

ADP screwed up your pay check?

Look to your employer, not the payroll processor

By Jeffrey I. Ehrlich

Goonewardene v. ADO, LLC

(2019) __ Cal.5th __ (California Supreme Court)

Who needs to know about this case? Lawyers handling wage-and-hour litigation in California; lawyers making or facing claims based on a third-party-beneficiary theory or a negligent-performance of contract theory.

Why it's important: (1) Holds that employees may not sue payroll-processing companies for substandard or negligent performance of the payroll-processor's duties; (2) provides additional clarity about when claims based on a third-party-beneficiary theory will be viable.

Goonewardene sued her employer, Altour, in 2012 for wrongful termination and Labor Code violations. In a fourth-amended complaint, she sought to add a UCL claim against Altour's payroll processor, ADP. She then filed a motion for leave to file a fifth-amended complaint that would have asserted breach-of-contract, negligence, and negligent-misrepresentation claims against ADP. The trial court sustained ADP's demurrer without leave to amend. The Court of Appeal reversed, finding that a proposed sixth-amended complaint stated viable claims against ADP for breach of contract, negligent misrepresentation, and negligence based on allegations that ADP performed payroll services for plaintiff's benefit in an inaccurate and negligent manner. The California Supreme Court granted review and reversed in a unanimous decision.

1. *Third-party beneficiary*. Under California's third-party beneficiary doctrine, a third party – that is, an individual or entity that is not a party to a contract – may bring a breach of contract action against a party to a contract only if the third party establishes not only (1) that it is likely to benefit from the contract, but also (2) that a motivating purpose of the contracting parties is to provide a benefit to the third party, and further (3) that permitting the third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.

Here, the Court concluded that whether or not a contract between an employer and a payroll company will in fact generally benefit employees with regard to the wages they receive, providing that type of benefit is ordinarily not a motivating purpose of the contracting parties. Instead, the relevant motivating purpose of the contracting parties is to provide a benefit *to the employer*. In addition, permitting each employee to name the payroll company as an additional defendant in any wage-and-hour lawsuit an employee may pursue would impose considerable litigation defense costs on the payroll company that inevitably would be passed on to the employer through an increased cost of the payroll company's services, a result that would not be consistent with the objectives of the contract and the reasonable expectations of the employer or payroll company. Accordingly, an employee should not be viewed as a third-party beneficiary who may maintain an action against the payroll company for an alleged breach of the contract between the employer and the payroll company with regard to the payment of wages.

2. *Negligence/negligent misrepresentation*. In light of a variety of policy considerations that are present in the wage-and-hour setting, we conclude that it is neither necessary nor appropriate to impose upon a payroll company a tort duty of care with regard to the obligations owed to an employee under the applicable labor statutes and wage orders and consequently that the negligence and negligent misrepresentation causes of action lack merit.

Short(er) takes:

Wage-and-hour; employer's requirement that employees call-in two hours before they are scheduled to start their shift triggered Wage Order's reporting-time requirement. *Ward v. Tilly's* (2019) __ Cal.App.5th __ (2d Dist., Div. 3.)

Tilly's adopted the following on-call scheduling process for its employees: Employees are assigned on-call shifts but are not told until they call in two hours before their shifts start whether they should actually come in to work. If they are told to come in, they are paid for the shifts; if not, they do not receive any compensation for having been "on call." Plaintiff Ward filed a putative class-action against Tilly's, arguing that Tilly's scheduling practices required it to pay "reporting time pay" under Wage Order 7, and that Tilly's violated California law by not properly compensating its employees. The trial court sustained Tilly's demurrer without leave to amend. Reversed.

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Wage Order 7 requires employers to pay employees reporting time pay, as follows:

"(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage. . . .

Tilly's argues that "report[ing] for work" requires an employee's physical presence at the workplace at the start of a scheduled shift. Tilly's says: "[A]n employee only reports for work by being present (reporting) at the start of the shift (for work). That is the plain meaning of Wage Order 7." Thus, Tilly's urges, "the plain meaning of 'report for work' requires an employee to present herself at the start of a shift – not merely to verify the schedule in advance." Amicus Abercrombie & Fitch Stores, Inc. urges us to interpret "report for work" in similar fashion, suggesting that Wage Order 7 requires reporting time pay only "if the employee (1) shows up ('reports') (2) ready for work ('for work')." By thus interpreting "report[ing] for work" to mean physical presence at the work site, amicus asserts the IWC "drew and maintained" a "bright-line rule."

Plaintiff, in contrast, asserts that Wage Order 7 is triggered by any manner of reporting, whether in person, telephonic, or otherwise. She says: "There is no specific language in [the] phrase [report for work] that requires or necessitates that such reporting be physical in nature. In short, the face of the wage order does not include an element requiring that workers physically present themselves at a workplace." Thus, plaintiff urges: "In the modern era, where many workers complete their tasks remotely, use telephones to clock in and clock out for timekeeping purposes, and, check for shifts telephonically, a commonsense and ordinary reading of the order would include the reporting that Plaintiff engaged in in accordance with Tilly's policies."

The Court held that the text of Wage Order 7, alone, is not determinative of the question, because, as a purely linguistic matter, it is not obvious whether "reporting for work" requires the employee's presence at a particular place and time, or whether it may be satisfied by the employee presenting himself or herself in whatever manner the employer has directed, including, as in this case, by telephone, two hours before the scheduled start of an on-call shift.

Based on its view of the other interpretative aids available to construe the Wage Order, the Court concluded that the on-call scheduling alleged in this case triggers Wage Order 7's reporting-time pay requirements. On-call shifts burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts – but who nonetheless receive no compensation from Tilly's unless they ultimately are called in to work. This is precisely the kind of abuse that reporting-time pay was designed to discourage. Accordingly, the trial court erred in sustaining the demurrer.


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