



Responding to the Donohue Dilemma

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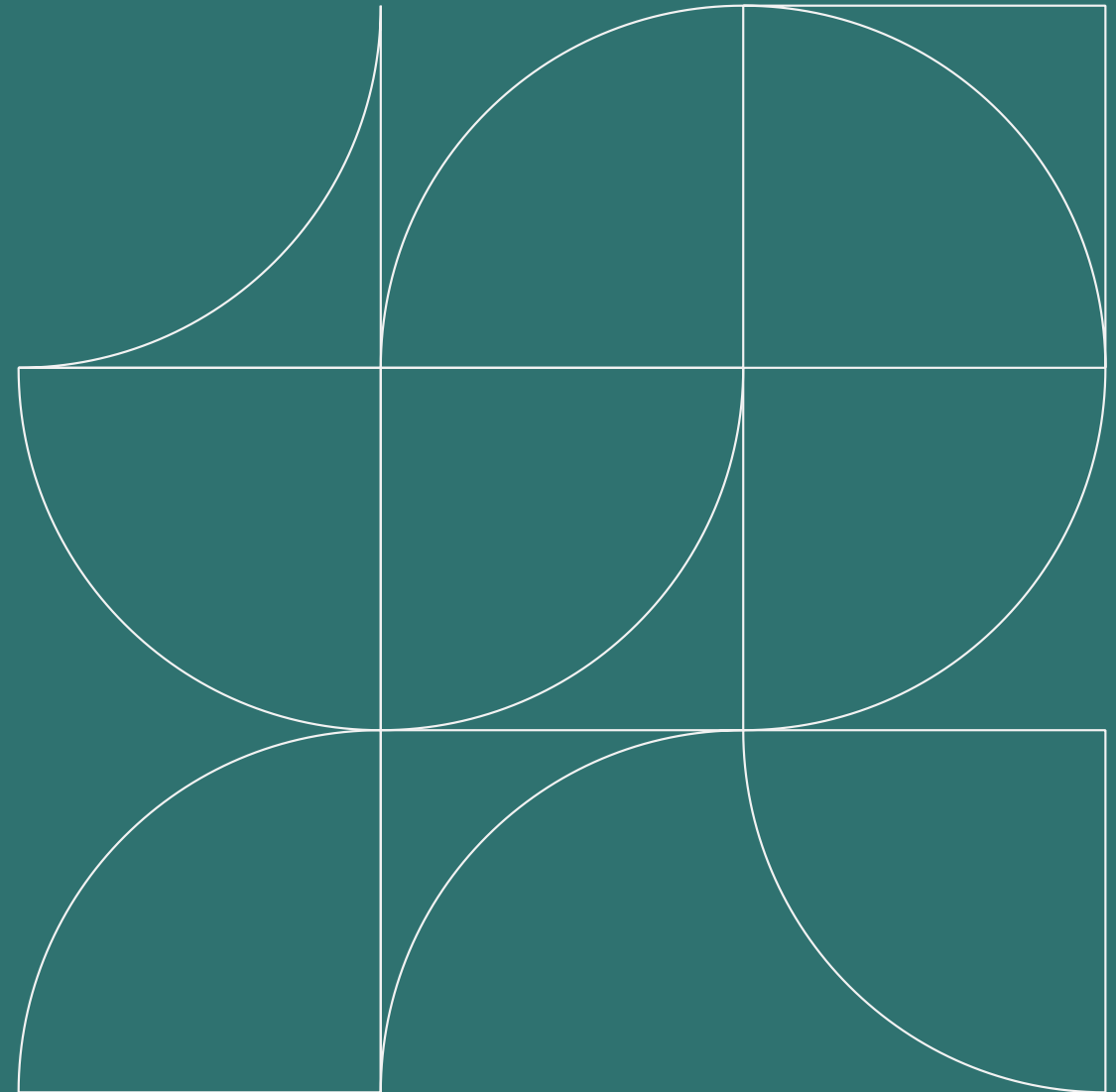
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Summary of the Donohue Decision and Its Key Holdings



Donohue Decision

Summary

- *AMN* used a time system that rounded punches to the nearest 10-minute increment.
- Rounding applied to meal periods
- Although *AMN* used a meal period attestation for apparently non-compliant meal periods, the attestation was only triggered based on rounded time

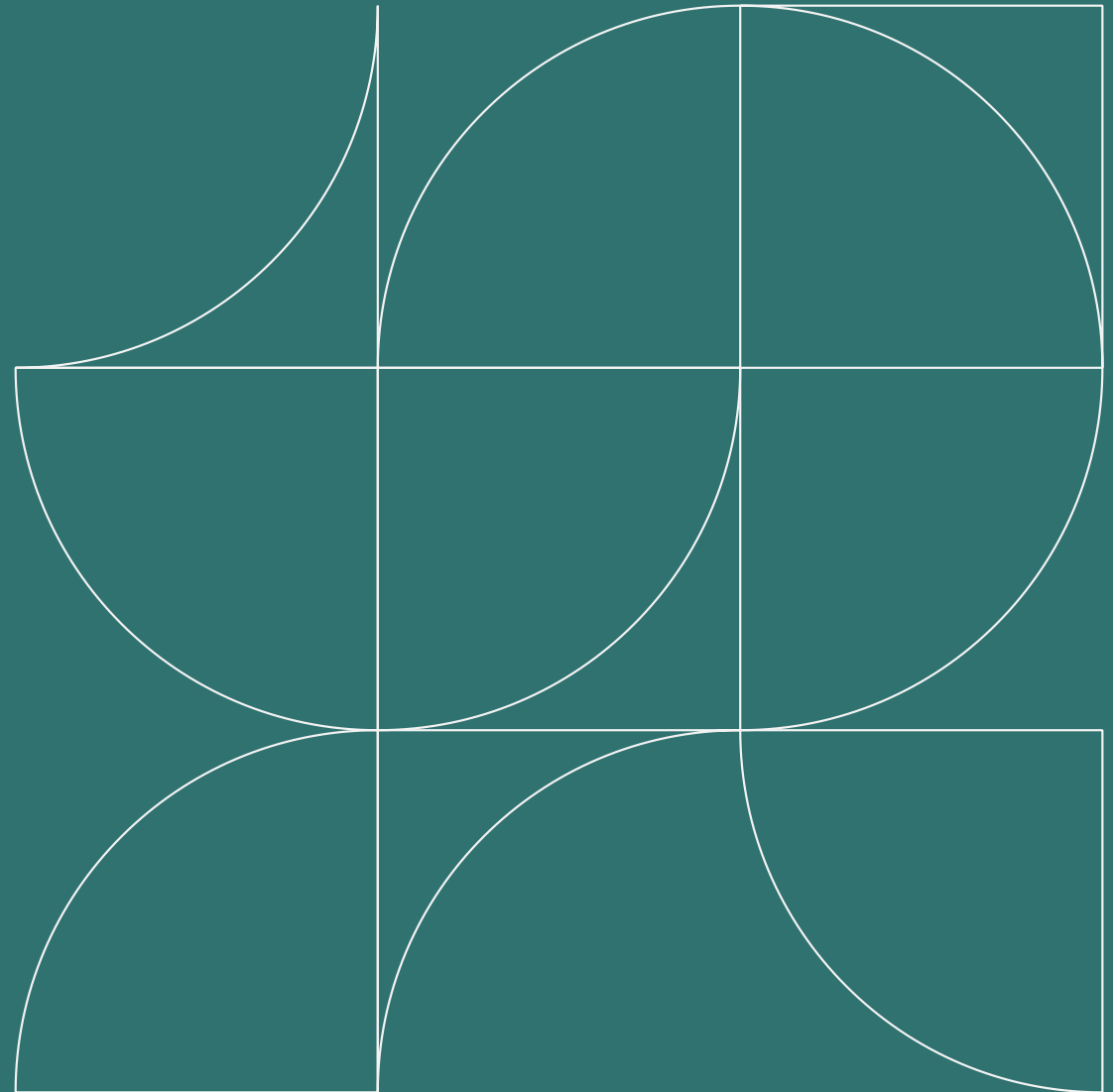
Donohue Decision

Key Holdings

Two Key Holdings:

- Employers cannot engage in the practice of rounding time punches in the meal period context.
- Time records showing non-compliant meal periods give rise to a rebuttable presumption of meal period violations.

The Rise of the Rebuttable Presumption



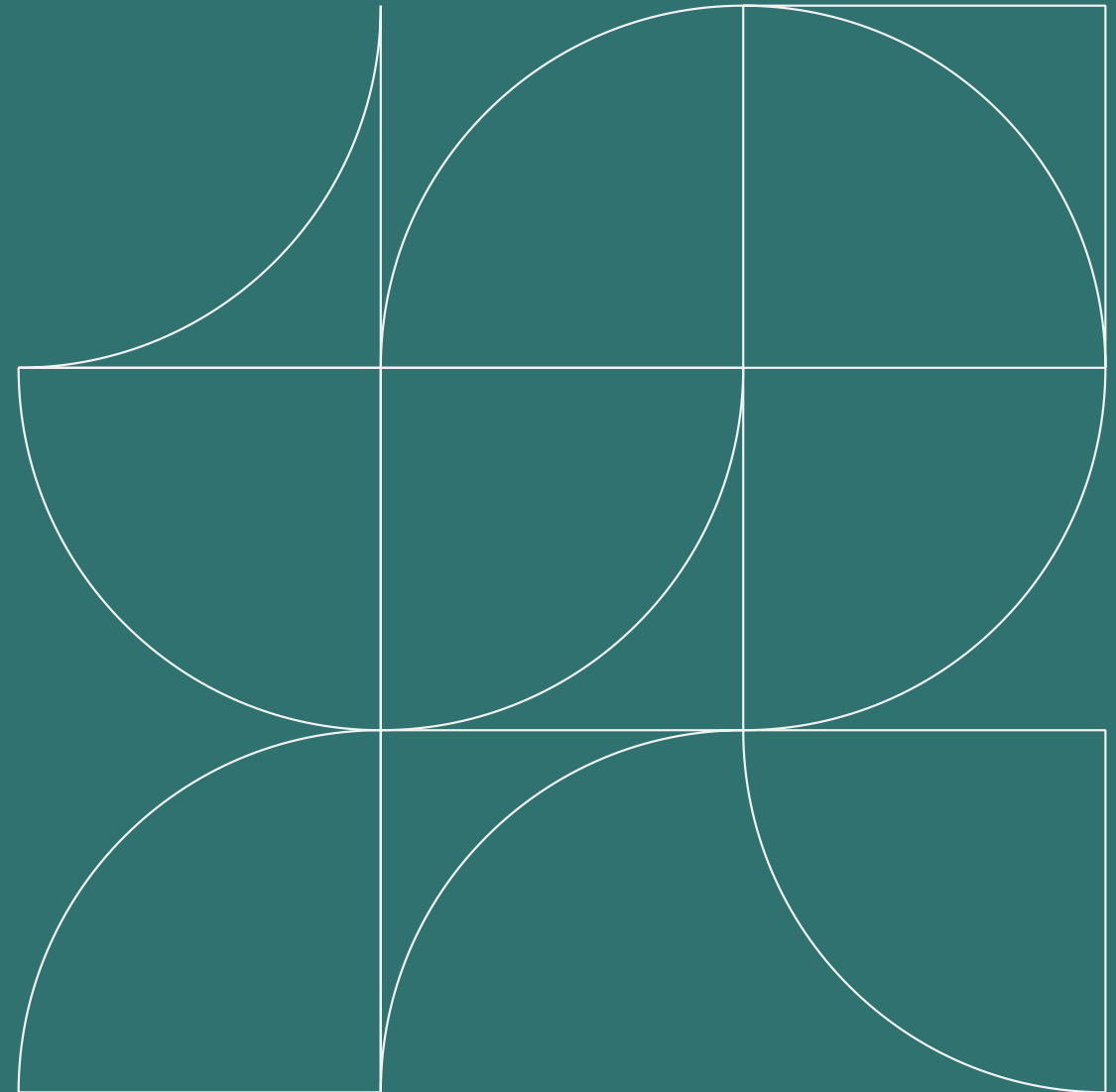
The Rise of Rebuttable Presumption

Summary

The court adopted Justice Werdegar's rebuttable presumption from her concurrence in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012)

“An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, ***the assertion is an affirmative defense, and thus the burden is on the employer***, as the party asserting waiver, to plead and prove it.”

Rebutting the Presumption: Practical Solutions and Common Applications



Rebutting the Presumption

Automatic Payment of Meal Period Premiums

- Employers can automatically pay meal period premiums based on apparently non-compliant meal periods as reflected in employee's time records.
- Helpful in managing individual and class liability
- Does not eliminate liability in PAGA actions
- Can result in employers overpaying meal period premiums

Rebutting the Presumption

Meal Period Attestations

Have employees to attest whether or not they received a compliant meal period in the timekeeping system.

“The employer is not required to police meal periods to make sure no work is performed. Instead, the employer’s duty is to ensure that it provides the employee with bona fide relief from duty and that this is accurately reflected in the employer’s time records.”

Rebutting the Presumption

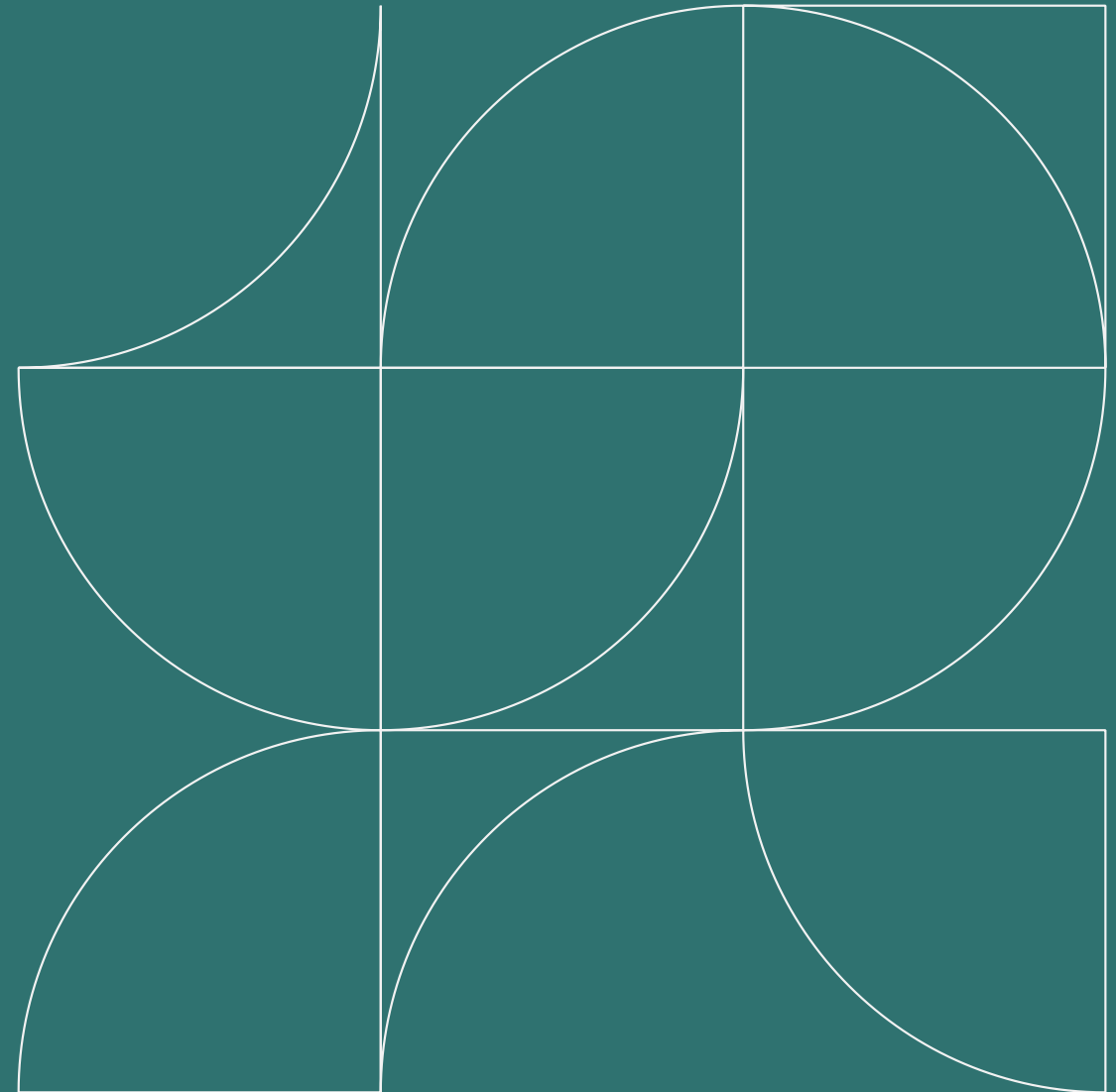
“Representative Testimony, Surveys, and Statistical Analysis”

“Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work.”

“‘Representative testimony, surveys, and statistical analysis,’ along with other types of evidence ‘are available as tools to render manageable determinations of the extent of liability.’”

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Best Practices Regarding Rounding, Meal/Rest Periods, and Timekeeping Attestations



Best Practices Re: Rounding

Brief Summary of the Law on Rounding

- California law “permits employers to use a rounding policy for recording and compensating employee time as long as the employer’s rounding policy does not ‘consistently result[] in a failure to pay employees for time worked.’”
- A rounding policy is lawful if it is “fair and neutral on its face and ‘it 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.’”
- Rounding policies have been found to violate this rule when they only round down and thereby “systematically undercompensate employees.”

See’s Candy Shops, Inc. v. Superior Court, 210 Cal. App. 4th 889, 901 (2012).

Best Practices Re: Rounding

Is *Donohue* a Precursor to the End of Rounding?

- *Donohue* did not address the use of rounding outside of the meal period context.
- **BUT** the Cal. Supreme Court did go out of its way to point out that it “has never decided the validity of the rounding standard articulated in *See's Candy I.*”
- The Cal. Supreme Court also suggested that: “the practical advantages of rounding policies may diminish further” as “technology continues to evolve” and that “technological advances may help employers to track time more precisely.”
- **Practical Advice: Discontinue rounding employee time punches.**

Best Practices Re: Meal/Rest Periods

Written Policies, Training, Acknowledgements

- Review your written meal and rest period policies for California compliance
- Implement employee and supervisor training on meal and rest period requirements
- Policy / training acknowledgements
 - Not legally required, but recommended
 - It is much harder to defend a meal and rest period case, and overcome the *Donohue* meal-period-violation presumption, if the employer is not able to show that an employee signed off on the policy and was trained on it
- Post the applicable Wage Order

Best Practices Re: Meal/Rest Periods

Meal/Rest Period Scheduling and Length

- Eliminate meal period rounding, period.
- Consider other options to help limit potential meal/rest period exposure:
 - Providing meal periods that are 35 minutes or longer
 - Authorizing and permitting 15-minute rest periods
 - Scheduling meal periods to begin at least 30 minutes before the end of the fifth hour of work
 - Implementing a tool to coordinate and schedule meal/rest periods to ensure they are timely, and mandate its use
 - Automatically paying penalty for “facial” meal period violations
 - Alternative, implement a daily meal and rest period attestation

Best Practices Re: Timekeeping Attestations

Timekeeping Attestations

- **Does *Donohue* require employers to implement a system that employees can use to attest to meal and rest period compliance?**
 - No, but best practices do!
- **What should an attestation cover?**
 - The ideal attestation covers hours worked and meal/rest periods
- **Why should employers consider attestations?**
 - Reduces potential exposure without additional costs associated with automatic premiums
 - Creates a record to overcome *Donohue's* rebuttable presumption for meal periods, as well as off-the-clock claims
 - Attestation reports allow employers to spot employee abuse and compliance deficiencies

Timekeeping Attestations — Continued

Best Practices Re: Timekeeping Attestations

- **What does a typical attestation look like?**

“I hereby certify that the hours recorded accurately identify all time worked, and that, I was provided with all relevant off-duty uninterrupted meal periods and authorized and permitted to take all relevant off-duty uninterrupted rest periods as provided in the [Company] Meal and Rest Period Policy.”

- **Is there anything else it should cover?**

As a result of *Donohue*, employers should consider adding a second sentence to the attestation: “I was not required to miss any meal or rest periods, or to take short or late meal or rest periods, and any short, late, or missed period was a result of my voluntary choice.”

Best Practices Re: Timekeeping Attestations

Meal Period Attestation Mechanics

- If the employee selects “**Agree**,” then the process ends, and the employee should be clocked out.
- If the employee selects “**Disagree**,” additional screens should prompt employees to answer more specific questions regarding their time meal periods.
 - Example: inclusion of a drop down menu that allows employees to identify if the issue was a missed, late, or short meal/rest period, and whether it was voluntary or not
- Enhanced Approach: “flagging” or “highlighting” non-compliant meal periods
 - Example: If an employee tries to clock in from lunch early, the system will “flag” the issue and ask the employee whether the short meal period was voluntary

Best Practices Re: Timekeeping Attestations

Add'l Timekeeping Attestation Considerations

- **Should an employee's time (and corresponding pay) reflect the time spent completing the attestation process?**
 - Yes, the final punch out time should be after the conclusion of the attestation procedure.
 - Time spent completing the attestation should be paid.
- **Daily or End of Pay Period Attestations?**
 - Attestations are strongest when they are daily, as opposed to the end of each pay period.
- **Should employees be able to view the time punches they are attesting to?**
 - Yes. When attesting, employees should be able to clearly view all relevant time punches for the period covered, including punches in and out for meals.

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Thank You!