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## Employment Law

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# Court Affirms \$187.6 Mil. Verdict Against Wal-Mart for Missed Breaks

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Jeffrey Campolongo

The Superior Court of Pennsylvania upheld a class action award of \$187.6 million against Wal-Mart and Sam's Club in favor of 187,000 hourly employees employed by the companies in Pennsylvania between 1998 and 2006. In *Braun v. Walmart-Stores Inc.*, the court agreed with the underlying decision from the Philadelphia Court of Common Pleas that there was evidence of violations of the Pennsylvania Wage Payment and Collection Law (WPCL), breach of contract and unjust enrichment.

The class alleged that Wal-Mart had employees doing "off the clock" work that they were not paid for, and that they were at times not permitted to or even encouraged not to take "rest breaks." Upon hire, Wal-Mart employees received an employee

handbook that included provisions instructing employees that they are to take paid rest breaks if they work a certain number of hours and to take unpaid meal breaks during longer shifts. This type of arrangement is hardly unusual, meaning this decision may have a substantial impact on the way employers enforce their "rest break" policies.

At issue were allegations that managers encouraged employees not to take breaks, and the employees did not receive any compensation for the time they spent

working when they should have been on breaks. Wal-Mart disputed this as being any type of violation, as it paid employees whether they took breaks or not, and did not view not taking a short rest break as entitling an employee to additional pay.

Sufficient evidence of these violations was found, in large part based upon a national audit of 128 Wal-Mart stores that found 76,472 meal and wage break violations over a one-week period. The majority of those violations were for too few rest breaks, while the others were for two few meal breaks. The court also found merit in evidence that the corporate office was putting pressure to reduce costs and ensure the availability of bonuses for higher-ups. This led to understaffing, resulting in rest break violations. Wal-Mart actually contested the use of its own time-keeping records because they were too inaccurate to exhibit what was actually happening.

Wal-Mart defended its actions by pointing to the fact that the employee handbook specifically stated that it was not a contract, thus they were under no legal obligation to comply. The court, in contrast, determined that Wal-Mart's employee handbook made the rest breaks part of the employment agreement. The court said: "Essentially, Wal-Mart promised to pay a full-time hourly employee for a forty-hour workweek in exchange for thirty-seven-and-a-half hours of labor (including meal periods) and two-and-a-half hours of rest." Thus, not paying additional compensation

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to employees who were not taking breaks amounted to less than what was promised.

In explaining that the employee handbook can alter the traditional "at-will" employment agreement and create contractual obligations, the court cited with approval other cases that determined an employee handbook can create a unilateral offer of employment. The offer is accepted by the employee's performance of employment duties, and if a reasonable person would interpret the provisions of the handbook as evidence of the employer's intent to modify the standard "at-will" employment agreement. In this case, breaks were further guaranteed by Wal-Mart as it warned employees and managers of disciplinary action if breaks were not taken, or if breaks were too short.

For the class to be awarded damages for unpaid wages under the WPCL, they had to show that the contractual violation of not allowing breaks amounted to unpaid wages. The WPCL defines "wages" as including "any other amount" pursuant to an employment contract. (See 43 P.S. § 260.2a.) The court held that monetary payments for contractually promised rest breaks constitute wages in the form of fringe benefits within the meaning of the WPCL. (See 43 P.S. §§ 260.1-260.12.)

As to other issues on appeal, the court disagreed with Wal-Mart that to certify the class it was necessary to determine that each potential class member had proof of Wal-Mart's potential liability or that each class member needed to prove their damages. However, the court did remand for a recalculation of the award of attorney fees.

The awarded amount of \$45.6 million improperly supplanted the lodestar with a factor reflecting the risk of a contingent fee, as some of the attorneys had already included such a factor in their fees already. But the court did specifically recognize that a contingent risk factor may be added to the lodestar. The significance of recognizing the availability of an enhancement, over and above the lodestar, cannot be stated enough for plaintiff's employment attorneys who absorb all the risk in contingency cases.

The court's use of a very broad interpretation of "wages" under the WPCL may certainly lead to more cases being brought under the WPCL so employers should be watchful of what policies, contracts, and promises they have made to their employees. They should also consider to what extent provisions of employment handbooks could be interpreted as contractually binding. Finally, the court's recognition that counsel fees can be awarded over and above the lodestar amount because of the risks assumed in a contingency case means this decision may have even more far reaching results than anticipated.

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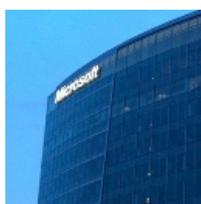


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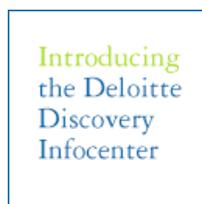
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