

### Complying With California's Unsettled Meal Period Laws

“This is the biggest problem for companies out there in the employment area by far. I can hit a company with a hundred sexual harassment lawsuits, and it will not inflict anywhere near the damage that a wage and hour suit will.” That is what a plaintiff’s lawyer recently told MSNBC.com while bragging about the half-billion dollars in settlements he had extracted from companies in wage and hour class actions over the past few years. Michael Orey, MSNBC.com, September 24, 2007, <http://msnbc.msn.com/id/20908975>.

Meal period litigation, which involves claims against employers for not providing lunch breaks to employees, has become the claim *du jour* among wage and hour cases in California. According to statistics compiled from Courthouse News Service, which provides subscribers with daily reports of new case filings, more than 800 meal period cases have been filed in California state and/or federal courts since January 2007. Meal period litigation is so prevalent, and the financial stakes are so high, that plaintiffs lawyers have created websites that are devoted to the topic. See, e.g., [www.gotmealbreaks.com](http://www.gotmealbreaks.com) (“If you don’t get lunch, the employer owes a bunch”); [http://www.ck-lawfirm.com/class-action-help/employer\\_mistakes.html](http://www.ck-lawfirm.com/class-action-help/employer_mistakes.html) (“Ten Biggest Mistakes Made By Employers”).

The focus of the litigation has been on the meaning of the obligation to “provide” meal periods to employees — does it mean that employers must ensure employees actually take meal periods or merely make them available? The final answer to this question could have profound consequences on how employers conduct business in California and how meal period claims are litigated. If employers are required to ensure meal periods are taken, whether the employee wants them or not, employers will face huge financial risks. For example, in *Savaglio v. Wal-Mart Stores, Inc.*, the Court used the “ensure” standard when instructing the jury on the applicable law. The result was a verdict against Wal-Mart for more than \$172 million in back wages and punitive damages.

Unfortunately, a final answer may be a long way off. The Fourth District Court of Appeal in California will soon decide the issue in *Brinker Restaurant Corporation v. Superior Court (Hohnbaum)*, No. D049331. However, the losing party in that case will likely seek review from the California Supreme Court, and if the Supreme Court accepts the case, it could take a year or more before its final opinion is published. There is also a bill pending before the California Senate that officially defines provide as “make available” Sen. Bill No. 1539 (2008 Reg. Sess.). However, employee groups from several different industries have strongly opposed this bill and the earliest such legislation would go into effect is January 1, 2009.

Until the California Supreme Court or the California State Legislature definitively resolves the debate, it is important for employers to understand the law “currently on the books” and take steps to follow it. Currently, an employer’s meal period obligation is set forth in the Labor Code and various wage orders promulgated by the California Industrial Welfare Commission (“IWC”). Labor Code section 512 states 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 period may be waived by mutual consent of the both the employer and employee.” Cal. Lab. Code § 512. A second meal period must be provided when the employee works more than 10 hours in a workday. *Ibid.* The remedy for a meal period violation is “one additional hour of pay at the employee’s regular rate of compensation.” Cal. Lab. Code § 226.7(b); Cal. Code Regs. Tit. 8 § 11010 (11); see also, Cal. Lab. Code § 2699 (providing for additional fines under Private Attorney General Act).

Only one published California state appellate decision has addressed the meaning of “provide.” *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2007). In *Cicairos*, truck drivers suing their company for meal period violations presented unchallenged evidence that defendant did not schedule meal periods, did not program activity codes for meal periods in each truck’s computerized timekeeping system, and pressured drivers to drive extra routes resulting in missed breaks. *Id.* at 962. Based on these facts and a 2002 opinion letter from California’s Division of Labor Standards Enforcement, which stated employers have “an affirmative obligation to ensure that workers are actually relieved of all duty,” the appellate court upheld summary judgment for plaintiffs. *Ibid.* Plaintiffs have since relied on *Cicairos* as support for the proposition that employers have an affirmative obligation to “ensure” meal periods are actually taken, even if that means forcing the employee to take an unwanted break.

Two federal district courts have rejected plaintiffs’ “ensure” interpretation and held an employer provides meal periods merely by offering or making them available to employees. *White v. Starbucks Corp.*, 497 F. Supp. 2d 1080 (N.D. Cal. 2007); *Brown v. Federal Express Corp.*, \_F. Supp. 2d\_, 2008 WL 906517 (C.D. Cal. 2008). Both courts distinguished *Cicairos* based on its unique facts and read the state court’s analysis of the law to be consistent with an interpretation that requires employers to make meal periods available. *White*, 497 F. Supp. 2d at 1089; *Brown*, WL 906517 at \*6. The courts reasoned that requiring an employer to ensure meal periods would place an “undue burden on employers whose employees are numerous,” and would create “perverse incentives,” encouraging employees to violate company meal break policy in order to receive extra compensation under California’s wage and hour laws. *Ibid.*

The reasoning of these federal courts makes sense for the employer and employee. A more flexible standard would require employers to offer meal period opportunities to employees but would stop short of requiring a company to deputize shift supervisors as lunchroom police. Such a standard would also preserve an employee’s right to choose when he or she takes a lunch break and how that time is spent. For example, under a make available standard, a commission-earning employee could choose to work in order to close a profitable sale rather than sit down for an uninterrupted and unwanted, 30-minute sandwich. Or, a single parent could forgo a meal period in order to leave early – perhaps to pick up children at day care, to get to night school classes on time, or simply to get a jump-start on a holiday weekend. Essentially, employees and employers would have the flexibility needed for a mutually beneficial and productive relationship under a make available standard, but not under an ensure standard.

Hopefully, the California Supreme Court or California State Legislature will resolve the debate over the meaning of provide and give employers and employees much needed certainty on this topic. Meanwhile, the following steps can be taken to help avoid costly litigation:

- ❖ Implement a written meal period policy. If your company has locations in multiple states, you need to check the state and federal rules for each jurisdiction. Until the California Supreme Court clarifies the issue, California meal period policies should at least track the Labor Code, e.g., “the company shall provide all non-exempt employees uninterrupted, 30 minute meal periods within the meaning of California law.”
- ❖ Implement a written policy requiring employees to accurately record all time worked and meal periods. You should use accurate and reliable timekeeping equipment and technology that is not susceptible to abuse. Timekeeping records are critical evidence in virtually every meal period case. Ultimately, the employer bears the burden of maintaining those records. Failing to do so can negatively impact a company’s meal period defense and can be the basis for additional record-keeping fines.
- ❖ Create written schedules that explicitly account for timely, 30-minute meal periods. Post each schedule in advance and maintain a copy with the timekeeping records. Also, schedule enough employees for each shift so that meal periods can actually be taken.
- ❖ Investigate instances of missed or mistimed meal periods, as well as timekeeping violations. Your company should have a grievance and remediation policy in place so that problems can be identified and resolved early.
- ❖ Train employees and managers on the company’s meal period and timekeeping policies and procedures, and the importance of following them. Discipline employees and managers who violate established policies and procedures.

Misapplication of California's meal period laws (and other wage and hour laws) can pose a significant but hidden liability for employers. For more information on this topic, including assistance with drafting and implementing compliant policies, please contact Randy Grossman at [rgrossman@mckennalong.com](mailto:rgrossman@mckennalong.com) or any other member of MLA's employment law practice group.