the bill originated in the Assembly ignores the critical fact that the Senate is responsible for crafting the remedy ultimately enacted.

The IWC contemplated how to address the problem of non-compliance with rest and meal period requirements for which an employee or the labor

---

[5] It is particularly unhelpful to report a count of the number of times the word "penalty" is invoked without analysis in IWC proceedings, legislative history, the changing position of the DLSE, and cases not analyzing the meaning of the term for purposes of assessing the applicable statute of limitations. In fact, it appears the Legislature and Courts have not placed analytical significance on linguistic distinctions between "payments" and "penalties." (See, e.g., *Los Angeles County Metropolitan Transportation Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 272 [use of term "penalty" in statute does not compel finding that a Civil Code §52, subd. (b)(2) payment is primarily for purposes of punishment]; *Friddle v. Epstein* (1993 16 Cal.App.4th 1649, 1660 fn. 9 [Penal Code 637.2, subd. (a)(1) payments alternately described as "civil award," "statutory penalty," or "minimum damages award"].) Even this Court refers to restitution under the Unfair Competition Law as "monetary penalties." (*Korea Supply Co. v. Lockheed Martin Co.* (2003) 29 Cal.4th 1134, 1148 ["*Korea Supply*"] ["The fact that the "restore" prong of section 17203 is the only reference to monetary penalties in this section indicates that the Legislature intended to limit the available monetary remedies under the act."].)

commissioner could only pursue injunctive relief to compel prospective compliance. The remedy the Commission proposed was for the employer to pay the employee an hour "premium pay" (not "penalty pay") as a "self-enforcing" remedy, i.e., compensation an employer pays directly to the employee without an enforcement proceeding through the DLSE. The following exchange on these points between IWC commissioner Barry Broad and DLSE staff counsel Miles Locker is highly instructive:

> COMMISSIONER BROAD: Now, I was surprised to learn -- and I'd like you to confirm this -- that there is no Fair Labor Standards Act enforcement in this area, there's nothing in the Fair Labor Standards Act governing breaks or meal periods.
>
> MR. LOCKER: That's my understanding, that under the FLSA there are no requirements as to meal periods or rest periods.
>
> COMMISSIONER BROAD: So, we have a situation, then, where this may be a statute that, when it's breached, there's no real effective remedy or regulation when it's breached. There's no effective remedy.
>
> MR. LOCKER: The remedy, as I say, would be -- it's an expensive thing to bring about that remedy. And then, of course, the remedy, if we were to get the injunctive relief, the remedy would be basically a court order telling the employer, "You can't do this ever again." It's prospective.
>
> COMMISSIONER BROAD: Well, I guess what we could do -- I'm not asking you to comment on this -- but as a general comment to my fellow commissioners, I guess what we could do is require the payment of ***premium pay*** for the time that was not given, or require that any employer that doesn't give rest periods or a meal period in accordance with our rules would have to, say, pay the employee one hour

at their regular rate of pay, in addition to all hours worked on that day, or something so that there would be an economic disincentive to violate the rule, and that it would be more ***self-enforced***.

MR. LOCKER: That's -- you know, I mean, I -- I don't want to comment much on that, other than to say that given our -- given our limited enforcement, we like ***self-enforcement. We do like self-enforcement***.

(See Exhibit 7 to CMJN, IWC Hearing Transcript, May 5, 2000)

Evidently, the DLSE much appreciated a remedy that did not require use of its limited resources for enforcement. A retrospective remedy functioning to provide direct compensation to the employee for violations was preferable.

This conclusion finds further support in the IWC regulatory history when it adopted the hour of pay regulation the following month.

In its final version, AB 2509 enacted the hour of pay provision to match that adopted by the IWC in wage orders 1-13, 15, and 17 at the June 30, 2000 hearing. (See Exhibit 8 to CMJN, IWC Hearing Transcript, June 30, 2000.) The transcript of this hearing shows the IWC intended the hour of pay to function as a retrospective "remedy" to the employee beyond the existing right to prospectively enjoin compliance. Also, the IWC envisioned an affirmative obligation on an employer to pay the employee one hour "on any day" that an employer does not provide a rest or meal period.

The critical language is as follows:

COMMISSIONER BROAD: . . .This is a rather -- a relatively small issue, but I think a significant one, and that is we received testimony that despite the fact that employees are entitled to a meal period or rest period, that **there really is no incentive as we establish it, for example, in overtime or other areas, for employers to ensure that people are given their rights to a meal period and rest period. At this point, if they are not giving a meal period or rest period, the only remedy is an**

> **injunction against the employer or -- saying they must give them**. And what I wanted to do, and I'd to sort of amend the language that's in there to make it clearer, that what it would require is that **on any day that an employer does not provide a meal period or rest period in accordance with our regulations, that it shall pay the employee one hour** -- one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided. I believe that this will ensure that people do get proper meal periods and rest periods.

(*Id.* at 25 [emphasis added].)

The IWC thus states that the hour of pay was provided to correct the problem that the only "remedy" for an employee was an injunction, indicating that the hour of pay was intended to be an additional compensatory remedy for the employee, not an employer penalty.

Then Commissioner Broad continues the analogy to overtime:

> COMMISSIONER BROAD: The employer who, under our regulations, lawfully establishes an on-duty meal period would not be affected if the employee then takes the on-duty meal period. This is 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. Let me respond, if I may. Clearly, I don't intend this to be an hour counted towards hours worked any more than the overtime penalty. 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 30.)

This comment suggests that the IWC intended the hour of pay to function as a continuing obligation, operating prospectively to require an employer to pay the hour of pay each time a day goes by in which an employee is not provided a rest or meal period. The fact that there is a discussion as to whether the hour of pay will be counted towards the day's hours worked for

purposes of an employee's entitlement to overtime for working over eight hours underscores the intention that the employer's obligation would be affirmative and continuing. There would be no need to discuss this issue if an employee were required to bring an enforcement action looking backward in time unless for some reason it was contemplated that the employee could re-construct the hours worked that day and also make a claim for overtime. That would be stretching the analysis far beyond what was likely considered by the IWC.

(c) Self-Executing Affirmative Pay Obligations under the Wage Orders Constitute Compensation to Employees

IWC Commissioner Broad analogizes the need for an incentive to provide the hour of pay similar to that provided for overtime. Both remedies are self-enforcing.

Along with providing the hour of pay requirement, the other remedies provided under the wage orders are similarly self-enforcing.

The IWC began promulgating wage orders governing wages, hours, and working conditions in 1916. (*Industrial Welfare Commission v. Superior Court* (1980) 27 Cal.3d 690, 700). The seventeen orders appear at 8 Cal.Code Regs. sections 11010, et seq.

It is well known that the original intent of these provisions was to protect women and minors. (*Id.* 27 Cal.3d at 700.) In the early 1970's, the Legislature expanded the IWC's jurisdiction to include all employees. (*Id.* at pp. 700-701, citing Stats. 1972, ch. 1122, §§ 2-6, pp. 2153-2155; Stats. 1973, ch. 1007, §§ 1.5-4, pp. 2002-2003.) This Court has consistently upheld the IWC's constitutional and statutory authority to create the wage orders. (See *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325; *IWC v. Superior Court, supra*, 27 Cal.3d at 725-729; *Ramirez v. Yosemite Water Company, Inc.* (1999) 20 Cal.4th 785, 799-800; *Morillion*

v. Royal Packing Co. (2000) 22 Cal.4th 575; *Cuadra v. Millan, supra*, 17 Cal.4th at 858.)

The current wage orders have been in effect in essentially the same form since the last major revisions in 2000. They contain multiple minimum employer payment obligations, including provisions establishing overtime premium pay requirements and exemptions (Sec. 3), minimum wages and split shift premiums (Sec. 4), minimum reporting pay requirements (Sec. 5), rest and meal period pay (Sec. 11 and 12), as well as prohibitions against deductions for cash shortages and breakage (Sec. 8), requirements that employers bear the expense of furnishing and maintaining required uniforms (Sec. 9), maximum lodging and meal charge credits against minimum wage (Sec. 10), as well as other non-monetary provisions governing working conditions. (See, e.g., Exhibit 9 to CMJN, Wage Order 4-2000.) These provisions are all mandatory minimum requirements.

All of the provisions in the wage orders are "self-enforcing." That is, employers are obligated to post the orders in the workplace (Sec. 22) and follow their terms. As with rest and meal period pay, an employee is not required to initiate an enforcement proceeding to receive minimum wages, overtime, split-shift-premiums, reporting pay, or any other requirement under the wage orders. As an example, overtime requirements were historically founded solely upon the IWC orders until in 1999 the Legislature enacted AB 60, which restored daily overtime after a period in which the wage orders provided only weekly overtime and codified the basic overtime requirements. (See Labor Code §§ 510-511, 515, 1198, and section 3 of IWC wage orders 1-17.)

///

////

Rest and meal period pay under Sections 11 and 12 of the wage order function similarly to split shift premiums and reporting pay obligations.[6] The fact that none of these items counts toward daily hours worked for purposes of entitlement to overtime does not define them as penalties. The intention is that the employer provide these minimum obligations without employee enforcement proceedings, functioning as compensation[7]. Rest and meal period pay functions identically and so may also fairly be classified as compensation.

(d) Because Penalties Generally Are Not Paid Without an Enforcement Action, Self-Executing Direct Pay Obligations Under the Wage Orders and Section 226.7 Function as Compensation, Not Penalties

Where an employer has an affirmative obligation to pay the sum owed and an employee need not bring an action to enforce the obligation because it

---

[6] In *Kerr's*, this Court upheld these provisions as within the IWC authority to promulgate regulations "affecting wages." (*Kerr's*, *supra*, 57 Cal.2d at 330.)

[7] Defendant Kenneth Cole Productions (KCP) states that no statute is self-operational, and that all employee rights require enforcement proceedings. (KCP Answering Brief, p.8 ["absent voluntary payment, they must be enforced. They are not 'self-executing.' " A simple example reveals the flaw of this reasoning. An employer must pay overtime premium or penalty pay automatically, without requiring a lawsuit. Section 226.7 functions the same way. KCP also claims incorrectly Section 203 (waiting time penalty wages) is also a self-functioning statute. (*Id.*) Only "wilful" violators incur the penalty, and it is doubtful that any employer would assess itself as a wilful labor law violator subject to additional penalties under Section 558 or PAGA. CELC also present a singular example of a 10% penalty for late disability payments under Section 4650, subdivision (d), that is self-operational. (CELC Amicus Brief, p. 49) There is no authority provided that this penalty carries a one-year statute of limitations. Moreover, it arises under an entirely different statutory scheme, the worker's compensation statutes relating to injuries sustained while working. Penalties for late temporary disability payments are more analogous to penalties for late wage payments under Section 203 than self-functioning wage payment regulations and statutes.

is self-operational, then the hour of pay *does not function as a penalty*. This is because the right to penalty sums does not accrue or vest until it has been enforced. (See *Anderson v. Byrnes* (1898) 122 Cal. 272, 274 ["no person has a vested right in an unenforced penalty"]; *Jones v. Shore's Ex'r* (1816) 14 U.S. 462, 474; [4 L.Ed.2d 136, 1 Wheat 462] ["The court are clearly of opinion, that the right of the collector to forfeitures *in rem* attaches on seizure, and to personal penalties on suits brought, and in each case it is ascertained and consummated by the judgment"].) In other words, an employee would not be paid the hour of pay for breaks violations but must act affirmatively to enforce the violation in order to be paid.

But the hour of pay is **owed** *when it is incurred.*

The language of Section 226.7 provides that the employer has an affirmative obligation to pay the employee. It does not envision the necessity of an enforcement action by the employee.

Section 226.7(b) provides:

> If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

This section sets up an immediate payment obligation. If an employer fails to provide any rest or meal period required, "the employer shall pay the employee" an additional hour of pay for that workday. Employers have an affirmative obligation to make the payment in the same manner they have the affirmative obligation to pay wages bi-weekly under Section 204. The intent is that an employer owes the hour of pay when the employee misses the rest or meal period and must include payment for each work day the breaks are unprovided in the next pay check. As with overtime, minimum wage, and other payment obligations, employees do not need to bring claims against employers to receive these amounts owing. This is the way employee

compensation operates.

To avoid the conclusion that the hour of pay functions as compensation, employers argue that employees have no vested interest in the Section 226.7 remedy because there is no vested right in a penalty. This is circular reasoning: "there is no vested right in a penalty so there is no vested right in the hour of pay." But functionally, that is not how the hour of pay operates. It is owed by the employer, who "shall pay the employee." The employee has an immediate possessory ownership interest in the sum and is not required to initiate litigation to enforce the violation. Thus, the opposite reasoning is appropriate: because the hour of pay is owed immediately and thereby creates an ownership interest on the employee, it is compensation and not a penalty.

Accepting the employers' arguments requires a finding that the Legislature, in stating "the employer shall pay the employee . . . for each work day," intended instead that the employer is merely "*subject to*" the obligation to pay and *pays only* if the employee brings suit. Aside from defying common sense, this statutory construction would not result in a very efficient or effective deterrent or disincentive. Employers would feel much safer about not providing rest or meal periods knowing that they would only be obligated to pay for violating Section 226.7 if an employee sues them for enforcement. Many currently-employed workers likely would forego pursuing claims in the face of retaliation or discomfort in the workplace.

The better analysis–and more likely legislative intent–is that the hour of pay is "self-enforcing," as the IWC described it at the May 2000 hearings. It thereby functions as employee compensation for unprovided meal and rest periods, vesting an ownership interest in the employee when incurred, and differentiating it from a penalty.

///

///

///

2. Unpaid Sums Under Section 226.7 Are Subject to Restitution under the Unfair Competition Law, Carrying A Four-Year Statute of Limitations

The companion cases under review in these proceedings raise the issue of whether claims for unpaid sums owed under Section 226.7 seek restitution compensable under the UCL. Claims under the UCL carry a four-year statute of limitations. (Bus. & Prof. Code § 17208.)

The intended operation of Section 226.7 as a self-operating payment obligation directly to the employee payable with the employee's wages indicates that the employee has an immediate possessory right, and ownership interest, in the funds owed. Unpaid sums under Section 226.7, subdivision (b), arising from an employer's failure to abide by its statutory obligation to pay its employees for failing to provide meal or rest periods in accordance with IWC wage orders, would therefore be subject to restitution.

This Court has held that the right to restitution hinges on either the return of monies improperly held or restoration of sums in which a party has an ownership interest. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177-178 ["*Cortez*"]; *Korea Supply,* 29 Cal.4th at 1144.)

In the simplest sense, if the employer fails to pay the hour of pay, the employee is entitled to a claim for back pay. Claims for back pay are restitutionary payable under the Court's equitable power in a UCL action. (*Cortez, supra,* 23 Cal.4th at 177-178.)

Key language defining restitution appears in *Cortez*:

> The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of "restore" includes a return of property to a person from whom it was acquired (see Webster's New Internat. Dict. (2d ed. 1958) p. 2125), but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is

> property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitutionary remedy authorized by the UCL.

(*Cortez, supra*, 23 Cal.4th 178; see, also, *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1080 ["Earned but unpaid salary or wages are vested property rights, claims for which may not be properly characterized as actions for monetary damages"]; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 263 [restitutionary awards encompass quantifiable sums one person owes to another].)

The key to restitution is restoring money or property to someone with an "ownership interest." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126-127; *Korea Supply*, *supra*, 29 Cal.4th at 1148 [unfairly obtained profits recoverable only "to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest"].) A "vested interest" qualifies. (*Id.* at 1149 ["restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest"].)

The holding of *Korea Supply* is inapposite but its discussion of general restitution principles is instructive. This Court held nonrestitutionary disgorgement of potential profits under a contract awarded to a higher bidder not recoverable under the UCL. "Unlike *Cortez*, then, the monetary relief requested by KSC does not represent a quantifiable sum owed by defendants to plaintiff. Instead, it is a contingent expectancy of payment from a third party." (*Korea Supply*, *supra*, 29 Cal.4th at 1150.) By contrast here, the hour of pay is an easily quantifiable sum owed by the employer to the employee and not an attenuated expectancy[8].

---

[8] Section 17202 of the UCL, also governed by a four-year statute of limitations, provides that "specific or preventive relief may be obtained to enforce a penalty involving unfair competition." Thus, should the Court

B. HARMONIZING THE STATUTORY SCHEME SUPPORTS A FINDING THAT SECTION 226.7 PROVIDES A COMPENSATORY REMEDY SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS

1. The Gravamen of a Section 226.7 Claim is Enforcing the Right to Payment for an Unprovided Meal or Rest Period

This gravamen of the action dictates the applicable statute of limitations.

> To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. [Citations.] '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]"

(*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23 [limitations period for action challenging land use regulation governed, not longer period for

---

find the hour of pay constitutes a penalty, employees may nevertheless invoke Section 17202 both to enforce the hour of pay prospectively as a statutory penalty and to obtain specific performance of defendant's breached contractual obligation to comply with the wage order and Labor Code requirements to pay employees the hour of pay owed for missed rest and meal periods. (See *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County* (1946) 28 Cal.2d 481, 486 ["The contract of employment must be held to have been made in the light of, and to have incorporated, the provisions of existing law"].) Such penalties are distinguishable from UCL Section 17206 penalties restricted to recovery by public officials. Person engaging in unfair competition may be liable under section 17206 for a civil penalty not to exceed $2,500 for each violation; however, claims for such sums may only be brought by public officials in the name of the State of California. Nothing in Section 17206 prohibits private claims for penalties that may be subject to restitution under section 17202 aside from the $2,500 civil penalty under section 17206. (See *Korea Supply*, *supra* 29 Cal.4th at 1148-1150. [only damages and disgorgement of profits are not recoverable under the UCL, which limits remedies to injunctive relief and restitution].)

compensation for taking allegedly effected by the ordinance].)

Thus, the relief provided under Section 226.7, whether characterized as compensatory or penal, is not determinative; the nature of the right sued upon dictates the statute of limitations. The gravamen of the action under Section 226.7 is to enforce statutory rights to rest and meal periods and commensurate pay for non-compliance with those rights, thereby compelling employer compliance with the statute. Therefore, the action is a liability created by statute, governed by Code of Civil Procedure section 338, subdivision (a). (See *People ex rel. Department of Conservation v. Triplett* (1996) 48 Cal.App.4th 233, 251 [gravamen of action challenging assessor's valuation was to compel compliance with re-assessment statute, governed by Code of Civil Procedure section 338, subdivision (a)].)

2. The Court Examines the Relevant Statutory Scheme in Determining the Applicable Statute of Limitations

This Court examined statutes of limitation for certain employee claims in *Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072 (*Coachella Valley*). Because, as here, there was no specific discussion of the statute of limitations in the legislative history, the Court based its ruling on examining the entire statutory scheme:

> [P]erhaps most importantly, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided.

(*Id.* at 1089 [citing *In re Marriage of Harris* (2004) 34 Cal.4th 210, 222; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663].)

Coachella Valley involved a public employees union claim of discrimination against a school district. The union brought an administrative unfair practice charge under the Meyers-Milias-Brown Act (MMBA) with the Public Employment Relations Board (PERB). PERB argued for a three-year

statute of limitations for labor claims.

This Court referenced authority finding, in non-MMBA cases, all statutory labor law claims governed by three-year statute of limitations under Code of Civil Procedure section 338, subdivision (a):

> [T]he Court of Appeal in *Giffin v. United Transportation Union* (1987) 190 Cal.App.3d 1359, 1365 had held that three years was the statute of limitations for an alleged violation of a state labor law.

(*Coachella Valley*, *supra*, 35 Cal.4th at pp. 1077, 1084, 1088.[9]) However, harmonizing the entire statutory scheme produced a different result. The statutory scheme under the Government Code had previously provided judicial jurisdiction for MMBA charges, which were governed by a three-year statute of limitations. The Legislature subsequently vested jurisdiction in PERB.

> By changing the forum--vesting an administrative agency (the PERB) rather than the courts with initial jurisdiction over MMBA charges--the Legislature abrogated the three-year statute of limitations under section 338(a), and we assume that this abrogation was intentional and not inadvertent.

---

[9] This Court did not infer that *Giffin v. United Transportation Union, supra,* 190 Cal.App.3d at 1365, states a blanket rule that all labor law claims involving payments to employees are subject to a three-year statute of limitations but merely noted the limitations period generally applicable to actions arising under labor law statutes. CELA has not located cases finding other than a three-year statute of limitations for violations of state labor law involving payments to employees. *State Comp. Ins. Fund v. Workers Comp. Appeals Board* (1998) 18 Cal.4th 1029 notes that the 10% penalty an employer pays to an employee whose workers compensation benefits are unreasonably delayed constitutes a penalty but makes no mention of the statute of limitations. In *Cuadra v. Millan*, this Court in dicta adopted the position advanced by the Labor Commissioner that all amounts employees recover in administrative proceedings before the Commissioner are recoverable for "four years for a claim on a written contract, two years for a claim on an oral contract, and three years for a claim on a statutory liability." (*Cuadra v. Millan*, *supra*, 17 Cal.4th at 866.)

(*Id.* at 1089.) Thus, the Court found that a different statute of limitations applied to administrative proceedings under the MMBA. (*Id.)* It determined not to apply the three-year limitations period generally applicable to labor claims, as the specific claim involved an administrative proceeding with a six-month filing deadline.

3. Under the Statutory Scheme for Compensating and Penalizing Employers for Wage and Hour Violations, Section 226.6 Provides Compensation to Employees and Section 558 Penalizes Employers

Applying that standard here, and harmonizing the various statutes affecting rest and meal period violations, the hour of pay owed under Section 226.7 is an obligation created by statute other than a penalty. Meal period requirements date back to 1916, rest periods to 1932. (*California Manufacturers Ass'n v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 114-115.) In *IWC v. Superior Court*, this Court specifically found that rest and meal requirements in the wage orders (those requiring them but not at that time providing a remedy for non-compliance) concern the "health and welfare" of employees. The Court found these requirements were not superseded or preempted by Cal/OSHA provisions, in light of public policy to protect workers:

> Finally, the interpretation of the statute urged by the IWC is sustained by the general principle of statutory interpretation, noted at the outset of this opinion, that remedial legislation of this nature is to be liberally construed in favor of accomplishing the principal objective of the legislation, i.e., protecting workers. Under the employers' interpretation of the statute, employees would be deprived of the benefits of health- and safety-related regulations of the IWC even though Cal/OSHA had not yet acted on the subject to protect the workers' interests. Such a construction is clearly at odds with the remedial purpose of the entire statutory framework.

(*IWC v. Superior Court*, *supra*, 27 Cal.3d at 724.) The revised rest and meal provisions which include the employee remedy for unprovided breaks carry a

similar remedial component as part of the statutory scheme.

Section 226.7 arises from these health and safety concerns and was enacted to codify IWC wage order provisions promulgated as a response to a growing problem of non-compliance by employers with rest and meal period requirements. (See Exhibit 10 to CMJN, IWC Statement as to Basis to 2000 amendments to Sections 11 and 12 of Wage Orders 1-15.)

The following is the relevant chronology:

1. The IWC rest and meal period regulations require paid 10-minute rest periods for every four hours worked and an unpaid 30-minute meal period for work periods exceeding five hours. The Labor Code provided no specific compensatory remedy for the employee or penalty on the employer for non-compliance with Sections 11 and 12 of the wage orders; however, the wage orders referenced Section 1199 providing for misdemeanor fines for violations of any provision of an IWC order (See Exhibit 9 to CMJN, IWC Wage Order 4, Section 20 [which now includes additional penalty language taken directly from Labor Code section 558]);
2. In 1999, the Legislature enacted Section 558 as part of AB 60 (effective January 1, 2000), which establishes civil penalties[10] against employers who violate any provision of an IWC wage order in the amount of $50 per "underpaid" employee per pay period for the first violation and $100 for subsequent violations. At the time, only the Labor Commissioner had standing to bring actions to enforce these penalties, and Labor Code section 558 (a)(3) provided that wages collected along with penalties would

[10] Misdemeanor criminal penalties for violations of the wage orders already existed under Labor Code section 1199.

be paid over to the employee;

3. On June 30, 2000, the IWC adopted the hour of pay remedy for violations of rest and meal period requirements, effective October 1, 2000 (See Exhibit 8 to CMJN; Exhibit 9 to CMJN, p.1)

4. As of the adoption of the hour of pay provision, Section 558 civil underpayment penalties[11] applied to violations of the wage order rest and meal period payment requirements (see, e.g., IWC Legal Counsel Marguerite C. Stricklin analysis at the June 30, 2000 hearing (Exhibit 8 to CMJN, pp. 33-34 [a regulation which sets forth a penalty for rest and meal period violations would just be an additional penalty (to the penalties under Section 558), which the IWC has the power to do]);

5. In October 2000, the Legislature enacted Section 226.7 as part

---

[11] The subsequent adoption of the hour of pay remedy by the IWC explains why the Department of Industrial Relations Enrolled Bill Report, dated prior to the date the wage orders were revised to add the hour of pay, states that Labor Code section 558 penalties do not apply to meal period claims. Since the legislative history reflects that the Legislature adopted the IWC's hour of pay remedy, it is assumed under principles of statutory construction that the Legislature was aware that Labor Code section 558 penalties applied to violations of the hour of pay requirement under new Sections 11 and 12 of the wage orders. (Exhibit 5 to CMJN, Enrolled Bill Report of Assembly Bill 2509, September 13, 2000.) The DLSE issued an interpretative memorandum of AB 60, with the proviso that its issuance predated the adoption of the IWC Interim Wage Order, and that wage order provisions would prevail over any inconsistent analysis in the memorandum. (See Exhibit 11 to CMJN, DLSE Memorandum re: AB 60, December 23, 1999.) DLSE's analysis concluded that Section 558 penalties did not apply to rest and meal period violations because the penalties only were payable to "underpaid" employees. With the addition of the hour of pay provision to the wage orders and Labor Code in 2000 and 2001, respectively, employees denied rest or meal period pay are "underpaid," hence Section 558 penalties obtain. IWC's legal counsel concurred. (Exhibit 8 to CMJN, pp. 33-34)

of AB 2509, effective January 1, 2001.

6. AB 2509 also enacted Section 226 providing specifically designated employer "penalties" for record-keeping violations providing the greater of either "actual damages" (such as any benefits lost) or a "penalty" of $50 for the first violation and $100 for succeeding violations; and

7. In 2003, the Legislature enacted SB 796 (PAGA), which provided employees a private right of action to sue for penalties under the Labor Code (including Section 558 penalties), 25% of which is retained by the employee with the remainder being paid to the state.

Harmonizing these provisions, the legislative intent is to provide a compensatory remedy for employees under Section 226.7 (an hour of pay, covered by a three-year liability period) and a penalty against employers under Section 558 ($50 for initial and $100 for subsequent violations, covered by a one-year liability period). If the employer pays the required extra compensation on the pay day for the pay period for which the meal and rest period violations took place, there would be no underpayment and thus, no penalty under Section 558. Nor would there be a violation of the wage order subject to misdemeanor liability under Section 1199. Thus, the Section 558 penalty would function to foster prompt payment of meal or rest period premium pay, the same way it functions to foster prompt payment of required overtime premium pay.

The Legislature clearly knew that the IWC had adopted the hour of pay provision, as it co-opted this remedy into Section 226.7. It is also assumed that the Legislature was aware that an employer's failure to pay the hour of pay under the wage orders constituted underpayment subjecting the employer to penalties under Labor Code section 558. The "[l]egislature is deemed to be aware of statutes and judicial decisions already in existence, and to have

enacted or amended a statute in light thereof." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1269 [quoting *People v. McGuire* (1993) 14 Cal.App.4th 687, 694].)

It is unlikely that the Legislature would have felt the need to establish *two penalties* on the employer with *no* compensation to the employee. It is true that Section 558(c) states that the penalties provided are in addition to existing civil and criminal penalties. However, it is more likely that the removal of the prior "civil penalties" provision and replacement with the IWC hour of "pay" the Senate called "wages" was intentional and is explained as an effort to provide a compensatory remedy to the employee along with the extant employer penalty.[12]

4. As Statutory Penalties Are Assessed In Addition to Compensatory Damages, Section 558 Provides the Applicable Penalties for Meal and Rest Violations

A penalty compels "a defendant to pay a plaintiff other than what is necessary to compensate him [or her] for a legal damage done ... by the former." (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 837.)

Statutory penalties collected by private parties are assessed in addition to compensatory damages. (See, e.g., doubling and trebling of compensatory damages under Bus. & Prof. Code §16750, subd. (a); Penal Code §637.2, subd. (a)(2); Code Civ. Proc. §733; Civil Code §3346.) Consequently, penalties added to compensatory damages designed to punish are generally the exclusive penalty for a claim under a given statute. (See generally; *De Anza Santa Criz Mobile Home Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Home*

---

[12] The Legislature's inclusion in the same bill of a dedicated statutory "penalty" for record-keeping violations under Section 226 supports the conclusion that Section 226.7 is compensatory and not a penalty. AB 2509 must be interpreted with consistency. The Legislature's use of the term "penalty" for one remedy and "pay" for another demonstrates one is a statutory penalty and the other is not.

Estates (2001) 94 Cal.App.4th 890. [Plaintiffs who assert only Mobile Home Residency Claim are limited to recovery of only $500 wilful violation penalty under that statute]; *Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 827 [Plaintiffs who assert only Cartwright Act claim are limited to penalty of treble damages under that statute].)

Thus, the statutory scheme provides the hour of pay as the employee's actual compensatory detriment for the economic harm resulting from denied rest and meal breaks, and Section 558 penalties upon the employer for underpayment.

Neither the legislative history nor the statutory scheme support the conclusion that the Legislature intended Section 226.7 to be governed by the statute of limitations for statutory penalties over the limitations period for obligations created by statute. Its primary concern was protecting employees and providing them a remedy for employer non-compliance. A statute designed to compel compliance with another law or statute produces an obligation created by statute, governed by the three-year limitations period. (See *People ex rel. Department of Conservation v. Triplett*, *supra*, 48 Cal.App.4th at 251; see, also, *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148 [primary purpose of payments under Health and Safety Code section 1428 not punitive "but to secure obedience to statutes and regulations imposed to assure important public policy objectives...The focus of the Act's statutory scheme is *preventative*].)

5. Public Policy Concerns Support a Longer Liability Period for Violations Related to Working Conditions

Any statutory interpretation involving employee rights must follow powerful public policy liberally construing legislation regarding wages and working conditions ***in favor of protecting employees.***

> [t]he Legislature has declared that it is the public policy of California 'to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work

> under substandard unlawful conditions, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.'

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 [quoting Labor Code § 90.5, subd. (a)].)

> [I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.

(*Ramirez v. Yosemite Water Co., supra*, 20 Cal.4th at 794, quoting *Industrial Welfare Com. v. Superior Court, supra*, 27 Cal.3d at 702[13].)

This Court has acknowledged that recognized public policy considerations and liberal construction play a critical role in analyzing the statute of limitations in employment cases arising under the Fair Housing and Employment Act (FEHA). "FEHA advances the fundamental public policy of eliminating discrimination in the workplace, and the provisions of the act are to be construed broadly and liberally in order to accomplish its purposes." (*Yanowitz v. L'Oreal USA., Inc.* (2005) 36 Cal.4th 1028, 1054, fn. 14.) This

---

[13] Perhaps in light of this policy, the only California case addressing liquidated damages under the Fair Labor Standards Act (FLSA) for failure to pay wages when due concluded they were compensation and not a penalty. (*Hays v. Bank of America National Trust & Savings Assn.*(1945) 71 Cal.App.2d 301, 304.) The court was unconcerned whether the amount was mathematically tied to labor performed to assess whether it constituted wages or a penalty. A federal case analyzing liquidated damages payments to employees under the FLSA found Code of Civil Procedure section 340 inapplicable on the ground that such payments were compensation and not a penalty. The court ruled the period of limitations recovery of amounts in addition to overtime is the same as that for the recovery of overtime, three years under Code of Civil Procedure section 338. (*Culver v. Bell & Loffland, Inc.* (9th Cir. 1944) 146 F.2d 29, 32.)

policy informed assessment of the applicable statute of limitations:

> Moreover, as we previously have stressed, the liberal construction mandated by the FEHA extends to interpretations of the FEHA's statute of limitations: "In order to carry out the purpose of the FEHA to safeguard the employee's right to hold employment without experiencing discrimination, the limitations period set out in the FEHA should be interpreted so as to promote the resolution of potentially meritorious claims on the merits."

(*Id.* at 1058 fn. 17; [quoting *Richards v. CH2M Hill Inc.* (2001) 26 Cal.4th 798, 819].)

Public policy ***protecting workers*** has primacy in guiding this proceeding. Specifically, remedial legislation promoting workers' health and welfare and protecting their right to premium pay for denied rest and meal periods informs the applicable liability period. Protecting the welfare of businesses that fail to comply with California law does not.

III. CONCLUSION

Based on the foregoing, CELA respectfully requests that this Court reverse the decision of the Court of Appeal and find a three-year statute of limitations applicable to Section 226.7 claims, recoverable as restitution under the four-year statute of limitations under the UCL.

DATED: November 7, 2006

Respectfully submitted,
COHELAN & KHOURY

By: _____
Michael D. Singer
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

CERTIFICATION OF WORD COUNT

Pursuant to Cal. Rules of Court, Rule 14(c)(1), Amicus Curiae hereby certify that the text of the Amicus Brief of California Employment Lawyers Association, to be filed on November 9, 2006, contains 9,260 words as counted by Corel WordPerfect, the word processing program used to generate the brief.

Dated: November 7, 2006

Respectfully submitted,
COHELAN & KHOURY

By: _____
Michael D. Singer
Attorney for Amicus Curiae
California Employment Lawyers
Assoc.

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan & Khoury, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On November 8, 2006, I served the foregoing documents described as **AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT JOHN PAUL MURPHY** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[ ] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[XX] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed November 8, 2006 at San Diego, California.

Amber Worden

SERVICE LIST

Murphy v. Kenneth Cole Productions, Inc.
No. A107219 and A108346 (consolidated)

California Court of Appeal First Appellate District, Division 1 350 McAllister Street San Francisco, CA 94102	Clerk of the Appellate Court
Superior Court Clerk Hon. Anne Bouliane San Francisco County 400 McAllister Street San Francisco, CA 94102	Clerk of the Superior Court
Robert Tullen, Esq. SEYFARTH SHAW LLP 560 Mission Street, Suite 3100 San Francisco, CA 94105	Attorney for Defendant Kenneth Cole Productions, Inc.
Donna Ryu, Esq. Nancy M. Stuart, Esq HASTINGS CIVIL JUSTICE CENTER 100 McAllister Street, No. 300 San Francisco, CA 94102	Attorney for Plaintiff John Paul Murphy