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CERTIFIED FOR PUBLICATION

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NATIONAL STEEL AND SHIPBUILDING COMPANY, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; ROBERT GODINEZ et al., Real Parties in Interest.	D046692 (San Diego County Super. Ct. No. GIC840471)

PROCEEDINGS in mandate after the superior court denied the motion to strike. Patricia A. Y. Cowett, Judge. Petition denied.

O'Melveny & Myers, Gordon E. Krischer, Larry A. Walraven and Brian A. Selvan for Petitioner.

Steven Drapkin for Employers Group, California Employment Law Council, California Restaurant Association, Alliance of Motion Picture & Television Producers, Airline Labor Relations Conference and California Lodging Industry Association as Amici Curiae on behalf of Petitioner.

Robert Jones for Division of Labor Standards Enforcement, Department of Industrial Relations, and California State Labor Commissioner as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Tosdal, Smith, Steiner & Wax, Thomas Tosdal and Fern M. Steiner for Real Parties in Interest.

Neyhart, Anderson, Flynn & Grosboll, John L. Anderson and Scott M. DeNardo for California Teamster Public Affairs Council and California Conference Board of the Amalgamated Transit Union as Amici Curiae on behalf of Real Parties in Interest.

Weinberg, Roger & Rosenfeld, David A. Rosenfeld, M. Suzanne Murphy and Anne I. Yen for International Association of Machinists and Aerospace Workers; District Lodge 947, AFL-CIO; and International Brotherhood of Electrical Workers, Local 569, AFL-CIO, as Amici Curiae on behalf of Real Parties in Interest.

Cohelan & Khoury and Michael D. Singer for California Employment Lawyers Association as Amicus Curiae on behalf of Real Parties in Interest.

The Labor Code requires that an employer pay an employee the equivalent of one hour of pay if the employer fails to provide a meal or rest period as required by applicable orders of the Industrial Welfare Commission (IWC). (Lab. Code, § 226.7,

subd. (b), all further undesignated statutory references are to this code.) In this case, the primary question presented is what statute of limitations applies to the payment, the one-year statute of limitations for an "action upon a statute for a penalty or forfeiture" (Code Civ. Proc., § 340, subd. (a)), or the three-year statute of limitations for "[a]n action upon a liability created by statute, other than a penalty or forfeiture" (Code Civ. Proc., § 338, subd. (a)). The answer to this question turns on whether the payment is considered primarily a penalty against employers or a wage to employees.

We conclude that a payment under section 226.7 is an obligation created by statute, other than a penalty, subject to a three-year statute of limitations period (Code Civ. Proc., § 338, subd. (a)), and that this remedy will support a claim for restitution under Business and Professions Code section 17203.

FACTUAL AND PROCEDURAL BACKGROUND

Robert Godinez, Indalecio Parra and John Petersen (collectively plaintiffs) sued their employer, National Steel and Shipbuilding Company (NASSCO), in a putative class action alleging that within the last four years NASSCO violated the Labor Code and certain IWC wage orders by requiring them to work in excess of five hours per day without receiving a meal break of at least 30 minutes and not providing them with a 10-minute rest period every four hours. (§§ 226.7, subd. (a), 512, subd. (a); Wage Order 1-2001 (Cal. Code Regs., tit. 8, § 11010, subds. 11(A) & 12(A)).) Plaintiffs assert that these violations constitute unfair competition within the meaning of Business and Professions Code section 17200. They seek: (1) compensation of one hour's pay for each day of violation of the meal or rest period law (§ 226.7, subd. (b)); (2) restitution

(Bus. & Prof. Code, § 17203); (3) an injunction enjoining further violations of the meal or rest period laws; and (4) attorney fees and costs.

NASSCO moved to strike any reference in the complaint to a time period more than one year prior to its filing on the ground that the "one additional hour of pay" required by section 226.7, subdivision (b) was a penalty subjecting plaintiffs to a one-year statute of limitations. (Code Civ. Proc., § 340, subd. (a).) It also sought to strike plaintiffs' claim for restitution on the ground the complaint did not support such a cause of action. (Bus. & Prof. Code, § 17203.) Plaintiffs opposed the motion, arguing that the "one additional hour of pay" was a wage, not a penalty, for which they could seek restitution up to four years before the filing of the complaint under the Business and Professions Code. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177-179.)

During the proceedings below, both parties requested judicial notice of the legislative and administrative history of section 226.7, and we have considered these documents. We do not consider, however, the unpublished state trial court and federal court decisions and orders submitted by the real parties in interest. (Cal. Rules of Court, rule 977(a), (b); *People v. Webster* (1991) 54 Cal.3d 411, 428, fn. 4.)

The trial court concluded that section 226.7 created a wage and denied the motion to strike all reference to a time period more than one year prior to the filing of the complaint. NASSCO sought writ review of the trial court's order, requesting (1) that the order be vacated and a new and different order be entered granting the motion and (2) an immediate

stay of all proceedings. We stayed the proceedings pending our review and issued an order to show cause why the relief sought should not be granted.

DISCUSSION

Issue Presented and Standard of Review

Section 226.7 provides:

> "(a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the [IWC].
>
> "(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the [IWC], the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

The primary question presented is what statute of limitations applies to the payment referred to in the statute. The answer to this question turns on whether the payment is primarily considered a penalty against employers or a wage to employees and therefore involves statutory interpretation, which presents a question of law subject to de novo review on appeal. (*Bialo v. Western Mut. Ins. Co.* (2002) 95 Cal.App.4th 68, 76-77.) Our goal is to ascertain and carry out the Legislature's intent (Code Civ. Proc., § 1859), looking first to the words of the statute, giving them their usual and ordinary meaning. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172.) If the language of the statute is susceptible to more than one reasonable construction, we can look to the legislative history to aid in ascertaining the legislative intent. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055.) "We are guided by the fundamental rule 'that the objective sought to be achieved by a statute as well as the evil to be prevented is

of prime consideration in its interpretation.'" (*People v. United National Life Ins. Co.* (1967) 66 Cal.2d 577, 596, quoting *Rockcreek etc. Dist. v. County of Calaveras* (1946) 29 Cal.2d 7, 9.)

Analysis

A. The Section 226.7 Payment Is Both a Penalty and a Wage

"Wages" are defined as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (§ 200, subd. (a).) The term includes benefits to which an employee is entitled as a part of his or her compensation; such as, money, room, board, clothing, vacation pay and sick pay. (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091.) In contrast, a "penalty" is "one which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage[s] sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong." (*County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596 (*Ballerino*).) Stated differently, a "penalty" compels "a defendant to pay a plaintiff other than what is necessary to compensate him [or her] for a legal damage done [] by the former." (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 837.)

If we turn to the language of the statute, credible arguments exist for interpreting the payment as both a penalty and a wage. If an employer requires an employee to work during a mandated meal or rest period, the "employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation." (§ 226.7, subd.

(b).) The payment is in the nature of a penalty because the language of the statute suggests that the payment does not apply if an employee voluntarily chooses to forego a meal or rest period. Similarly, the payment is not related to the amount of time worked because an employee receives a full hour of pay for a missed 10 minute rest period or half-hour lunch period. On the other hand, the requirement that the employer make the payment directly to the employee rather than a regulatory authority suggests that the payment is a wage. Additionally, labeling the remedy as an additional hour of "pay" suggests a wage. Section 226.7 is also part of the Labor Code's division 2 (Employment Regulation and Supervision), part 1 (Compensation), chapter 1 (Payment of Wages), article 1 (General Occupations).

Thus, the payment appears to be a penalty against the employer in the form of a wage to the employee. Because the payment required by the statute can reasonably be interpreted as both a penalty and a wage, and the Legislature did not address what limitations period applied, the statute is ambiguous and we may look to extrinsic sources, including the ostensible objects to be achieved by the statute and the legislative history. (*People v. Coronado* (1995) 12 Cal.4th 145, 151.)

Before reviewing the legislative history of section 226.7, we pause to note that the Division of Labor Standards Enforcement of the Department of Industrial Relations (DLSE) recently issued a precedent decision interpreting the section 226.7 payment as a penalty. (*Hartwig v. Orchard Commercial, Inc*. (2005) (Cal. Div. Labor Stds. Enforcement, May 11, 2005, No. 12-56901RB) (*Hartwig*); Gov. Code, § 11425.60, subd. (b) ["An agency may designate as a precedent decision a . . . part of a decision that

contains a significant legal or policy determination of general application that is likely to recur."].) Additionally, a federal district court has characterized the payments under section 226.7 as restitutionary, equating them to the payment of overtime wages. (*Tomlinson v. Indymac Bank F.S.B.* (C.D.Cal. 2005) 359 F.Supp.2d 891, 896; *Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 299 [federal court decisions interpreting California law are persuasive but not binding].) More recently, Division One of the First District concluded that the section 226.7 payment was a penalty. (*Murphy v. Kenneth Cole Productions, Inc.* (2005) 134 Cal.App.4th 728, petition for review filed Jan. 11, 2006 (S14038).)

As the DLSE aptly notes in its amicus brief, the issue of whether the payment under section 226.7 is a penalty or a wage has become highly politicized because of the potential financial exposure to employers based on the number of lawsuits and class actions pending in the state. In an effort to clarify its interpretation of section 226.7, the DLSE revoked prior inconsistent attorney opinion letters and adopted *Hartwig* as a precedent decision. Our job, however, is to ascertain and carry out the *Legislature's* intent. (Code Civ. Proc., § 1859.) Although the DLSE's construction of the statute is entitled to consideration and respect, it is not binding, and the judiciary is ultimately responsible for the interpretation of this statute. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.)

The IWC is the state agency empowered to formulate wage orders governing employment in California and the DLSE is the state agency empowered to enforce California's labor laws, including IWC wage orders. (*Tidewater Marine Western, Inc. v.*

Bradshaw (1996) 14 Cal.4th 557, 561.) Although the Legislature defunded the IWC effective July 1, 2004, its wage orders remain in effect. (*Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal.App.4th 893, 902, fn. 2.)

B. Legislative History of Section 226.7

IWC wage orders require meal and rest periods after specified hours of work and provide that employers who fail to provide a meal or rest period "shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day" that the meal or rest period is not provided. (Cal. Code Regs., tit. 8, § 11010, subds. 11(A) & 12(A).)

Assembly Member Darrell Steinberg introduced Assembly Bill No. 2509 as a means of enforcing the existing IWC wage order prohibitions against requiring an employee to work during a meal or rest period by providing "penalties" to employers that violate the IWC wage orders and allowing employees to file a civil action or bring a complaint before the Labor Commissioner. (Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Feb. 24, 2000, pp. 3, 5.) Supporters of the bill commented about the "large and growing" problem of employers who are chronic violators of wage and hour laws, including employers that worked their employees for long hours without rest breaks. (*Id*. at p. 9.)

As introduced, Assembly Bill No. 2509 provided that employers could not require employees to work during any meal or rest period mandated by an IWC order and subjected employers to a $50 civil penalty for each violation and "[p]ayment to the aggrieved employee of an amount equal to twice his or her average hourly rate of compensation for the full length of the meal or rest periods during which the employee was required to perform

any work." (Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Feb. 24, 2000.) The bill also provided that "[a]n aggrieved employee could bring an administrative action before the Labor Commissioner or could commence a civil action for recovery of these amounts, and if the employee prevails in such a civil action, the employee would be entitled to recover attorney's fees." (*Ibid*.)

In August 2000, the Senate deleted the initial language describing a penalty and payment to an employee and "[p]lace[d] into [the] statute the existing provisions" of the IWC wage order regarding meal and rest periods. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3rd reading analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 25, 2000, p. 4.) The Senate also deleted the language requiring that an employee aggrieved by a violation file a complaint under section 98 or a civil action. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3rd reading analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 25, 2000, p. 4.)

The Assembly concurrence in the Senate amendments described the amendment as "[d]elet[ing] the provisions related to penalties for an employer who fails to provide a meal or rest period, and instead codify[ing] the lower penalty amounts adopted by the [IWC]." (Conc. in Sen. Amendments, analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended Aug. 25, 2000, p. 2.) Consistently, in a post-passage letter sent to the Governor, the author of the bill stated the bill codified the "IWC's penalty level" by imposing a "penalty" on employers that violate the IWC orders regarding meal and rest periods. The letter further indicated that the bill, as originally introduced, "had higher penalties, but had been amended to conform to the IWC levels." (*Ibid*.; *In re Marriage of*

Bouquet (1976) 16 Cal.3d 583, 590 [a legislator's statement may be considered when it reiterates legislative discussion and events leading to adoption of proposed amendments, rather than merely expressing a personal opinion].)

Although the Senate struck certain words and inserted others into Assembly Bill No. 2509, in net effect, it simply lifted the language of the existing IWC orders regarding meal and rest periods and inserted that language into the bill. Stated differently, the Senate did not remove the language regarding a penalty, leaving the language regarding payments; rather, it completely rewrote the proposed language so that it matched existing IWC provisions.

The Senate amendments also eliminated the need for an employee to file an enforcement action and instead created an affirmative obligation on the employer to pay the employee the one hour's pay -- "the employer *shall pay* the employee . . . for each work day . . . ." (§ 226.7, subd. (b), italics added.) Thus, although section 226.7 penalizes an employer for requiring an employee to work through a mandated rest or meal period, the statute is self-executing in that an employee is immediately entitled to the section 226.7 payment, just like an employee is immediately entitled to payment for overtime.

The self-executing nature of the payment suggests it is not a penalty because the right to a penalty does not accrue until it has been enforced. (*People v. Durbin* (1966) 64 Cal.2d 474, 479 ["No person has a vested right in an unenforced statutory penalty or forfeiture"]; *Anderson v. Byrnes* (1898) 122 Cal. 272, 274 ["no person has a vested right in an unenforced penalty"].) Because the hour of pay under section 226.7 is owed when it is incurred, it is similar to earned wages, claims for which are payable under a court's

restitutionary power. (*Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 176 [Bus. & Prof. Code, § 17203 authorizes an order compelling a defendant to pay back wages as a restitutionary remedy]; see also *Tomlinson v. Indymac Bank F.S.B.*, *supra*, 359 F.Supp.2d at p. 896 [finding that claims under § 226.7 are restitutionary].)

The lingering question is how the Legislature viewed these changes in terms of the applicable statute of limitations. Unfortunately, the legislative history is bereft of any discussion of what statute of limitations period applies to the payment required by section 226.7, rendering it of limited value.

C. Harmonizing the Statutory Scheme

Because the legislative history of section 226.7 is not particularly enlightening, we turn to the entire statutory scheme of which section 226.7 is part to ascertain the Legislature's intent. In doing so, we cannot construe section 226.7 in isolation but must read it "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Clean Air Constituency v. California State Air* (1974) 11 Cal.3d 801, 814.)

In 1999, the Legislature enacted Assembly Bill No. 60, the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. (Stats. 1999, ch. 134, § 14.) Among other things, Assembly Bill No. 60 restored the eight-hour workday (§ 510) and mandated that the IWC conduct public hearings and adopt consistent wage orders (§ 517, subd. (a)), including orders pertaining to meal and rest periods (§ 516). Assembly Bill No. 60 also added a penalty provision to the Labor Code, enforceable by the Labor Commissioner, subjecting employers to civil penalties for any violation of an IWC wage

order regulating hours and days of work. (§ 558; Assem. Com. on Appropriations, Assem. Bill No. 60 (1999-2000 Reg. Sess.) as amended March 22, 1999 pp. 4-5.) Section 558 requires employers to pay a civil penalty of $50 for initial violations, and $100 for subsequent violations, for each underpaid employee for each pay period for which the employee was underpaid and to pay the wages to the underpaid employee. (§ 558, subd. (a).)

The penalty provision of section 558 indicates that employers owe the civil penalty to "underpaid" employees. (§ 558, subd (a).) In an interpretative memorandum of Assembly Bill No. 60, the DLSE stated that the civil penalties of section 558 apply to meal period violations, but only to the extent that an employee is actually "underpaid," i.e., the violation must be coupled with a failure to pay the employee for the time worked during the unlawfully deprived meal period. (DLSE Memorandum dated December 23, 1999 at pp. 19-20 at <http://www.dir.ca.gov/dlse/AB60update.htm> [as of Dec. 19, 2005] see Addendum A.) Stated differently, if employers pay the required additional hour of pay on the payday for the pay period for which the meal and rest period violations took place, there would be no "underpayment" and thus, no civil penalty under section 558.

Effective March 1, 2000, the IWC issued "Interim Wage Order - 2000" that implemented the changes in the law as a result of the Legislature's adoption of Assembly Bill No. 60. (Summary of Interim Wage Order - 2000 at <http://www.dir.ca.gov/IWC/SummaryInterimWageorder2000.html> [as of Dec. 19, 2005] see Addendum B.) The interim wage order essentially adopted the civil penalty provisions of section 558 for any violation of the interim wage order. The IWC later promulgated

Wage Order 1-2001 (effective Jan. 1, 2001, as amended), which included the one hour of pay requirement for meal and rest period violations and the penalty provision contained in the interim wage order. (Cal. Code Regs., tit. 8, § 11010, subds. 11, 12 & 20.)

In turn, Assembly Bill No. 2509 sought to strengthen the enforcement of existing wage and hour standards contained in current statutes and wage orders. (Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as introduced Feb. 24, 2000, p. 7.) In this regard, section 226.7, effective January 1, 2001, adopted the one hour of pay provision of Wage Order 1-2001 for meal and rest period violations.

Sections 558 and 226.7 complement each other. Under section 226.7, employers must pay their employees the compensatory remedy of one hour of pay for meal and rest period violations. If employers fail to do so on the payday for the pay period for which the meal and rest period violations took place, they will also be subject to the civil penalty of section 558. This overall scheme suggests that the payment under section 226.7 is in the nature of a statutory remedy to employees because it is unlikely that the Legislature intended to establish two penalties on employers for meal and rest period violations.

The DLSE contends that section 558 does not apply to meal or rest period violations, citing the enrolled bill report for section 226.7. The enrolled bill report states, without explanation, that the penalties of section 558 are for the underpayment of wages, and not meal or rest period violations. (Dept. of Industrial Relations, Enrolled Bill Rep. on Assem. Bill No. 2509 (1999-2000 Reg. Sess.) Sep. 13, 2000, p. 9.) We reject this conclusion as it is not instructive, not reflected in the legislative history of section 226.7 and does not comport

with the statutory scheme just described. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19 [enrolled bill report prepared by DLSE was instructive on matters of legislative intent where it reflected the understanding of the Legislature as a whole].)

D. General Legal Principles and the Object of Section 226.7

We assume "that the Legislature has in mind existing laws when it passes a statute." (*Estate of McDill* (1975) 14 Cal.3d 831, 837.) Existing law creates a one-year statute of limitations for an "action upon a statute for a penalty or forfeiture" (Code Civ. Proc., § 340, subd. (a)) and a three-year statute of limitations for "[a]n action upon a liability created by statute, other than a penalty or forfeiture." (Code Civ. Proc., § 338, subd. (a).) Here, the Legislature could have, but did not, label the statutory payment of section 226.7 as a "penalty." Significantly, the Legislature was aware of how use of the word "penalty" impacts the applicable statute of limitations because in enacting section 203, which continues the unpaid wages of a discharged employee as a "penalty" for up to 30 days, it expressly provided that "[s]uit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." (§ 203.)

We thus conclude that the payment of section 226.7 is an obligation created by statute, other than a penalty, governed by Code of Civil Procedure section 338, subdivision (a). (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23 [the applicable statute of limitations depends on the nature of the right sued upon, not the label of the cause of action pleaded in the complaint].) General legal principles and the object of section 226.7 support this conclusion.

First, statutes governing conditions of employment are construed broadly in favor of protecting employees. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) Applying this principle here suggests that the longer limitation period should apply. Additionally, the general purposes underlying statutes of limitations do not warrant a one-year limitations period. Statutes of limitation protect potential defendants from stale claims by affording them an opportunity to gather evidence while facts are still fresh. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 512.) Because employers are required to keep all time records for a minimum of three years, they will have all documents necessary to mount their defense to plaintiffs' claims. (Cal Code Regs, tit. 8, § 11010, subd. 7(A)(3) & (C).)

Section 226.7, subdivision (a) states that "[n]o employer shall require" an employee to work through a rest or meal period but, if the rest or meal periods are not provided, the employer shall pay the one-hour pay. (§ 226.7, subds. (a) & (b).) Thus, the object of section 226.7 is to pay employees for additional work performed during mandated meal or rest periods and deter employers from requiring employees to work through these periods. Construing this section in favor of employees, it provides a statutory measure of compensation for what would otherwise be uncompensated labor performed during a meal or rest period. The fact that the Legislature tied the section 226.7 payment to the employee's regular rate of compensation also suggests that it considered the payment to be compensation for otherwise uncompensated work, compensation that is properly measured by the employee's regular pay rate. (§ 226.7, subd. (b).) Construing the payment as a penalty illogically results in employers of lower-

paid employees being "penalized" less than the employers of higher-paid employees for the exact same offense.

Interestingly, the IWC has characterized overtime payments to employees as both a premium and penalty pay. (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 713 [containing IWC statement regarding overtime].) Despite this, it has long been recognized that an action to recover overtime compensation is governed by the three-year statute of limitations period of Code of Civil Procedure section 338. (*Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404.)

Use of the word "penalty" in the legislative history is not surprising because the payment is a deterrent device in the form of a wage to the employee. Significantly, however, the Legislature deleted the word "penalty" from Assembly Bill No. 2509 and never linked its use in the legislative history to the one-year limitations period of Code of Civil Procedure section 340. Moreover, employers have an affirmative obligation to make the payment or else the employee will be underpaid and the employer subject to a penalty under section 558, suggesting that the payment is remedial in nature. It appears to us that use of the word "penalty" in the legislative history to describe the section 226.7 payment is simply a way of describing the effect of the payment on an employer, rather than mandating what statute of limitations should apply to the payment.

We find that the use of the word "penalty" in discussing the section 226.7 payment is not controlling because the Legislature chose not to apply this label, and as NASSCO argues, whether or not the section 226.7 payment is a penalty turns on its function and operation, not on its label. Here, the payment is clearly remedial to the employee and penal to the

employer. (*Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1243 [same provision may be penal to the offender and remedial to the victim].) Nonetheless, in the labor law arena, statutes must be construed in favor of the employee, militating that the payment should be subjected to the longer statute of limitations period.

E. Restitution Under the Business and Professions Code

Plaintiffs' third cause of action seeks restitution under Business and Professions Code section 17203 for the unpaid one hour of pay. Employees earn the additional hour of pay when they are denied a meal or rest period; thus, the payments under section 226.7 are restitutionary and recoverable under California's Unfair Competition Law. (*Tomlinson v. Indymac Bank F.S.B.*, *supra*, 359 F.Supp.2d at p. 896.)

F. Conclusion

Section 226.7 has the dual function of deterring employers from requiring their employees to work through mandated meal and rest periods and compensating employees required to work through these periods. The Legislature could have, but did not, label the statutory payment of section 226.7 as a "penalty," and the entire statutory scheme suggests that the payment under section 226.7 is primarily in the nature of a statutory remedy to employees. Of course, if this is not what the Legislature intended, then it may amend the statute to clarify its intent.

DISPOSITION

The petition is denied, and the temporary stay of proceedings issued on August 8, 2005, is vacated. Real Parties in Interest are entitled to costs in this writ proceeding.

CERTIFIED FOR PUBLICATION

McINTYRE, J.

I CONCUR:

McCONNELL, P. J.

IRION, J., Dissenting.

I respectfully disagree with my colleagues. I am persuaded by the reasoning of *Murphy v. Kenneth Cole Productions, Inc.* (2005) 134 Cal.App.4th 728, 750-756, that Labor Code section 226.7 creates a penalty to which the one-year limitations period of Code of Civil Procedure section 340, subdivision (a), applies.

As I read section 226.7, subdivision (a), it unambiguously *prohibits* an employer from requiring an employee to work during a rest period, stating that "*[n]o employer shall require*" such work from an employee. (Italics added.) "Payment imposed on the employer due to impermissible conduct is not an employee benefit given for labor performed, but is a *sanction* or *punishment* for failure to provide work accommodations such as adequate meal breaks." (*Murphy*, *supra*, 134 Cal.App.4th at p. 752, italics added.) Accordingly, I am unable to reach any conclusion other than that Labor Code section 226.7 reflects a *penalty* for statute of limitations purposes.

Indeed, my colleagues recognize that Labor Code section 226.7, subdivision (b), *is* a penalty, albeit in the form of a wage. In my view, as long as the liability created by Labor Code section 226.7 represents a penalty, it is irrelevant whether that penalty takes the form of a wage. Any liability constituting a penalty is unambiguously excepted from the three-year statute of limitations period of Code of Civil Procedure section 338, subdivision (a), which applies to "[a]n action upon a liability created by statute, *other than a penalty* or forfeiture." (Italics added.) Because the liability created by Labor Code section 226.7 is a penalty, I would conclude that it is controlled by the one-year

statute of limitations for an "action upon a statute for a penalty or forfeiture." (Code Civ. Proc., § 340, subd. (a).)

____

IRION, J.