

Legal Lectern: Gimme a Break!

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Like many States, California has rules which *require* employers to give employees meal breaks and rest breaks. Currently, these are in the Industrial Welfare Orders that may vary from industry to industry in various particulars, but they are virtually uniform on the subject of breaks. The rules are pretty simple. Assuming the usual eight hour day, all employees are entitled to a ten minute rest break in both the first half and the second half of the shift, preferably “in the middle of each work period.” If the shift is shorter, there are proration provisions. On meals, assuming the shift is at least five hours, employees are likewise entitled to a 30 minute meal break which must start no later than in the fifth hour from the start of the shift. If the shift is longer than 10 hours, the employee gets a second meal break¹. Both meal breaks and rest breaks are mandatory, but meal breaks are especially so: the Division of Labor Standards Enforcement’s (DLSE) historic policy has been that the employer must *compel* a meal break.

Rest period time is *paid* time off, and counts as part of the workday. Lunch breaks, assuming the employee is completely duty-free during the period (no eating at your desk and taking calls, Charlie), are unpaid in the case of non-exempt employees and do not so count. If you’re astute, you’ll have figured out that in the related area of overtime pay, which starts for non-exempt employees after eight hours of daily work, the eight hours are computed by including

¹Rest Breaks. “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.”

Meal Breaks. “[Except in very limited circumstances where there is a written agreement to the contrary,] no employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, [nor] for a work period of more than ten (10) hours per day without providing the employee with a *second* meal period of not less than 30 minutes. . . .”

The exempt employee’s right to a meal break rests on Labor Code § 512, but he is not entitled to premium pay for failure to provide the meal period, since Labor Code § 226.7 only applies if the meal period in question is provided by an IWC order. The IWC Orders specifically exclude exempt employees from the coverage of the IWC meal period requirement. Hence, no premium pay may be imposed on an employer who fails to provide a meal period to an exempt employee.

the rest breaks and excluding the lunch breaks.

Now this is pretty uncontroversial stuff. The rules have been around for a long time², and, after all, everybody's got to eat sometime. Twenty years ago, if an employer ran afoul of one of the break rules, it would simply correct its rules and get on with life.

But then again, this is now 21st Century California, where three assumptions are almost always valid: First, some employer, usually from out of State, will decide that it doesn't need to learn anything about the rules or that it can ignore them. Second, some plaintiffs' attorney will bring a class action to challenge the employer's practice. Third, excruciating cries of pain will issue from Sacramento, and a new movement for employment "reform" will be born.

And indeed, that's what's happened here. (*I love this profession!*)

While most employers and some States provide for breaks in one way or another, California's rules have an unusual premium pay provision added in 2000 after the IWC found that there was widespread noncompliance with break rules. The revised orders state, "If an employer fails to provide an employee a rest [or meal] period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest [or meal] period is not provided." Figuring that the wage order might not be a strong enough legal foundation on its

² The current five hour rule has a statutory basis appearing in Labor Code § 512, passed in 1999:

"(a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

"(b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees."

However, the five hour rule is much older, appearing in wage orders going back almost fifty years.

own, the Legislature adopted the one hour premium pay rule by statute in 2001.³

Into this fertile legal marsh stepped none other than Wal-Mart, the designated bad boy of the plaintiffs' employment bar. It seems that in 2000, Wal-Mart ran an internal multi-State spot check of 127 stores that suggested that it had some 76,000 missed meal and rest breaks in *one week*. (In fairness, Wal-Mart claimed that "most" of these weren't missed breaks, but merely actual breaks that had not been recorded in company records). Unsurprisingly, sundry plaintiffs filed suit in Alameda County, claiming that the chain, among other infractions, forced employees to forego lunch breaks. The case, a certified class action with perhaps as many as 200,000 members, is set to go to trial in June. Suffice it to say that several tens of thousands of employees, multiplied by two "hour[s] of pay at the employee's regular rate of compensation for each workday," multiplied by the number of days in the three year (or possibly one year) statute of limitations produces a very large number.

With a trial date fast approaching, it was obviously time for Sacramento to chime in. When he was running for office, the Governor promised to be more business-friendly, and one place this promise has been evident is in the area of employment law. Late last December, the administration proposed a regulation that would have three major effects. First, it proposed to amend regulatory rules to provide that the one hour's premium pay for not "providing" the required break would be regarded as a "penalty" rather than as a "wage." This technical change, if eventually accepted as valid by the courts, would reduce the potential period of limitations from three years to one and arguably cut the potential recovery in the Wal-Mart and similar cases by two-thirds. Second, it would allow employees to request a meal break to begin after the sixth hour of work. In the absence of employee consent, the meal break would have to be provided in or before the fifth hour. These changes seem to have occasioned little criticism. Third, some definitions were reworked, with the result that an employer would be held to have "provided" a meal break so long as it "makes the meal period available to the employee and affords the opportunity to take it." This "make available" test is radically less stringent than the historical DLSE policy that "it is the employer's burden to *compel* the worker to cease work during the meal period." In our hyperbolic times, it has led labor unions and other employee representatives to charge that the Administration is trying to undermine the mandatory meal break entirely. The language cannot be stretched that far, but there is no doubt that it may become a lot harder to prove a meal break violation, and that some employers may try to informally coerce employees into "voluntarily" abandoning lots of meals.

³Lab. C. § 226.7:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, 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.

Once public hearings are concluded in March, the new regulation will go into force later in the spring unless there are further developments. And there may be some, for the soap opera continues. The Superior Court judge in the Wal-Mart case recently ordered many of the case's factual records sealed, which has resulted in legal proceedings by a Berkeley newspaper to open them up. Reason, according to San Francisco's legal daily, *The Recorder*: "... the lawyers think the material could shed light on the business *and political* strategies used by [Wal-Mart]." Which could make it unseasonably hot in Sacramento, producing even more regulations, statutes, and good old fashioned lawsuits.

My advice? For the time being, follow the old rule of requiring your employees to take a meal break no later than within the fifth hour. Give them their required rest breaks. Make sure that your record keeping clearly shows that you're granting the required breaks in a timely fashion. Take comfort in the fact that DLSE is now leaning toward the employer's side. You want more insight than that when there's ongoing litigation and serious politics that could change the rules overnight? Sheesh. Gimme a break.