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December 16, 2019

Via TrueFiling

Hon. Dennis M. Perluss, Presiding Justice
Hon. Laurie D. Zelon, Associate Justice
Hon. Gail Rudeman Feuer, Associate Justice
Court of Appeal
Second Appellate District, Division Seven
300 S. Spring St., Floor 2, North Tower
Los Angeles, California 90013

Re: *David Cacho, et al. v. Eurostar, Inc.*,
Case No. B284827 (Filed Dec. 4, 2019) –
Request for Publication Pursuant to Appellate Rule 8.1120(a)

Dear Presiding Justice Perluss,
Associate Justice Zelon, and
Associate Justice Feuer:

The California trial courts are flooded with thousands of wage and hour class actions primarily alleging violations of meal and rest period requirements.[1] In these thousands of cases, the trial courts regularly deal with the following rest and meal period issues: (1) If a meal or rest period written policy is lawful, but does not state every required element of law with respect to meal or rest periods, does the omission of certain requirements support and/or mandate class certification?; (2) If an employer's written break policy on its face is

[1] This is not hyperbole. It is general knowledge among the employment law bar that multiple firms bringing such cases each have filed hundreds of meal/rest period class actions.

unlawful, but the employer's practice has not been to apply the unlawful portion of the policy to employees, does the unlawful written policy mandate class certification?; and (3) Does an examination of the facts to determine whether the omitted and unlawful portions of the policy are actually followed violate the rule that the merits are not to be determined on class certification?

The bench and bar, together with our CELC Membership, need answers to these questions. Your decision, issued unpublished, provides answers these questions. We quote from the introduction to your opinion:

> "This case presents the question whether in the wake of *Brinker*, if the employer has a break policy (here, a meal break policy) that is compliant with the applicable wage order but silent as to certain requirements, does the omission of those requirements support class certification in the absence of evidence of a uniform unlawful policy or practice? Similarly, where an employer has a uniform written break policy that on its face is unlawful (here, a rest break policy), but in practice the policy has not been applied to company employees, is it nonethelsss suitable for class certification? The answer to both questions is no. Although trial courts must be wary of analyzing evidence of wage and hour violations at the class certification stage in a manner that prejudges the merits, they may properly consider the evidence to determine whether classwide liability can be established through common proof."

Slip Op. at 2.

Pursuant to Appellate Rule 8.1120(a), the California Employment Law Council (CELC) requests publication of your extremely thorough

opinion in the above-entitled case. Your opinion meets the requirement for publication set forth in Rule 8.1105(c)(6) ("involves a legal issue of continuing public interest"). It also meets the standard set forth in Rule 8.1105(c)(2) ("applies an existing rule of law to a set of facts significantly different from those stated in published opinions"). It also meets the standard set forth in Rule 8.1105(c)(8) ("reaffirms a principle of law not applied in a recently reported decision").

CELC is an organization of approximately 70 major California employers. Eurostar, Inc. is not a member of CELC. Our organization seeks moderate principles of employment law in California, fair to employer and employee alike. We regularly file amicus briefs in key California employment cases. Numerous of our members who do their upmost to comply with California meal and rest period requirements have nevertheless been sued because the wording of a particular policy does not exactly correspond to the wording of the wage orders. For example, a common actual situation is an employer whose employees normally work eight hour days. Many such employers set forth in writing the normal break schedule for such a day – a paid rest period during the first half of the shift, an unpaid meal break in the middle of the shift, and a paid rest period during the second half of the shift. Such an employer even if breaks regularly occur two hours, four hours, and six hours into the shift are sued in class actions alleging the following defects:

(1) The policy does not state that employees who work over three and one-half hours are entitled to a rest break;

(2) The policy does not state when the meal period has to be taken; and

(3) The policy does not contain wage order language that a rest period is due for every four hours of work "or major fraction."

According to plaintiffs, the fact that the employer actually schedules and employees take rest and meal periods which are totally compliant is a merits inquiry which cannot be addressed at class

certification. It is an extraordinarily brave employer that will proceed with a wage hour class action case after class certification. Plaintiff's counsel believes, with substantial justification, that class certification is "the whole ball game". In short, CELC cannot overemphasize the necessity for guidance on whether defects in the wording of policies by themselves warrant class certification, even in the absence of any indication that the defect in the policy has actually been applied to the defendant's employees.

THE CRITICAL LEGAL ISSUES RULED UPON IN YOUR OPINION

Meal Period Issues

Your Holding:

> "Plaintiffs argue the policy is unlawful because it does not specify an employee's meal break should commence *within* the first five hours of work and does not authorize a second meal break for shifts exceeding 10 hours. Plaintiffs contend Eurostar's written policy therefore evidences a uniform unlawful policy appropriate for class adjudication under *Brinker*. (See *Brinker*, *supra*, 53 Cal.4th at p. 1033.) It does not.
>
> "As the trial court correctly observed, … plaintiffs' argument is essentially that the written policies are noncompliant for omitting certain language; that is, not going far enough in expressing all aspects of the legal requirements." The fact Eurostar's employee handbook does not address when meal breaks are given within a shift is not evidence the company has a policy not to provide meal breaks within the first five hours. Likewise, the fact Eurostar's handbook authorizes 'at least' one half hour meal break for

> a shift over five hours is not evidence the company has a policy to deny employees a second break for shifts exceeding 10 hours."

Slip Op. at 33-34.

Importance:

Your opinion addresses an extraordinarily common situation – a policy that is not unlawful but does not set forth every requirement of the wage orders with respect to a meal break. This exact situation recurs again and again in the thousands of cases currently in California's trial courts.

Your Holdings:

> "Berger opined 12.3 percent of shifts in his sample showed a meal break that was missed, short, or late. The trial court did not consider this figure to be high enough to support the inference of an unlawful companywide policy …."

Slip Op. at 36.

> "Berger's analysis also did not break down the violations by store, so there was no way for the court to assess whether violations could reasonably be attributed to a uniform policy across different stores, rather than concentrated at one or two stores under certain managers.

Slip Op. at 37.

Importance:

Since employees must punch out and in for meal breaks, there will always be some percentage of missed, short or late meals. It is important that the bench and bar understand that the issue is not whether

there are some non-compliant meals, but whether the facts support an inference of an unlawful policy. Moreover, in multi-location workplaces, aggregating the data obscures exactly what your opinion focuses on – whether non-compliant meals could reasonably be attributed to a uniform policy rather than being concentrated under certain managers.

Your Holdings:

> "In the absence of an express unlawful meal break policy, evidence of Eurostar's policy to the contrary, and plaintiffs' purely anecdotal evidence of missed meal breaks, plaintiffs would need to call numerous employees from different stores to testify at trial about their missed meal breaks in order to prove a uniform policy or practice of not providing meal breaks. On this record, the trial court did not abuse its discretion in finding plaintiffs could not prove Eurostar's liability for meal break violations at trial by facts common to members of the class."

Slip Op. at 37.

Importance:

This is exactly what the bench and bar need to know: Just because a meal break policy is incomplete, is that sufficient to avoid the need to call numerous employees with different supervisors to testify and would this be manageable?

Rest Period Issues

Your Holding:

> "Plaintiffs relied on the employee handbooks as facial evidence Eurostar had a uniform unlawful rest break policy. The 2007 handbook stated an employee was entitled to a first rest break after four hours of work, not three and a half hours, and the handbook failed to authorize a third rest break for shifts over 10 hours."

Slip Op. at 16.

Importance:

These allegations are typical of those in the thousands of cases currently in California trial courts.

Your Holding:

> "As to plaintiffs' rest break claims, the court found Eurostar's policy set forth in the 2007 handbook was defective in stating a first rest break accrued after four hours rather than after three and a half hours, which could evidence a common issue, but plaintiffs failed to present any evidence Eurostar … had a companywide practice of denying rest breaks on that basis. Silva's testimony that her rest breaks depended on whether she had a good or bad manager bolstered the court's finding individual issues predominated."

Slip Opinion p. 24.

Importance:

Your opinion thus presents the common situation, a defective policy, but compliant practices.

Your Holding:

> "Plaintiffs contend the trial court abused its discretion in denying class certification as to the rest break subclass because Eurostar's pre-2013 rest break policy …, by authorizing a first rest break after four hours (instead of three and a half hours), is facially unlawful. … Plaintiffs are correct Eurostar's pre-2013 rest break policy is inconsistent with the Wage order, providing some evidence of a uniform unlawful policy. But it does not follow that Eurostar had a uniform practice of denying rest breaks for employees who worked fewer than four hours."

Slip Op. at 38.

Importance:

As your opinion notes, the actual practice of Eurostar was to provide a first break after two hours of work. Therefore, the facial illegality of the written policy was factually irrelevant. This factual situation recurs again and again in the thousands of meal/rest period cases pending in the trial courts, and the bench and bar need guidance as to policies that are unlawfully written but do not evidence an actual practice of denying rest breaks. As your opinion notes, "Vazquez testified her practice was to schedule employees to take their first break within the first two hours of their shift." *Id.* at p. 40.

Your Holding:

> "With respect to rest breaks, Eurostar admitted it had not paid rest break premiums during the class period, but unlike meal breaks, rest breaks were not compulsory absent an employee request.

> Further, plaintiffs presented no evidence of a companywide policy to deny rest breaks or to fail to pay a premium for missed breaks."

Slip Op. at 42 n. 16.

Importance:

Employees punch out and in for meal breaks. Employees do not punch out and in for rest breaks. Absent an employee request or a notification from the employee, an employer frequently has no way of knowing that an employee involuntarily did not take a rest break. As your opinion notes, the record establishes that during the relevant timeframe the employer paid 506 meal break premiums. (Slip Op. 13.) It is important for the bench and bar to know that on these facts, it is still essential for class certification that the plaintiff establish a policy or practice of not paying premiums when rest periods are denied.

Consideration of the Merits in Determining Whether Common Issues Predominate

Your Holdings:

> "In cases where there is a dispute as to whether there is a uniform unlawful policy, however, it may be necessary for the trial court to weigh the evidence at the certification stage for the purpose of making the threshold determination whether there is substantial evidence of a uniform policy or practice for the purpose of determining whether common issues predominate."

Slip Op. at 31.

> "Because there is no uniform written policy regarding the timing of the first and second meal breaks, the trial court did not err in considering the parties' testimony and statistical evidence

> regarding Eurostar's policies and practices to determine whether plaintiffs' proof of Eurostar's liability at trial would involve common or individual issues."

Slip Op. at 34.

Importance:

The bench and bar need to know that when policies are incomplete, it is not a prohibited merits inquiry to examine the facts to determine whether common issues or individual issues predominate.

Your Holding:

> "Silva and Cacho testified their rest breaks were frequently interrupted or delayed. But Silva conceded that in most instances when she missed a break she had not asked to take it. Unlike the requirements for compulsory meal breaks, the Wage Order requires employers to "authorize and permit" employees to take their 10-minute rest breaks. (Wage Order, §12(A).)
>
> "On this record, the trial court did not err in considering the parties' evidence to determine whether plaintiffs could establish through common proof that Eurostar had an unlawful rest break policy and practice. The court did not abuse its discretion in concluding they could not."

Slip Op. at 40.

Importance:

Since employees do not punch out for rest breaks, unless an employee requested a rest break which was denied, she cannot after the fact contend that she is entitled to a rest period premium of an hour's pay. It is important that the bench and bar understand the distinction between rest and meal periods.

CONCLUSION

Your court obviously put a tremendous amount of work into your extremely detailed and analytical opinion. The trial courts and the bar are regularly confronted with exactly the issues your court analyzed. The guidance you have provided in your opinion is of great importance. Publication of your opinion, analyzing the very issues now present in literally thousands of wage hour class actions pending in the trial courts, will be of meaningful value to the bench and bar.

Respectfully submitted,

CALIFORNIA EMPLOYMENT LAW COUNCIL (CELC)

By: Paul Grossman

Paul Grossman [CA State Bar #035959]
CELC General Counsel

cc: CELC Members

Service List Attached

CERTIFICATE OF COMPLIANCE

Cacho, et al. v. Eurostar, Inc., Case No. B284827

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this amicus brief contains 2,421 words (including footnotes), which is less than the total words permitted by the California Rules of Court. The letter brief's type size and typeface comply with CRC 8.204(b)(3) and (4). In making this certification, I have relied on the word count of the computer program used to prepare the brief.

CALIFORNIA EMPLOYMENT LAW COUNCIL (CELC)

By: Paul Grossman

Paul Grossman
[CA State Bar #035959]
CELC General Counsel

PROOF OF SERVICE

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I am employed in the City of Los Angeles and County of Los Angeles, State of California. I am over the age of 18, and not a party to the within action. My business address is 515 South Flower Street, Twenty-Fifth Floor, Los Angeles, California 90071-2228

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Executed on December 16, 2019, at Los Angeles, California.

Cathy Smith-Joo

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David Cacho, et al. v. Eurostar, Inc.,
Court of Appeal, Second Appellate District
Case No. B284827

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Court of Appeal, Second Appellate District
Case No. B284827

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