

Law Report

LEGAL NEWSLETTER

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MEAL AND REST PERIODS IN THE WORKPLACE

Courts Unclear on What Employers Must Do to "Provide" Breaks

California requires employers to "provide" to its hourly, exempt-from-overtime workers a minimum ten-minute *paid* break for every four-hour shift and "provide" a minimum thirty-minute *unpaid* meal period for every five hours on the job. In a previous article "Murphy's Law Revised," we reported the California Supreme Court's April 16, 2007 decision in *Murphy v. Kenneth Cole Productions, Inc.*

California law imposes a one-hour pay premium per worker for every day that a business "fails to provide" the required minimum break or meal period

to hold employers liable for up to three years of previous violations on these meal break and rest period laws. Those laws impose a premium on an employer of one hour extra pay per

worker for every day that business "fails to provide" the required minimum break or meal period.

In its short seven-year history, this "provide or pay premium" law has grown into a monster, with claims for missed meal and rest periods perhaps the hottest and most frequently used theory of wage-oriented challenge against California employers today. Some consequences are, to say the least, ironic for unwary employers. For instance, since the law requires an *unpaid* meal period for each five hours worked, an employer can rack up an obligation to pay an employee yet another one hour of premium pay where that business has been magnanimous enough to provide that employee *paid* half-hour or longer meal break.

A frequent question employers raise is just what each must do to comply with the requirement to "provide" the 10-minute breaks and the 30-minute meal periods. While no

published upper court decision exists on what "provision" of the 10-minute break periods means, it appears enough from agency guidelines that businesses issue and post notices on

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employee rights to take such time off each shift. While a California Court of Appeal is expected to issue a decision soon on what "provision" of the meal periods means (*Brinker Restaurant Corp. v. Superior Court*), it is unsettled whether an employer is required to walk the halls and literally police its employees to take that minimum thirty minutes of unpaid lunch or other mealtime.

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EMPLOYMENT 101: CALIFORNIA PAY STUB REQUIREMENTS

Employers that Fail to Comply with Pay Stub Requirements May Be Liable for Penalties

Along with each paycheck, California law requires employers provide a written itemized statement containing nine pieces of information about that payment:

- Gross wages earned;
- Total hours worked (except salaried exempt employees);
- Piece rate units and rate, if applicable;
- All deductions, including taxes, disability insurance, and health and welfare payments (deductions ordered by the employee may be aggregated and shown as one item);

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The Law Offices of Timothy Bowles work primarily in employment and health care fraud law; mediation; arbitration; and civil litigation. While published articles convey the firm's views on topics it has found concern many of its clients, the articles are not intended and should not be considered legal advice. Such professional advice requires full disclosure to an attorney of a client's circumstances and that attorney's opportunity to analyze those circumstances against applicable law.

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Employer’s Actions for Compliance with California’s Rest Period

Rule: Labor Code section 226.7 states: “No employer shall require any employee to work during any [required] meal or rest period.... If an employer fails to provide an employee [such] a meal period or rest period..., the employer shall pay the employee one additional hour of pay at the employee’s regular rate of

The DLSE, California’s enforcement agency, only requires the employer to issue and promote proper policy on employee rest periods

compensation for each work day that the meal or rest period is not provided.”

California’s several Industrial Welfare Commission (IWC) Wage Orders provide “[e]very employer shall authorize and permit all employees to take [minimum 10-minute] rest periods, which insofar as practicable shall be in the middle of each work period.” In contrast to its hardball stand on meal periods discussed below, the Division of Labor Standards Enforcement (DLSE), entrusted to enforce California’s labor laws, merely requires the employer to “authorize and permit all employees to take rest periods.”

Thus, an employer’s issuance and respect for a policy setting out paid rest breaks is probably enough

to avoid incurring the one-hour premium pay obligation. Employers need not prowl the workplace policing the employees to take their ten-minute breaks. According to the DLSE, no premium pay obligation attaches for an employee “who was truly authorized and allowed to take a rest break [and who] freely chooses without any coercion or encouragement to forego or waive a rest period.” DLSE September 17, 2001 Opinion Letter.

California’s “Police Force” Interpretation of the Law on Meal Breaks: The IWC Wage Orders provide “[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes...” A second meal period of not less than thirty minutes is required if an employee works more than ten hours per day.

The DLSE takes the “police force” interpretation of this rule, asserting it is the employer’s burden to compel the employee to cease work during the meal period and that employers are liable if an employee does not take a timely meal period, regardless of the employer’s intentions and policies. DLSE September 17, 2001, Opinion Letter.

If the courts were to ultimately agree with this view and an employee, perhaps working in an area not usually frequented by managers, chooses to eat at his desk while working and reports the time as working hours, the employer could be liable not only for the time actually worked but for an extra hour of pay for not coming around and ensuring that worker did not knock off and take his

lunch off the clock.

California Has Only Limited Exceptions to the Mandatory Meal Break Rule: There are exceptions to the minimum 30-minute unpaid meal break requirement: (1) by mutual consent of the employer and employee if the employee’s total work period per day is no more than six (6) hours; and (2) by written agreement with an employee to provide a paid “on duty” meal period if “the nature of the work prevents an employee from being relieved of all duty” (for example, a security guard stationed alone at a remote site).

In addition, when employees work more than ten hours per day, if the total hours worked is no more than twelve, waiver of the second 30-minute meal period is allowed with mutual consent of the employer and employee if the employee timely took the first 30-minute meal period.

The DLSE takes a “police force” interpretation of the meal period rule, that employers must compel employees to cease work during the meal period

California Court of Appeal May Resolve the “Police the Halls” Rule on Meal Periods: In the *Brinker* case, restaurant employees filed a class action lawsuit in 2004 alleging the employer’s widespread meal period and rest break violations. Brinker Restaurant Corporation (Brinker) owns and operates over 130 restaurants in

California – including Chili’s, Maggiano’s Little Italy and Romano’s Macaroni Grill – with over 50,000 employees. When the case reached the California Court of Appeal in 2006 to decide whether Brinker’s current and for-

In limited circumstances, employer and employee can agree in writing to a paid, on-duty meal period

mer hourly employees should be included as claimants on the meal and rest issue (a point that could earn the defendant employer over \$100 million in liability), that higher court took notice of the DLSE’s “police work for employers” position from its above-described September 17, 2001 Opinion Letter.

While that Court of Appeal concluded it could not yet issue a formal opinion on this issue, it noted in contrast a recent business-friendly federal district court decision – *White v. Starbucks Corp.* (N.D.Cal. July 2, 2007) 497 Federal Supplement (F.Supp.) second series (2d) 1080 – that California’s employers “provide” meal periods merely by offering them through policy and practice. The federal judge in *White* predicted “the California Supreme Court, if faced with this issue, would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that

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Pay stub for an employee paid an hourly wage

The name and address of the legal entity that is the employer

The last 4 digits of the social security number

All applicable hourly rates

The inclusive dates of the period for which the employee is paid

SMITH AND COMPANY, INC.			
123 West Street Smalltown, CA 98765			
EMPLOYEE	SOCIAL SECURITY NO.	PAY RATE	PAY PERIOD
Johnson, Bob	XXX-XX-6789	18.00 regular 27.00 overtime	2/11/02 to 2/17/02
EARNINGS	HOURS	AMOUNT	DEDUCTIONS
Regular	40.00	720.00	Federal W/H
Overtime	2.00	54.00	FICA
			Medicare
			CA State W/H
			CA State DI
			401k
GROSS EARNINGS:		774.00	
TOTAL DEDUCTED:		217.04	
NET EARNINGS:		556.96	

This pay stub is not applicable to an employee whose compensation is solely based on a salary and who is exempt from payment of overtime under Labor Code section 515(a) or any applicable Industrial Welfare Commission order.

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- Net wages earned;
- The inclusive dates of the pay period;
- The name of the employee along with his or her social security number (last four digits only) or an employee identification number;
- The name and address of the legal employing entity; and
- All applicable hourly rates in effect during the pay period and the corresponding number of hours

worked at each hourly rate by the employee.

This law is intended to prevent workers from being cheated on their pay.

California’s pay stub law is intended to prevent workers from being cheated on their pay

Intentional failure to provide this pay stub information entitles the employee

to recover all actual damages or up to \$50 for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period, up to a total of \$4,000, plus costs and reasonable attorney’s fees.

The Division of Labor Standards Enforcement (DLSE) provides an example of an itemized wage statement (pay stub) as required by California law for an employee paid an hourly wage (<http://www.dir.ca.gov/dlse/PayStub.pdf>)

The law requires employers to provide a written itemized statement containing nine pieces of information about the accompanying paycheck

– modified above to reflect the new January 1, 2008 requirement that the itemized statement may only show the last four digits of the social security number.

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he was *forced to forego* his meal breaks as opposed to merely showing that he did not take them regardless of the reason.” Unfortunately, while a measure of sensibility for businesses (since it discredited the “internal police” interpretation of the law), a decision from a federal trial court judge is not legally binding on any California agency or court.

Employers Must Take Reasonable Steps to Ensure Hourly Workers Actually Take Their Meal Periods:

Until California courts fully resolve the issue of what an employer must do to “provide” meal periods (and in light of the DLSE’s harsh view in the 2001 opinion letter), employers must

remain diligent to take all reasonable measures for ensuring hourly, not-exempt-from-overtime employees *actually take* timely meal periods. These steps could include:

- Conduct a thorough audit of the company’s meal and rest period policies and practices to make sure they reflect a close agreement with the applicable law, preferably with assistance of a California lawyer experienced in wage and hour law;
- Ensure all non-exempt employees read and acknowledge in writing their understanding of the company’s meal and rest period rights policy and the underlying laws;
- Determine if any exception applies for mandatory unpaid meal periods. Consult with a lawyer expe-

rienced in wage and hour law on whether the nature of an employee’s work permits a written agreement for a paid “on-duty” meal period;

Employers must remain diligent to take all reasonable measures for ensuring hourly, not-exempt-from-overtime employees actually take timely meal periods

- Ensure that any such written agreement for an “on duty” meal period specifies the nature of the work justifying the exception and confirms the employee may, in writing, revoke the agree-

ment at any time;

- Have supervisors and managers conduct (and document) regular monitoring to ensure employees under them are taking their meal and rest periods and entering their unpaid meal period start and end times on time cards or sheets;

- In the event a manager finds a worker not taking the required meal period, policy and practice should direct that manager’s correction of the matter as well as documented agreement by the worker to take those periods in the future; and

- Ensure proper record-keeping is in place and maintained (i.e., time cards showing meal period start and end times) for at least a rolling four-year period, or longer if currently engaged in litigation.