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Talking points in light of the Supreme Court's decision in *Murphy v. Kenneth Cole Productions, Inc.*, Case No. S140308 (Cal. Sup. Ct. April 16, 2007):

1. The Supreme Court held that the “one hour of pay” provision in Labor Code section 226.7 constitutes “wages” and not a “penalty.” The Supreme Court flatly rejected the employer’s argument that section 226.7 created a “penalty.” According to the Court, section 226.7 payments are “pay remedies.”

2. The practical effects of this holding are:

a. The Court’s holding only applies to nonexempt employees – that is, employees who are entitled to overtime compensation, and who are otherwise subject to other provisions of the Labor Code.

b. The statute of limitations for failure to provide meal and rest periods for non-exempt employees is 3 years.

c. The statute of limitations for an unfair competition claim arising from a failure to provide meal and rest periods is 4 years.

d. Because the court declined to hold that the “pay remedy” provisions of section 226.7 constitute a penalty, it is more likely that other wage penalties may be awarded for failure to provide meal and rest periods for non-exempt employees. For example, an employer who fails to pay section 226.7 “pay remedies” upon termination of employment may be subject to waiting time penalties pursuant to Labor Code 203, in an amount that cannot exceed 30 days’ wages.

3. Employers in California have *no* guidance as to what they must do to avoid section 226.7 pay remedies. Labor Code section 512(a) and the Industrial Welfare Commission Wage Orders generally provide that employers can’t employ employees for more than 5 hours “without providing the employee with a meal period of not less than 30 minutes.”

a. The oldest DLSE interpretation of “provide” required employers to force their employees to take meal and rest periods. In addition, the DLSE opined that meal periods must start before commencement of the fifth hour of work, as opposed to some time

“after the commencement of” the 5th hour of work. The DLSE withdrew this interpretation in December 2004.

b. In December 2004, the DLSE issued proposed new regulations that defined “provide” as “make available,” which suggested that section 226.7 pay remedies would only be awarded in those cases in which the employer actively prevented employees from taking their breaks. These regulations were also withdrawn.

4. This will result in further class action litigation in California.

5. In light of the Supreme Court’s decision in Murphy, employers should:

a. Ensure that applicable wage orders are posted in the workplace.

b. Consider preparing written policies describing the employee’s right to take meal and rest periods.

c. Train supervisors to enforce meal and rest periods for non-exempt employees. For full time employees, meal periods should commence before the fifth hour of work; 10 minute paid work breaks usually should be provided for every four hours of work.

d. Maintain adequate records that document when meal and rest periods have been taken.

e. Consider whether voluntarily to make “pay remedy” payments to those employees who fail to take meal and rest periods.