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An employer's guide to California meal and rest break requirements

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It has been five years since the California Supreme Court issued its seminal ruling on meal and rest breaks in *Brinker Restaurant Corporation v. Superior Court*. Although many considered the ruling in *Brinker* to be beneficial to employers, class actions against employers for meal and rest break violations have continued unabated. For example, here is a sampling of settlements in the past few years:

- **\$26 million settlement** in *Gravina v. City of Los Angeles* (2014 - denied off-duty meal breaks).
- **\$8.5 million settlement** in *Roberts, et al. v. TJ Maxx of California LLC* (2017 - failure to provide meal breaks and failure to pay for time spent closing).
- **\$7.8 million settlement** in *Wang, et al. v. Chinese Daily News Inc.* (2016 - unpaid overtime, meal and rest breaks).
- **\$2.55 million settlement** in *Hart v. Parkview Community Hospital Medical Center* (2016 - wage and hour claims, including missed meal and rest breaks).
- **\$2.0 million settlement** in *Pittacora v. Aurora Vista Del Mar, LLC* (2016 - wage and hour claims, including missed meal and rest breaks).
- **\$1.5 million settlement** in *Williams v. Il Fornaio* (2015 - wage and hour claims, including missed meal and rest breaks).

In other words, although *Brinker* answered many of the compliance issues that had plagued employers ever since California enacted its meal and rest break laws in 2000, many employers continue to struggle. For that reason, we offer this guidance for California employers in an effort to help employers avoid costly class actions that allege meal and rest break violations.



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Meal Breaks

Employers must “provide” 30-minute meal breaks

California Labor Code Sections 226.7 and 512, as well as Section 11 of **California Wage Order No. 4-2001**, establish the following requirements for meal breaks:

- “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” (Wage Order, Section 11).
- An employer may not employ an employee for a work period of more than 10 hours per day without providing a second meal period of not less than 30 minutes (Labor Code, Section 512).
- If an employer “fails to provide an employee a meal period,” the employer “shall pay” the employee one hour of pay for each work day that the meal period is not provided (Labor Code Section 226.7, Wage Order Section 11).

The key obligation for employers is to *provide* the above-described meal breaks. So how does an employer “provide” required meal periods? First, employers provide meal breaks through policies that affirmatively tell employees that they are provided and through work schedules. Having provided a policy, the issue is then whether employers must force employees to take their meal breaks. The court in *Brinker* answered that question as follows:

The employer satisfies this obligation [to provide a meal period] if it **relieves** its employees of all duty, **relinquishes control** over their activities and **permits them a reasonable opportunity** to take an uninterrupted 30 minute break and **does not impede or discourage** them from doing so.

(Emphasis added.) To put it simply, the employer must *relieve, relinquish, permit, and get out of the way*.

The *Brinker* court further stated that employers are “not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer’s obligations.” This is so even if the employee chooses to forgo the meal period after it has been provided:

[W]ork by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay.

Nonetheless, the court in *Brinker* cautioned that employers must be careful and “may not undermine a formal policy of providing meal breaks by pressuring [their] employees to perform their duties in ways that omit breaks.” In other words,

[t]he wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forgo, or otherwise encouraging the skipping of legally protected breaks.

Once the employer makes the meal period available, it needs to get out of the way so that the employee may take the meal period without any pressure to skip the meal period.

When meal periods must be taken

After *Brinker*, many meal period class actions have alleged late meal periods. Although *Brinker* lessened the burden on employers with regard to whether they must force employees to take meal periods, it added a stricter requirement with regard to the timing of meal periods. The *Brinker* court said that

Section 512 requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work.

There can be confusion, however, with regard to the phrases "fifth hour" and "10th hour" of work. To be clear, the first hour of work occurs when the employee has worked between zero minutes and 60 minutes. After the employee completes the first hour, the employee is now beginning to work his or her second hour of work, and so on. Thus, a first meal period must begin sometime *before* an employee has worked five hours. For example, an employee who starts working at 8 a.m. must begin the first meal period no later than 12:59 p.m.:

Time Worked	Hour
8:00 a.m. to 9:00 a.m.	1st hour
9:00 a.m. to 10:00 a.m.	2nd hour
10:00 a.m. to 11:00 a.m.	3rd hour
11:00 a.m. to 12:00 p.m.	4th hour
12:00 p.m. to 1:00 p.m.	5th hour (first meal break must begin before the employee works five hours or before 1:00 p.m. -- <i>i.e.</i> , by no later than 12:59 p.m.)

Similarly, a second meal period has to begin *before* an employee has worked 10 hours.

If the employer fails to provide a timely meal period, then the employer must pay one hour of premium pay to the employee. This obligation is triggered even if the delay is caused by an unusually busy period or co-workers who are out sick, among other reasons. It does not matter that the employee got a meal period.

On the other hand, if the employer *provides* a timely meal period but the employee fails or chooses not to take it on time, then the employer owes no premium pay. In a class action alleging untimely meal periods, the fight is typically about whether the late meal period was the fault of the employer or

whether it was the voluntary choice of employees.

Waivers and on-duty meal periods

One of the confusing areas of California's meal period rules concerns waivers and on-duty meal periods. It is essential that employers first understand that, in all instances when an employee works through a meal period, he or she must be paid because it is time worked. Therefore, if an employee works through a meal period and is paid for such working time, the only remaining issue is whether *the extra hour of premium pay* is owed, in addition to the pay for time worked. There are three instances when premium pay is not owed:

1. When no meal period is required and may be waived by mutual consent of the employer and employee "when a work period of not more than six (6) hours will complete the day's work" (Wage Order, Section 11).
2. When the second meal period is not required because the total hours worked is no more than 12 hours, the first meal period "was not waived," and the employer and employee mutually agree (Labor Code, Section 512).
3. When the on-duty meal period meets the requirements of the Wage Order (Wage Order, Section 11).

In the first two instances, an employee may work through a required meal period if all of the conditions above are met. In both instances, the employer and the employee must mutually agree to forgo the required meal period. If the employee agrees, the employer should have the agreement documented somewhere (*e.g.*, in an e-mail, on the time sheet, or on a signed form).

With the employee's agreement to forgo the meal period, an employer commits no violation of the first meal period and owes no premium pay when the employee works only six hours. With the employee's agreement, the employer commits no violation of the second meal period when the employee works no more than 12 hours, but only if the *first* meal period was not waived.

The third exception is trickier. It addresses the on-duty meal period. As set forth in Section 11 of the Wage Order, an on-duty meal period is permitted only when

- The nature of the work prevents the employee from being relieved of all duty during the meal break;
- The employee and employer have a signed agreement authorizing an on-duty meal period; and
- The signed agreement expressly states that the employee may, in writing, revoke the agreement at any time.

The purpose of the on-duty meal period is to address situations when employees cannot be relieved of all duty for a minimum of 30 minutes; for example, when the employee works on an assembly line that cannot stop. Other employers may be able to provide timely meal breaks most of the time but periodically are unable to do so, whether due to customer demands, staffing issues, or similar “intermittent” issues. Employers in these situations often have employees sign “blanket” on-duty meal period agreements with the requisite right to revoke. A valid on-duty meal period agreement may relieve the employer of the obligation to pay an hour of premium pay for a late or missed meal break.

In class actions, however, the issue becomes whether the employer can demonstrate that “the nature of the work prevents the employee from being relieved of all duty.” The California Labor Commissioner applies a multi-factor objective test to determine whether the “nature of the work” supports an on-duty meal period agreement. Specifically, the Labor Commissioner looks at the following:

- The availability of other employees to provide relief to an employee during a meal period;
- The potential consequences to the employer if an employee is relieved of all duty;
- The ability of the employer to anticipate and mitigate these consequences; and
- Whether the work product or process will be destroyed or damaged by relieving the employee of all duty.

The Labor Commissioner takes the position that an on-duty meal period should be used only in limited circumstances when an off-duty meal period simply cannot be provided when taking all of the above factors into consideration. That issue, however, has not been addressed definitely by the courts, and we expect it to be the subject of future litigation. For that reason, we recommend caution when relying on on-duty meal period agreements to avoid payment of premium pay for late or missed meal breaks.

Rest Periods

Under Section 12 of the California Wage Order, employers are required to provide rest breaks as follows:

- They must “authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period;”
- The rest periods shall be paid and shall be “10 minutes net rest time per four (4) hours or major fraction thereof,” although “a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours;” and
- “If an employer fails to provide an employee a rest period,” the employer “shall pay the employee one (1) hour of pay.”

Like meal periods, the court in *Brinker* required employers only to *provide* the required rest periods, but employers are not required to *force* employees to take them. Thus, the emphasis continues to be on the employer’s obligation to provide rest periods. How do employers demonstrate that they provided the required rest breaks, especially when employees do not clock in or out for rest periods? Most employers provide rest breaks through policies that affirmatively tell employees that they are provided and through work schedules. For that reason, it is a good practice for employers to maintain all posted work schedules for at least the past three or four years as a way of demonstrating that rest periods were provided.

There is no fixed time period for rest breaks. The court in *Brinker* said, “Employees are entitled to 10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.” The following chart illustrates how this works:

Number of Hours Worked	Number of Authorized 10-Minute Rest Periods
Less than 3.5 Hours	0
3.5 – 6 Hours	1
6 – 10 Hours	2
10 – 14 Hours	3

The court in *Brinker* also acknowledged that rest breaks should occur in the middle of each work period “insofar as practicable,” but rejected arguments that a rest period must be provided before the first meal period. In other words, the timing of rest periods is not as important as the timing of meal periods. Nonetheless, employers should try to provide a 10-minute rest break in the middle of each four-hour work period unless they can demonstrate that doing so is not “practicable.” Documentation of the reason that such a rest break was “not practicable” will, of course, be invaluable to an employer trying to defend its decision before an agency or a court.

On-call rest periods are not permitted

On-call rest periods are not permitted. The California Supreme Court in ***Augustus v. ABM Securities Services, Inc.***, recently said that employers are required to “relieve their employees of all duties and relinquish any control over how employees spend their break time.” In *Augustus*, the employee security guards were required during their rest breaks to keep their radios and pagers turned on and to be available to respond to emergencies. The court said that these requirements deprived employees of their statutory rest breaks. Therefore, the employer had to pay the employees one hour of premium pay for every day that they had an on-call rest period.

Premium Pay

As noted above, any failure by an employer to provide a required meal or rest break results in an obligation by the employer to pay one additional hour at the employee’s regular rate per work day

for a missed or late meal break and an additional hour per day for a missed rest break. These one-hour premiums constitute wages and are in addition to regular wages that are owed for any time worked, including any time worked during meal or rest breaks.

Again, the premium pay is owed only when the employer fails to provide the meal or rest period. It is not owed when the employee chooses not to take a meal or rest period.

In paying these premiums, employers should include a separate line item on the employee's pay stub so that it is clear when the premium pay was paid. This will allow employers to easily demonstrate through payroll records that such premiums are paid when they are owed.

Best Practices

Employers should train supervisors and managers on the above legal requirements. Here are some additional practical steps that employers should consider:

- Because every class action begins with an examination of the employer's policies, ensure that the meal and rest break policies comply with the law. For example, meal break policies should say that meal breaks are offered by the fifth hour and that second meal breaks are offered by the 10th hour; and rest break policies should say that rest periods are offered for every four hours of work "or major fraction thereof."
- Provide copies of the meal and rest break policies to employees, and require written or electronic acknowledgment of receipt.
- Establish a timekeeping policy that requires employees to accurately record all time worked and all meal breaks taken, and require that employees provide written or electronic acknowledgement of receipt of the policy.
- Establish a system for reviewing time records to promptly detect meal or rest period violations.
- Establish a system for employees to report meal and rest breaks that they missed voluntarily. This should include forms in which employees expressly acknowledge that they were provided meal or rest periods, that they voluntarily chose not to take them, and the reasons why.
- Establish a disciplinary system to apply when employees improperly fail to take meal and rest breaks.
- Incorporate meal and rest break times into employees' regular work schedules.
- Require that employees review and verify the accuracy of their weekly or biweekly time records, including meal periods and rest breaks, and require them to expressly indicate

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- on the time record if they did not receive proper meal or rest periods.
- Train managers and supervisors to allow employees’ meal and rest breaks to be uninterrupted and undisturbed, to ensure that no work is performed during those breaks, and to ensure that no one is “on call” during a meal or rest period.
- Train managers and supervisors on the company’s policies on timekeeping and off-clock work.
- Train and remind employees about meal and rest periods. This can be done in staff meetings, via monthly email announcements, or in any other mode of communication that is documented.
- Maintain files of all documentation related to meal and rest periods, including the communications described above, plus employees’ signed and verified time records and work schedules.
- Establish a system of promptly paying one hour of “premium pay” to employees for missed meal and rest periods that were not the employee’s choice.

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