

A hand in a grey suit sleeve holds a white time card with a grid of columns labeled 'IN', 'OUT', 'IN', 'OUT'. Below the hand is a white clock with a black face and white numbers. The background is a blurred image of a clock face.

California Court of Appeal Clarifies Reporting Time Pay and Split Shift Premium Requirements

By Nicole Kamm

VER THE HOLIDAYS, A family arrived at the Denver airport the day after Christmas eager to catch their flight home to California and be back to work the following morning. After checking their bags and clearing security, they were greeted at the gate with the dreaded announcement that the flight had been overbooked and offers were being provided of free vouchers in exchange for being bumped to a later flight. Luckily, other more flexible passengers gave up their seats and the family was able to make it home to Burbank before sunset that evening.

Overbooking Workers

In the employment context, this similar practice of “overbooking” workers is addressed by the requirement that employers provide their employees “reporting time pay” under certain circumstances. In the past, reporting time pay was one of the most overlooked requirements in California wage and hour law. But with the continually increasing number of

wage and hour class actions, California employers are taking greater notice of this regulatory creation.¹

Reporting time pay is a form of premium pay that, like overtime or missed meal period compensation, is intended to reduce work scheduling practices that create an undue burden



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on employees. Set forth in Section 5 of the Industrial Welfare Commission (“IWC”) wage orders, the rationale behind reporting time pay is to discourage employers from intentionally overstaffing their operations and then

sending home “extra” workers without pay.

Subject to a few limited exceptions, the IWC wage orders provide that for each day an employee is required to and does report to work, but is finished less than half the “usual or scheduled” day’s work, the employer must pay the employee for half the scheduled day’s work, but not less than two hours or more than four hours pay. If the employee is required to report to work a second time, but is given less than two hours work on the second reporting, the employer must pay the employee an additional two hours of pay.

Scheduled Meetings

What if an employee is required to attend a meeting that lasts less than two hours on a day he or she is not normally scheduled to work? The Division of Labor Standards Enforcement (“DLSE”) generally has taken the position that employers are required to pay employees two to four hours of reporting time pay when they report to work for a previously scheduled meeting of shorter duration. Recently,

however, the California Court of Appeal issued a contrary decision in *Aleman v. AirTouch Cellular*, 202 Cal.App.4th 117(December 21, 2011).

In *Aleman*, a putative class of employees sought a minimum of two hours reporting time pay for attending scheduled staff meetings on days they were not otherwise scheduled to work. The meetings were noted clearly on the weekly schedule, which was posted at least four days in advance, and generally lasted from one hour to one-and-a-half hours. Rejecting the plaintiffs' claim, the Court of Appeal held that, where any work time is scheduled, reporting time pay is only owed when the employee works less than half of the expected scheduled time. In this case, the plaintiffs were scheduled and expected to work only one to one-and-a-half hours, and they worked at least half that scheduled time. Thus, the court held, no reporting time pay was owed.

In its ruling, the Court of Appeal closely analyzed Section 5 of the IWC wage orders. Section 5 states that employees are owed reporting time pay if they report for their "usual or scheduled" shift and work less than half that time. The plaintiffs in *Aleman* attempted to argue that because their usual shifts were generally longer than two hours, any time they showed up and worked less than two hours, they were entitled to at least two hours of reporting time pay. The court disagreed, holding that since the work periods at issue were pre-scheduled meetings of an established duration, they qualified within the term "usual or scheduled" day's work. The length of an employee's "usual" shift was irrelevant. Provided the employee worked at least half of the scheduled work time—whatever that length of time happened to be—reporting time pay was not owed.

The court disregarded the plaintiffs' reliance on the DLSE Enforcement Policies and Interpretations Manual, stating it was unclear as applied to the facts in this case and, regardless, the court was not bound by a DLSE interpretation.

The Facts are Critical

In another recent case, *Price v. Starbucks*, 192 Cal. App. 4th 1136 (2011), an employee was called in

on a day that he was not scheduled to work for "a talk" (i.e., to get fired). The meeting lasted approximately 45 seconds. Recognizing the employee was entitled to at least some reporting time pay, the employer paid the employee two hours of reporting time pay. The employee sued, claiming he should have been paid 3.3 hours of reporting time pay, based on the average length of his scheduled shifts, instead of two hours. On appeal, the court in *Price* held that employees are only entitled to the minimum payment of two hours of reporting time pay when they are called in to work to "attend a meeting for an unspecified number of hours," which is what the employee had received. The *Aleman* court distinguished *Price*, recognizing that in *Aleman*, the meetings were pre-scheduled and had definite start times, expected topics and durations. Unlike the unscheduled, 45-second "talk" in *Price*, the *Aleman* meetings "could only be considered scheduled work." Thus, so long as the time is scheduled and the employee works at least half the scheduled time, no reporting time pay is owed.

A further clarification was provided in *Aleman* regarding split-shift premiums. The wage orders define a "split shift" as "a work schedule, which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods." Under the wage orders, an employee who works two such separate shifts in a day is entitled to one hour of pay at the minimum wage in addition to the minimum wage for that workday. In *Aleman*, the plaintiffs occasionally worked a split shift, when they attended a meeting in the morning and then returned for a longer shift later the same day.

The company argued that it had properly paid the plaintiffs on these days because their total daily pay exceeded the minimum wage for all hours worked, plus an additional hour at minimum wage. The court agreed, noting that the wage orders only required one hour at the minimum wage to be paid "in addition to the minimum wage for that day," rather than the "regular wage" for the day. In this case, because the plaintiffs were paid an hourly rate over the state minimum wage, the surplus amount

could be used to satisfy the split-shift premium requirement.

In sum, the *Aleman* court clarified that an employee who works eight hours on a split-shift must receive minimum compensation of nine hours times the minimum wage, as opposed to eight hours their regular rate plus one hour of minimum wage. For example, assuming an \$8 minimum wage, an employee who earns more than \$72 for an 8 hour day is not entitled to receive a split-shift premium, even if he or she works a split shift. This is because they were paid a total amount equal to or greater than the minimum wage for all hours worked, plus one additional hour.

Split-Shift Premiums

As is often the case, the court left open the remaining question of what happens when an employee works less than eight hours in a workday. Nevertheless, the *Aleman* case confirms that employers need be most mindful about split-shift pay for employees whose hourly wage is at or close to the minimum wage (though, when in doubt, do the math or consult employment counsel).

In view of *Aleman* and *Price*, employers are advised to:

- clearly designate all meetings and events of short duration on employee work schedules
- indicate the precise length of the meeting
- ensure the meeting lasts at least half as long as the scheduled time
- make sure employees record the time spent attending the meeting

With regard to split-shifts, employers should make sure they are using the proper calculation to determine whether split-shift premium payments are in fact owed. 📌

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¹ The reporting time pay requirement is not currently codified in a California Labor Code section