



One Minute Memo[®]

Recovery of Attorney's Fees in Wage Claims: California Court of Appeal Strengthens Prevailing Employers' Claims For Attorney's Fees In Actions For Unpaid Wages And Benefits

Under California law, a party may recover attorney's fees only when a statute or agreement of the parties specifically provides for fee-shifting. California Labor Code Section 218.5 is a fee-shifting statute generally providing for the recovery of attorney's fees by the prevailing party (either employee or employer) in actions for unpaid wages and employment benefits. Labor Code Section 1194 also provides for an award of attorney's fees in actions for unpaid overtime or minimum wages, but only to the prevailing employee.

On July 27, 2010, in *Kirby v. Immoos Fire Protection, Inc.*, the California Court of Appeal ruled on the following issue: May a prevailing employer recover attorney's fees under Section 218.5 when the lawsuit includes both claims for unpaid minimum or overtime wages, and other wage claims? The Court of Appeal affirmed the trial court's award of attorney's fees to the employer under Section 218.5, holding that the inclusion of a claim for unpaid minimum or overtime wages does not preclude recovery of attorney's fees by a prevailing employer for separate causes of action otherwise subject to Section 218.5.

Anthony Kirby filed a class action against his former employer, Immoos Fire Protection, Inc., for various Labor Code violations as well as violation of the Unfair Practices Act (Business and Professions Code Section 17200 *et seq.*) Kirby dismissed the case after the trial court denied class certification. The trial court subsequently awarded attorney's fees to Immoos in part for its defense of Kirby's cause of action for failure to authorize and permit rest periods.

In reaching its decision, the Court of Appeal harmonized Labor Code Sections 218.5 and 1194. Section 218.5 includes an express exception to its provision allowing an award of attorney's fees to prevailing employers: "This Section does not apply to any action for which attorney's fees are recoverable under Section 1194." Section 1194 provides that employees—but not employers—who prevail in an "action" to recover unpaid minimum wages or overtime may also recover their reasonable attorney's fees. Arguing that an "action" refers to an entire case, Kirby asserted that Immoos could not recover fees because his complaint included causes of action for unpaid minimum and overtime wages. The Court of Appeal disagreed, holding that Kirby's approach would lead to absurd results as it "would allow the exception of Section 1194's unilateral fee-shifting to eviscerate the rule of Section 218.5." Moreover, plaintiffs would be able to insulate claims against employers from otherwise applicable fee-shifting provisions by simply adding a cause of action for unpaid minimum or overtime wages.

The court also rejected Kirby's characterization of his cause of action for failure to provide rest periods as one for unpaid minimum wages. Kirby alleged that he was owed an additional hour of wages per day per missed rest period under Labor Code Section 226.7. According to Kirby, any unpaid wage is necessarily less than statutorily mandated wages and therefore

subject to Section 1194. The Court of Appeal disagreed. If Kirby's claim for failure to provide rest periods had succeeded, he would have been entitled to an *additional* wage "at the employee's rate of compensation" under Labor Code Section 226.7. The "employee's rate of compensation" refers to the contractual rate of compensation, not the legal minimum wage. Thus, Kirby's claim was not one based on any failure to pay the minimum wage, and Section 1194 did not apply.

Although the Court of Appeal affirmed the trial court's award of attorney's fees to Immoos for prevailing on the rest period cause of action, the court reversed the trial court's award of attorney's fees to Immoos for prevailing on Kirby's Labor Code Section 2810 and Unfair Practices Act causes of action. The Court of Appeal remanded the case back to the trial court to determine the reasonable amount of fees to award to Immoos for prevailing on the rest break cause of action only.

What Kirby Means For Employers

While *Kirby* will not halt the filing of class actions for unpaid wages and benefits, it will cause attorneys to think twice about filing marginal complaints for wage claims subject to the bilateral fee-shifting provision of Section 218.5. *Kirby* also gives employers additional leverage in negotiating settlements of wage and hour class actions where the prospect of success in certifying the class or on the merits is in question.

For more information, please contact the Seyfarth attorney with whom you work, or [any Labor and Employment attorney on our website](#).



Breadth. Depth. **Results.**

www.seyfarth.com