

Simplifying Workplace Rules Can Encourage Economic Growth

There is no question that California has some of the most stringent and complex labor laws in the nation. California employers struggle with meeting the overwhelming employment requirements imposed, while trying to develop and grow their businesses. Costly class action lawsuits for alleged labor law violations are a constant threat to employers due to the significant incentives for plaintiff attorneys to file such claims and the lack of consequences for frivolous litigation.

These significant hurdles for employers in California discourage growth and job development, which provides no benefit for either the employer or the employee. Accordingly, California must address some of these issues to alleviate the burden on employers and spur economic growth.

Two areas in which California can provide relief to employers and employees are:

- Clarifying meal period requirements; and
- Minimizing the procedures for adopting alternative workweek schedules.

Given the current interpretations and/or requirements surrounding these issues, there is limited flexibility for employers to work with employees and adjust work schedules to accommodate the employees' requests. Simplifying these requirements and providing the employee and employer with more authority to dictate the work environment will alleviate some of the burden on employers while still addressing employee needs.

Meal Period Reform

Background

'Providing' Meal Periods

Labor Code Section 512 and the Industrial Wage Orders defining Labor Code Section 512 generally require an employer to provide an employee with a 30-minute off-duty meal period after five hours of work, 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 allowed to leave the employer's premises.

If an employee works for more than 10 hours in a workday, the employee is entitled to a second 30-minute off-duty meal period unless the total hours worked that day does not exceed 12 hours. The second meal period may be waived by mutual consent between the employer and employee only if the first meal period was not waived. An employer must pay an employee an additional hour of pay at the employee's regular rate each day it fails to provide a required meal period. There are some minor deviations from these general rules for certain industries.

In *Murphy v. Kenneth Cole*, the Supreme Court interpreted this one hour of pay as a wage rather than a penalty, thereby providing employees with a three-year statute of limitations to pursue such wages.

One of the main issues of debate among employees and employers regarding meal periods is the definition of the term "provide." Employee advocate groups argue that the term "provide" means that the employer must police the employees to ensure that they take a full 30-minute meal period, free from duties. Such advocates claim that unless employers are forced to ensure meal breaks for employees, employers will pressure and coerce employees not to take meal breaks.

Comparatively, employers argue that the term "provide" simply means to make the 30-minute off-duty meal period available to employees to take, and allow the employees to decide whether to take it and/or for how long. Employers argue that they should not be held liable for such "missed" meal periods when employees unilaterally decide to either skip their meal breaks or return from their meal breaks early.

The California Supreme Court will resolve the meaning of the term "provide" as well as the timing of when the meal period must be taken in the five-hour period when it issues its ruling in *Brinker v. Superior Court (Hohnbaum)*, which many hope will occur in 2011.

‘On-Duty Meal Periods’

Although the Labor Code is silent regarding on-duty meal periods, the Industrial Wage Orders authorize on-duty meal periods pursuant to a written agreement between an employee and employer that provides the employee an opportunity to eat, but due to the nature of the work, the employee cannot be relieved of all duty for the duration of the meal period.

A valid on-duty meal period is paid as time worked, but the employer is not subject to an additional hour of wages for a “missed” meal period as discussed above.

Given the current narrow interpretation by the Division of Labor Standards Enforcement as to “nature of the work,” few employers can securely enter into on-duty meal agreements with employees, even when it makes sense for both the employer and employee to do so.

Recent Reported Settlements of Cases Involving Meal Period Violation Claims

- *Cicero v. DirecTV, Inc.* (C.D. Cal. July 2010): \$4.3 million settlement, \$1.9 million of which was paid out in attorney’s fees.
- *Ozga v. U.S. Remodelers, Inc.* (N.D. Cal. August 2010): \$1.8 million settlement, \$520,000 of which was paid out in attorney’s fees.
- *Ross v. US Bank National Association* (N.D. Cal. September 2010): \$3.5 million settlement, \$1.5 million of which was paid out in attorney’s fees.

Current Action

In September 2010, Governor Arnold Schwarzenegger signed AB 569 (Emmerson; R-Redlands, Chapter 662, Statutes of 2010), which amended Labor Code Section 512 to state that employees in a construction occupation, commercial drivers, registered security officers employed by private patrol operators, and employees of an electrical corporation, gas corporation or a local publicly owned electric utility, are not subject to the meal period requirements if (1) the employee is covered by a collective bargaining agreement; and (2) the collective bargaining agreement expressly addresses meal periods, binding arbitration for meal period provisions, as well as other wage-and-hour issues.

CalChamber Position on Meal Periods

Although the signing of AB 569 was definitely a move in the right direction with regard to meal periods, it does not solve the entire problem. Non-union employers, as well as union employers not included in the carve-out provided by AB 569 are still suffering from the ambiguity of the meal period requirements. Million-dollar class action lawsuits regarding alleged missed meal periods, as referenced above, are rampant throughout the state and are having a devastating impact on all industries.

Many of the allegations are not that the employers forced employees to work without a meal period, but rather

that the employer *failed to literally force* an employee to take a meal period and/or remain off-duty for the entire 30-minute period.

Although the California Chamber of Commerce believes employees should be given the opportunity to take meal breaks, it does not believe the law should usurp the employees’ independent choice as to whether they want to take a meal break, dictate the length of any meal break, and/or require employers to force employees to take meal breaks.

Reform Procedures for Employers to Adopt Alternative Workweek Schedules

Background

Generally, employers cannot require hourly employees to work more than eight hours in a day or 40 hours in a week without paying overtime. Labor Code Section 511 and the Industrial Wage Orders, however, allow an employer and its employees to enter into a regular recurring alternative workweek schedule (AWS), provided that the AWS does not require an employee to work more than 10 hours in a day or 40 hours in a week without the payment of overtime.

A properly adopted AWS alleviates the employer from having to pay overtime to employees who work up to 10 hours in a day. Although an AWS seems like an ideal option for many employers and employees, the drawback is that the current requirements an employer must satisfy to adopt a valid AWS are onerous and intimidating.

The first step in adopting an AWS is identifying a work unit that wants the AWS. The employer has to submit a written proposal to that work unit that describes the alternative workweek schedule and/or a menu of various alternative workweek schedules, such as alternating between a workweek of four 10-hour days and a workweek of five eight-hour days.

A secret ballot election is then scheduled to vote on the alternative workweek schedules set forth in the written proposal.

At least 14 days before any secret ballot election, the employer must hold a noticed, in-person meeting with the employees of the work unit to discuss the effects of adopting the AWS and also issue a written disclosure to such employees containing the same information.

Two-thirds of the affected employees in the work unit must approve the alternative workweek schedule(s) through the election. Within 30 days after the election, the employer must report the results of the election to the Division of Labor Statistics and Research.

Once an AWS is elected, it can be repealed only through a two-thirds vote via secret ballot election by the employees in the affected work unit. In addition, if the employer and/or employee want to deviate from the elected AWS, they can do so only by going through the entire process set forth above to adopt a new AWS.

Recent Action

In 2009, ABX2 5(Gaines; R-Roseville) passed with

bipartisan support during budget negotiations. This bill relaxed and clarified some of the stringent requirements of adopting an AWS. Specifically, the bill allowed the traditional eight-hour day, five-day workweek schedule to be an option on the menu of alternative workweek schedules on the ballot, which previously was not permitted.

It also allowed employees to alternate between various workweek schedules, as long as these schedules were approved by two-thirds vote during the election process, the employer consented and the adopted workweeks were regularly recurring.

Before this bill, employees could not alternate between schedules, unless a new election was conducted each time.

Despite these positive revisions, the adoption procedure for an AWS remains a difficult process for employers to navigate. Currently, there are only 19,884 reported AWS election results with the Division of Labor Statistics and Research, some of which are for the same employer as the results are reported by work units, not employer. According to the Employment Development Department's calculations in 2009, there are approximately 1,347,245 employers in California, thereby proving that less than 2 percent of California employers are utilizing this option.

Research Regarding Benefits of Flexible Work Schedule

- In December 2006, the Sloan Work and Family Research Network from Boston College published statistics that demonstrated employees in their 20s and 30s reported flexibility that allowed them to spend more time with their families as the most important job characteristic. In addition, half of the employees evaluated in the study who had access to flexible work arrangements reported a "high level" of satisfaction at work. Employees with flexible work arrangements also indicated they were less inclined to switch employers.

- In 2007, Wake Forest University School released a study that also demonstrated a flexible work environment is good for health. The study evaluated approximately 3,000 employees and found that when employees perceived they had flexible work options, there were fewer absences due to illness, and employees made healthier lifestyle choices, such as exercising and better sleep.

- A 2008 report by the California Air Resources Board Economic and Technology Advancement Advisory Committee also suggested that flexible working hours could reduce commute travel and greenhouse gas emissions by 10 percent due to the reduced traffic. This reduction could assist the state with achieving its overall goal of reducing greenhouse gas emissions by approximately 25 percent by the year 2020 pursuant to AB 32. Additionally, less traffic also

would improve movement of goods throughout the state.

- The U.S. Census Bureau's report regarding commute time for employees in California between 2006 and 2008 showed that more than 500,000 people in California had a one-way commute time of 60 minutes, whereas more than 700,000 people in California had a one-way commute time of approximately 30 to 34 minutes. By these statistics, cutting one day of work from an employee's schedule could literally save more than 1 million California employees 50-plus hours a year of sitting in traffic.

CalChamber Position on Alternative Workweek Schedules

Generally, employers want to accommodate their employees' requests for flexible work schedules, but are not afforded the necessary flexibility under the law to do so without the risk of incurring additional costs for overtime and/or facing litigation that challenges any AWS they adopt.

One minor slip-up in the current process to adopt an AWS, and an employer could face thousands of dollars of backpay and penalties to employees operating under the AWS. This is a risk that most employers simply are not willing to take, thereby eliminating the option of alternative workweek schedules for employees.

The CalChamber supports policy that allows an employer and employee, who both desire an alternative workweek arrangement, to enter into an agreement to that effect without having to cross so many procedural hurdles that unnecessarily expose employers to so much risk.



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