

## **GIVE ME A BREAK**

The issue of breaks has caused many business owners in California to come close to the breaking point. In California, employees must be able to take a 10 minute rest break for every 4 hours of work and a 30 minute meal break after 5 hours of work. It seems simple enough, but these requirements have led to a significant increase in the filing of wage and hour claims. As you start this new year, it is important to be aware of this new trend, understand how it started and take steps to protect your business from claims that can be avoided.

### **When It Started: AB 60**

The roots of this new trend in California employment litigation can be found in Assembly Bill 60, which was signed into law on July 20, 1999, by then Governor Gray Davis. It became effective January 1, 2000, and marked a return in California to stricter requirements for things like overtime, alternative work schedules and, of course, rest and meal breaks. Prior to the passage of AB 60, California's wage and hour laws had evolved to be more in line with the federal law. In the 1980's and 1990's, the wage orders for a number of industries were amended to eliminate the daily overtime requirement and allow more flexible work schedules. With the passage of AB 60, however, this development was reversed, and California returned to being a state with one of the strictest wage and hour laws in the country.

Rest and meal breaks requirements were not new, but AB 60 imposed some new conditions relating to how these breaks needed to be taken as well as new penalties if the breaks were not taken. In summary, employers are required to "authorize and permit" a net 10 minute paid rest period for every 4 hours worked "or major fraction thereof," and the rest period should be taken in the middle of the work period, if possible. Because the rest period is paid, the employer can require the person to remain onsite, but must be sure the employee is relieved from

his or her duties in order to take this rest break. For meal breaks, the "authorize and permit" language is not used, but instead the law states that an employer must "provide" the employee with a meal period of 30 minutes. The meal period is unpaid, but the employee must be relieved of all duties and be permitted to leave the work site.

In addition to these requirements, the passage of AB 60 also introduced the "Missed Break Premium." Starting in 2000, if an employee was not able to take a rest or meal break, he or she was entitled to receive one additional hour of straight time pay. Not surprisingly, claims for this premium began to be asserted with increasing frequency. This frequency turned to fervor when the state agency responsible for the enforcement of California's wage and hour laws, the Department of Labor Standards Enforcement ("DLSE"), began enforcing claims for missed meal periods even if the employee had been permitted to take the meal period but did not for some other reason. Noting the difference in the language with regard to rest and meal breaks, the DLSE required employers to not only authorize a meal break, but make sure the employees actually take the authorized break and maintain records reflecting that the meal breaks were in fact taken.

Employers began challenging the onerous nature of this requirement, arguing that it placed employers in the position of having to police their employees to make sure they were actually taking their meal breaks. Even in situations where the employees took breaks, employers were still getting hit with the missed break premium if the time records showed the employee clocked back in before a full 30 minutes had been taken. If an audit was conducted of time records of a large employer, it was not unusual for a business to be required to pay hundreds of thousands of dollars for missed meal breaks that were not documented, even when other

evidence indicated that meal breaks were taken, but simply not captured by the company's time records.

### **When The Tide Started To Turn: The *Brinker* Case**

In July of 2008, a California Court of Appeal rendered a decision in a case called *Brinker Restaurant Corporation v. Superior Court* ("*Brinker*") that departed significantly from the DLSE's enforcement position with respect to meal breaks. The court in *Brinker* held that an employer was not required to ensure that its employees actually take their meal breaks, but need only provide the employee with the opportunity to do so. If the employee elects not to take the meal break, the employer is not responsible for the missed break premium. This decision was appealed to the California Supreme Court and has been pending before that court since October 22, 2008. It is expected that a decision will be rendered by the state's highest court before the end of this year.

### **Steps Employers Can Take**

The day after the California Supreme Court accepted the *Brinker* case for review, the DLSE issued a letter stating that, until a decision was reached in that case, the DLSE's position was that an employer was not required to ensure meal periods were actually taken, but that employers were expected to adopt policies permitting the meal breaks to be taken and keep documentation that the meal breaks were actually taken. As a practical matter, this has not prevented claims from being asserted, because if you do not have documentation that meal breaks were actually taken, the DLSE will enforce claims for missed meal breaks against you, notwithstanding evidence you may present that you permitted meal breaks but the employee elected not to take them. Thus, going forward, employers should take the following steps to protect against this type of a claim:

- Issue a written policy clearly stating that employees are expected to take rest and meal breaks and outlining when and how these breaks are to be taken. Make sure your policy also clearly states employees are expected to get permission to work through a break or alert their supervisor that he or she missed a break. The best practice is to have your employees complete a "Missed Break" form whenever a break is actually missed.
- Have every employee sign an acknowledgment of receipt of your break policy.
- Require your employees to clock in and out for meal breaks. If you have a point of sale system that makes clocking in and out mid-shift difficult, then create a form for each employee to fill out and sign that states the start and end time of the meal break taken each day.
- If you become aware that an employee missed a break for any reason at all, add the one hour premium to their pay even if the employee does not ask for it. This will demonstrate that you are not trying to avoid the premium requirement and pay it on occasion when it is required.
- Periodically audit your records for missed breaks. If you discover one after the fact, address the issue with the employee as you would for any other performance issue. Find out why the employee failed to document the missed meal break. If the employee says it was just an oversight and that he or she did actually take the meal break, have them sign an acknowledgment that this was the case and confirming that no premium is due. If the employee says there was some reason they missed their meal break, pay the one hour premium, but document that the employee was reminded of your policy and warned that if he or she does not

either get permission to work through a break or notify a supervisor immediately after a break is missed, the employee will be subject to discipline, up to possible termination.

If you implement these steps and then find an employee repeatedly forgetting or failing to document the missed breaks, despite prior reminders and warnings, this is a redflag you should not ignore. If you have documentation reflecting receipt of the policy, payment for missed breaks, reminders and warnings regarding the requirement to give notice when a break is missed, and your periodic audit continues to turn up instances when the employee fails to clock in and out for the meal break, you have an employee who is either unable or unwilling to comply with this important policy and therefore should be discharged for this reason. By ignoring it, you might save on a few missed break premiums now, but you will likely pay much more later.