



# Prevailing Parties in Meal or Rest Break Actions are not Entitled to Attorney Fees

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On the heels of *Brinker*, the California Supreme Court ruled on April 30, 2012, in *Kirby v. Immoos Fire Protection, Inc.*, that parties prevailing on a claim that Labor Code section 226.7 was violated are not entitled to attorney's fees. Section 226.7, subdivision (a) prohibits employers from requiring employees to work during Industrial Welfare Commission (Wage Order) mandated rest or meal breaks. Subsection (b) provides the remedy - the employer must 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 break is not provided.

In *Kirby*, the plaintiff employees sued their employer for, among other things, missed meals and rest breaks, i.e., section 226.7 violations. The employees sued others, with whom they settled. Due to that settlement, the employees decided to dismiss their claims against their employer resulting in the employer being the prevailing party on the section 226.7 claim. The employer filed a motion for attorney's fees pursuant to Labor Code section 218.5, which requires the awarding of attorney's fees to the prevailing party in "any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." This section requires the award of fees to the prevailing party whether employee or employer - a two-way fee-shifting provision. The employer contended that a section 226.7 claim was an "action brought for the nonpayment of wages" within the meaning of section 218.5.

The employees, opposing the employer's motion for attorney's fees, contended that the required payment for missed meal or rest breaks is essentially a statutorily prescribed minimum wage and therefore subject to the attorney's fee provision of Labor Code section 1194. Section 1194 entitles "any employee receiving less than the legal minimum wage or the legal overtime compensation" to recover the unpaid balance of the minimum wage or overtime due, plus reasonable attorney's fees. Unlike section 218.5, section 1194 is a one-way fee-shifting provision. That is, only employees who prevail in an action for unpaid minimum wages or overtime can recover attorney's fees. Employers who successfully defeat a claim for unpaid minimum wages or overtime may not recover attorney's fees.

The California Supreme Court took this case to decide when, if ever, a party prevailing on a section 226.7 action for an alleged failure to provide meal or rest breaks may be awarded attorney's fees. Their answer - never! The Court concluded that neither fee-shifting provision of sections 218.5 or 1194 applied to section 226.7 actions. The Court concluded that such actions are governed by the default American rule on attorney's fees - each side must cover its own attorney's fees.

This is a good decision for employers as it could have a deterrent effect on plaintiffs' counsel, who now know they can not recover their fees even if successful in a section 226.7 action for allegedly missed meal or rest breaks.