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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL MARLO,)	Case No. CV 03-04336 DDP (RZx)
)	
Plaintiff,)	ORDER RE: (1) SCOPE OF THE MOTOR
)	CARRIER ACT EXEMPTION, (2)
v.)	PREMIUM PAYMENTS PURSUANT TO
)	LABOR CODE § 226.7, AND (3) THE
UNITED PARCEL SERVICE, INC.,)	MEANING OF "PROVIDE" UNDER
a corporation,)	§ 226.7
)	
Defendant.)	[Motion filed on April 17, 2009]
_____)	

This California wage and hour case proceeds to trial on Tuesday, May 5, 2009. In this Order, the Court addresses outstanding issues raised by the parties: (1) the scope of the Motor Carrier Act exemption, (2) payment for missed meal and rest breaks under California Labor Code § 226.7, and (3) the requirement that employers "provide" meal periods.¹

I. MOTOR CARRIER ACT EXEMPTION - SCOPE

The Court turns first to an issue left unresolved by the Court's March 19, 2009 order granting UPS's motion for summary

¹Because the facts and procedural history of this case are well-known to the parties, the Court does not recite that background here.

1 judgment on the Motor Carrier Act Exemption. See Order (1)
2 Granting Defendant's Motion for Partial summary Judgment as to the
3 Motor Carrier Act Exemption, (2) Denying Plaintiff's Motion for
4 Summary Judgment as to the Motor Carrier Act Exemption, and (3)
5 Denying in Part and Sustaining in Part Plaintiff's Request for
6 Sanctions and Objections to Evidence (Docket Entry No. 798) (March
7 19, 2009). In that order, the Court held that Marlo falls under
8 the exemption contained in section 3(L) of IWC Wage Order No. 9,
9 codified at Title 8, § 11090 of the California Code of Regulations
10 ("C.C.R."), during the periods that he held the position of On-Road
11 Supervisor. The parties debate the implications that ruling for
12 Marlo's potential recovery.² The parties agree that the Motor
13 Carrier Act exemption does not exempt UPS from providing Marlo with
14 meal or rest periods. See Def.'s Supp. Br. at 1 n.1; Pl.'s Supp.
15 Br. at 2. In particular, the parties debate whether, if only the
16 Motor Carrier Act exemption applies to Marlo's time as an On-Road
17 Supervisor (i.e., neither the executive nor administrative
18 exemption applies), Marlo is entitled to compensation beyond his
19 salary for any time worked over forty hours per week at his regular
20 hourly rate - in other words, whether Marlo is entitled to
21 "straight time."

22 Under California law, the Motor Carrier Act exemption is
23 located at subsection L of section 3 of IWC Wage Order No. 9. 8
24 C.C.R. § 11090(3)(L). It provides that the provisions of § 3 are

26 ²Because Marlo raised this issue at oral argument on the
27 hearing for the Motion for Summary Judgment, the Court requested
28 short supplemental briefing on the topic. See Order Requesting
Short Supplemental Briefing on Two Issues (Docket Entry No. 794)
(February 25, 2009).

1 "not applicable to employees whose hours of service are regulated"
2 by the Motor Carrier Act.³ Section 3, titled "Hours and Days of
3 Work," sets out: (1) overtime rates of pay and when those rates of
4 pay apply; (2) alternative workweek schedules; and (3) limits on
5 the number of hours an employee may work in certain situations.
6 Section 4 contains the minimum wage requirement and sections 11 and
7 12 contain meal and rest break requirements.

8 Marlo argues that the Motor Carrier Act exemption exempts an
9 employee *only* from (as relevant here) the premium rate for overtime
10 compensation; it does not exempt an employee from being paid for
11 hours worked over forty. For those hours, Marlo argues, he would
12 be entitled to a regular rate of pay as established by dividing his
13 weekly salary by forty hours. He would be entitled to that pay in
14 addition to his salary. UPS argues that the Motor Carrier Act
15 exemption exempts UPS from paying Marlo any time beyond his salary
16 because his salary is intended to cover all hours worked. The
17 parties have cited no case that directly resolves this issue.

18 The Court finds that because the overtime provisions do not
19 apply and because Marlo neither alleges a Labor Code § 1194 claim
20 nor a breach of contract claim, Marlo may not seek straight time
21 beyond his salary for the time he was an On Road Supervisor.
22 Section 3 of IWC Wage Order No. 9, like § 510 of the California
23 Labor Code, sets out a prohibition on employee work over 40 hours
24 per week unless the employee is compensated at the applicable
25 overtime rate for all additional hours. Because § 3(L) of the wage
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27 ³By contrast, the executive, administrative, and professional
28 exemptions provide an exemption from the entire wage order. 8
C.C.R. § 11090(1).

1 order applies, however, the prohibition on hours worked contained
2 is inapplicable. See Final Pretrial Conference Order (Docket Entry
3 No. 870) (April 22, 2009), at 5-6.

4 The parties do not appear to debate that Marlo must be paid
5 for all of the hours he worked. In support of his argument that he
6 is entitled to straight time, Marlo cites two cases showing that
7 the hourly employee who was exempt under the FLSA Motor Carrier Act
8 was nevertheless actually paid for his work over forty hours. See
9 Morris v. McCombs, 332 U.S. 422, 428-30 (1947) (addressing FLSA
10 exemption, not California Wage Order); Hodgson v. Ellis Transp.
11 Co., 1971 WL 687 (C.D. Cal. January 14, 1971). That Marlo was paid
12 on a salary basis, as opposed to hourly, is the critical
13 distinction according to UPS. The parties do not appear to debate
14 that, if Marlo were an hourly employee, he would be entitled to
15 payment at his hourly rate (as opposed to an overtime rate) for all
16 hours he worked. Indeed, UPS is not suggesting that Marlo deserves
17 no pay for hours beyond 40 simply because he is salaried. Rather,
18 UPS explains that, through his salary, Marlo was paid for *all* hours
19 worked because his salary was intended to cover all hours worked.

20 Although Marlo notes that individuals who fall under the Motor
21 Carrier Act exemption are often paid hourly, Marlo does not appear
22 to argue that he may not be paid on a salary basis under California
23 law or federal law interpreting the Motor Carrier Act. However,
24 Marlo appears to argue that a salary cannot be considered to cover
25 all hours worked unless the employee is exempt under the executive,
26 administrative, or professional exemption; rather, Marlo appears to
27 argue, any salary presumptively covers only a 40-hour work week.
28 At first glance, Marlo's argument draws some support from the

1 California approach to calculating the overtime rate. California
2 law generally requires that, when a court or employer calculates
3 the overtime rate of compensation for a salaried full-time
4 employee, the individual's regular weekly salary is divided by 40.
5 Cal. Labor Code § 515(d) ("For the purpose of computing the overtime
6 rate of compensation required to be paid to a nonexempt full-time
7 salaried employee, the employee's regular hourly rate shall be 1/40
8 th of the employee's weekly salary."); see 2002 Update to 1998 DLSE
9 Enforcement Policies and Interpretations Manual, § 48.1.5.4. The
10 DLSE's justification for its approach (as opposed to the
11 "fluctuating work week" approach) is that California's "premium pay
12 for overtime is to . . . create a disincentive to employers to
13 impose overtime on employees," and that dilution of that premium
14 would lessen the disincentive. DLSE Manual, § 48.1.4. Marlo has
15 pointed to no similar rule that applies in a wage and hour context
16 other than calculating the rate of overtime pay, such as, for
17 example, calculating minimum wage. Relatedly, Marlo has not
18 explained how the forty-hour work week base line is relevant in a
19 context where overtime is not required or why the flexible work
20 week rule would be inappropriate outside the overtime context.⁴
21 Because the Motor Carrier Act exemption provides that the *entirety*
22 of the overtime rules do not apply, the Court is not persuaded that
23 Marlo is entitled to a presumption that he receives straight time
24 above and beyond his salary.

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27 ⁴For example, the Wage Order's definition of "workweek" does
28 not include a presumption that the appropriate work week is 40
hours. See 8 C.C.R. § 11090(2).

1 The California court of appeal's decision in Armenta v.
2 Osmose, Inc., 135 Cal. App. 4th 314 (2005), does not counsel to the
3 contrary. In Armenta, the plaintiffs were paid hourly wages
4 ranging between \$9.08 and \$20.00, depending on their position. The
5 plaintiffs claimed that the company had not paid them for hours to
6 which they were entitled, had therefore violated the requirement
7 that employees be paid a minimum wage. Cal. Labor Code § 1194.
8 The employer argued that it had not violated the minimum wage
9 requirement because, even though the plaintiffs had not been paid
10 for certain hours, their average rate of pay including those extra
11 hours was still above the minimum wage. The court rejected the
12 employer's argument. The court explained that the "minimum wage
13 standard applies to *each hour* worked by respondents for which they
14 were not paid." Id. Although Marlo emphasizes that he must be
15 paid for "all hours worked," he does not explain how Armenta's
16 rejection of the averaging method for *hourly* employees bears on a
17 *salaried* employee like him. As far as the Court can tell, Armenta
18 does not apply in this case: unlike the plaintiffs there, Marlo
19 does not bring a Labor Code § 1194 claim and is not an hourly
20 employee.

21 The Court is wary of ruling in a way that undermines the
22 protections afforded to workers under California's wage and hour
23 laws or offends the structure set out by the wage and hour scheme.
24 Upon consideration, however, it appears to the Court that the
25 policy considerations underlying this issue point in both
26 directions. On the one hand, California wage and hour law treats
27 workers who are not exempt from an entire wage order (e.g., because
28 they are executive employees) in a sense like hourly employees,

1 whether or not they are paid by a salary: although employees may be
2 paid by salary, employers must keep track of the hours these
3 employees work, they are entitled to overtime above and beyond
4 their salary when they work more than forty hours per week, and
5 their overtime compensation is based on a calculation of their
6 hourly rate. As Marlo points out, in many cases, employees
7 subject to the Motor Carrier exemption will be so-called "blue-
8 collar" workers, to whom the wage and hour laws were meant to
9 apply. The employer-employee relationship is not devoid of
10 flexibility or completely protected from the market, however. In a
11 context where an overtime rate does not apply, the parties have
12 pointed the Court to no provisions of the Labor Code that suggest
13 it would be inappropriate for an employer and employee to contract
14 for a different salary structure, i.e., one in which the employer
15 is paid at a higher salary and has a flexible work week, on the
16 basis of a market that will depend on the skill level and demand
17 for a certain type of employees. The law does not leave such an
18 approach without bounds: on one end, the minimum wage provisions,
19 as well as the requirements that employees are provided meal and
20 rest breaks, provide protections from salary abuse; on the other,
21 the regulations enacted pursuant to the Motor Carrier Act further
22 provide a limit on the amount of time such an employee may work.⁵
23 And nothing precludes unionized employees from entering into
24 collective bargaining agreements as to pay, time, and benefits.

25 The Court therefore holds that the application of the Motor
26 Carrier Act exemption precludes Marlo from seeking pay for hours in

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⁵See, e.g., 8 C.C.R. § 11090(4); 49 C.F.R. § 395.3.

1 excess of forty. Marlo has not suggested that his salary was
2 intended to cover only forty hours, and this is not a situation
3 where Marlo was an hourly employee who claims he was not
4 compensated at his hourly rate for hours he in fact worked under
5 either Labor Code § 1194 (regarding minimum wage) or a breach of
6 contract action.

7 **II. CALIFORNIA LABOR CODE § 226.7 and § 512**

8 The parties seek a ruling on two issues under California Labor
9 Code § 226.7, related to Marlo's claims for damages for missed meal
10 and rest periods. First, the parties debate whether § 226.7
11 provides for (1) one hour of pay for each workday an employee
12 misses a meal period and one hour of pay for each workday an
13 employee misses a rest period or (2) one hour of pay for each
14 workday an employee misses a meal period, a rest period, or some
15 combination. Second, the parties debate UPS's obligation to
16 provide its nonexempt employees with meal periods under Labor Code
17 § 226.7. Both issues arise in the context of jury instructions.

18 **A. Payment for Missed Meal & Rest Breaks**

19 The parties first dispute whether Marlo may be compensated
20 once or twice per day under Labor Code § 226.7. The parties agree
21 that the premium wage provided by § 226.7 is one additional hour of
22 pay. They disagree, however, on how many additional hours Marlo is
23 entitled to receive in the event he missed one or more meal periods
24 and one or more rest periods on any particular day. Marlo argues
25 that he may be compensated once for each workday that he missed a
26 meal period and once for each work day that he missed a rest period
27 - or, in other words, that he may receive up to two § 226.7 premium
28 work days. UPS argues that the statute evinces a clear intent to

1 impose a premium wage that is not based on the number of violations
2 that occur, but on the number of *days* any violations occur.
3 Neither party proffers a case that resolves this issue as part of
4 its holding or an administrative interpretation that might shed
5 light on the section.

6 Section 226.7 provides, in relevant part:

7 (b) If an employer fails to provide an employee a meal period
8 or rest period in accordance with an applicable order of
9 the Industrial Welfare Commission, the employer shall pay
10 the employee one additional hour of pay at the employee's
11 regular rate of compensation for each work day that the
12 meal or rest period is not provided.

13 Cal. Labor Code § 226.7(b). IWC Wage Order No. 9 considers meal
14 periods and rest periods in different sections. Subsection 11(D)
15 provides that "[i]f an employer fails to provide an employee a meal
16 period in accordance with the applicable provisions of this order,
17 the employer shall pay the employee one (1) hour of pay at the
18 employee's regular rate of compensation for each work day that the
19 meal period was not provided." 8 Cal. Code Reg. § 11090(11)(D).
20 Subsection 12(B) provides that "[i]f an employer fails to provide
21 an employee a rest period in accordance with the applicable
22 provisions of this order, the employer shall pay the employee one
23 (1) hour of pay at the employee's regular rate of compensation for
24 each workday that the rest period is not provided." Id. at §
25 11090(12)(B).

26 The Court begins with the text of § 226.7. Focusing on the
27 use of the disjunctive "or" and the use of the term "work day,"
28 both parties present a reasonable way to parse subsection (b).

1 Marlo focuses on the use of the disjunctive "or." Marlo argues
2 that the use of "or" signals that the violation of a meal period
3 requirement and the violation of a rest break requirement
4 constitutes two separate violations. According to Marlo, the text
5 therefore suggests that each type of violation can lead to one hour
6 of extra compensation. UPS argues that the use of "or" signals
7 that, even if distinct violations have occurred, the statute only
8 punishes per *workday*. The parties do not appear to dispute that
9 multiple violations of the rest break requirement in a single work
10 day would result in only one additional hour of compensation for
11 the employee. UPS essentially argues that if the legislature had
12 sought to break out the premium wage requirement, it could have
13 done so through providing separate sections for meal and rest
14 breaks or through clearer language.

15 To support his interpretation, Marlo points to the language in
16 § 226.7(b) referring to the IWC Wage Orders and to the structure of
17 those orders. Subsection (b) provides that if an employer fails to
18 provide a meal period or rest period "in accordance with" the
19 applicable wage order, the employer must pay one additional hour of
20 compensation for each workday that the meal or rest period is not
21 provided. Marlo argues that this language signals an intent to
22 incorporate the language of the Wage Order. The structure of the
23 wage orders supports Marlo's position.⁶ Using IWC Wage Order No. 9
24 as an example, the Wage Order sets out the requirements for meal
25 and rest breaks in two separate sections. See 8 C.C.R.

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27 ⁶In light of what the Court considers to be the clear
28 structure of IWC Wage Order No. 9, the Court is not persuaded by
UPS's administrative history argument to the contrary.

1 § 11090(11)-(12). Each section provides one hour of compensation
2 for the violation of that section per workday. Id.⁷ The
3 grammatical structure of § 226.7(b) does not compel the result
4 Marlo seeks, however. The "in accordance with" language is located
5 in the *first* clause of § 226.7(b) - the clause describing when an
6 employer violates § 226.7 - as opposed to the *second* clause of
7 § 226.7(b), which describes what the employer must pay when a meal
8 or rest period is not provided.

9 The legislative history likewise could be read to support
10 either party's position. The Legislature's apparent cognizance of
11 the wage orders, however, suggests that Marlo's interpretation may
12 square better with that history. On the one hand, as Marlo
13 emphasizes, the legislature has signaled that it was cognizant of
14 the requirements of the wage orders, and the timing of the
15 respective provisions is consistent with such a reading.
16 Additionally, at least one district court in California has quoted
17 the following language from a letter from the author of Assembly
18 Bill 2509, which enacted § 226.7: "this bill codifies the actions
19 of the IWC establishing a penalty for an employer who violates the
20 law requiring meal and rest periods." See Doe v. D.M. Camp & Sons,
21 2009 WL 921442, *10 (E.D. Cal. March 31, 2009); accord Murphy, 40
22 Cal. 4th at 1107 ("In discussing the amended version of section
23 226.7, which ultimately was signed into law, the Senate Rules
24 Committee explained that the changes were intended to track the

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26 ⁷ Most of the other IWC wage orders are structured
27 consistently. See 8 C.C.R. §§ 11010-130, 11150-60; but see 8
28 C.C.R. § 11140(11)-(12) (not explicitly providing premium wage for
either meal period or rest period); id. § 11170 (not providing for
rest period).

1 existing provisions of the IWC wage orders regarding meal and rest
2 periods."). On the other hand, three factors suggest that the
3 legislature may have intended to impose a different premium wage:
4 (1) the legislature chose a different structure from that provided
5 in the wage orders (one provision describing the premium wage to be
6 applied as opposed to two provisions); (2) the legislature
7 incorporated the wage orders into the first clause of § 226.7(b)
8 and not the second; and (3) the legislature used the structure it
9 did as opposed to an alternative that more clearly supports Marlo's
10 reading, such as payment of one hour's compensation per workday
11 that a meal period is not provided *and* one hour's compensation per
12 workday that a rest period is not provided.⁸

13 The only two cases that the parties cite to address the issue
14 appear to support UPS's interpretation. The parties cite only two
15 cases that seem to address this issue, though it does not appear to
16 be part of the holding of either. In Corder v. Houston's
17 Restaurants, Inc., the district court primarily addressed whether
18 the one hour compensation due under § 226.7(b) was a penalty. 424
19 F. Supp. 2d 1205, 1207 (C.D. Cal. 2006). Among other allegations,
20 the plaintiff claimed that Houston's had failed to provide her with
21 meal and rest periods or compensation in lieu thereof. Id. at
22 1206. In a footnote, the court explained that the parties
23 "disagree[d] about whether Labor Code [§] 226.7 requires an
24 employer to pay the employee for each break missed, or whether the

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26 ⁸The Court finds other comments in the legislative history
27 highlighted by the parties relatively unhelpful here. Because
28 those comments largely track the language of the section, to the
extent the language of the section is unclear, the commentary sheds
little to no additional light on the intent in this situation.

1 statute requires an employer to pay the employee for each work day
2 that breaks were not provided." Id. at 1207 n.2. Based on the use
3 of "for each work day," the court concluded that "the plain wording
4 of the statute is clear that an employer is liable per work day,
5 rather than per break not provided." Id.⁹ The court did not
6 discuss the legislative history, wage orders, or policy.

7 In Murphy v. Kenneth Cole Productions, Inc., the California
8 Supreme Court mentioned this issue, but did not address it as part
9 of the holding in that case. 40 Cal. 4th 1094, 1112 (2007). In
10 Murphy, the court addressed the question of whether the one hour of
11 pay provided in § 226.7(b) constituted a penalty or a wage, and
12 concluded that it was the latter. Discussing why it did not
13 consider the premium wage to be a penalty, the court noted that the
14 defendant argued in part that the additional hour of pay was a
15 penalty "because it is imposed without reference to actual damage,
16 since an hour of pay is owed whether the employee has missed an
17 unpaid 30-minute meal period, two paid 10-minute rest periods, or
18 some combination thereof." Id. at 1112. Though the Supreme Court
19 disagreed with the defendant's argument that this supported finding
20 the premium wage to be a penalty, the court neither disputed
21 plaintiff's characterization of § 226.7(b) nor expressly agreed
22 with it. Id. The court explained that the pay "is not transformed
23 into a penalty merely because a one-to-one ratio does not exist
24

25 ⁹ Marlo correctly points out that Corder's conclusion that the
26 one hour of pay was a penalty is not good law after Murphy v.
27 Kenneth Cole Prods., Inc., 40 Cal. 4th 1094 (2007). It does not
28 automatically follow, however, that every conclusion by the
district court is likely to have been incorrect, particularly
because the question of whether the one hour's pay is a penalty had
led to conflicting views from the courts prior to Murphy.

1 between the economic injury caused by the meal and rest period
2 violations on the one hand and the remedy selected by the
3 Legislature on the other hand. . . . Courts have long recognized
4 that the monetary value of harm to employees can be difficult to
5 ascertain." Id. Indeed, a "focus on the apparent lack of a
6 perfect correlation between the section 226.7 remedy and the
7 employee's economic injury also ignores the noneconomic injuries
8 employees suffer from being forced to work through rest and meal
9 periods." Id. at 1113. (The court of appeal had not addressed
10 this issue. See Murphy v. Kenneth Cole Productions, Inc., 36 Cal.
11 Rptr. 3d 418, 440 n.25 (Cal. Ct. App. 2005).) The Court notes that
12 the Murphy reasoning would still apply whether or not the court had
13 agreed with the defendant's characterization of the statute.

14 Finally, Marlo looks to public policy. Because meal period
15 violations and rest period violations are separate kinds of
16 violations, Marlo argues, it would make sense to impose a premium
17 wage for each type of violation. Marlo emphasizes that such an
18 approach would best square with the "health and safety
19 considerations" that "motivated the IWC to adopt mandatory meal and
20 rest periods in the first place." See Murphy, 40 Cal. 4th at 1113.
21 However, because the premium wage reflects a calculation of
22 noneconomic injury, the alternative interpretation would not
23 necessarily be *contrary* to public policy. Overall, because the
24 remedy does not exactly track with the economic injury, how the
25 public policy weighs is difficult to discern.

26 The best resolution of this inconclusive authority is to look
27 to the structure provided by the wage orders. In describing the
28 legislative history of § 226.7, the Murphy court expressly noted

1 that the Senate had changed the payment amount (from twice the wage
2 to one additional hour of pay) to "track the existing provisions of
3 the IWC wage orders regarding meal and rest periods." 40 Cal. 4th
4 at 1107. Although the Murphy court did not quarrel with the
5 defendant's characterization of how many premiums the plaintiff was
6 to provide, the court did find the point for which the defendant
7 made that characterization unavailing. Id. at 1112. As described
8 above, the Wage Orders provide a separate remedy for violations of
9 meal period requirements and violations of rest period
10 requirements. Allowing an employee to recover one hour of pay for
11 each *type* of violation listed in the statute per work day is not
12 contrary to the "one additional hour" "per work day" language in
13 § 226.7(b). Moreover, providing one additional hour for each *type*
14 of violation strikes the proper balance in incentives for
15 employers: by providing no additional premium wage when the second
16 type of violation occurs, the alternative approach would encourage
17 an employer to require an employee who has missed a ten-minute rest
18 break to also miss his lunch period.

19 Marlo may recover up to two additional hours of pay on a
20 single work day for meal period and rest break violations: one if
21 any meal period violations occur in a work day and one if any rest
22 break violations occur in a work day. However, if more than one
23 rest period violation occurs in a single work day but no meal
24 period violations occur, Marlo may only recover one additional hour
25 of pay for all of the rest period violations combined; likewise, if
26 more than one meal period violation occurs in a single work day but
27 no rest period violations occur on that day, Marlo may only recover

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1 one additional hour of pay for all of the meal period violations
2 combined.

3 **B. Requirement that Employers "Provide" Meal Periods**

4 The parties also dispute UPS's obligation under California
5 Labor Code §§ 512 and 226.7 and IWC Wage Order 9 to provide meal
6 periods.¹⁰ Relying on Cicairos v. Summit Logistics, Inc., 133 Cal.
7 App. 4th 949 (2005), Marlo argues that employers have an
8 affirmative obligation to ensure that workers are actually relieved
9 of all duty during the required meal period. UPS argues that it
10 need only provide nonexempt employees the opportunity to take a
11 meal break, not to ensure that meal breaks actually are taken. The
12 Supreme Court of California has granted review of this issue.

13 Two Labor Code provisions and the language of IWC Wage Order
14 No. 9 are principally at issue here. Section 512 reads, in
15 relevant part: "An employer may not employ an employee for a work
16 period of more than five hours per day without providing the
17 employee with a meal period of not less than 30 minutes An
18 employer may not employ an employee for a work period of more than
19 10 hours per day without providing the employee with a second meal
20 period of not less than 30 minutes" Cal. Labor Code
21 § 512(a). Section 226.7 reads, in relevant part: "(a) No employer
22 shall require any employee to work during any meal or rest period

23
24 ¹⁰As discussed above, Labor Code § 226.7 covers obligations
25 for both meal periods and rest breaks. The parties do not dispute
26 the nature of UPS's obligation with respect to ten-minute rest
27 breaks. Rather, the parties dispute UPS's concern with respect to
28 meal periods. Compare 8 C.C.R. § 11090(11)(A) ("No employer shall
employ any person for a work period of more than five hours without
a meal period of not less than 30 minutes . . .") with 8 C.C.R.
§ 11090(12)(A) ("Every employer shall authorize and permit all
employees to take rest periods. . . "). See White v. Starbucks,
497 F. Supp. 2d 1080, 1085-86 (N.D. Cal. 2007).

1 mandated by an applicable order of the Industrial Wage Commission.
2 (b) If an employer fails to provide an employee a meal period . . .
3 .” Id. at § 226.7(a)-(b). IWC Wage Order 9 reads, in relevant
4 part: “(A) No employer shall employ any person for a work period of
5 more than five (5) hours without a meal period of not less than
6 thirty minutes (B) An employer may not employ an employee
7 for a work period of more than ten (10) hours per day without
8 providing an employee with a second meal period of not less than
9 thirty minutes” 8 Cal. Code Regs. § 11090(11)(A)-(B).

10 Marlo argues that the California Court of Appeal’s opinion in
11 Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949 (2005),
12 mandates that employers “ensure employees are actually relieved of
13 all duty” so that they can actually take their meal periods. In
14 Cicairos, the California Court of Appeal considered whether the
15 employer of certain truck drivers had provided meal periods to the
16 employees. The defendant employers had used an “Activity Based
17 Compensation” system in determining the plaintiffs’ wages. 133
18 Cal. App. 4th at 955. Each truck had a computerized system which
19 recorded factors such as speed, starts and stops, and time, and the
20 employees had to manually input factors for accurate tracking. Id.
21 “Absent one of the designated reasons for a delay, a trip that took
22 longer than expected resulted in a loss to the driver because the
23 driver was not paid for the extra time.” Id. at 955-56. The
24 defendant neither scheduled meal periods nor included an activity
25 code for them such that they were on a list of acceptable delays.
26 Id. The court found that the employer had not met its burden to
27 establish at summary judgment that it provided the plaintiffs with
28 their required meal periods. Id. at 962-63. In particular, the

1 court noted that the defendant did not schedule meal periods or
2 provide an activity code for them while management simultaneously
3 "pressured drivers to make more than one daily trip, making drivers
4 feel that they should not stop for lunch." Id. at 962. The court
5 explained that "[u]nder the facts presented . . . , the defendant's
6 obligation to provide the plaintiffs with an adequate meal period
7 is not satisfied by assuming that the meal periods were taken
8 because employers have 'an affirmative obligation to ensure that
9 workers are actually relieved of all duty.'" Id. (quoting Dep't of
10 Industrial Relations, DLSE, Opinion Letter No. 2002.01.28 (Jan. 28,
11 2002)).

12 UPS argues that the relevant provisions require an employer
13 provide employees with the opportunity to take a thirty-minute meal
14 period, but that the employer's obligation stops there. That is,
15 UPS argues that employers have no obligation to keep track of
16 whether or not their employees actually take the meal period that
17 is provided. UPS looks first to the plain meaning of the word
18 "provide," the word that all three relevant provisions consistently
19 uses to characterize the employer's obligation,¹¹ as well as that
20 word's use elsewhere in the Labor Code. The dictionary definition
21 of that word includes "[t]o make available." Am. Heritage
22 Dictionary, at 676 (4th ed. 2000). Second, UPS explains that the
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24 ¹¹The language of section 11(A) of IWC Wage Order No. 9 is
25 slightly different. That subsection is also consistent, however,
26 with the word "provide." Because Labor Code §§ 226.7 and 512(a)
27 and IWC Wage Order No. 9's section 11(B) each use "provides," and
28 because even Cicairos explains that the "language of IWC wage order
No. 9 relating to meal periods tracks the language in the Labor
Code," the Court finds that the language should be interpreted
consistently. Cicairos, 133 Cal. App. 4th at 952. See Brown v.
Fed. Express Corp., 249 F.R.D. 580, 586 (C.D. Cal. 2008).

1 California Supreme Court has characterized the employee's right as
2 one against being "forced to forgo" or "forced to work through" a
3 meal period. See Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th
4 1094, 1104, 1110, 1113 (2007). Third, UPS points to numerous
5 federal cases interpreting California state law, and rejecting the
6 suggestion in Cicairos that the employer has an affirmative
7 obligation to keep track of an employee.

8 The Court holds that these provisions require that employers
9 make a meal period *available* to employees, but place them under no
10 further obligations. The Court agrees with UPS that this is the
11 most natural reading of the statute's language. The Court
12 recognizes that the language used by the Cicairos court
13 contemplates an affirmative obligation on employers to ensure that
14 employees are relieved of all duty during a meal period. So far as
15 the court can tell, however, the majority of cases addressing
16 Cicairos have held that the obligation is one to make a meal period
17 *available*. See White v. Starbucks, 497 F. Supp. 2d 1080 (N.D. Cal.
18 2007) (Walker, C.J.); Brown v. FedEx, 249 F.R.D. 580 (C.D. Cal.
19 2008) (Fischer, J.); Kenny v. Supercuts, Inc., 252 F.R.D. 641 (N.D.
20 Cal. 2008) (Breyer, J.); Salazar v. Avis Budget Group, Inc., 251
21 F.R.D. 529 (S.D. Cal. 2008) (Gonzalez, C.J.); Perez v. Safety-Kleen
22 Sys., Inc., 253 F.R.D. 508 (N.D. Cal. 2008) (Hamilton, J.);
23 Gabriella v. Wells Fargo Fin., Inc., 2008 WL 3200190 (N.D. Cal.
24 2008) (Illston). See also Wren v. RGIS Inventory Specialists, 256
25 F.R.D. 180, 208 (N.D. Cal. 2009) (Spero, J.); Watson-Smith v.
26 Spherion Pacific Workforce, LLC, 2009 WL 426122, *2 n.1 (N.D. Cal.
27 February 20, 2009) (White, J.); Carter v. Anderson Merchandisers,
28 LP, 2008 WL 4948489 (C.D. Cal. November 18, 2008) (Phillips, J.).

1 In particular, the White court explained that such an
2 interpretation would place an undue burden on employers and would
3 "create perverse incentives." Brown, 249 F.R.D. at 585 (citing
4 White). The Court finds the reasoning from White and Brown
5 persuasive, and holds that an employer has no further obligation
6 than to make available the meal period.¹²

7 Marlo argues that UPS has missed its point, and White, Brown,
8 and the other cases are unhelpful. According to Marlo, UPS is
9 focusing on the issue of whether an employer must "force" an
10 employee to take a break, but he is not advocating such a position.
11 Put differently, Marlo argues that there is an important
12 distinction between forcing an employee to take his break and
13 "ensuring" that an employee is relieved of all duties so that the
14 employee *may* take his break. At the same time, Marlo appears to
15 argue that the cases UPS cites - e.g., White and Brown - are
16 *consistent* with his rule. See Reply at 9:9-22 ("Cicairos is in
17 accord with the authorities cited by Defendant because an
18 employer's failure to ensure an employee is relieved of all duty
19 means that an employee has not been 'provided' an opportunity to
20 actually take the required meal break."). In sum, Marlo appears to
21 be arguing that the statute (and wage order) requires one of two
22 things: either (1) that an employers must ensure that employees
23 actually take their meal breaks (a characterization which Marlo
24 rejects) or (2) that UPS must offer him the opportunity to take a

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26 ¹²The Court notes that UPS framed its argument as "provide"
27 means "provide an opportunity." Because the language used by the
28 dictionary definition and the other courts on which UPS relies is
that "provide" means "make available," the Court finds that
language more appropriate.

1 duty-free meal period, but need not follow up to ensure he actually
2 takes that period.

3 Assuming that Marlo advances the latter argument, it appears
4 to the Court that the parties' approaches are not completely
5 contrary, but primarily differ in phrasing. To the extent Marlo
6 argues that the opportunity to take a meal break must be a
7 meaningful one for it to count as a meal break "provided" by the
8 employer, the Court agrees, and the Court does not read UPS's
9 papers to advocate the opposite. The various cases that doubted
10 the Cicairos rule largely did not disagree with its result based on
11 the facts of that case, where the employer's policies effectively
12 punished employees for taking meal breaks. See White, 497 F. Supp.
13 2d at 1089; Brown, 249 F.R.D. at 586. Additionally, the Court does
14 not understand UPS to argue that the meal break it makes available
15 can *include* ongoing duties. See 8 C.C.R. § 11090(C). That said,
16 the Court finds the "make available" language preferable to the
17 language proposed by Marlo, that the employer has an "affirmative
18 obligation to ensure that the employee is relieved of all duties."
19 This phrasing from Cicairos - especially the term "ensure" -
20 suggests that an employer's obligation is to actually determine
21 that the employee is no longer engaged in job duties, i.e., to
22 *force* a break.¹³ Even if Marlo does not suggest that a forced
23 break is required, the Court has some concerns that an instruction
24 using this language would be misleading and/or confusing for a
25 jury. Rather, consistent with the various courts cited above, the
26 Court finds that the employer's obligation is to make a meal period

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28 ¹³That the various courts have framed the Cicairos holding in
this way supports such a reading.

1 available to an employee. The Court does not read the parties to
2 be in disagreement as to whether this availability must be
3 meaningful, or whether the meal period offered must be one during
4 which the employee is "relieved of all duties." See 8 C.C.R. §
5 11090(11)(C). Whether UPS actually made meal periods available to
6 Marlo, or whether Marlo was forced to forgo meal breaks, is a
7 factual issue for the jury to decide.

8 IT IS SO ORDERED.

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11 Dated: May 5, 2009

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DEAN D. PREGERSON
United States District Judge