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## The Unanswered Question: Do “Call-In” Schedules Trigger California Reporting Time Pay Obligations?

By Cheryl D. Orr, Philippe A. Lebel and Irene M. Rizzi

On June 8, 2017, plaintiffs Mayra Casas and Julio Fernandez (“Plaintiffs”) filed an unopposed motion seeking approval of a \$12 million settlement reached against defendant Victoria’s Secret Stores, LLC (“Victoria’s Secret”) in a closely watched case challenging the legality of Victoria’s Secret’s “call-in” scheduling practices. The case, *Casas v. Victoria’s Secret Stores, LLC*, was pending before the Ninth Circuit Court of Appeals at the time the parties’ settled the case, and was one of many currently pending class action lawsuits challenging similar practices by retailers. As a result of the parties’ settlement, the ultimate question in *Casas* remains unanswered: Are employees who are required to call their employer to determine if they are required to show up for call-in shifts entitled to reporting time pay?

### Retail Industry Reporting Time Pay Requirements

In addition to the Labor Code, employers in California must adhere to the requirements of industry-specific Wage Orders, promulgated by the now-defunct Industrial Welfare Commission. Wage Order 7, which applies to the “mercantile” industry (i.e., retailers), requires employers to pay non-exempt employees for certain unworked but regularly scheduled time. Such compensation is known as reporting time pay. Under Wage Order 7, retailers are required to pay reporting time pay if an employee “is required to report for work and does report, but is not put to work or is furnished less than half ...[of his or her] usual or scheduled day’s work.” When this occurs, the employee must be paid the greater of (1) half his or her usual or scheduled day’s work (up to four hours), or (2) two hours at his or her regular rate of pay.

In the past, most reporting time pay litigation concerned situations where non-exempt employees were called in to work for special meetings or were sent home early on regularly scheduled days of work.

### *Casas v. Victoria’s Secret Stores, LLC*

Filed in 2014, *Casas* called into question the legality of call-in scheduling, a common practice among retailers. Victoria’s Secret’s call-in policy required employees to call their managers two hours before the start of certain scheduled call-in shifts to determine if the employees needed to show up for work. When employees were required to come in to work, they were paid for their work time. However, when employees were told that they did not need to report to work, they were not paid. Plaintiffs argued that this policy violated Wage Order 7 because employees “reported to work” by calling their manager and were thus entitled to reporting time pay when Victoria’s Secret failed to furnish or cut short their call-in shifts.

In December 2014, U.S. District Court Judge George H. Wu rejected Plaintiffs’ argument and dismissed their call-in claims, reasoning that both the common meaning of “report” and legislative history held that “reporting for work” entailed physically appearing for work. Thereafter, Plaintiffs took an interlocutory appeal to the Ninth Circuit.

During oral argument, the three-judge Ninth Circuit panel expressed concerns about rendering a decision on the legality of uncompensated call-in procedures, and suggested that the question might be better resolved by the California Supreme Court.

Following oral argument, but before the Ninth Circuit rendered any decision, the parties settled the case, depriving the appellate court of the ability to render an opinion. Under the terms of the proposed settlement, Victoria’s Secret will pay \$12 million to settle the claims of the 40,000 putative class members.

## Questions Left Unanswered

While *Casas* was pending, numerous other retailers (including Club Monaco, Hollister, Abercrombie & Fitch, and Zumiez) were hit with similar putative class action lawsuits challenging their respective call-in scheduling practices. Several of those cases were stayed pending resolution of *Casas*, and will now proceed without a definitive answer from the Ninth Circuit regarding the law.

Several large retailers, including Victoria's Secret, have done away with call-in shifts. However, such practices remain commonplace in the retail industry. Whether employers—retailers in particular—are required to pay reporting time pay for unworked call-in shifts remains an open issue.<sup>1</sup> We will continue to monitor case law and legislative developments in this area.

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<sup>1</sup> Several state attorneys general have put pressure on large retailers to abandon call-in scheduling and certain jurisdictions (e.g., San Francisco) have proposed and/or enacted legislation prohibiting employers from such practices. However, to date, California has not passed any state-wide legislation addressing the practice.

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