Hold the Pickle—and the Meal Break: California Supreme Court Holds that Healthcare Workers May Voluntarily Waive Second Meal Period Even When Shifts Last More Than 12 Hours

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In a decision that facilitates flexible staffing practices for healthcare employers, the California Supreme Court recently held that healthcare workers can legally waive a second meal period when they work shifts longer than 12 hours. *Gerard v. Orange Coast Mem'l Med. Ctr.*, 430 P.3d 1226 (Cal. 2018). The high court's decision finally and conclusively resolves a contentious and technical dispute over labor enactments that had been the subject of several prior appellate rulings. See our prior discussion re *Gerard II* here.

Plaintiff healthcare workers alleged that their hospital employer had violated California Labor Code section 512(a) by allowing waivers of second meal periods when they worked shifts longer than 12 hours.

Defendant employer argued that such waivers were expressly allowed by Section 11(D) of Industrial Welfare Commission Wage Order No. 5, which creates an exception allowing healthcare employees to voluntarily waive the second meal period on shifts over 12 hours. (Nothing in the *Gerard* case addressed the first meal period requirement, also set forth in section 512(a), which mandates a meal period of at least 30 minutes for an employee who works more than five hours per day.)

In *Gerard*, the high court resolved this conflict by affirming the validity of Wage Order No. 5 and holding that it did not violate the Labor Code. To reach that decision, the Court's opinion wades through a morass of legislative and administrative provisions, as well as the prior appellate decision and an intervening statutory

amendment. To reiterate, the core dispute was between, on the one hand, Labor Code section 512(a) which expressly allows voluntary waivers of second meal periods for employees who works shifts of 8 but ***no more than 12 hours*** and, on the other hand, Section 11(D) of Wage Order No. 5 which creates an express exception for healthcare employees that allows such waivers, even if the employee works ***more than 12 hours***.

The Court carefully explained the relevant chronology, emphasizing that the Industrial Wage Commission (IWC) ***adopted*** Section 11(D) of Wage Order No.5—the provision which permits second meal period waivers in shifts longer than 12 hours—***in June 2000*** in accordance with the Labor Code enactments then in effect. That timing is dispositive because it means the Legislature's September 2000 enactment of Senate Bill No. 88 (now codified as a portion of Labor Code section 516(a)) did not impact the legal effect of Section 11(D), which had been adopted three months earlier. Senate Bill No. 88 prospectively limited the IWC's authority to allow meal periods and other conditions that departed from Labor Code Section 512(a)—i.e., the statute that prohibits second meal period waivers in shifts longer than 12 hours. (On this issue, the Court of Appeal acknowledged in its 2017 decision (*Gerard II*) that it had erred in its 2015 decision (*Gerard I*) by applying Senate Bill No. 88 retroactively to invalidate Section 11(D).)

The Supreme Court agreed with the Court of Appeal that the IWC acted within its authority to enact Section 11(D) and that the subsequent enactment of Senate Bill No. 88 was irrelevant. Following that conclusion, the Court dispatched plaintiffs' remaining contentions. It rejected plaintiffs' efforts to ascribe a retroactive effect to Senate Bill No. 88, as well their argument that the Legislature did not intend to allow waiver of second meal periods by employees who work shifts longer than 12 hours. It noted that the Legislature, since 2000, had amended section 512(a) to exempt other classes of employees from the prohibition against waiving second meal periods on shifts or more than 12 hours (*viz.*, unionized and higher-wage employees working in construction or security services or as commercial drivers). None of those efforts reflect any attempt to alter the IWC's preexisting and comparable exemption for healthcare workers. Nor did the Supreme Court find that Senate Bill No. 327— which was enacted in response to *Gerard I*—in any way changed the effectiveness of Wage Order No. 5, which, as stated, was validly adopted back in 2000.

After years of litigation, the *Gerard* case is final. The *Gerard* decision is a clear win for both employers and employees in the healthcare industry. The upshot is that hospitals and other healthcare employers and their employees have greater scheduling flexibility to ensure patient care and to accommodate workers. But, in light of the highly regulated environment, those employers are well advised to consult their employment counsel to ensure the legality of their policies and practices.

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