

Resolving Employer Issues Can Encourage Job Growth Meal Periods, Alternative Schedules, Independent Contractors, Private Actions

California has a reputation of being an unfriendly business state with too many burdensome regulations and laws. In order to change this reputation and encourage businesses not only to locate here, but also to stay and expand here, California must reform its regulatory and legal environment to prevent any further impediment to economic growth. One area in which California can initiate this reform is in the labor and employment arena. Below are four employment-related issues that are plaguing California businesses and must be reformed in order to encourage growth in the private sector.

Meal Periods

The *Brinker* Case

After having been fully briefed by the parties involved for more than two years, the California Supreme Court finally heard oral argument on November 8, 2011 in *Brinker v. Superior Court (HohnBaum)*, which dealt with the issue of what it means to “provide” a meal period and when a meal period must be taken during the workday.

For the last 10 years there has been significant litigation regarding whether “provide” means an employer must simply make a meal period available to an employee or ensure that the employee takes a full, 30-minute, uninterrupted break.

At the oral argument in *Brinker*, attorneys representing the employee perspective argued that requiring employers to *ensure* the meal period is taken is the only way to guarantee this employee right. Conversely, attorneys on behalf of the employer argued that employers should have flexibility over when meal periods are taken and that nothing in the legislative history or Industrial Wage Orders requires employers to *force* employees to take breaks.

Also at issue in *Brinker* was the timing of when the employer must “provide” the meal period during the workday.

The Supreme Court should deliver its decision on this case no later than April 12, 2012 which will provide needed clarity for both employers and employees on these two significant topics.

Post-*Brinker*

Even though the court’s decision in *Brinker* should clarify what it means to “provide” a meal period as well as when the meal period should be taken, there are other issues regarding meal periods that will remain unresolved even after the court’s decision.

One significant issue regarding meal periods that employers will continue to struggle with post-*Brinker* is “on-duty” meal periods. The Labor Code is silent regarding on-duty meal periods. The Industrial Welfare Commission (IWC) Wage Orders, however, authorize on-duty meal periods pursuant to a written agreement between an employee and employer that specifies an employee has 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 *does not* subject the employer to pay the employee an additional hour of wages for a “missed” meal period.

Currently, the Division of Labor Standards Enforcement has interpreted the term “nature of the work” so narrowly that few employers can securely enter into on-duty meal period agreements with employees, even when it makes logical sense for both the employer and employee to do so.

Another issue that will be left unanswered by the *Brinker* decision is the available remedies for a missed meal period. Labor Code Section 226.7 requires an employer to pay an employee one-hour of pay for any meal period that is not provided in accordance with the Labor Code or industry wage order. However, when an employer immediately pays an employee the one hour of pay for a missed meal period, there is a dispute as to whether the employee should be entitled

to additional penalties for the “missed” yet paid meal period. Specifically, the question remains as to whether employers should be subjected to 1) Labor Code Private Attorney General Act (PAGA) claims for civil penalties; or 2) a claim under the Unfair Competition Law (Business and Professions Code Section 17200 et seq.) for their failure to “provide” the employee with a meal period, even if the employer immediately compensates the employee with the additional one hour of premium pay. This stacking of remedies for a “missed” yet paid meal period will continue to be a concern for employers post-*Brinker*.

Recent Legislative Action

In September 2010, the Governor signed AB 569 (Emmerson; R-Hemet), which amended Labor Code Section 512 to state that employees in a construction occupation, commercial drivers, 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.

In 2011, SB 389 (Dutton; R-Rancho Cucamonga) was introduced to amend Labor Code Section 226.7 to specify that the one hour of premium pay is the exclusive remedy for a missed meal period and that payment of the one hour of premium pay constitutes compliance with any meal period requirement under the Labor Code or IWC Wage Orders. SB 389 was held in the Senate Labor and Industrial Relations Committee.

CalChamber Position

Although the California Chamber of Commerce is pleased that employers will finally receive much needed clarity from the California Supreme Court regarding what it means to “provide” an employee a meal period as well as the timing of the meal period, additional work on this issue is still required. Before California employers face another decade of devastating litigation that literally forces businesses to shut down, reduce workforces, or eliminate employee benefits, the Legislature should: 1) clarify the circumstances under which on-duty meal periods may be taken; and 2) prevent further litigation by specifying that an employee who has been immediately compensated for a “missed” meal period is not entitled to additional statutory penalties or remedies.

Alternative Workweek Schedules

Background

Under the Federal Labor Standards Act (FLSA), employers are required to pay overtime wages only when an employee works more than 40 hours in a week. The FLSA does not impose any daily overtime requirement. By far, most states simply follow federal law and impose only a weekly overtime requirement on employers. California is one of only three states that have both a daily and weekly overtime requirement. Of those three, California is the most stringent in its application and exception to the daily overtime requirement.*

Generally, California employers cannot require hourly employees to work more than eight hours in a day or 40 hours in a week without paying overtime. For example, employers in California cannot allow an employee to regularly work four, 10-hour days (4/10s) and give the employee a three-day weekend, without paying daily overtime for the ninth and 10th hour worked each day. The only exception to this is if the employer and employee adopt an alternative workweek schedule (AWS) pursuant to Labor Code Section 511 and the IWC Wage Orders. A valid AWS allows an employee to work up to 10 hours in a day or 40 hours in a week without payment of overtime wages.

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. If an employer actually elects to utilize the AWS option, any adopted AWS can be repealed only through a two-thirds vote via secret ballot election by the employees in the affected work unit. Additionally, if the employer and/or employee want to deviate from the elected AWS, they can do so only by going through the entire election process set forth in Section 511 and the Wage Orders to adopt a new AWS.

Currently, there are 21,654 reported AWS election results with the Division of Labor Statistics and Research (DLSR). Many of these reported elections are either outdated or are for the same employer as the results are reported by work units, not individual employer. A cursory review of only the first 20 pages of the AWS database reveals one employer that reported 41 separate alternative workweek schedules for 41 separate work units. This demonstrates that the actual number of employers in California utilizing this option is far less than the 21,654.

According to the Employment Development Department’s calculations in 2009, there are approximately

*California, Nevada, and Alaska are the only states with an eight-hour daily overtime requirement. In Nevada, an employer and employee can mutually agree to a longer workday without overtime pay. Additionally, if an employee in Nevada receives an hourly wage of \$10.875 or more and qualified health benefits, there is no daily overtime requirement. In Alaska, several industries are exempt from the daily overtime requirement, including hospital employees, agricultural employees, and employers with three employees or less. Also, employers and employees in Alaska can enter into a written agreement to work 10-hour days without overtime pay.

1,347,245 employers in California. At best, less than 2% of California employers are utilizing the AWS option. However, more realistically, given that the information in the database is according to work unit instead of employer, it is likely that less than 1% of employers in California are utilizing the AWS option.

One of the reasons employers are unwilling to utilize the AWS process, even when their employees want it, is the significant risk of litigation. As evidenced by recent lawsuits, if even one step in the election procedure is missed or slightly altered, the entire AWS could be invalidated and the employer potentially liable for daily overtime wages for those employees who worked more than eight hours in a day pursuant to the presumed valid AWS. Such litigation can be pursued despite the fact that any *de minimis* violation in the election procedure had no effect on the employees' intent or desire to adopt the AWS.

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 2007, Wake Forest University School released a study that also demonstrated a flexible work environment is good for health, as employees with flexible work options had fewer absences due to illness and made healthier lifestyle choices.

In March 2010, the Executive Office of President Barack Obama released its executive summary titled *Work-Life Balance and the Economics of Workplace Flexibility*, which also emphasized the economic and social benefits of workplace flexibility that addresses the needs of the changing workforce in America.

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% due to the reduced traffic. This reduction could assist the state with achieving its overall goal of reducing greenhouse gas emissions by approximately 25% by the year 2020 pursuant to AB 32.

Resistance to Reform

In 2011, Sen. Bob Dutton (R-Rancho Cucamonga) introduced two bills to address concerns with the current AWS process. SB 367 would have exempted employers with 25 employees or fewer from having to go through the numerous steps required to adopt an AWS, substituting instead a revocable, written agreement between the employee and employer regarding the employee's hourly schedule. SB 378 would have exempted employers with five employees or fewer from having to go through the AWS election process and defined the meaning of a "regularly scheduled" AWS. SB 367 was voted down by

the Senate Labor and Industrial Relations Committee and SB 378 was held in the same committee due to opposition from employee organizations regarding any leniency to the eight-hour workday requirement.

Employee organizations voiced concern regarding eliminating the eight-hour workday, as they say longer hours would subject employees to increased workplace injuries and limit employees' daily family/workplace balance. The opposition also indicated that the eight-hour day was intended to be a job creator. This argument, of course, is undermined by the fact that California is only one of three states that has a daily overtime requirement and has the second highest unemployment rate in the country.

CalChamber Position

Generally, employers want to accommodate their employees' requests for flexible work schedules, such as a 4/10 workweek, 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 literally face thousands of dollars of backpay and statutory penalties to employees operating under the AWS. This is a risk that most employers are simply not willing to take, thereby eliminating the option for alternative workweek schedules for employees.

Accordingly, 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.

Independent Contractors

Background

The use of independent contractors is a popular and lawful tool employers use as a part of their overall business model. For businesses, it is a cost-effective way in which to address specialized needs. For entrepreneurs, it is a way in which to maximize profits and grow their own business.

The main concern from all parties involved in the independent contractor relationship, however, is the subjective and inconsistent analysis used to determine whether an individual qualifies as an employee versus an independent contractor. Characterizing someone as an independent contractor not only has an impact on labor and employment issues, but tax issues as well.

The common law test for determining the status of an individual as an employee versus an independent contractor focuses primarily on who has the right to control the details of the work performed but also includes consideration of the following factors:

- 1) Whether the relationship may be terminated "at will";

- 2) Whether the individual performing services is engaged in a business distinct from the principal's;
- 3) Whether the work performed is typically done under the direction of the principal or without supervision;
- 4) What the required skill is to perform the job;
- 5) Whether the principal supplies the tools and the worksite;
- 6) What is the length of time for which the services are to be performed, that is, is it ongoing or is there a set deadline for the services to end;
- 7) What is the method of payment, that is, hourly or by the job; and
- 8) Whether the parties believe they are creating the relationship of employer-employee.

No single factor in this analysis, including the right to control, is determinative. Moreover, the analysis is not based upon the "totality of the circumstances," meaning that even if an employer satisfies a majority of these factors in favor of independent contractor classification, there is no guarantee that such a classification is accurate. Rather, the application and importance of each factor is determined on a case-by-case analysis.

To add to the confusion and intimidation of this analysis for employers, there is no consistency across state agencies or even federal agencies regarding the tests used to determine independent contractor status. In fact, the California Department of Industrial Relations admits that an individual may be considered an independent contractor for its purposes, but an employee for another state agency's purpose, and vice versa. Notably, if an employer gets the analysis wrong, even if the mistake is inadvertent, the employer could be liable for significant damages, including unpaid wages, statutory penalties, punitive damages, workers' compensation fines, and unpaid taxes.

Recent Federal Activity

In 2011, the U.S. Department of Labor (DOL) released its five-year strategic plan, which focused heavily on going after the misclassification of workers as independent contractors. The DOL estimates that at least 30% of individuals are misclassified as independent contractors.

Since the release of this plan, the DOL has certainly ramped up its efforts on this issue. The DOL has requested and received a significant amount of additional money in its budget to hire additional staff solely to handle misclassification efforts, including approximately 100 new investigators. In addition, the DOL has entered into several inter-agency agreements with state agencies to work together in identifying misclassified employees.

In October 2011, the Internal Revenue Service (IRS) launched an amnesty program for employers to voluntarily come clean about their misclassification issues and in exchange pay a smaller amount for back taxes owed. According to the IRS, employers accepted into the

program will pay an amount effectively equal to slightly more than 1% of the wages paid to the reclassified worker for the past year. No interest or penalties will be owed, and the employer will not be audited on payroll taxes related to these workers for prior years.

In order to be eligible for this amnesty program, the employer must have: 1) consistently treated workers in the past as non-employees; 2) filed all required 1099 tax forms for the workers for the previous three years; 3) not be under an IRS audit; and 4) not be under an audit by DOL or any state agency relating to the proper classification of these workers.

Recent California Activity

In 2011, SB 459 (Corbett; D-San Leandro, Chapter 706) was signed by the Governor. The new law provides for statutory penalties up to \$25,000 for employers who "willfully misclassify" employees as independent contractors. SB 459 also imposes non-monetary punishment on the employer, such as posting obligations.

CalChamber Position

It is unfair to penalize employers who rely upon and satisfy the independent contractor analysis of one state agency, only to be held liable to another state agency for "misclassification," or even worse "willful misclassification." In order to achieve greater compliance from employers with regard to accurate classification of employees, California needs to provide employers with certainty that they can safely rely upon information provided by a government agency, and that such information will be binding on all other state agencies as well.

Labor Code Private Attorney General Act

In 2003, Governor Gray Davis signed into law SB 796 (Dunn; D-Garden Grove, Chapter 906), creating the Private Attorney General Act (PAGA). PAGA basically allows an aggrieved employee to file a representative action on behalf of the employee and all other current or former employees similarly aggrieved, for civil penalties due to the violation of any provision of the Labor Code.

If the statute allegedly violated already establishes a civil penalty, then the employee is limited to that penalty in a PAGA action. If there is no corresponding penalty for the alleged violation, however, then PAGA provides civil penalties ranging from \$100-\$500 per aggrieved employee, per pay period during which the alleged violation occurred.

Any recovery under PAGA is supposed to be distributed as follows: 1) 75% to the Labor and Workforce Development Agency; and 2) 25% to the aggrieved employee. PAGA provides for a statutory right to attorneys' fees for the employee's attorney only, thereby providing an incentive for plaintiffs' attorneys to file this case.

Since the enactment of PAGA, the number of private actions filed as a direct result of this law has been

significant. In 2010, California was ranked as one of the top 10 most litigious states in the country. There were also two important cases in 2010 that expanded PAGA beyond the Labor Code to apply to the IWC Wage Orders as well, thereby increasing the opportunity for more litigation in California. Specifically, *Home Depot USA v. Superior Court (Harris)* and *Bright v. 99 Cent Only Store*, allowed the employees at issue to pursue a PAGA claim for the employer's failure to provide suitable seating, as required by the Wage Orders.

CalChamber Position

Since its enactment, PAGA has been misused by many plaintiffs' attorneys as a litigation tool to force larger settlements with higher attorneys' fees. The CalChamber is opposed to any further extension of PAGA and supports legal reform that will actually achieve PAGA's stated purpose of vindicating employee rights, instead of incentivizing litigation.



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