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# IDAHO

## EMPLOYMENT LAW LETTER

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### EMPLOYER LIABILITY

## Cat's-paw liability—Idaho federal court tackles the new cat's meow

by Jason R. Mau  
Parsons Behle & Latimer

In 2011, the U.S. Supreme Court formally adopted a legal doctrine commonly known today as the “cat’s-paw” doctrine. The doctrine is named after the Aesop’s fable about a monkey who induces a cat to swipe chestnuts roasting on a fire. The cat burns its paw in the process, and the monkey makes off with the chestnuts, leaving the cat with nothing. Applied to employment law, the doctrine aims to prevent innocent managerial decision makers from being manipulated by a lower-level employee into carrying out illegal acts.

Specifically, the legal doctrine involves a determination of whether the discriminatory or retaliatory intent of a lower-level employee is sufficient to impute liability to an employer when an adverse job action is taken. If a court finds that a non-decision-maker’s aim of unlawfully discriminating or retaliating against a protected employee has a causal link with an adverse employment action, the employer will be held liable for the non-decision-making employee’s discriminatory or retaliatory animus, even though the ultimate decision maker had no knowledge of the employee’s protected status or the subordinate’s illegal conduct.

The U.S. 9th Circuit Court of Appeals (whose decisions apply to Idaho employers) has further developed the cat’s-paw doctrine over the past few years to require an employee to show, at a minimum, that a

non-decision-maker set the adverse employment action in motion. If so, the employee may be able to show that any allegedly independent adverse decision made by the employer wasn’t reached through an independent decision-making process but was influenced by the biased subordinate. Many employees have since taken advantage of the cat’s-paw theory of liability.

The Idaho federal district court has recently been asked to apply the cat’s-paw doctrine in three local cases, further indicating that this theory of liability is becoming an important strategy for discharged employees. You need to be aware of this development and make sure your ultimate decision makers do more than just rubber-stamp a lower-level supervisor’s decision or blindly rely on notations in a personnel file before making an adverse employment decision.

### Cat’s-paw theory in the 9th Circuit

The U.S. Supreme Court first reviewed the cat’s-paw theory in a case involving the Uniformed Services Employment and Reemployment Rights Act (USERRA). At the time, courts had mainly applied the doctrine in cases brought under Title VII of the Civil Rights Act of 1964. Since then, its reach has extended to most federal laws prohibiting discrimination and retaliation. In the 9th Circuit, the cat’s-paw theory was first analyzed in a retaliation case

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## AGENCY ACTION

**NLRB launches ADR pilot program.** The National Labor Relations Board (NLRB) announced in July that it is launching a new pilot program to enhance the use of its alternative dispute resolution (ADR) program. The pilot program is intended to increase participation opportunities for parties in the ADR program and help facilitate mutually satisfactory settlements. Under the new program, the NLRB's Office of the Executive Secretary will proactively engage parties with cases pending before the Board to determine whether their cases are appropriate for inclusion in the ADR program. Parties also may contact the Office of the Executive Secretary and request that their case be placed in the ADR program. There are no fees or expenses for using the program.

**Acosta praises action to create workforce advisory board.** U.S. Secretary of Labor Alexander Acosta spoke in support of President Donald Trump's July 19 Executive Order establishing the National Council for the American Worker and the American Workforce Policy Advisory Board. "President Trump's Executive Order represents a national commitment to helping Americans up-skill and reskill to embrace rapidly changing job demands," Acosta said. "A blend of traditional and workplace lifelong learning is required for a nimble workforce ready to succeed in overcoming any challenge." The council is made up of senior administration officials and is charged with developing a strategy for training and retraining workers needed for high-demand industries.

**DOL cites court ruling in rescinding Persuader Rule.** The U.S. Department of Labor (DOL) in July rescinded the 2016 Persuader Rule, which the department said exceeded the authority of the Labor-Management Reporting and Disclosure Act. The DOL said the rule impinged on attorney-client privilege by requiring confidential information to be part of disclosures. Also, the DOL noted that a federal court had decided the rule was incompatible with the law and client confidentiality.

**DOL announces training grants to help homeless veterans reenter workforce.** The DOL in July announced the award of 163 Homeless Veterans' Reintegration Program grants totaling \$47.6 million. This funding will provide workforce reintegration services to more than 18,000 homeless veterans. Funds are awarded on a competitive basis to state and local workforce investment boards, local public agencies, nonprofit organizations, tribal governments, and faith-based and community organizations. Homeless veterans may receive occupational skills training, apprenticeship opportunities, and on-the-job training as well as job search and placement assistance. ❖

under the Age Discrimination in Employment Act (ADEA), but it has since been analyzed in multiple contexts throughout the circuit.

Early decisions in the 9th Circuit were considered relatively employee-friendly, simply focusing on whether the subordinate employee's animus tainted an independent investigation. At the time, the 4th Circuit took the opposite position, strictly requiring that the biased employee be a supervisor principally responsible for work-related decisions affecting the employee. Several circuits adopted a more moderate burden of proof, requiring a causal connection between the subordinate employee's animus and the ultimate adverse action.

The 9th Circuit eventually migrated toward that intermediate burden of proof by developing elements related to the causal connection an employee must establish to prove cat's-paw liability. Generally, the employee must first show that the non-decision-making employee performed an act that was motivated by discriminatory animus (e.g., reporting the employee to upper management for an infraction without a sufficient basis because he has a discriminatory bias based on the employee's race, gender, religion, or some other protected characteristic). The employee must then show the act was intended to cause an adverse employment action, and it was the proximate cause of the adverse action. Again, using our example, the non-decision-making employee must have intended for the groundless report to lead to an adverse action such as termination, and "but for" the report, the employee would not have been terminated.

Cat's-paw cases in the 9th Circuit haven't been limited to those in which a subordinate falsely reports an employee's misconduct. The court has also been presented with cases based on a subordinate concealing relevant information from a decision maker or skewing recommendations to higher-ups, based on a discriminatory or retaliatory animus.

## Idaho decisions

In one cat's-paw case in Idaho, a former employee filed a lawsuit in federal court against Edward Jones and its Idaho Falls brokerage, claiming the company had discriminated and retaliated against her because of her religion and disability. Her employment was terminated after she walked out of the office following a disagreement with her local supervisor during a performance review. The decision to terminate her employment ultimately came from Edward Jones' national associate relations (AR) department after the supervisor reported the incident.

Edward Jones attempted to get the former employee's claims dismissed without a trial on a motion for summary judgment, arguing it had a legitimate nondiscriminatory reason for its adverse decision because the individual was insubordinate when she walked out. The employer argued that the AR department relied on her insubordination when it made the decision, and there was no evidence that it acted in a discriminatory manner. The court didn't take such a narrow view but instead looked at all the circumstances surrounding the termination.

Viewing the evidence in the employee's favor, the court found it was entirely possible that the local supervisor's

discriminatory animus created a hostile environment that induced the employee's insubordination. The court reasoned that a jury could find the local supervisor had set in motion the AR department's independent proceeding that led to the adverse action. Had the supervisor not caused the employee to walk out of the meeting, the AR department wouldn't have had a reason to determine whether it should terminate her employment.

The court pointed to previous reports about the employee's medical conditions that the local supervisor had provided to AR, his critical remarks about her mental state, and his alleged comments about her religion, all of which could show the supervisor's discriminatory bias. The court determined there was a genuine issue of fact about whether the supervisor's bias had influenced

AR's decision, and the former employee's case was free to move forward.

A more recent Idaho federal case in which the cat's-paw doctrine played a part was filed against Lemhi County. A former employee who was the first woman to hold a position at the county's landfill filed several claims related to her allegations that she was continually harassed by her coworkers because of her gender. During her employment, she was investigated by the county commissioners for falsifying time cards, a charge she claimed was based on false accusations by her coworkers. The commissioners eventually determined that she had falsified the time cards and fired her.

The county sought to have the employee's claims dismissed, arguing she couldn't produce sufficient evidence

## QUESTION CORNER

### Preemployment inquiries that may discriminate

by Jason R. Mau  
Parsons Behle & Latimer

**Q** *Most of our positions require a U.S. Department of Defense (DOD) security clearance. To get a DOD security clearance, an employee must be a U.S. citizen. Is it legal for us to require applicants to note on our employment application whether they are U.S. citizens?*

**A** Generally, the Immigration and Nationality Act (INA) prohibits you from asking whether an applicant is a citizen before you make an employment offer. However, the INA does permit such an inquiry if citizenship status is required for compliance with a federal regulation or contract.

**Q** *Our company would like to run background checks on applicants for certain positions. Is that OK, or do we have to run a background check for every job at the company?*

**A** Federal law doesn't prohibit you from limiting background checks to certain positions if you consistently run the checks based on job requirements. You may not single out applicants for background checks based on federally protected characteristics such as race, age, national origin, religion, or sex.

**Q** *Is there a statute of limitations for sexual harassment complaints? For example, if an employee brings forth a complaint from many years ago, are we obligated to investigate?*

**A** Although an employer will not be directly liable under the law for an isolated incident that occurred

many years ago, a past incident may be relevant to demonstrating a hostile work environment for purposes of a later complaint if other employees have been subjected to related harassment. Regardless of the time limits in the law or whether it is specifically covered by your workplace policies or a collective bargaining agreement, you should take every sexual harassment complaint very seriously and respond with prompt and effective remedial action to ensure that employees are working in an environment free from discrimination.

**Q** *We are moving from a paper to an electronic time card system. Our senior management team wants all exempt personnel to log in and out of the new system. In other words, they want to track exempt employees' time. Would that eliminate the exemption and open us up to liability for overtime?*

**A** The Fair Labor Standards Act (FLSA) doesn't specifically prohibit employers from requiring exempt employees to track their time. The fact that an employee uses an electronic timekeeping system wouldn't, by itself, eliminate the exemption.



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to prove that her discharge was due to gender discrimination because she was terminated for performance issues, including falsifying her time cards. The employee responded that any performance issues were fabricated by her coworkers as a pretext, or excuse, to have her fired. The court applied the cat's-paw doctrine to find that a jury could reasonably determine, based on the disputed facts, that the ultimate decision maker took an adverse employment action in reliance on information provided by coworkers who displayed gender animus, and the coworkers' animus could be imputed to the county. The court therefore allowed the employee to pursue her gender discrimination claims against the county.

In another recent case, a lower-level supervisor's alleged racial bias toward a Hispanic employee didn't lead to cat's-paw liability for the city of Idaho Falls after the employee was discharged for misconduct. The employee argued that his direct supervisor's deep animus toward Hispanic people should be imputed to the city and its parks and recreation director, who made the decision to discharge him. The employee's cat's-paw argument was unsuccessful because he couldn't show that his direct supervisor had any influence over the decision to fire him. The parks and recreation director's ultimate decision was completely independent from any involvement by the lower-level supervisor and was based solely on coworkers' complaints about the employee's misconduct.

### **Other developments**

The cat's-paw doctrine is still relatively new in the legal landscape. Despite the Supreme Court's adoption of the doctrine, many crucial issues remain undeveloped or are still being analyzed inconsistently among the federal circuits. The issues that haven't been consistently analyzed and may require further instruction from the high court include:

- Whether a lower-level employee must hold some type of supervisory role before liability may be imputed to the employer or whether an employer might be held liable for illegal conduct by any employee; and
- The extent to which an employer's independent investigation will shield it from, or provide an affirmative defense for, any discriminatory or retaliatory behavior by subordinate employees.

Unfortunately, as the case from Lemhi County illustrates, we've seen some inconsistency in Idaho on the first issue. In allowing the case to move forward, the court reviewed the conduct of the employee's coworkers, including some of her subordinates, rather than relying only on actions taken by supervisory employees.

It's quite telling that the Supreme Court's cat's-paw case included a concurring opinion warning that its adoption of the doctrine could open the door to employers being found liable for innocently accepting negative

information provided by low-level employees as part of an adverse employment decision. That concern seems to have perfectly foretold the current situation and illustrates the point that employers can no longer rely on the sincerity or honesty of ultimate decision makers if biased recommendations or reports have tainted the process. In fact, courts in the 2nd Circuit have recently found that an employer may be liable under the cat's-paw doctrine for innocently relying on information provided by any low-level employee, not just a lower-level supervisor.

### **Bottom line**

Until we have more guidance on just how far the cat's-paw doctrine reaches, you should thoroughly review all the evidence against an employee before making any adverse employment decisions. Here are some practical steps you can take to reduce your potential cat's-paw liability for discrimination or retaliation claims:

- At a minimum, you should conduct a sensible inquiry into all significant adverse employment actions before implementing them and seriously consider whether any evidence offered about the employee may be based on a discriminatory or retaliatory motive. Extra steps may be required to determine whether any coworkers provided information about the employee or were involved in the investigation that led to the decision, and whether there is any indication that anyone connected to the decision harbored animosity toward the employee.
- If the employee offers credible evidence that biased motives or false factual conclusions were involved, you should carefully determine whether those motives or conclusions stem from discrimination or retaliation based on the employee's protected characteristics.
- Finally, if you rely on coworkers to establish a basis for an adverse employment action, document all of your investigative steps because they may become critical evidence to demonstrate that your company acted reasonably.

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### **SUPREME COURT**

## **The end of the Kennedy era**

*For the past 20 years, Anthony Kennedy has decided the most important issues in America. An early protégé of Justice Antonin Scalia, Kennedy was appointed by Ronald Reagan as a conservative choice for the U.S. Supreme Court. At first, he voted with the conservative bloc more than 90 percent of the time and remained solidly conservative on criminal justice issues throughout his judicial tenure.*

But as often happens with Supreme Court justices, Kennedy became a centrist swing vote. He joined Justices Sandra Day O'Connor and David Souter in protecting abortion rights and taking a nuanced view of affirmative action. He wrote the opinion that solidified the right to same-sex marriage.

Kennedy retired July 31, 2018. Nominated to replace him is Judge Brett Kavanaugh. Though there will be a loud fight in the Senate, expect Kavanaugh to be confirmed. He is a Yale graduate who clerked for several judges, worked for the White House, served under the solicitor general, and has a long track record on the influential U.S. Court of Appeals for the District of Columbia Circuit. Absent some personal revelation yet to come, it's hard to see him getting derailed.

## A peek at the Court's future

So how would a Justice Brett Kavanaugh change the employment law landscape of the Supreme Court? He is known to follow the originalist and literalist theory espoused by Justice Scalia, and his writings reflect a narrow and strict reading of the law. More than anything else, he shows a pragmatic bent that often defies political labeling.

Two discrimination cases show Kavanaugh's employee-friendly side. In the race discrimination case of *Ayissi-Etoh v. Fannie Mae*, the question was whether a single use of the "n" word could create a hostile work environment. He wrote a ringing concurring opinion, quoting case law, Equal Employment Opportunity Commission (EEOC) compliance manuals, and *To Kill a Mockingbird* to conclude that a single use of that word can create a hostile work environment.

In another discrimination case, *Ortiz-Diaz v. United States HUD*, Kavanaugh is credited with moving the appellate panel to find a violation of Title VII of the Civil Rights Act of 1964 when an employer refused to provide a "lateral transfer" because of race or gender. His concurring opinion was expansive on what constitutes an "adverse employment action," again taking a practical approach in finding for the employee.

In an analysis that makes it easier to present a claim of discrimination, Kavanaugh is critical of the classic *McDonnell Douglas* test, which requires an employee to first set forth a *prima facie* (minimally sufficient) case and then prove the employer's explanation for its actions is unworthy of credence. Kavanaugh would ignore the *prima facie* showing and go straight to the bottom line: Once an employer explains its conduct, the case goes straight to whether that was the actual reason or a cover-up for discrimination. However, that shouldn't be seen as a proemployee ruling, but more of a pragmatic view of what the *McDonnell Douglas* test is all about.

Kavanaugh used that same practical approach in vacating a National Labor Relations Board (NLRB) order that found it unlawful for a phone company to prevent employees from wearing prounion T-shirts saying "Inmates" and "Prisoner of AT&T" on the job. The opening sentence of his opinion reads, "Common sense sometimes matters in resolving legal disputes."

In another case, Kavanaugh dissented from the holding that people who are not legally permitted to work in the country



## WORKPLACE TRENDS

**Survey finds more than half of workers open to new job opportunities.** Recruitment firms Accounting Principals and Ajilon released results of a new survey in July exploring job search trends among more than 1,000 U.S. full-time workers in sales, office, and management/professional occupations. The survey found that 25.7% of respondents are actively seeking new job opportunities and that 55.5% are passively open to new job opportunities. The survey found that salary is the most important factor respondents consider when deciding to accept a job offer. The survey also found that 43.2% of respondents would be enticed to leave their company if another one offered a better salary or pay. That rate is highest among respondents ages 18 to 25, while respondents age 55 and older are least likely to leave for better pay.

**Research finds counteroffers often ineffective.** Research from staffing firm Robert Half suggests that offering higher salaries to workers who announce they're planning to quit for a better job may not be effective in the effort to hold on to top talent. Instead, counteroffers may serve only as a stopgap retention strategy since employees who accept a counteroffer typically end up leaving the company in less than two years. The primary reasons leaders said they extend counteroffers are to prevent the loss of an employee's institutional knowledge and to avoid spending time or money hiring a replacement. "Counteroffers are typically a knee-jerk reaction to broader staffing issues," said Paul McDonald, senior executive director for Robert Half. "While they may seem like a quick fix for employers, the solution is often temporary."

**Study finds organizations confident but unprepared for crises.** Many organizations overestimate their ability to deal with a crisis despite their awareness of the increasing threat of emergencies, according to Deloitte Global's 2018 crisis management survey. The survey, "Stronger, fitter, better: Crisis management for the resilient enterprise," found that nearly 60% of respondents believe organizations face more crises today than they did 10 years ago, yet many overestimate their ability to respond. The study's researchers surveyed over 500 senior crisis management, business continuity, and risk executives about crisis management and preparedness. The research found that 80% of organizations worldwide have had to mobilize their crisis management teams at least once in the past two years. Cyber and safety incidents in particular have topped companies' crises (46% and 45%, respectively). The study says that being ready significantly reduces the negative impact of a crisis, particularly if senior management and board members have been involved in creating a crisis plan. ❖



## UNION ACTIVITY

**Farmworkers union supports petition for heat protection.** The United Farm Workers union is supporting a petition drive calling on the Occupational Safety and Health Administration (OSHA) to issue a national heat protection standard. The union announced in July that the petition marks the launch of a national campaign to raise awareness around climate change's impact on the health and safety of workers and other vulnerable populations and advance standards to prevent injuries and deaths from outdoor and indoor heat stress. The union's statement says that heat is the leading weather-related killer in the United States and that climate change is resulting in more frequent days of extreme heat.

**AFL-CIO voices support for Dodd-Frank.** AFL-CIO President Richard Trumka issued a statement in July supporting the Dodd-Frank Wall Street Reform and Consumer Protection Act on the eve of the law's eighth anniversary. He warned against attacks on the law from corporate CEOs. "Attacks in the mission to undo protections for working people are coming from all directions," Trumka said. "At the center of attacks is the egregious effort to dismantle the Consumer Financial Protection Bureau, highlighted by the [U.S.] Supreme Court nomination of Judge Brett Kavanaugh, who has vehemently opposed it. This watchdog agency has protected working people from dangerous financial products and returned more than \$12 billion to ripped-off consumers."

**Unions speak against Kavanaugh nomination for Supreme Court.** President Donald Trump's July nomination of Brett Kavanaugh for a seat on the U.S. Supreme Court sparked a wave of criticism from union interests. "Judge Kavanaugh routinely rules against working families, regularly rejects employees' right to receive employer-provided health care, too often sides with employers in denying employees relief from discrimination in the workplace and promotes overturning well-established U.S. Supreme Court precedent," said AFL-CIO President Trumka. Mary Kay Henry, president of the Service Employees International Union, also criticized the nomination: "With his nomination of Judge Kavanaugh, President Trump has doubled down on rhetoric and policies that tilt our country further towards billionaires and greedy corporate CEOs, and away from all working people, whether they are white, black or brown."

**Education unions fight orders affecting bargaining.** The National Education Association and the Federal Education Association joined a "national day of action" dubbed #RedforFeds in July that coincided with a federal court hearing to challenge the Trump administration's Executive Orders affecting bargaining rights of federal workers. A coalition of 13 unions representing 300,000 federal workers sued the Trump administration, claiming the orders violate government workers' rights. ❖

could be "employees" under the National Labor Relations Act (NLRA): "An illegal immigrant worker is not an 'employee' under the NLRA for the simple reason that . . . an illegal immigrant worker is not a lawful 'employee' in the United States."

## Bottom line

At age 53, Brett Kavanaugh is likely to influence our nation even longer than Justice Kennedy has. We can only begin to list the questions he will face. Is sexual orientation covered by Title VII? Do job applicants have rights under the Age Discrimination in Employment Act (ADEA)? Can an employer use past salary as a factor in making a job offer? Where will the line be drawn between an employee's right to privacy and an employer's right to protect and control its workplace? How far can casual labor agreements erode traditional employment rights and benefits?

In the great tradition of our Supreme Court, we maintain the hope and belief that Kavanaugh—or whoever is appointed—will rise to the task of making those important decisions. ❖

## EMPLOYEE RIGHTS

### New technologies create new employee privacy issues

*Unless you work for a company that's very small or very low-tech by nature, chances are, one of your biggest challenges is keeping up with technology. If your competitors are taking advantage of the many new technological advances that promote efficiency and productivity while you're stuck in 1999, your business will struggle to compete.*

*Yet many new technologies, while providing a business advantage, have the potential to violate your employees' privacy rights if you don't implement them in a careful and thoughtful manner. From offering online benefits enrollment to encouraging the use of fitness trackers as part of your wellness program, you are asking employees to trust you with their personal information. Yet too many employers give little thought to privacy until they're forced to by concerned employees or—worse yet—some sort of breach occurs.*

*For example, employers are increasingly using GPS tracking software, apps, or devices to monitor the progress of delivery drivers, truckers, and other employees who travel from one location to another as part of their regular duties. There are a number of reasons you might want to do that—from tracking mileage to providing customers with updates on the status of their deliveries or an estimated time of arrival for a service call. Other employers use biometric identifiers (such as fingerprints, facial recognition, and even retinal scans) for logging in to systems and accessing secure facilities. Even employee ID cards can be used to track and gather information about employees, including their location and speech patterns (if you don't believe us, google "Humanyze").*

### Legal concerns

Employers considering the use of new technologies should proceed with caution. For the most part, the law is way behind the times when it comes to new technology and how it affects

employee privacy. Currently, the two applicable federal laws are the Electronic Communications Privacy Act (ECPA) and the Health Insurance Portability and Accountability Act (HIPAA). This article focuses on technologies that aren't covered by either of those or any other federal law.

While federal laws have fallen behind and are unlikely to catch up anytime soon, employee privacy has long been the subject of litigation under the common law (nonstatutory law) in state courts. States also are more likely to have laws governing the use of new technologies, including biometric information (Illinois, Texas, and Washington), GPS tracking (quite a few states address this), and employer monitoring/access to employees' social media accounts (about half of the states have laws on this).

### ***Steps you should take***

Because there is no overarching federal law and state laws vary so widely, it's extremely important to seek legal advice whenever you are collecting or accessing employees' personal information. However, there are some key steps you should follow in most situations:

- (1) Analyze the privacy implications *before* implementing new software or technologies that could collect sensitive information about employees. Think broadly about the information you could gather if you wanted to—or that employees might think you're gathering. For example, if you ask employees to download a secure app to access their work e-mail on their personal phones, they might fear you're getting access to other information on their phones as well. If you offer them a wearable device as part of your wellness program, they might think you're monitoring their heart rate. While these things might sound ridiculous, they are actual concerns employees have raised in the past couple of years.
- (2) Pay close attention to state law, especially if you have locations in different states. But don't focus only on state statutes because the boundaries between legitimate employer actions and employee privacy have historically been set by the courts (i.e., through case law).
- (3) Develop a written policy describing the technology, how it is to be used, what employee information may be gathered, and how you intend to protect it from unauthorized disclosure.
- (4) Train all employees who will be gaining access to personal information on the appropriate handling, use, and protection of the information.
- (5) Consider getting signed consent from employees before asking them to use any new technology that will gather personal information (such as biometric identifiers) or track their activities (such as GPS apps or devices).

- (6) Rinse and repeat with each new technology you implement. ❖

### **BREAKS**

## **Employee fails at thinking outside the bun in suit against Taco Bell**

*Taco Bell permits employees to buy a reduced-price meal but requires them to eat the meal in the restaurant. Does that turn what would otherwise be an unpaid meal break into paid time? No, according to a recent decision from the 9th Circuit.*

### ***Background***

California law requires employers to provide meal and rest breaks to all nonexempt employees after a certain number of hours worked. Meal breaks can be unpaid so long as they are at least 30 minutes and the employer relinquishes all control over the employees during that time. If the employer retains control, the meal period is on-duty time and must be treated as time worked. In addition, California law imposes a penalty of one hour of pay for each missed meal and rest break.

Taco Bell provides compliant meal and rest breaks for its California employees. In addition, it offers reduced-price meals employees can purchase. However, if employees choose to purchase a reduced-price meal, Taco Bell requires that they eat it on the premises (to prevent them from purchasing food at a reduced price and giving it to someone else).

One Taco Bell employee filed a class action lawsuit against the company claiming, among other things, that by requiring employees to eat the reduced-price meal in the restaurant, Taco Bell had exercised control over the workers and therefore was required to pay them for that time and pay a penalty for the "missed" meal break. The trial court tossed the lawsuit, and the employee appealed to the 9th Circuit, which affirmed that the claim was properly dismissed.

### ***Court's reasoning***

The 9th Circuit began by pointing out that it was undisputed that except for the condition on eating reduced-price meals, Taco Bell's meal and rest break policy complied with California law. Taco Bell had relieved the employees of all duties during their meal breaks and exercised no control over their activities. The employees were free to use the 30 minutes for whatever they wanted, they could go wherever they wanted, and they could buy a full-price meal and eat it anywhere they wanted. The only restriction Taco Bell imposed was that employees had to eat on the premises if they opted for a reduced-price meal. And the restaurant didn't urge or encourage



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employees to use that benefit, much less pressure or coerce them to do so.

Thus, the Taco Bell circumstances weren't remotely similar to the cases the employee relied on in which employees were "on call" during their breaks and subject to being called back to duty. In one of those cases, employees had to carry a device during the break so the employer could reach them. In another case, employees were forbidden from conducting any personal business while being on call.

By contrast, the 9th Circuit pointed to other California cases that distinguished between situations in which the employer required employees to ride to work in a company vehicle (in which case the travel time must be considered work time) and situations in which the employer simply made transportation available but the employees weren't required to use it. In the latter situation, even if the employees accepted the employer's offer to ride to work in the company's vehicle, the travel time didn't need to be treated as work time.

In closing, the 9th Circuit noted the perverse result of ruling in the employee's favor: Taco Bell's offer of a reduced meal, intended as a benefit to the employees, could simply be discontinued. *Rodriguez v. Taco Bell Corp.*, Case No. 16-15465 (9th Circuit, July 18, 2019).

### ***Takeaway for all employers***

Although Taco Bell prevailed—as well it should have—this decision is a reminder that California's law on meal and rest breaks is very demanding. Other states have their own meal and rest break requirements that are also frequently the subject of employee class action lawsuits. In all those states, employers are wise to have clearly stated meal and rest break policies that make it clear that employees are required to take the breaks and ensure they are completely relieved of work duties and can use their break time as they wish. In addition, employers should take steps to be sure those policies are followed. ❖

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