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PERSPECTIVE

GUEST COLUMN

The clock is ticking on rounding

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The anachronistic practice of rounding employees' time entries rather than paying for their actual time on the clock is one tick away from its final hour.

Employers who round time adjust employees' hours worked, either up or back, typically to the nearest quarter or tenth of an hour. For example, when time entries begin less than seven minutes before the hour mark, they are rounded up and employees lose that time, with the opposite true if they begin within the rounding window increment after the demarcation. Rounding thus permits employers to use one set of employees' time that is added during rounding windows to offset another's that is deducted. Some employees lose wages, some gain, ho hum.

For about ten years, this practice – utilized for the convenience of employer accounting though pedaled off as affording flexibility for workers – has been accepted in California provided the rounding is neutral on its face (does not only round one way in favor the employer) and in impact (does not systematically underpay the employees). That will end soon, particularly if the California Supreme Court takes up the surprising invitation to address the propriety of rounding schemes extended by the *Sixth District Court of Appeal in Camp v. Home Depot U.S.A., Inc.*, 84 Cal.App.5th 638 (Oct. 24, 2022).

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For a very brief period of time, rounding was found illegal under California law. The San Diego Superior Court in *Silva v. See's Candy Shops, Inc.* granted summary adjudication for a class of plaintiffs on several affirmative defenses to claims alleging unpaid wages due to rounding. See's Candy Shops sought a writ of mandate to review the decision, which Division One of the Fourth District Court summarily denied. The California Supreme Court granted See's Candy Shops' petition for review and ordered the Court of Appeal to vacate its prior order and issue an order to show cause why it should not reverse the summary adjudication order.

Feigning the concern for California workers they had previously espoused in matters such as unsuccessfully arguing against California's enactment of worker-protective laws providing overtime premium pay for hours in excess of eight per day, not solely for hours in excess of forty per week as provided under the Fair Labor Standards Act (FLSA), the defense amici Employers Group, the California Employment Law Council, and the Chamber of Commerce weighed in. They argued that a decision finding rounding to be a violation of California law would harm both employers and employees, forcing employers to make costly changes to their time-keep-

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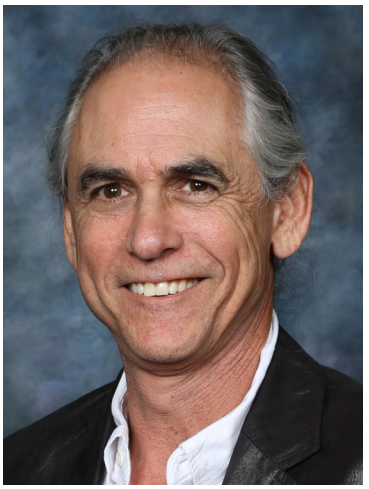

ing systems and taking away the "flexibility" that rounding provides employees.

The court sided with the employer and announced a rule endorsing rounding under California law. *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889 (2012). Though rounding is permitted under the FLSA, 29 C.F.R. § 785.48(b), there is no analogue in the California Labor Code or Industrial Welfare Commission Wage Orders, the statutory and regulatory scheme governing California labor law. Nevertheless, See's Candy Shops grounded its decision on the FLSA rounding rules, as adopted by the California Division of Labor Standards Enforcement, Enforcement Policies and Interpretations Manual §§ 47.1, 47.2 (the same manual repeatedly found by the courts to contain unlawful "underground regulations" in violation of the California Administrative Procedures Act).

The court concluded that "the rule in California is that an employer is entitled to use the nearest-tenth rounding policy if the rounding policy 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." 210 Cal.App.4th at p. 907. In other words, rounding is permissible even if large groups of employees are underpaid for their time on the clock provided that time is counterbalanced by employees paid for time rounded in their favor.

The inequity of such a system is obvious. Imagine hospital nurses reporting to work, clocking in during the rounding window seven minutes prior to the hour, and beginning their day's patient care tasks. They lose wages for time that is rounded up but cannot recover those wages because the hospital can credit against that time the amount it pays to other employees who clock in after the hour or clock out within the rounding window before the shift's ending time. In other words, one employee shorted thousands of dollars over time is not owed those wages if the time records as to other employees show the system evens out as to the workforce as a whole. That system might have made sense in a pre-technology era in which handwritten time cards or a punch clock were the primary modes of timekeeping, but no longer.

One additional oddity. A single employee who loses wages under a rounding system cannot challenge the system based solely on their own pay records. The FLSA rule adopted in California requires a showing of non-neutrality based on aggregate time records for the entire workforce, a costly burden of proof for a single employee to shoulder.

Compounding the problem of endorsing a system that untethers employers' wage obligations from time records, See's Candy Shops also created a payment scheme it called a "grace period." Speciously described as operating for the "convenience" of the employees, workers operating under a grace period are paid only for their scheduled shift hours but are provided an unpaid window of time prior to their shift to clock in. At See's Candy Stores, the policy expressly precluded employees from working during the grace period and provided a means of obtaining compensation if they did so. According to See's Candy Shops, this system was a creature ostensibly different from and impervious to the neutrality requirements of rounding. Employees could not invoke an analysis of a negative aggregate impact to the workforce to recover lost wages for pre-shift time as they could under a rounding system. Instead, pre-shift time on the clock would be treated as if it were time off-the-clock, subject to the rule in *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal.4th 1004, 1051 (2012) establishing a presumption that employees are not working when they are clocked out. The grace period concept sanctioned in the *See's Candy Shops* decision is not found in any statute or regulation, including the FLSA, and there are no published rules or regulations governing grace periods like those that exist for rounding.

Though the California Supreme Court has yet to specifically weigh in on the propriety of rounding, three recent decisions are pointing the way. In *Donohue v. AMN Services, LLC*, 11 Cal.5th 58 (2021), the Supreme Court outlawed the practice of rounding 30-minute meal periods. The Court ruled that an employer that fails to provide compliant meal periods cannot offset that non-compliance based on instances where employees received proper meal periods. Relevant to the rounding issue, the Court also found that employer time records showing missed, late, or short meal periods raise a rebuttable presumption of liability. *Donohue* observed that rounding was developed as a means of efficiently calculating hours worked and wages owed to employees, useful in some industries, particularly where time clocks are used. "But as technology continues to evolve, the practical advantages of rounding policies may diminish further." *Donohue*, 11 Cal.5th at p. 73.

Holding that the federal de minimis rule did not apply to California wage and hour claims seeking small amounts of unpaid wages – a defense often asserted by employers in justifying rounding schemes--the *California Supreme Court in Troester v. Starbucks*, 5 Cal.5th 829, 848 (2018) had previously noted that "technological advances may help with tracking small amounts of time."

Camp v. Home Depot U.S.A., Inc. is the first published California decision to directly criticize rounding. Relying on language from *Donohue* and *Troester*, Camp noted that efficiencies previously claimed for rounding time no longer apply in most instances since employers can record time to the exact minute. Remarkably, the *Camp* panel explicitly invited the California Supreme Court to take on the issue and provide guidance on the propriety of time rounding in view of language from its opinions noting technological advances that now exist which help employers to track time more precisely.

Following the reasoning of *Camp*, one federal court has already ruled Oregon law does not authorize rounding. *Eisele v. Home Depot U.S.A., Inc.*, 2022 U.S. Dist. LEXIS 216588 (D. Or. Nov. 29, 2022).

Beyond technological advances, one critical difference between the FLSA and California labor law demonstrates the inconsistency of permitting employers to round time rather than paying for all employee time on the clock. The FLSA is an "averaging" scheme. California law expressly is not. Under the FLSA, an employer meets its obligation to pay minimum wage if hours averaged over the course of the pay period total at least the applicable minimum wage. What this means is that an employee earning an hourly rate over minimum wage may work hours – called "gap time" – that go unpaid provided the averaged total meets or exceeds minimum wage. Not so in California, which requires employers to pay at least minimum wage for all hours worked with no averaging permitted. *Gonzalez v. Downtown LA Motors, LP*, 215 Cal.App.4th 36 (2013).

Following *Troester*, *Dononhue*, and now *Camp*, the next step is for the California Supreme Court to expressly denounce rounding. Technological timekeeping advances, established differences between California law and the FLSA, and California's public policy protecting employees' wages, hours, and working conditions warrant it.

In so doing, the court can declare that the *Donohue* rule that time records showing meal period violations raise a rebuttable presumption of liability also applies to bind employers to time records by raising a rebuttable presumption that all recorded time on the clock is compensable work time. Such a ruling would establish an obverse, analogous presumption for time on the clock to that announced in Brinker regarding time off the clock. California law requires employers to maintain reliable records to ensure the accurate payment of wages, and for enforcement of workplace violations, payroll taxes, workers compensation premiums, and more. There is no reason employees should not also be able to rely on the record of their actual daily time as correctly reflecting the amount of wages they have earned and are due.

If employers who rounded meal period entries were taken by surprise once *Donohue* outlawed the practice, those who continue to round time or maintain so-called grace periods may wish to rethink these practices in view of the inevitable change coming.