California Employers, Employees Will Benefit from Reforms to Workplace Requirements

California employers comply with the most stringent and complex labor laws in the nation and face the threat of the highest fines and penalties. Given the current economic situation and reduced competitiveness, employers are calling for simplification of workplace rules and laws.

Today, employer responsibilities are more challenging due to vague or ambiguous language in rules and regulations, sometimes intertwined with conflicting workplace laws, along with constantly changing government regulations and diminishing corporate resources. Both employers and employees would benefit from easy-to-follow, common-sense workplace rules that provide opportunities to address work/life balance issues.

Meal/Rest Period Rules Require Simplification

Labor Code Section 512 provides the framework for meal period requirements for employees in California. The Industrial Welfare Commission wage orders are the regulations further defining meal period requirements. The language of the law is brief, remaining silent or ambiguous on critical components of meal periods. 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.

Generally, in California, an employer must provide an off-duty meal break of at least one-half hour for every work period of more than five hours. If six hours of work will complete the employee's work for the day, however, the employee may voluntarily choose not to take the meal break. 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 (with few exceptions) 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 law and the wage orders; however, individuals can bypass the DLSE altogether and go straight to the courts to resolve complaints. The 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." Until October 2008, 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."

This interpretation was unreasonable and burdensome. It 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.

It means the employee must take the meal period at the prescribed time and for the full 30 minutes or the employer is liable for an hour of pay regardless of whether the employer knew the employee did not take the meal period.

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

On July 23, 2008, the California 4th District Court of Appeal ruled in the case

of *Brinker Restaurant Corporation et al. v. The Superior Court of San Diego County (Hohnbaum)* that under California law employers need only provide meal periods, but not ensure that they are taken. This was a great victory for California employers; however, employer relief was short-lived. In October 2008, the California Supreme Court decided to consider the *Brinker* case for review. As a result, the *Brinker* case cannot be followed until the Supreme Court rules; therefore, employers are in the same position as they were before the appellate court ruling.

In response to the appellate court ruling in the *Brinker* case, the DLSE issued a memo on October 23, 2008 stating, "until such time that the Supreme Court provides guidance on this fundamental question, the DLSE will rely upon the language of the statute and wage order as well as existing California Supreme Court and Court of Appeal decisions and other recent, persuasive federal court decisions in interpreting Labor Code Section 512 and the meal period provisions set forth in the applicable wage orders. Taken together, 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. A decision by the Supreme Court on the *Brinker* case will provide further clarification to employers and to the courts. Until the court determines what it means to provide a meal period, however, employers have no clarification on which to rely.

- **On-duty meal periods.** Although the Labor Code is silent regarding on-duty meal periods, the wage orders authorize them. An on-duty meal period is when 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 and is considered time worked. An on-duty meal period is permitted only when certain criteria are met, however (see next page).

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 not allowed by the DLSE or by the court creates essentially a missed meal period and therefore obligates the employer to an hour of pay.

- **Employer liability.** Under Labor Code Section 200, for each workday that the employer fails to provide the required meal period, the employer shall pay the employee one hour of pay at the employee's regular rate of compensation. In *Murphy v. Kenneth Cole Productions*, the California Supreme Court decided that this one-hour-of-pay is a premium wage (and not a penalty). This increases the employer's liability and makes class action lawsuits more lucrative for plaintiffs because the statute of limitations to file a claim for a wage is three years — sometimes four — as opposed to a one-year statute of limitations to file a claim for a penalty.

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.

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 polices which require that employees leave their workstation to take

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

Pending litigation includes three large hospitals and an electronics retailer.

the full, off-duty, 30-minute meal period on time. Employees often are 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.

These requirements have a negative impact on all employers; however, 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 customers being present, since the servers derive a significant portion of their income from tips.
- Sales professionals can be in the middle of a sale when the fifth hour occurs. Leaving the customer for 30 minutes is detrimental to closing a sale, and customers may not wait or be pleased with the interruption of their transactions with a lunch break.
- Retailers must deal with agitated customers when a clerk must close a cash register or other service area to take a lunch break.

On-Duty Meal Periods

According to the Industrial Welfare Commission wage orders, under very limited circumstances, an on-duty meal period is permitted if all of the following conditions are met:

- the employee and employer agree in writing;
- the agreement can be revoked at any time by the employee (except under wage order 14);
- the employer pays the employee for the on-duty meal period as time worked; and
- the nature of the work prevents the employee from being relieved of all duty.

It is the last 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 on-duty meal period to be permissible. An on-duty meal period that does not meet the criteria may be considered a missed meal period and creates a liability for the employer of one hour of premium pay for each on-duty meal period.

Examples

There are numerous situations in which an on-duty meal period is appropriate, 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.
- Refineries commonly are located in remote areas. In this situation, supervisors or other employees may leave the site to pick up lunch for all their workers, who must remain on site to keep the plant running.
- 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. Supervisors also need to be on site during this time to oversee and make critical decisions.
- 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 possible on those days. Once again, on-duty meal period agreements in these situations are appropriate to allow dedicated health care professionals to carry out their job duties.
- 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.

Scenarios

There are three scenarios for employers when providing an on-duty meal period:

- If an on-duty meal period is deemed to be in compliance with the narrow interpretation of when it is allowed, the employee works eight hours and takes the meal period while on duty. The employer pays the employee for eight hours of work.
- If an employee takes an on-duty meal period, but it is determined that the criteria for an on-duty meal period were not met, the employer must pay the employee one hour of premium pay for each non-compliant on-duty meal period within the same pay period in which the meal period occurred. In total, the employer must pay the employee for eight hours of work plus one hour of premium pay for each day the employee took an on-duty meal period that does not meet the specified criteria.
- If the employee takes an on-duty meal period and it is later found to have not met the criteria, the employer is liable for not only an hour of premium pay for each on-duty meal period as a missed meal period, but also for additional penalties.

In the second scenario above, the employer voluntarily acknowledges the missed meal period and compensates the employee with an hour of premium wage in the same pay period for each missed meal period, or each meal period that is identified as not meeting the allowable criteria.

In the third example, the employer did not voluntarily recognize and compensate the employee within the same pay period

Key Employment Trends

- Employee demand for flexible work schedules
- Employee demands for customized employment relationships
- Greater demand for time off

Source: SHRM® 2004-2005 Workplace Forecast: A Strategic Outlook

as the on-duty meal period that does not meet the criteria. It is this situation that could lead to legal action by the employee or representative class of employees.

Improvement Needed

To summarize, the DLSE's narrow and ambiguous interpretation of the "nature of the work" criterion for on-duty meal periods should be broadened and clarified. The guidance provided by the DLSE is narrowly focused and 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 difficulties and the liability that employers face with meal period rules, Labor Commissioner Angela Bradstreet called two public forums upon her appointment in 2007 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, the CalChamber, along with more than 40 business organizations, sponsored and supported SB 1539 (Calderon; D-Montebello), which would have provided clarity and guidance for the compliance and enforcement of meal period laws. The bill was a comprehensive solution that would have served employers and employees across all industries, regardless of size or union status, clarifying what it means to "provide" a meal period so employees have the opportunity to take meal breaks, enter into on-duty meal period agreements in appropriate situations, and collectively bargain for meal periods. The bill passed the Senate Labor and Industrial Relations Committee with amendments, then was held in the Senate Rules Committee.

Although 2008 also brought the issue of meal period clarification to the state budget talks to be included as part of economic stimulus, the effort was unsuccessful.

As a result of increasing public awareness of the issue and excessive litigation against employers, the CalChamber and other business groups are hopeful that relief will come in the 2009 legislative session.

Flexible Work Schedules

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 difficult to maintain.

Due to increasing competition and rising costs, employers are taking a hard look at areas that once were considered part of the cost of doing business — such as employee turnover, absenteeism and downtime on the job.

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 four-day workweeks for individual workers desiring to find a balance between work and personal lives.

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 weekly 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.

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 based 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. These flexible scheduling arrangements could provide for a weekly or biweekly extra day to spend with family, attend children's school activities, take care of dependent elders, go to medical appointments or attend to other private affairs that usually cannot be accomplished on a weekend, and could eliminate or minimize the use of sick leave for family responsibilities and personal time.

No Flexibility

Under current (and very detailed) Labor Code and Industrial Welfare Commission 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 all must follow it. 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. This effectively eliminates most employers and employees from choosing schedule options such as flextime, part-time, job sharing, telecommuting and compressed workweeks.

Only a handful of employers in California (11,000 of 800,000-plus) are currently trying to operate under the restrictive 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. It is about changing demands, both in society and the workplace, to include time for quality of life, time for loved ones and time for individual pursuits.

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 four 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 on a party-line vote. In 2006, AB 2217 (Villines; R-Clovis) and SB 1254 (Ackerman; R-Tustin), both failed passage in their respective labor policy committees on party-line votes. In 2007, AB 510 (Benoit; R-Bermuda Dunes) failed passage in committee on a bipartisan vote. In 2008, Assemblyman John J. Benoit carried AB 2127, which also failed in its first legislative policy committee. The bill was known as the Small Business Family Scheduling Option and would have allowed a small business employer to agree to a request of an employee for an alternative workweek schedule.

The concept of allowing an employer to agree to an employee's request for an alternative workweek schedule was proposed as an economic stimulus in the 2008 budget negotiations as well as in the 2008 special session on the budget. The CalChamber remains hopeful that the concept will gain support for enactment in 2009, either through the budget process or in the regular 2009 legislative session.

CalChamber Position

The CalChamber 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 flexible workplace schedules and to actively work to resolve conflicts in meal and rest break rules and regulations.

Staff Contact
Marti Fisher
Policy Advocate

marti.fisher@calchamber.com
California Chamber of Commerce
P.O. Box 1736
Sacramento, CA 95812-1736
(916) 444-6670
www.calchamber.com
January 2009