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Sweet News on Rounding for California Employers: See's Candy Shops, Inc. v. Superior Court

By Laura Hayward

In *See's Candy Shops, Inc. v. Superior Court*, the California Court of Appeals for the Fourth Appellate District explicitly held that in California employers are entitled to use a timekeeping policy that rounds employee punch in/out times to the nearest one-tenth of an hour (a "nearest-tenth rounding policy") if the rounding policy is "fair and neutral on its face" and "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." The court adopted the standard used by both the United States Department of Labor and the California Division of Labor Standards Enforcement, bringing "sweet" news to employers who use rounding policies.

Until recently, the future of employer rounding policies had been called into doubt after a San Diego Superior Court summarily dismissed two of See's key affirmative defenses in a certified class action challenging its rounding policy. See's, like many employers, used a timekeeping policy that rounds employee punch in/out times to the nearest one-tenth of an hour (a "nearest-tenth rounding policy"). The plaintiff, a former employee, successfully filed a summary adjudication motion challenging See's defenses that its nearest-tenth rounding policy was consistent with state and federal laws permitting rounding for the purposes of computing and paying wages and overtime and that it did not deny the plaintiff or class members full and accurate compensation. Not surprisingly this caused considerable heartburn for employers with rounding policies, especially those defending rounding class actions. Now employers can rest a little bit easier because the Fourth Appellate District has upheld the use of a nearest-tenth rounding policy in California if the policy is fair and neutral on its face and does not result in a failure to compensate employees for all of the time they have actually worked.

See's Timekeeping Policies

Two of See's timekeeping policies were at issue in the case – its nearest-tenth rounding policy and a grace period policy. See's rounding policy rounded time punches up or down to the nearest tenth of an hour (every six minutes beginning with the hour mark). For example, an employee who clocked in at 7:58 a.m. would be rounded up to 8:00 a.m., and an employee who clocked in at 8:02 a.m. would be rounded back to 8:00 a.m. See's also employed a grace period policy, which allowed employees to clock in up to 10 minutes before their scheduled start time, and clock out up to 10 minutes after their scheduled end time. Employees were forbidden from working during

the grace period; rather it was time in which to socialize or use for personal activities. If an employee punched in during the grace period, and did not otherwise inform his or her manager that he or she was performing work during this time, the employee's pay was adjusted to the actual shift start/stop times. Generally, when the grace period policy applied rounding was not in effect because the time was adjusted to the actual shift start and stop times, usually whole hours. While the grace period policy was not technically at issue in the summary adjudication motion, or the appellate court's review, curiously the plaintiff devoted much of her briefing to the issues surrounding the grace period policy.

Expert Findings and Time Records

See's expert, Dr. Ali Saad, a labor economist and statistician, concluded that with respect to the entire class: (1) the rounding policy was both mathematically and empirically unbiased; (2) it resulted in a total gain of 2,749 hours for class members as a whole; and (3) did not negatively impact employees' overtime compensation. He determined that 60% of the class had a net gain, while 33% of the class had a net loss, and 7% had no change. Dr. Saad claimed that "the fact that the results came out in favor of the employees in this data is meaningless – the extremely small excess amount could have been a minutely small shortfall with a different sample of data." This was borne out by the fact that when he looked at the plaintiff's data over the class period she came out behind, but when he looked at her time over her entire employment period, she came out ahead.

The plaintiff's expert, Dr. Thomas Thompson, looked at the data and determined that the class was net underpaid by \$1.4 million due to the rounding and grace period policies. Dr. Thompson assumed that employees had in fact worked during their grace periods and were not paid for their time, unlike Dr. Saad who had separated out the grace period time adjustments.

Throughout the process the plaintiff made much of the fact that a See's "person most knowledgeable" witness testified that its time records were accurate, but that See's had later disputed this in its opposition to summary adjudication. See's had characterized this fact as "disputed" based on the view that while clockings made during the grace period accurately show when employees punch in or out, they do not show their compensable time. The plaintiff contended that this was an admission by See's that its records violate California law.

The Trial Court's Flip-Flopping

The trial court seemed unsure of how to handle rounding policies, as it continuously flip-flopped back and forth in its positions. The trial court initially issued a tentative ruling in the plaintiff's favor based in part on the court's view that See's had admitted to having inaccurate time records and failed to show that class members were compensated for all time subject to its control. But after the hearing, in which See's argued it had only admitted that employee compensation was based on its grace period policy and had presented evidence that employees did not work during the grace period, the court reversed course and held that the plaintiff had not met her summary adjudication burden to establish that class members were not compensated for all work time, and that even if she had See's showed a triable issue of fact with respect to its rounding policy affirmative defenses.

The plaintiff then filed a motion for reconsideration based in part on the *Sullivan v. Oracle* case (applying California overtime law to nonresident plaintiffs' claims). The plaintiff also submitted an expert declaration based on allegedly newly produced time records, which showed that class members had allegedly lost a total of \$1.4 million based on the rounding and grace period policies. As stated above, the plaintiff's expert assumed that employees were working during their grace periods, unlike See's expert. At the hearing the plaintiff reasserted that See's had admitted its records were inaccurate and contended that rounding was valid only in so far as an employer performed a "mini actuarial process" every two weeks to ensure that every employee received compensation for his or her unrounded time. The court granted the motion for reconsideration and granted summary adjudication as to the rounding affirmative defenses, focusing on See's supposed admission that its time records were inaccurate, and holding that See's had not rebutted the language of California Labor Code section 204 requiring payment of all wages every two weeks. The court also found that See's did not prove full payment to class members as required by the federal rounding standard. See's writ of mandate was summarily denied, but See's petitioned the California Supreme Court for review, resulting in an order that the appellate court issue an order to show cause in the matter.

The Appellate Court's Analysis

In its review the Fourth Appellate District explicitly adopted the standard used by the U.S. Department of Labor (DOL) and California Division of Labor Standards Enforcement (DLSE) for analyzing rounding policies. The court held that an employer may use a nearest-tenth rounding policy if the rounding policy is “fair and neutral on its face” and “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.” It further explained that if the employer applies a consistent rounding policy that on average favors neither overpayment nor underpayment it complies with the DOL regulation. On the other hand, if the policy systematically undercompensates employees by, for example, always rounding down, it does not comply. The Court of Appeal relied on the DLSE manual which it held, while not binding on courts, could be considered for its persuasive value. The court also relied on a federal district court case, *Alonzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1126 (C.D. Cal. 2011), that applied the DOL standard to an employee’s time-rounding challenge brought under California law, explaining that even though the parties in that case had stipulated that the DOL rounding regulation governed, the court also indicated its agreement that the federal regulation is the applicable standard under California law. The See’s court seemed swayed by the fact that a rounding practice had been long adopted by employers throughout the country and that holding otherwise would prevent California employers from adopting and maintaining rounding practices available to employers throughout the rest of the country.

The plaintiff’s main argument was that the DOL/DLSE standard is inconsistent with California Labor Code section 204, which imposes an obligation of timely payment of wages upon California employers and states that “all wages . . . are due and payable twice during each calendar month.” The plaintiff contended rounding could only be legal if employers performed a mini-actuarial process at the time of payroll to reconcile rounding with actual time punches. The Fourth Appellate District countered this argument by finding that section 204 simply pertains to the timing of payments, not to the manner in which an employer ascertains each employee’s work time. The court similarly dismissed the plaintiff’s claims under California Labor Code section 510, which provides that “any work in excess of eight hours in one workday” shall be compensated at overtime rates. Again it held that the code section had nothing to do with rounding or calculating time; rather it sets the multiplier for the rate at which overtime must be paid. The Court of Appeal further stated that whether California’s overtime rules mean a rounding rule is biased against employees is a factual issue, not a legal one. Further, the plaintiff’s reliance on *Sullivan v. Oracle* (which was instrumental in the granting of the plaintiff’s reconsideration motion) was misplaced. The court found that *Sullivan* simply stands for the proposition that any work in excess of the statutory time period must be compensated at the premium rate and that overtime laws apply to all individuals employed in the state, but does not address the issue of whether state statutes prohibit rounding unless all unrounded sums are paid on a two-week basis. In sum, the appellate court interpreted these statutes with an eye towards practicality and declined to give them the literal and far-reaching impact the plaintiff was hoping for.

Once it had adopted the DOL/DLSE rounding standard, the Fourth Appellate District applied it to the facts at issue to determine whether the plaintiff was entitled to summary adjudication on See’s affirmative defenses. The court found that the plaintiff did not meet her burden to show that See’s rounding policy did not fully compensate employees over time. It discounted the plaintiff’s expert’s conclusion of a large short-fall of employee compensation. The record was devoid of any evidence supporting the expert’s assumption that employees worked during the grace period.

The Fourth Appellate District thus ordered the trial court to deny summary adjudication on See’s rounding affirmative defenses.

Lessons Learned for California Employers

- It is important to remember that this was not a case where the employer was asking the court to find its policy lawful as a matter of law; rather the employer was opposing the plaintiff’s motion for summary adjudication and asking the court to allow it to litigate its affirmative defenses at trial. Thus, while employers can rest somewhat easier, knowing that a rounding policy is not a *per se* violation of California’s wage laws, this decision does not validate the blanket use of rounding policies. The appellate court only addressed a one-tenth rounding policy. Further, it expressed that rounding policies must meet the “facially fair and neutral” standard, and may not over time fail to compensate employees for all of the time that they have worked. Employers should review their timekeeping policies to ensure that they are facially neutral and do not favor the employer by, for example, only rounding down. Employers should also review their tardiness and disciplinary policies to ensure that these policies do not allow rounding when it benefits the employer, but not the employee (*i.e.*, use rounded times to determine tardiness rather than clock-in times when it benefits the employer).

- The Fourth Appellate District provided no further clarity as to what period of “time” is the appropriate one over which to measure the impact of a rounding policy – *i.e.*, is it the employee’s entire employment, just the statutory period, or *any* period of time? The court also refused to give guidance on how to deal with a class in which some of the members may have endured a net loss during the class period, stating only that “it is questionable whether those employees would be entitled to a recovery for these wages *if See’s* establishes that *over time the rounding policy is neutral.*”
- The use of experts should not be underestimated in defending against wage and hour class actions, particularly in rounding cases where employee time and pay records are at the forefront. Here *See’s* expert disagreed with the plaintiff’s expert over how to analyze the data, creating a material fact leading to the court’s decision to deny summary adjudication. However, experts can also be used in other fashions. Consulting experts can help analyze the impact of a rounding policy and assess whether there is potential liability. In some instances, where expert findings are compelling, there may be a benefit to sharing them with your opponent (while agreeing to preserve all privileges) in an attempt to resolve the case without lengthy litigation.
- The appellate court’s interpretation of the Labor Code provisions at issue in the case tended more towards a common sense reading of statutes rather than a literal approach as pushed by the plaintiff. The court was careful not to expand the statutes beyond the purpose for which they were enacted. This approach is encouraging and makes it even more important to review the legislative history in cases where either party is asking the court to interpret a statute’s reach, such as paystub claims brought under Labor Code section 226.

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