Proposed Rules Would Modify Lunch-Break Policies

LAW UPDATE

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Some employees prefer to work through lunch so they can leave early and get home to their loved ones. If asked, many employees will say they would rather eat at their desks so they can leave early and be on time for their son's or daughter's T-ball practice or dance recital.

Previously, some employers would have been willing to accommodate these employees and grant them this desired flexibility. However, employers who have had to face labor commissioner audits or, even worse, individual lawsuits or class actions, realized that engaging in this form of "good deed" undoubtedly came back to haunt them.

Though there are some exceptions, as the law is currently written, employers *cannot* allow employees to work more than a five-hour work period without providing a 30-minute meal break. The meal break must be "duty-free"– meaning an employee cannot choose to eat at his or her desk while performing labor, no matter how minor. Apart from the meal periods, employers must also grant employees the ability to take paid 10-minute rest breaks in the middle of every four-hour work period.

Recently, these rules have been the subject of much confusion and debate. One such debate centered on the legally required start time for the meal period: Did the "five-hour" rule mean the meal break had to *commence* no later than the fifth hour of work? Asked differently, if the employee started the meal break at just five or ten minutes after the fifth hour, did that result in a technical violation? This issue resulted in conflicting rulings issued by staff of the Labor Commissioner's office (DLSE).

Employers faced a second problem with these rules starting in the fall of 2000 with the passing of Assembly Bill 2509. Among other things, this bill required employers to pay money each time there was a violation. The bill's purpose was well-intentioned. It was designed to protect employees' health and safety and act as effective enforcement of the meal and rest rules to ensure employers do not force employees to work during meal or rest periods. Under this payment scheme, not only would it be illegal for an employer to grant an employee's request to skip lunch, it would also result in an extra hour pay for each day the meal or rest period was missed by a non-exempt employee. For employers large and small, this resulted in numerous lawsuits, wage claims before the labor commissioner's office and class actions.

Conflicting interpretations

After the bill was signed into law, the question arose as to whether the extra hour of pay constituted a "penalty," subject to a one-year statute of limitations or a "wage," subject to a three-year statute of limitations. There were conflicting interpretations on this topic as well.

After Gov. Schwarzenegger took office, Assembly Bill 3018 was proposed in an effort to regulate meal periods for certain unionized employers. In vetoing the bill, the governor recognized there were inconsistent interpretations and confusion for both union and nonunion employees as to the meal and rest period rules. He stated:

"This confusion has left many employers facing steep penalties for failing to adhere to the law . . (and) unfortunately, provided incentive for some to take advantage of the confusion in this area in the hope of securing hefty awards from employers. This confusion is also hurting employees, as employers are growing so fearful of being hit with claims and lawsuits that they are resorting to rigid policies that deny employees any flexibility in when they may take their meal and rest periods."

The governor then directed the Labor and Workforce Development Agency:

"To immediately commence rulemaking on the regulations it believes necessary to resolve the confusion in existing law without hindering employees' access to meal and rest periods in any manner."

On December 10, 2004, in direct response to the governor's directions, the DLSE proposed emergency regulations intended to soften the harsh effects of these rules. Though initially designated as emergency regulations, the DLSE withdrew this designation and instead scheduled hearings in February and March 2005. In response to comments, the DLSE recently proposed modified regulations.

Among other things, the proposed regulations would clarify that the obligation to provide a meal period is *not* triggered until an employee works in excess of five hours, such that the meal break may commence before the start of the sixth hour of the workday. The regulations thus provide a flexible window of time for employees to take the meal break. So long as it commences by the start of the sixth hour of work, it will be deemed in compliance.

The regulations also appear to eliminate the need for employers to force breaks on employees who don't want them. As proposed, an employer would be deemed to have provided a meal period when the employer:

"a. Informs the employee of his/her right to take a meal period and the fact that he/she will suffer no retaliation for exercising this right;

b. Affords the employee the opportunity to take the meal period; and

c. Maintains accurate time records. . .or otherwise establishes by a preponderance of the evidence that a meal period was in fact actually provided to the employee."

Many view this proposed regulation to mean an employer need only demonstrate the meal period was made available to the employee and not that it was actually taken.

Clarifying rules

Also good news for employers is that the regulations, if passed, would clarify that the extra hour of pay for a missed meal or rest period is a penalty subject to a one year statute of limitations. In some litigation, this would have the effect of reducing the monetary value of the claims by 2/3, substantially reducing the employer's liability.

The proposed meal period regulations are still in the process of review. The public comment period ran through April 22,

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2005. The DLSE reported that over 4,000 written responses were submitted, with four-to-one in favor of the proposed regulations, and supporting that workers should have more flexibility when deciding when to take meal breaks. If no substantial changes are made, the regulations will be sent to the Office of Administrative Law and then to the Secretary of State.

What should employers do if the regulations are approved?

If the regulations pass, accurate record-keeping will be more important than ever. Plus, employers should consider circulating policies describing the rights to meal/rest periods and ensuring employees that no retaliation will be tolerated for those who choose to take them. When employees confirm their daily time entries, it is also recommended they be asked to confirm, in writing, that they were given the opportunity to take all required breaks in accordance with applicable law. This can be done by having employees sign acknowledgements on their time cards. Employers should also consider including the topic of meal/rest breaks during new-hire orientation and supervisory training, so that all employees are aware of the rules and their implications.

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