



## EMPLOYER'S OBLIGATIONS FOR MEAL AND REST BREAKS

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It is little surprise to California employers that California's labor and employment laws seem difficult to comply with. While there are many laws all employers must follow, those dealing with meal and rest breaks remain difficult for many employers to follow. This article discusses how an employer can assure compliance with laws relating to meal and rest breaks.

Employees are entitled to a 10-minute rest break every 4 hours of work (not to exceed 15 minutes) and a 30-minute meal break after the fifth hour worked, with a second meal break after an additional 5 hours of work (assuming the employee works overtime). Employers are liable to employees for premium pay (time and one-half) if they are prevented from taking meal and rest breaks.

What makes it challenging for employers is that employees do not have a duty to report missed or interrupted meal or rest periods to their employers. Even though employees owe a duty of loyalty to their employer, the duty does not extend to reporting missed or interrupted meal or rest periods. In fact, the California Supreme Court has long held that the employer bears the non-delegable duty to ensure that employees are provided the opportunity for compliant breaks. The responsibility is on the employer to make breaks available. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4<sup>th</sup> 1004.)

It is thus important to know an employer's duty and employee's responsibility, which are:

- **Employer's duty:** Employers have an affirmative, non-delegable duty to provide the opportunity for a compliant meal and rest break. This means employers must:
  - Notify employees when they are entitled to receive a meal or rest break.
  - Relieve employees of all duties during meal or breaks.
  - Relinquish control over the employees' activities during breaks.
  - Not interrupt employees during their break.
  - Not impede, discourage, or pressure employees into skipping breaks.
- **Employee's responsibility:** While employees have the right to a break, they are not obligated to take it. If they voluntarily choose to skip a break without any employer pressure, the employer is not liable for a missed break premium. However, California law makes it clear that the burden of proof is on the employer to demonstrate that a legally compliant break was made available and the employee voluntarily waived it.

The difficulty is how employers can know about missed breaks. Unfortunately, the employer's liability does not hinge on an employee's proactive notification. Instead, the employer's record-keeping obligations create a system for tracking break compliance.

- **Time records:** Employers are required to keep accurate time records showing the start and end times of meal periods. This recordkeeping should include meal and rest periods even though the employees are compensated for rest periods.
- **Rebuttable presumption:** If an employee's timecard shows a missed, short, or late meal period, there is a legal presumption that the employer violated break laws.
- **Employer must overcome the presumption:** To avoid paying a premium, the employer must present evidence to prove that it offered a compliant break and the employee's decision to miss or shorten it was completely voluntary and uncoerced. This can be difficult to prove, especially with faded memories or if a supervisor is no longer with the company.

So, what can an employer do to reduce exposure to claims for missed meal and rest breaks? It is recommended that because employers bear the burden of proof, they should adopt a proactive approach to managing and documenting breaks including:

- **Written policies:** Prepare clear, written policies regarding meal and rest breaks. These should be distributed to all employees that make clear when employees can take their rest and meal breaks.
- **Manager training:** Train managers to understand and enforce break policies correctly and not discourage or interrupt employees.
- **Prompt payment of premiums:** If a break violation occurs for a business-related reason (i.e., the employee was needed for work), employers should promptly pay the one-hour premium to the employee.
- **Affirmative attestations:** Some employers use timekeeping systems that prompt employees **to attest each shift** that they were provided all meal and rest breaks or note if they voluntarily chose to waive or skip one. This creates a record to counter the legal presumption of a violation. Here is an example your company can use for such an attestation:

"I understand that the Company provides a paid rest period of fifteen (15) minutes for each four (4) hour work period or major fraction thereof and that rest periods must be taken as close to the middle of each work period as possible. During an eight (8) hour workday I am required to take two (2) 10-minute rest periods (not to exceed 15 minutes). If I work less than three and one-half (3½) hours per day, I will not receive a rest period. In addition, I understand that I must take an unpaid meal period of at least thirty (30) minutes if I work more than five (5) hours in a day, unless an exception is authorized in writing. I hereby acknowledge: (1) I am signing this declaration voluntarily and free from duress; (2) this time sheet fully and accurately reports all the time that I have worked during the covered pay period; (3) I have been provided the opportunity to take all the rest periods and

meal periods that I was legally entitled to on each work day within the pay period covered by this time sheet; (4) I have been completely relieved of all duties during an unpaid meal period of at least thirty (30) minutes each work day within the pay period covered by this time sheet; (5) if I did not take a meal or rest period on any given workday, it was my own voluntary choice to do so; and (6) I reported to the Administrator each occasion when I was not provided a rest or meal period that was not voluntarily waived, so I could be properly compensated.”

At minimum, an employee should attest to the following:

“I hereby acknowledge: (1) I am signing this declaration voluntarily and free from duress; (2) this time sheet fully and accurately reports all the time that I have worked during the covered pay period; (3) I have been provided the opportunity to take all the rest periods and meal periods that I was legally entitled to on each work day within the pay period covered by this time sheet; (4) I have been completely relieved of all duties during an unpaid meal period of at least thirty (30) minutes each work day within the pay period covered by this time sheet; (5) if I did not take a meal or rest period on any given workday, it was my own voluntary choice to do so; and (6) I reported to the Administrator each occasion when I was not provided a rest or meal period that was not voluntarily waived, so I could be properly compensated.”

It is important for employers to implement procedures to minimize their potential exposure. Class Action lawsuits seeking to recover premium pay for missed meal and rest breaks for all employees are very common. These lawsuits assume if one employee is not paid properly, all employees were not paid properly for missed meal and rest breaks. Further, public agencies are investigating claims of unpaid meal and rest breaks as wage theft. As such, if your policies and procedures are not up to date, now is the time to revise them – and make sure you regularly review your employee’s time records carefully to make sure they are taking their breaks.

The labor and employment practice group at Coleman & Horowitz, LLP regularly represents employers in all facets of employment law. If you have questions about the above or your company’s needs, contact Gregory J. Norys, head of the firm’s labor and employment practice group at [gnorys@ch-law.com](mailto:gnorys@ch-law.com) or (559) 248-4820.

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