Employer's Rounding Policy Upheld and
Employees Lose Their Class Action & PAGA Lawsuit

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On December 10, 2018, the Fourth Appellate Court decision in *Kennedy Donohue v. AMN Services, LLC* ("AMN") was certified for publication and it brings good news for California employers who use a neutral rounding timekeeping system. The case involved a class action and PAGA action brought by Ms. Donohue on behalf of nurse recruiters who worked for AMN. Ms. Donohue claimed that AMN had violated various California wage and hour laws and brought claims for: 1) failure to provide meal and rest periods in violation of Labor Code sections 226.7 and 1197.1; 2) failure to pay overtime and minimum wage in violation of Labor Code sections 510 and 1197.1; 3) improper wage statements in violation of Labor Code section 226; 4) unreimbursed business expenses in violation of Labor Code section 2802; 5) waiting time penalties in violation of Labor Code sections 201-203; 6) unfair business practices in violation of Business and Professions Code section 17200; and 7) civil penalties authorized by the Labor Code Private Attorneys General Act of 2004 (PAGA), under Labor Code section 2698 et seq.

The parties brought cross motions for summary judgment and summary adjudication and, following oral argument, the trial court granted AMN's motion for summary judgment and denied Ms. Donohue's motion for summary adjudication. Ms. Donohue timely appealed and the Fourth Appellate Court sustained the trial court's decision in favor or AMN.

Background.

AMN is a healthcare services and staffing company that recruits nurses for temporary contract assignments. AMN employed Ms. Donohue as a nurse recruiter in its San Diego office between September 2012 and February 2014. Ms. Donohue earned a base hourly rate plus commissions, bonuses, and other forms of nondiscretionary performance-based pay. During the time AMN employed Ms. Donohue, AMN used a computer-based timekeeping system known as "Team Time" for all nonexempt employees, which included nurse recruiters. Recruiters like Ms. Donohue used Team Time at their desktop computers by clicking on an icon to open the program each day, after which they usually made four entries: they would "punch in" for the day, "punch out" when they took a meal break, punch back in when they returned from their meal break, and punch out at the end of the day.

The Team Time program rounded recruiters' punch times—both punch in and punch out—to the nearest 10-minute increment. To establish the proper hourly compensation, AMN would convert each 10-minute increment to a decimal (to the nearest hundredth of a minute), total the number of hours (to the nearest hundredth of a minute), and multiply the total hours by the recruiter's hourly rate. For example, all punch times between 7:55 a.m. and 8:04 a.m. would record as 8:00 a.m., and all punch times between 8:05 a.m. and 8:14 a.m. would record as 8:10 a.m., and 20 minutes would be .333 hours, which would convert to .33 hours; and 40 minutes would be .666 hours, which would convert to .67 hours.

If a recruiter believed that a recorded punch time was inaccurate—e.g., the recruiter may have worked while not clocked in or had forgotten to punch in or out—AMN's written policy allowed the recruiter to contact his or her manager, who would then notify the recruiter that his or her computer timecard had been unlocked and opened for correction by the recruiter. Recruiters did not have predetermined times during which they were required to take meal or rest breaks, but AMN had a written policy that stated that recruiters were:

> *"provided meal breaks and authorized and permitted rest breaks in accordance with California law; expected to take meal breaks as provided and rest breaks as authorized and permitted and in accordance with this policy"; and "required to accurately record their meal breaks on their time cards and to report to the Company if they are not provided with a meal break or authorized and permitted a rest break or do not otherwise take a meal break."*

The policy also provided that recruiters who work more than five hours per day are provided an uninterrupted 30 minute meal period no later than the end of the [recruiter]'s fifth hour of work. If a recruiter works more than five but no more than six (6) hours in a workday, the meal period may be waived by mutual consent of the Company and the recruiter. Further, whenever there was noncompliance with the meal period requirements—e.g., if the recruiter did not punch out to take a meal period before the end of the fifth hour of work, or if the meal period was less than 30 minutes—AMN had a policy in place to ensure what it considered an appropriate remedy.

Legal Analysis of AMN's Rounding Policy.

In California, the rule is that an employer is entitled to use a rounding policy "if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.' " (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907 (*See's Candy I*), quoting 29 C.F.R. § 785.48(b) and citing Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual (2002 rev.) §§ 47.1, 47.2 (DLSE Manual).

The Court noted that under this standard, an employer's rounding policy is "fair and neutral" if " 'on average, [it] favors neither overpayment nor underpayment' "; but such a policy is unacceptable if it " 'systematically undercompensate[s] employees' " because it " 'encompasses only rounding down.' " (*See's Candy I, supra*, 140 Cal.App.4th at pp. 901-902, 907.)

The record before the Court showed that AMN's expert analyzed the time records during the rounding period logged by 311 recruiters—time records that reflected more than 500,000 work-hours. Based on his detailed analysis, the expert testified that AMN's practice of rounding punch times to the nearest 10-minute increment resulted overall in **"a net surplus of 1,929 work hours in paid time for the Nurse Recruiter class as a whole."** As such, the expert opined: "The ten-minute rounding rule is thus neutral; in the long run, neither the employer nor the employee benefits from this policy."

In response, Ms. Donohue offered expert testimony from a statistic professor who disputed AMN's evidence and found that the Team Time system resulted in AMN failing to pay its employees for 2,631.583 hours of actual time worked. According to the expert, this amounted to $47,959.30 in unpaid compensation owed to the class. However, the Appellate Court agreed with the trial court who ruled that this evidence from Ms. Donohue's expert did not establish the existence of a triable issue of fact as to whether AMN's rounding policy was lawful, because Ms. Donohue's expert only considered the recruiters' uncompensated time as a result of "'Short Lunches'" and "'Delayed Lunches.'" The expert did not consider evidence that Plaintiffs may have gained (and, in fact, did gain) compensable work time by the rounding policy, and he necessarily did not offset the amounts of uncompensated time for which Plaintiffs were compensated but not working. To illustrate the flaw in Plaintiff's expert testimony, the Appellate Court gave the following example:

> *"For example, assume that the deadline for offering a recruiter a timely meal period is 1:00 p.m. (i.e., before the end of the fifth hour of work), but that the recruiter is not offered the meal period until 1:04 p.m. Under AMN's rounding policy, the meal period is timely because the actual punch of 1:04 p.m. is considered 1:00 p.m. Donohue's expert's testimony is that, in this example, AMN's rounding policy results in at least one violation (i.e., no meal break before the end of the fifth hour of work) and potentially second violation (i.e., if the recruiter punches back in at any time between 1:25 p.m. and 1:33 p.m., since such a punch is considered 1:30 p.m., yet the actual time of the meal period is less than 30 minutes). However, in forming his opinions, Donohue's expert failed to consider the situation where 1:00 p.m. is the deadline for a timely meal period, where the recruiter takes a meal period break at 12:55 p.m. (which is considered 1:00 p.m.) or punches back in at 1:34 p.m. (which is considered 1:30 p.m.). In both of these hypotheticals, the recruiter received credit for work and payment of wages for time during which the recruiter was on a meal period break."*

Ultimately the Appellate Court said that, on this record, AMN established that its rounding policy during the rounding period was—in the language of *See's Candy I, supra,* - "*fair and neutral on its face and . . .*
'used in such a manner that it [did] not result, over a period of time, in failure to compensate the [recruiter] employees properly for all the time they have actually worked.' "

TAKEAWAY: California employers can utilize a neutral rounding system for timekeeping purposes provided that on average, it favors neither the overpayment nor the underpayment of wages to employees. One word of caution however, is that if employers are going to adopt such a rounding system, they should conduct regular audits to ensure that the rounding of hours is in fact neutral and is not systematically undercompensating employees.

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