

Workplace Rules Need Simplification to Strengthen Economy

California employers comply with the most stringent and complex labor laws in the nation and face the threat of the highest fines and penalties—which hampers competitiveness and is slowing the state’s economic recovery. A priority to addressing the economy must be job creation and to reverse California’s barriers to recovery. The current economic situation and reduced competitiveness heightens the need for simplification of workplace rules for employers.

Today, employer responsibilities are more challenging than ever due to diminishing corporate resources along with vague or ambiguous language in rules and regulations, sometimes intertwined with conflicting workplace laws and constantly changing government regulations. Both employers and employees would benefit from easy-to-follow, common-sense workplace rules that also provide opportunities to address work/life balance issues. In order to reinvigorate and encourage business investment and job creation, California must address the issues that discourage employers from increasing their workforce.

California can provide relief to employers from burdensome rules and unfair class action lawsuits by clarifying and simplifying workplace rules. For example, the state’s meal period rules are unclear and its alternative workweek scheduling rules strongly discourage the adoption of flexible work schedules, even if they provide better lifestyle choices for employees and help reduce congestion and environmental impacts.

Meal/Rest Period Rules Require Simplification

California Labor Code Section 512 provides the framework for meal period requirements for employees in California. The language of the statute is brief, remaining silent or ambiguous on critical components of meal periods. The Industrial Welfare Commission (IWC) wage orders are the regulations further defining meal period elements. The language of the wage orders regarding meal periods is vague and overly broad, leaving employers without meaningful clarification, thereby leading to class action lawsuits against employers and burdensome practices for employers and employees alike.

In California, if an employee works more than five hours in a workday, he/she must be provided with a 30-minute off-duty meal period, unless six hours of work will complete the employee’s work for the day. For a meal period to be considered off-duty, the employee must be relieved of all duty and be allowed to leave the premises.

The statute is silent regarding on-duty meal periods, split shifts, collective bargaining agreements and specifically whether the employer must ensure that the employee takes the meal period or if the employer simply must make the period available to the employee. The Division of Labor Standards Enforcement (DLSE) enforces the rules—both the statute and the wage orders; however, individual employees can bypass the DLSE altogether and go straight to the courts to resolve complaints. The

Sampling of Costly Lawsuit Settlements Including Meal Period Issues

Casual Dining Restaurant Company	\$10 million
Fast Food Retailer	\$5 million
Financial Marketing and Service Holding Company	\$30 million
Financial Services Company	\$13.6 million
Hospital 1	\$20 million
Hospital 2	\$60 million
Lingerie and Beauty Products Retailer	\$41.25 million
Membership Warehouse Club Retail Store	\$7.5 million
Musical Instrument Retailer	\$3.5 million
Package Delivery Company (exclusively meal period)	\$487 million
Technology Services Company	\$26 million
Waste Management Firm	\$350,000
Wholesale Baker	\$8 million

courts and the DLSE may interpret the rules differently, which further complicates the ability of employers to comply. Furthermore, due to the threat of huge penalties, many employers settle out of court with multimillion-dollar settlements.

Problems

Some of the challenges that employers face with the current meal period rules include:

- **“Providing” meal periods.** The Labor Code prohibits an employer from employing an employee for certain durations without “providing the employee with a meal period.” The challenge has been defining what it means to “provide” a meal period.

Until 2008, the DLSE had interpreted the phrase “providing the employee with a meal period” to mean it is the “employer’s burden to compel the worker to cease work during the meal period.” The interpretation required an employer to police its workforce and watch the clock to ensure that, even if it is not convenient for or preferred by the employee, the meal break is taken at the prescribed time, for the entire time and without interruption, or be liable for an hour of pay regardless of whether the employer knew the employee did not take the meal period.

Some employees may choose to infringe on their meal periods, even in the face of strong and clearly communicated employer policies prohibiting such actions. Many employers have been held liable for these independent employee actions.

On October 23, 2008, the DLSE issued a memo stating: “...the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken.” This memo provides guidance to the division in its enforcement of the statute, but the courts are not bound by the DLSE interpretations.

Pending Supreme Court cases, especially *Brinker Restaurant Corporation et al. v. The Superior Court of San Diego County (Brinker)*, will provide further clarification to the

courts in the years to come. Until the courts determine what it means to “provide” a meal period, employers have no clear definition on which to rely. Therefore, until such time as the rule is clarified, either through a ruling in *Brinker* or statutory change, employers continue to be liable for lawsuits that allege meal period violations because there is no definitive interpretation of what it means to provide a meal period.

- **Timing of the meal period.**

California Labor Code Section 512(a) 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.”

While the Labor Code specifies that an employee has a right to a meal period, it does not specify when the meal period must be taken. Confusion exists about whether the meal period must be taken either before the fifth hour of work begins or before the sixth hour of work. Many employers have been faced with costly litigation over the timing of a meal period. As a result, cautious employers are following a conservative approach and ensuring the meal periods begin *before* the fifth hour of work is completed.

California employers and employees would benefit from the clarification in statutory language that the meal period may commence during the sixth hour of work, clearing up any ambiguity that currently exists.

- **On-duty meal periods.** Although the Labor Code is silent regarding on-duty meal periods, the wage orders authorize on-duty meal periods where the employee is provided the opportunity to eat but is not relieved of all duty for the duration of the meal period. The on-duty meal period is allowed in recognition that the nature of certain jobs prevents some employees from being able to be off duty for a 30-minute meal period.

Many jobs require employees to be on call, on site or accessible at any given moment. Enforcement by the DLSE of the on-duty meal period provision is so narrow and constraining that it cannot be used in most workplaces. Each on-duty

meal period taken but disallowed by the DLSE or by the court in essence creates a missed meal period and therefore obligates the employer to an hour of pay. This additional hour is not counted as hours worked for purposes of overtime calculations.

- **Employer liability.** Various court cases have increased employer liability. In the recent *Murphy v. Kenneth Cole Productions*, the California Supreme Court decided that the one-hour-of-pay for a missed meal/rest period is a wage (and not a penalty); therefore, the statute of limitations to file a claim is three years, as opposed to one. This increases the employer’s liability and makes class action lawsuits more lucrative for plaintiffs.

Employers are being sued for even minor violations, such as employees allegedly returning five minutes early from lunch. Moreover, workers can sue on behalf of themselves and all prior and current workers who may have missed a meal period. Workers seeking penalties for missed meal periods have filed a large number of class action lawsuits, many of which are seeking millions of dollars from employers.

- **Collective bargaining of meal periods.** In its 2006 decision in *Bearden v. U.S. Borax*, the California Court of Appeal in Los Angeles invalidated a provision of a wage order that exempted certain employees covered by collective bargaining agreements from meal period requirements. The court held that the wage order’s exemption exceeded the statutory exceptions to meal period requirements authorized by the California Legislature. The decision calls into question meal period provisions of the wage orders that provide relief from meal period requirements beyond the terms in Labor Code Section 512. Essentially, collectively bargained meal periods that are not in compliance with Labor Code Section 512 are invalid.

Repercussions

The narrow interpretation of Labor Code Section 512 often forces employers into an adversarial relationship with their employees. Employers must create and enforce rigid policies that require employees to leave their workstation to take the full, off-duty, 30-minute meal period

on time. Employees can be resentful that their employer will not allow them to waive their meal period in order to leave work early or to determine for themselves when it is appropriate to take the meal period.

Although these requirements have a negative impact on all employers, some employers have far greater challenges in ensuring employees take the 30 minutes on time:

- Airline employees, such as mechanics, baggage handlers and ticket agents, despite their best efforts to stay on schedule, frequently are disrupted by inclement weather, air traffic control delays, passenger demands or directives from the Federal Aviation Administration or the Transportation Security Authority.

- Restaurant servers often wish to take a meal break later than the fifth hour of work, due to timing of when customers are present, since they derive a significant portion of their income from tips.

- Sales professionals can be in the middle of a sale when the fifth hour occurs and may prefer to finish the sale rather than leaving the customer for 30 minutes and risk losing a sale.

On-Duty Meal Periods

According to the IWC wage orders, under very limited circumstances, an employee can agree to an on-duty meal period, but only if two very specific conditions are met:

- the worker must voluntarily sign a waiver (which must be revocable by the worker at any time) to work the on-duty meal period; and

- the worker is permitted to work an on-duty meal period only where the nature of the work actually requires the worker to do so.

It is the second requirement that has proven to be the significant problem because there is no clear definition of how compelling the nature of the work must be in order for the waiver to be permissible. An on-duty meal period that does not meet both criteria may be considered a missed meal period and creates a liability for the employer.

On-Duty Meal Scenarios: There are three scenarios for employers to provide an on-duty meal period during a typical eight-hour workday:

- If an on-duty meal period

is in compliance with the narrow interpretation of when it is allowed under the wage orders, the employee works eight hours and takes the meal period while on duty. The employer pays for eight hours of work.

- If an employee takes an on-duty meal period and it is not in compliance with the requirements for an on-duty meal period, the on-duty meal period is considered a missed meal period; the employer is liable for one hour of premium pay for each missed meal period and also must pay the employee for the time worked. In order to avoid liability for waiting time penalties, the employer must provide the payment in the same pay period in which the on-duty meal period occurred.

- If the employee takes an on-duty meal period and it is later found to have not met the criteria, the employer is liable, not only for an hour of pay for each on-duty meal period as a missed meal period, but also for additional penalties. This is a situation in which an employer can be sued for up to four years of missed meal periods because the employer either intentionally or inadvertently provided an on-duty meal period that was not in compliance with the requirements or the wage orders.

Examples: There are numerous situations in which an on-duty meal period is appropriate because the nature of the work prevents an off-duty meal period, but may not be permitted. For example:

- In a plant control center, an engineer must monitor controls and instruments at all times. If a change in the process occurs, the engineer is available to respond immediately. Throughout the shift, however, there is significant downtime for the employee to eat while still monitoring the controls.

- Operation of construction equipment, such as well-drilling and concrete-pouring, are critical, often requiring employees to remain on-duty through the entire process to effectively deliver the finished product, as well as for the safety of the employees and those in the vicinity. They have down time, however, during which they could eat their lunch while in or near their vehicles.

- In the health care industry, relieving surgery staff in the middle

of surgery can compromise patient care. In addition, due to health care industry staffing ratios, it may be impossible to find qualified coverage for meal periods on days where the patient census unexpectedly increases. Because staffing ratios are in place at all times, an off-duty meal period may not be plausible on those days. On-duty meal period agreements in these situations are appropriate to allow health care professionals to carry out their job duties without violating required hospital staffing ratios.

- Security guards may work alone on a shift and not be able to safely leave their post for a meal, but have ample time to eat while on duty.

Improvement Needed: To summarize, the DLSE's indefinite definition of the "nature of the work" criterion for on-duty meal periods should be broadened and clarified. The guidance provided by the DLSE creates a situation where almost every scenario could be challenged. The broad concepts of "nature of work" and "necessary job duties" are not sufficient to help guide businesses. The reality of many business operations today is that it is not always practical or safe for employees to take uninterrupted, off-duty meal periods.

State Action

In 2005, the DLSE proposed regulations to clarify when meal periods must be given during a work period and give employers needed flexibility in accommodating employee scheduling needs, among other provisions. The California Chamber of Commerce strongly supported the modifications, but they were not approved.

Recognizing the challenge and the liability that employers face with meal period rules, in 2007 the newly appointed Labor Commissioner called two public forums to educate herself about the challenges employers and employees alike face with the enforcement of the meal period rules. The Labor Commissioner's summary report of the hearings stated that "conflicts and confusion in the statute and in the IWC wage orders have proven problematic. The forums demonstrated an urgent need for common-sense solutions by the courts and by the Legislature which would

greatly benefit workers and businesses throughout California.”

In 2008 with SB 1539 (R. Calderon; D-Montebello) and again in 2009 with SB 287 (R. Calderon; D-Montebello), the CalChamber along with more than 40 business organizations sponsored legislation that would have provided clarity and guidance for the compliance and enforcement of meal period laws.

The legislation was a comprehensive solution that would have served employers and employees across all industries regardless of size or union status. The language of the bills clarified what it means to “provide” a meal period, defined the criteria for on-duty meal periods and provided collective bargaining of meal periods.

SB 1539 passed the Senate Labor and Industrial Relations Committee with amendments and was then held in the Senate Rules Committee. SB 287 was held in the Senate Labor and Industrial Relations Committee.

As part of the state budget talks in 2008 and 2009, it was suggested that meal period clarification be included as an economic stimulus measure, but the effort was unsuccessful.

On July 23, 2008, the California 4th District Court of Appeal ruled in the *Brinker* case that California law requires employers need only *provide* meal periods, but not ensure that they are taken. This was a great victory for California employers, but employer relief was short-lived. In October 2008, the California Supreme Court decided to consider the *Brinker* case for appeal, putting employers in the same position as they were before the appeals court ruling. As the *Guide* was going to print, there was no ruling from the Supreme Court in this case.

In 2009, the CalChamber filed a “friend-of-the-court” brief urging the California Supreme Court to affirm the *Brinker* appellate court ruling holding that employers need only *provide* and not ensure meal or rest periods are taken under California law.

There is widespread speculation that the *Brinker* case may be decided sometime in 2010, bringing resolution to the critical question of what it means to “provide” a meal period. On-duty meal period clarification and collective bargaining for meal periods are not addressed in this case, however. The

CalChamber will continue to explore and pursue opportunities to resolve meal period issues throughout the coming year.

Flexible Work Schedules Help Employees Balance Work/Life

California employers want to be flexible with their scheduling in order to be efficient and keep employees happy. Hectic days, long commutes, traffic congestion, high gasoline prices and conflicting work and personal schedules continue to show up as items employees and employers list as barriers to achieving work and life balance in California. Responsibilities such as young children, elderly parents and continuing education can make conventional eight-hour workday schedules impractical to maintain.

In October 2007, CCH (a Wolters Kluwer company) released the findings from its 17th annual *Unscheduled Absence Survey*. CCH’s employment law analyst Pamela Wolf says many workers today are part of dual-earning families, single parents or caregivers for aging parents. They are willing to go the extra mile for the company, but they want time when they need it to care for themselves and their families, and take that time by calling in sick when they are not.

Personal illness was the real reason that employees stayed home from work and called in sick only about one-third of the time in 2007. The other 66 percent of used sick time was because of family issues, personal needs and a feeling of entitlement. Flexible workweek scheduling can provide an option for employees and employers to reduce absenteeism through the use of sick time for other reasons.

What needs to be done to accommodate today’s increasingly fast-paced lifestyle that is fair to both employer and employee? The reform of overtime laws in California is a way to provide much-needed relief to work/life schedules. It is time for California to change workplace laws to permit flexible schedules that include alternate workweeks for individual workers who want that option.

The California Air Resources Board Economic and Technology Advancement Advisory Committee report (2008) suggests that flexible

working hours could reduce commute travel and result in reduced greenhouse gas emissions. A reduction of one day per week commute could result in a 10 percent reduction in emissions if just 10 percent of employees followed a four-day workweek schedule. Traffic congestion and emissions of priority air pollutants also would be reduced. Allowing a compressed workweek schedule would reduce traffic congestion at peak hours and reduce emissions through less idling and 20 percent less commute time per week per employee.

Studies Confirm Benefits

There is proof that compressed workweeks come with benefits for all. In Utah in 2008, all state workers switched to a compressed four-day workweek. The findings are all positive:

- Closing state offices one day per week resulted in a statewide reduction of 13 percent in energy use, shrinking the state’s carbon footprint by 6,000 metric tons, even more if savings from fewer commutes is added.

- Fewer workers commute on any given day, speeding travel for everyone and exposing them to fewer airborne pollutants during commute.

- Lori Wadsworth, a researcher at Brigham Young University, surveyed Utah workers who transitioned to the 4/10 workweek and found that 82 percent prefer it compared to the regular 5/8 workweek. In fact, Utah workers show decreased health complaints, less stress and fewer sick days. While absenteeism has dropped, productivity and quality of service has improved.

Research shows a flexible work life is good for health. Researchers at the Wake Forest University School of Medicine reported in the *Journal of Occupational and Environmental Medicine* (December 2007) that if people have the ability to compress workweeks, they are more likely to make healthier lifestyle choices, to exercise more and to sleep better. Perhaps the flexibility gives people the time to fit healthier lifestyle activities into their everyday regimen or maybe it just enables people to better manage their time.

Background

California law requires that overtime compensation be paid for work

performed by an employee in excess of eight hours in a single day, regardless of whether the employee works fewer than 40 hours in that week.

The federal Fair Labor Standards Act (FLSA) requires overtime compensation for salaried, non-exempt employees on 40 hours worked per week, rather than total hours worked per day. California is one of only four states that do not conform their wage laws to the national FLSA.

Of the three states with overtime requirements, Alaska has substantially similar overtime payment requirements as California. Nevada has an eight-hour requirement but also permits 10-hour days when a worker and employer have a mutual agreement. Colorado requires overtime pay for hours worked in excess of 12 hours in a workday. Florida overtime pay triggers at 10 hours per day.

Flexibility in daily overtime rules benefits both employers and employees. A statutory change should allow employees to work four 10-hour days a week, work 80 hours in nine work days, or some combination thereof that works for both employer and employee.

No Flexibility

Under current (and very detailed) Labor Code and IWC wage orders, employers may institute alternative work schedules only if all affected employees agree to the arrangement in writing and by secret ballot. Employers must hold discussion meetings at least 14 days prior to voting. Two-thirds of the company's employees must agree to the change and then select from a menu of scheduling options that may include an eight-hour workday/five-day workweek. Any deviation from the rigidly controlled process voids the election.

The rules also state that daily work schedules are limited to a maximum of 10 hours per day, with a daily minimum of four hours. Moreover, variances in schedules or the use of more than one schedule is prohibited without repeating the voting process, unless the specific options were voted on in the election. This in effect eliminates most employers and employees from choosing compressed workweek schedule options.

Only a handful of employers in California (11,000 of 800,000-plus) are currently trying to operate under the restrictive alternative workweek provisions of the wage orders. Employers who are

offering a flexible work schedule without going through the election process are operating in violation of the law.

Employees covered by collective bargaining agreements are exempt from daily overtime—these include all state, county and city employees, such as those employed by school districts, water districts and a multitude of other governmental agencies. Employees working in the mining, construction and logging industries also are exempt from daily overtime requirements.

Improvement Needed

California businesses are leaders in designing new workplace practices aimed at striking a better balance of work and life obligations. Experts note that workplace flexibility isn't just about working families or women.

The CalChamber strongly believes that permitting individual workers and their employers to arrange and use a four-day workweek and other flexible workweek scheduling will provide employees and employers the ability to be more responsive to employee work/life needs.

State Action

In the last five years, the CalChamber has sponsored legislation to allow an employee to request, and an employer to agree to, a four-day workweek.

- In 2005, AB 640 (Tran; R-Garden Grove) failed passage in the Assembly Labor and Employment Committee.
- In 2006, AB 2217 (Villines; R-Clovis) and SB 1254 (Ackerman; R-Tustin), both failed passage in their respective labor policy committees.
- In 2007, AB 510 (Benoit; R-Bermuda Dunes) failed passage in committee.
- In 2008, AB 2127 (Benoit; R-Bermuda Dunes), the Small Business Family Scheduling Option, would have allowed a small business employer to agree to a request of an employee for an alternative workweek schedule. This bill failed in its first legislative policy committee.
- In 2009, SB 187 (Benoit; R-Bermuda Dunes), a four-day workweek bill, also failed passage in its first policy committee.

The concept of allowing an employer to agree to an employee's request for an alternative workweek schedule was proposed as economic stimulus in the 2008 budget negotiations as well as in the 2008 special session on the budget.

In 2009 budget negotiations, ABX2 5 (Gaines; R-Roseville) passed with bipartisan support in both houses. Essentially, the bill created flexibility in using alternative workweek schedules once an employer has adopted alternative workweek schedules through the secret ballot election process. It allows employees to move freely, with employer consent, between schedules that are adopted in the secret ballot election. This new rule is a step in the right direction, but still does not resolve the basic obstacle to establishing alternative workweek scheduling—the rules for secret ballot elections are vague and confusing, therefore creating an unknown liability for employers.

CalChamber Position

The California Chamber of Commerce supports sensible changes in state labor laws and regulations aimed at making the workplace easier to administer. It makes sense to find ways to make compliance with state labor laws and regulations simple and straightforward so employers and employees can understand and follow the law. The CalChamber plans to continue to push for clarification and simplification of workplace rules, for flexible workplace schedules and to actively work to resolve conflicts in meal and rest break rules and regulations.



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January 2010