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## SELECTED CALIFORNIA WAGE & HOUR ISSUES

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**THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF CURRENT WAGE AND HOUR LAWS. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.**

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## I. Introduction

We have drafted these written materials to discuss only certain selected Wage-Hour topics among the many currently popular issues of our day. .. Accordingly, these materials are not comprehensive of all topics pertaining to wage-hour law although they do treat the covered topics in a comprehensive manner..

We first describe what federal law (the Fair Labor Standards Act of 1938 or “FLSA:” 29 U.S.C. § 201, et seq.) requires and permits. Thereafter, we discuss California state law and attempt to compare and contrast coverage. As to almost all issues, the law is different (sometimes in major ways). Typically, too, California law is more expansive (generous to the employee) than federal law. Moreover, California state penalties are more numerous, more detailed and more expansive. Of course, both federal and state laws attach simultaneously to the employer. Thus, “whatever is worse” for the employer controls.

## II. What Is Work?

Before we may discuss wages and the determination of appropriate compensation, it is necessary to define what “time worked” the employer must compensate with wages. Generally, compensable working time, or hours worked, is that period in which an employee either “suffers or is permitted” to work, even if the employer does not so instruct the employee. If the employer knows or has reason to believe that the employee is performing work, the employer must provide compensation. An employer may not “suffer or permit” work to occur without appropriate compensation.

### 1. The FLSA

The FLSA does not define “work” or “workweek.” Rather, to determine whether time is compensable under federal law, it is necessary to review case decisions interpreting these terms.

Whether time is compensable depends on whether the employee’s time is spent primarily for the benefit of the employer. In other words, activity the employer controls or requires and which employees pursue necessarily and primarily for the benefit of the employer and its business constitutes work the employer must compensate.<sup>1</sup> As a general rule, this includes all time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace and all time during which an employer suffers or permits

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<sup>1</sup> *Tennessee Coal, Iron & RR. Co. v. Muscoda Local 123*, 321 U.S. 590, 598 (1944).

an employee to work, whether or not the employer requires the employee to do so.<sup>2</sup> Furthermore, “work” does not require “exertion” or physical activity.<sup>3</sup>

Some general rules:

Walking, riding or traveling to/from the actual place of performance of the “principal activity” or activities of the job is not compensable work, but only because of The Portal to Portal Act (which amended the FLSA in 1947). This is because such actions constitute activities “preliminary” or “postliminary” to performance of the employee’s “principal activities” in a workday.

Time spent traveling in vehicles the employer provides for transporting workers from a “reporting” site to the jobsite is compensable (since “reporting” to a location is something the employer requires to enable the employee to commence work...thus, his/her first “principal activity” of the day). However, the time an employee spends traveling to his/her jobsite is generally not compensable absent the obligation to first report in elsewhere.

Time spent on an activity that is an “integral and indispensable part” of the principal activities is also compensable, since such integral and indispensable activities are also principal activities.<sup>4</sup>

An important concept to wage-hour law is the so-called “continuous work rule.” Once work starts, it continues until ended. Accordingly, activities after the employee’s first “principal activity” and before the last principal activity of the workday constitute compensable work. Thus, the donning and doffing of protective equipment, and time spent walking between the changing area and production area, is compensable since the equipment is an integral part of performing the principal activity of the position, even if waiting at the beginning of the day before work begins to receive work equipment is not compensable (because not an integral and indispensable part of the principal activity of meat cutting, for example).<sup>5</sup>

## 2. California State Law

California law is more expansive than the FLSA’s rules defining what constitutes work. California law defines “Hours worked” as time during which an employee is subject to the control of the employer and all time it “suffers or permits” the employee to work, as opposed to

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<sup>2</sup> 29 C.F.R. § 778.223; see also *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) ; *Ketchum v. City of Vallejo*, 523 F. Supp. 2d 1150, 1162 (2007) (off-duty time police officers spent training their horses for the purpose of patrolling special events on horseback was compensable work under the FLSA because it was primarily for the benefit of the employer)..

<sup>3</sup> *Armour & Co. v. Wantock*, 323 U.S. 125 (1944); *De Ascencio v. Tyson Foods, Inc.*, 2007 U.S. LEXIS 21289 (3d Cir. 2007) [It was error for trial judge to instruct jurors to consider whether protective equipment was cumbersome, heavy or required concentration to don an doff to determine whether “donning and doffing” this equipment was “work.”

<sup>4</sup> *Steiner v. Mitchell*, 350 U.S. 247 (1956)(time spent changing clothes and showering to wash off toxic materials after end of shift in battery plant compensable because shower was indispensable to safe performance of work).

<sup>5</sup> *IBP, Inc. v. Alvarez*, 546 U.S. 21(2005).

whether the time is for the “primary benefit” of the employer. However, California employers can only be liable for employees working “off the clock” if they knew or should have known employees were doing so. *Brinker v. Superior Court*, 165 Cal. App.4th 25, 60 (2008) [quoting *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 585 (2000)]. The California Supreme Court interprets the term “subject to the control of the employer” to include time traveling on vehicles the employer provides for transporting workers from the reporting site to the job location where the principal activities of the position occur.<sup>6</sup>

Discussed below are several different types of time an employee may incur as part of his or her employment, and the treatment of each as compensable time under both the federal law and California state law.

## A. Reporting Time

### 1. Federal Law

“Reporting time pay” is partial compensation for employees who report to work expecting to work a specified number of hours and who are deprived of that work time because the employer inadequately scheduled work or failed to properly notify the employee not to report for work. The FLSA does not currently require the payment of reporting-time pay merely for showing up to work. However, if an employer causes an employee to suffer or wait for work after the regular shift was scheduled to begin, the time spent waiting between the scheduled commencement of the shift and the time the employees starts work or the employer sends the employee home counts as compensable working time.

29 C.F.R. § 778.220 does provide that an employer may agree to pay an employee a “minimum of a specified number of hours’ pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at his scheduled starting time on a regular work day or on another day on which he has been scheduled to work, he is not provided with the expected amount of work.” Such amounts may be excluded from the computation of the employee’s regular rate and cannot be credited toward statutory overtime compensation due the employee.

### 2. California Law

Unlike federal law, California requires employers to compensate employees for the trouble of reporting to work only to find no work available. Pursuant to Section 5(A) of Wage Order 4 (covering Professional, Technical, Clerical, Mechanical, and Similar Occupations), an employee qualifies for compensation in the following circumstances:

#### a. Scheduled Work Day

1. If an employee reports to work on a scheduled workday but is not put to work or is furnished with less than half his or her usual or scheduled day’s work, the

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<sup>6</sup> *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 578 (2000) [Work begins at reporting site where employer required employees to board buses for transport to work site.]

employer must pay for the greater of (1) the employee's usual or scheduled day's work (up to four hours), or (2) two hours at his or her regular rate of pay.

2. If an employer requires an employee to report to work a second time in a scheduled workday and furnishes the employee fewer than two hours of work, the employer must pay two hours of compensation at the employee's regular rate of pay.

NOTE: Reporting time pay is a premium wage and not a penalty for purposes of calculating the statute of limitations. In other words, reporting time pay is another form of a "wage."<sup>7</sup>

b. **Unscheduled Work Day**

The minimum two hours of pay at the employee's regular rate of pay applies also in situations where an employer requires an employee to report to work when there is no usual or scheduled work day. For example, if an employer requires an employee to attend a mandatory meeting of one hour on an unscheduled work day, the employer must compensate the employee for two hours at the employee's regular rate of pay. This rule does not prevent an employee from agreeing to work an unscheduled work day of less than two hours without requiring an employer to pay the two hour minimum.

An exception to Section 5(A) of Wage Order 4 in regard to reporting time pay may exist when specific situations arise beyond the employer's control. For example, the DLSE Operations and Procedures Manual and DLSE Enforcement Policies and Interpretations Manual cite as exceptions to the reporting time pay requirement the following circumstances:

Inability of its operations to commence or continue because of threats to employees or to property, or because of the recommendation of civil authorities;

Failure of the sewer system or of public utilities to supply electricity, water, or gas;

Interruption of work caused by an act of God or other cause outside of the employer's control;

Instances where an employee makes a request to leave work early for personal reasons;

Where an employee reports to work unfit.

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<sup>7</sup> *Kamar v. Radioshack Corp.*, 2008 U.S. Dist. LEXIS 40581 at p. 14-15 (C.D. Cal. 2008) [quoting *Huntington Memorial Hospital v. Superior Court*, 131 Cal App.4<sup>th</sup> 893, 909-910 (2005)].

## B. Call-Back Time

### 1. Federal Law

29 C.F.R. § 785.44 defines “call back” time by noting, “There may be instances when travel from home to work is work time. For example, if an employee who has gone home after completing his day’s work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer’s customers (emphasis added), all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.”

“Call back” time typically “consists of a specified number of hours of pay” in compensation for responding to calls from their employer to perform extra work.<sup>8</sup> Call back time is not dependent on hours worked, but rather compensates the employee for showing up to a call-out. According to the Department of Labor, this type of compensation is excludable from the regular rate of pay. Under the “callback” payment, where the compensation is for showing up, and not for hours worked, the callback allowance is excludable from the regular rate of pay under the FLSA.

### 2. California Law

If an employer requires an employee to report for work a second time in any one workday and furnishes the employee less than two (2) hours of work on the second reporting, the employer is required to pay for two (2) hours of work at the employee’s regular rate of pay, which shall not be less than the minimum wage. Wage Order No. 4-2001 5(B). Thus, if there is a required meeting scheduled after an unpaid hiatus at the end of the shift, the employee must be paid for at least two hours for reporting a second time in one day. There is no call back pay obligation if the employer schedules the meeting to immediately follow the scheduled shift. DLSE Manual § 45.1.4. The DLSE Manual further provides, “The Division does not take the position that simply requiring the worker to respond to call-backs is so inherently intrusive as to require a finding that the worker is under the control of the employer. Such factors as (1) geographical restrictions on employees’ movements; (2) required response time; (3) the nature of the employment; and (4) the extent the employer’s policy would impact on personal activities during on-call time must all be considered. The bottom line consideration is the amount of “control” exercised by the employer over the activities of the worker.” DLSE Manual § 47.5.6.1. Thus, California employers must consider compensation for travel time to work necessitated by a call-back on a case-by-case basis.

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<sup>8</sup> *Jonites v. Exelon Corp.*, 2007 U.S. Dist. LEXIS 55400 at p. 34 (N.D.Ill. 2007).

## C. On-Call Time

### 1. Federal Law

Special considerations apply to employees who employers ask to stand ready to perform after normal working hours have ended or reside on the employer's premises on a permanent basis or for extended periods of time (twenty-four hours or more) and who do not perform duties during the entire time that they are on the premises. As a general matter, time spent engaging in normal private pursuits such as eating, sleeping, entertaining, and other periods of complete freedom from all duties is not work time.<sup>9</sup> Because of the difficulty of determining the exact hours worked under these circumstances, the federal regulations provide that "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." 29 C.F.R. § 785.23 (2001); see also *Rousseau v. Teledyne Movable Offshore, Inc.*, 805 F.2d 1245, 1248-49 (5th Cir. 1986) (employees required by agreement to remain on barges for seven full days but only compensated for time spent in active physical labor were not entitled to compensation for off-duty time which could be spent sleeping, eating, watching television, etc.); *Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1355 (9th Cir. 1995); see also *Lee v. U.S. Sec. Assocs.*, 2008 U.S. Dist. LEXIS 28578 at pp. 21-22 (W.D. Tx. – A.D. 2008) [whether on call time is compensable working time depends on the working agreement between the parties governing on call work and the degree to which the employee is permitted or free to engage in personal activities during periods of idleness when he is subject to call].

### 2. California Law

#### a. General Rule

Although California's wage orders define "hours worked," as previously discussed, neither the wage orders nor the Labor Code define on-call, standby or waiting time or establish rules to determine when such time must be included in hours worked. Thus, whether the time in question is compensable as hours worked depends on whether the employer "controls" the time. See 2002 D.L.S.E. Manual § 46.1.1. Thus, it is important to know the facts of the at-issue situation.

Generally, an employer has "control" of an employee's time if the employer so restricts it that the employee cannot pursue personal activities or come and go at will. *Id.* § 473.4. The D.L.S.E. has explained:

"The Division does not take the position that simply requiring the worker to respond to call backs is so inherently intrusive as to require a finding that the worker is under the control of the employer. Such factors as (1) geographical restrictions on employees' movements; (2) required response time; (3) the nature of the employment, and, (4) the extent the employer's

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<sup>9</sup> *Thomas v. Connor Group*, 2008 U.S. Dist. LEXIS 35384 at p. 11 (S.D. Ind. – Indianapolis Division).

policy would impact on personal activities during on-call time, must all be considered. The bottom-line consideration is the amount of “control” exercised by the employer over the activities of the worker. In some employments, the employer can be said to be exercising some limited control over his employee at all times. For instance, by statute the employee must give preference to the business of his employer if it is similar to the personal business he transacts. However, immediate control by the employer which is for the direct benefit of the employer must be compensated.”

*Id.* 4 47.5.6.1 (citations omitted).

To determine the extent of an employer’s control, the D.L.S.E. has adopted and applies the test the California Supreme Court set out in *Madera Police Officers Assoc. v. City of Madera*, 36 Cal. 3d 403, 204 Cal. Rptr. 422 (1984). See 2002 D.L.S.E. Manual § 47.5.4.

The Madera compensability test is a two-part analysis. The first prong is whether the restrictions on the employee were primarily directed toward the fulfillment of the employer’s requirements and policies. 36 Cal. 3d at 409. The second prong is whether the employee was substantially restricted so as to be unable to attend to private pursuits. *Id.* In applying the second part of the test, the D.L.S.E. indicated that it “must examine the restrictions cumulatively to assess their overall effect on the worker’s noncompensatory time.” 2002 D.L.S.E. Manual § 47.5.4.2. The D.L.S.E. specifically notes that some restrictions as to time and space may be placed on the employee, so long as the restrictions are not substantial enough to prevent the employee from attending to private pursuits. *Id.*

If, under the Madera test, the employee’s time is “uncontrolled,” then according to the D.L.S.E. the employee generally need not be paid for such time:

“An employee who has the choice of being available or not to respond to a request by the employer to return to work for an emergency may be on uncontrolled standby if the employee ‘is completely unrestricted to use his or her time for their own purposes. Such ‘free’ standby time is not under the control of the employer and, thus, need not be paid.

*Id.* Q 47.52. For example, the requirement that an employee wear a pager, standing alone, is not sufficient control to require the employer to pay the employee for all the hours the pager is on. *Id.* § 47.5.5.”

Although California law is more restrictive than the F.L.S.A. with respect to on-call time, the 2002 D.L.S.E. Manual suggests that the Ninth Circuit’s decision in *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994), provides guidance for California employers regarding the factors that should be considered in “determining whether restrictions placed on employees during on-call hours were so extensive that such time should be deemed ‘hours worked’ under

the Fair Labor Standards Act” 2002 D.L.S.E. Manual 47.5.5.1. According to *Berry*, those factors include (1) whether there are extensive geographical restrictions on employees’ movements<sup>10</sup>; (2) whether the frequency of calls is unduly restrictive<sup>11</sup>; (3) whether a required response time is unduly restrictive<sup>12</sup>; (4) whether the on-call employee can easily trade his or her on-call responsibilities with another employee; and (5) the extent of personal activities engaged in during on-call time.

More recently, in *Morillion v. Royal Packing Co.*; 22 Cal. 4th at 582 (2000), the California Supreme Court held that “an employee who is subject to an employer’s control does not have to be working during that time to be compensated.” Accordingly, field worker employees who were required to meet each day at specified parking lots or assembly areas to be driven in employer-provided buses to the fields where they actually worked had to be paid for the transportation time. The court concluded such time was “hours worked” because the employees were prohibited from using their own transportation to get to and from the fields and, thus, they were under the employer’s control. *Id.* at 586. “Allowing plaintiffs the circumscribed activities of reading or sleeping [on the bus] does not affect, much less eliminate, the control Royal exercises by requiring them to travel on its buses and by prohibiting them from effectively using their travel time for their own purposes.” *Id.* The D.L.S.E. concurs, noting that “[t]he difference [from federal law] is that the California test places no reliance on whether the individual is engaged in “work” and, thus, the existence of an “agreement” regarding the understanding of the parties is of no importance. The ultimate consideration in applying the California law is determining the extent of the “control” exercised.” 2002 D.L.S.E. Manual § 47.5.6.

b. Employees Required to Remain on an Employer’s Premises for Extended Periods of Time.

Generally, under California law, an employee who is required to remain at the employer’s place of business and respond to emergency calls is working and must be paid for all hours, even if the employee is doing nothing more than waiting for something to happen. 2002 D.L.S.E. Manual § 46.6.3.

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<sup>10</sup> As a practical matter, if an employee is not required to remain on the employer's premises, geographical restrictions are imposed according to the required response time for an employee to return to the employer's premises. See DLSE Opinion Letter to Gutierrez & Associates (December 28, 1998) [a 20-minute required response time to return to work would excessively limit employee’s geographical movements].

<sup>11</sup> Three to five calls in a twenty-four hour shift not excessively frequent so as to preclude effective use of on-call time for employee’s own personal pursuits where drivers had 30 minutes to respond, and no automatic discipline for failure to respond. See *DELP v. Mullins*, 2006 Cal. Unpub. LEXIS 1495 at p. 20 (2006).

<sup>12</sup> The proper inquiry regarding required response time is “whether a fixed time limit for response [is] unduly restrictive.” See *Owens v. Local No. 169, Ass’n of W. Pulp and Paper Workers*, 971 F.2d 347, 351 (9th Cir. 1992); see also *Berry*, supra, 30 F.3d at 1184 (other courts have held that on-call waiting time was not compensable even though employees were required to respond, in person at the employer's premises, within approximately twenty minutes of receiving a page or telephone call).

However, I.W.C. Wage Order No. 5-2001, covering the public housekeeping industry, contains an exception to the requirement that an employee must be paid for all hours spent on the employer's premises:

“Except for employees employed in the “Health Care Industry”, (as that term is defined) Orders 5-2002, contain a special definition for hours worked by employees in the Public Housekeeping Industry who are required to reside on the employment premises: “. . . in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked.” Under this definition, as applied, for instance, to a motel clerk who was required to reside on the motel grounds and to remain there 24 hours a day unless relieved, the California courts have held that only the time spent performing physical, mental or other specified tasks was counted as hours worked.”

2002 D.L.S.E. Manual § 47.3.2 and § 47.3.2.1; I.W.C. Wage Order No. 5-2001(2)(K); See also *Brewer v. Patel*, 20 Cal. App. 4th 1017, 1019, 25 Cal. Rptr. 2d 65 (1993) (employees who are required to live on motel premises but work no more than five hours per day are entitled to compensation only for the time they render actual services); see also *Isner v. Falkenberg/Gilliam & Assoc., Inc.*, 160 Cal. App.4<sup>th</sup> 1393 (2008) [similar to *Brewer*, plaintiffs were free to sleep, eat, talk on the telephone, use the Internet, play computer games, read for leisure and watch television while they were not responding to an emergency, so long as they remained available to respond (i.e., within audible range of the telephone and alarm)].

#### **D. Compensatory Time**

According to the U.S. Office of Personnel Management, compensatory time off (“comp time”) is time off with regular pay in lieu of overtime pay for irregular or occasional overtime work.

As a legal matter, “comp time” essentially does not exist in America for private sector employees. As a practical matter, employees and employers coast to coast engage in widespread informal “comp time” arrangements. The lack of legal recognition of “comp time” is one of the leading examples to support the national criticism that our wage laws are anachronistic and do not reflect the modern realities of the workplace. Oddly, too, this is one of the few areas of wage-hour law in which California law makes more sense and is more generous to employees and employers than federal law. But, the absence of federal law’s recognition of “comp time” nullifies California’s permissions other than as to those (very) few very small California employers not subject to the federal FLSA.

1. Federal Law
  - a. Private Sector Employers

The FLSA continues to require that private employers pay overtime to workers subject to the Act and covered by its overtime provisions. However, the U.S. Department of Labor has exercised its prosecution discretion not to prosecute those employers which allow employees to

take time off in lieu of overtime pay if the time off is taken in the same pay period in which the overtime occurred. See Wage & Hour Division, Field Operations Handbook § 32j16b (2000). Also, the DOL requires that:

1. An employer pay the at-issue employee on an hourly basis at a fixed rate of pay or on a regular salaried basis for a fixed number of hours per week (i.e. this practice cannot apply, however, to nonexempt salaried employees paid a fixed salary regardless of hours worked);
2. the pay period must be longer than a week
3. time off adjustments of one and one-half hours for each overtime hour worked must occur within the same pay period as when the overtime was taken; and
4. an employer must compute compensation for hours worked at an established hourly rate and paid to employees at the end of each period.

See Wage & Hour Opinion Letter No. 389 (September 1, 1965).

b. Public Sector Employers

Ironically, the FLSA and federal regulations allow public entities to provide compensatory time off to their employees.<sup>13</sup> At the request of an employee, the head of an agency (or its designee) may grant compensatory time off from an employee's tour of duty instead of payment for an equal amount of irregular or occasional overtime work.<sup>14</sup>

2. California Law

The DLSE takes the position that private employers in California cannot use "compensatory time" provisions.<sup>15</sup> Nonetheless, the California Labor Code provides two instances in which "compensatory time" provisions are permissible. However, if the employer is also subject to the FLSA (as most California employers are), this California law permission is null and of no utility or protection to the employer. Accordingly, currently, essentially only "Mom and Pop" shops in California not triggering application of the FLSA may avail themselves of "comp time."

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<sup>13</sup> 29 U.S.C. § 207(o); see also *Parker v. City of New York*, 2008 U.S. Dist. LEXIS 38769 at p. 10 (S.D.N.Y. 2008).

<sup>14</sup> 5 C.F.R. § 550.114(a); *Doe v. United States*, 513 F.3d 1348, 1359 (Fed. Cir. 2008) (holding that compensatory time may be granted to federal employees for overtime work on an hour-for-hour basis).

<sup>15</sup> DLSE Policies and Interpretations Manual § 6.1 (2002). However, Governor Arnold Schwarzenegger in 2003 issued Executive Order S-2-03, in which the government placed the DLSE opinion letters and the Enforcement Policies and Interpretations Manual under review to determine their legal force and effect and to ensure compliance with the requirements of the Administrative Procedures Act. Thus, it remains uncertain what the DLSE position is on any particular question of wage-hour law, including the use of "compensatory time" provisions, until the agency takes a prosecutorial position on the question.

a. Same “Workweek” Time Shift:

First, California Labor Code § 513 provides that an employer need not provide overtime pay for those hours above eight hours in a work day meant to make up work time an employee lost as a result of a personal obligation. Provided that the employee performs the hours of the “makeup work time” during the same workweek in which the work time was lost, the employer need not count these hours towards computing the total number of hours worked in a day for purposes of the overtime requirements California Labor Code §§ 510 or 511 specify, except for hours in excess of 11 hours of work in one day or 40 hours in one workweek. An employee must also provide a signed written request for each occasion that the employee makes a request to make up work time pursuant to California Labor Code § 513. Moreover, § 513 prohibits an employer from encouraging or otherwise soliciting an employee to request the employer’s approval to take personal time off and make up the work hours within the same week pursuant to this section.

b. 240 “Hours Bank” Time Shift:

The other instance in which California law permits “compensatory time” is codified at California Labor Code § 204.3. Section 204.3 permits a nonexempt employee to receive, in lieu of overtime compensation, compensating time off at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required by law. If an hour of employment would otherwise be compensable at a rate of more than one and one-half times the employee's regular rate of compensation, then the employer must pay compensating time off commensurate with the higher rate. However, this exchange of time off in lieu of overtime pay is permissible only if the employer also meets four other conditions:

1. The compensating time off is provided pursuant to applicable provisions of a collective bargaining agreement, memorandum of understanding, or other written agreement between the employer and the duly authorized representative of the employer's employees; or, in the case of employees not covered by the aforementioned agreement or memorandum of understanding, pursuant to a written agreement entered into between the employer and employee before the performance of the work.
2. The employee has not accrued compensating time in excess of a limit of 240 total hours of compensatory time off.
3. The employee has requested, in writing, compensating time off in lieu of overtime compensation.
4. The employee is regularly scheduled to work no less than 40 hours in a workweek.

Not only do these four conditions restrict the use of “comp time,” but California Labor Code § 204.3(h) states that Labor Code § 204.3 also does not apply to employees exempt from the overtime provisions of the California Wage Orders. Thus, exempt professional, administrative, executive, or computer professional employees, for example, are not eligible for this “comp time” banking.

## **E. Charitable Time (Volunteers)**

### **1. Federal And California Law Are Similar**

This issue may arise in two different contexts: incumbent employees and non-employee workers who offer their services to a company or institution.

a. Non-employee: the worker may provide free services if there is no express or implied compensation agreement, and the individual provides such time to a religious, charitable, civic, humanitarian or similar non-profit organization as a public service.<sup>16</sup>

b. Employee volunteer: The potential for coercion precludes employees from volunteering to perform the same services for their employers that make up the principal activities of their position.<sup>17</sup> This is because it is otherwise difficult to determine whether the employee really “volunteered,” or whether the employer merely coerced the employee. Indeed, the Code of Federal Regulations and California Wage-Hour Opinion Letters preclude employees from “volunteering” the same type of services they are employed to perform.<sup>18</sup> Additionally, under federal law, the court must “look at the objective facts surrounding the services performed to determine whether the totality of the circumstances supports a holding that, under the statute and under the regulations, the non-paid regulars are “volunteers.”<sup>19</sup> 29 C.F.R. § 553.101 identifies these objective facts courts must consider to determine whether the individual is a volunteer, including whether the individual: (1) submits to the work voluntarily, without any coercion; (2) performs the service, at least in part, for humanitarian reasons; (3) may only receive nominal fees and/or reimbursement for service provided; and (4) may not volunteer for the same type of work in which he or she is otherwise employed.<sup>20</sup> However, if the employee voluntarily spends time on charitable activities outside the employee’s normal working hours, such time is not “hours worked” subject to compensation.<sup>21</sup>

## **F. Donning and Doffing Time**

### **1. Federal Law**

The United States Supreme Court has held that the “principal activity” of work includes those activities which are an “integral and indispensable part of the principal activities for which

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<sup>16</sup> *Wallig v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) [Interpreting FLSA.] But see, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) [Volunteer services limited to those individuals who help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth; ordinary commercial activities of eleemosynary, religious, or educational organizations will be treated under the FLSA the same as if an ordinary business enterprise had performed them].

<sup>17</sup> *Vonbrethorst v. Washington County*, 2008 U.S. Dist. LEXIS 54106 at pp. 7-8 (D. Idaho 2008).

<sup>18</sup> DLSE Opinion Letter to Christian Science Committee on Publication for Southern California (October 27, 1988); 29 C.F.R. § 553.101(b)-(d).

<sup>19</sup> *Vonbrethorst*, *supra*, 2008 U.S. Dist. LEXIS 54106 at p. 10.

<sup>20</sup> 29 C.F.R. § 553.101.

<sup>21</sup> 29 C.F.R. § 785.44.

covered workmen are employed.”<sup>22</sup> In other words, the duties for which the employee is paid are “principal activities,” and those activities necessary to perform those duties are “integral and indispensable parts” for which an employee should also receive compensation. Thus, the time necessary to don (put on) and doff (take off) safety equipment necessary to perform a job is compensable time, since the performance of the principal activities cannot occur without using that equipment.<sup>23</sup> This includes the donning or doffing of not just specialized safety equipment or clothing, but standard equipment or clothing as well.<sup>24</sup> This also includes time spent sanitizing and cleaning protective clothing.<sup>25</sup> However, the time waiting to don safety equipment before the shift begins is not compensable because it is not an “activity” integral to the work to be performed.<sup>26</sup> Furthermore, the time spent changing clothes or washing at the beginning or end of each workday which was excluded from measured work time by the express terms of or by custom or practice ***under a bona fide collective-bargaining agreement*** applicable to the particular employee do not count as hours worked pursuant to federal law.<sup>27</sup>

A change of clothes *on the employer's premises* which the law, *the rules of the employer*, or the nature of the work requires, is integral and indispensable to the principal activities of the work.<sup>28</sup> Typically time spent donning and doffing a uniform or safety gear at home is not compensable work under the FLSA because such an activity is not part of the continuous workday and is not integral and indispensable to the principal activities of the employee.<sup>29</sup>

In *De Ascencio*, the Third Circuit Court of Appeals concluded that it was error for the court to instruct the jury to consider whether employee protective gear *Tyson* required its meat processing personnel to don, was cumbersome, heavy, or required concentration to don and doff to determine whether the activity was “work” pursuant to the FLSA.<sup>30</sup> Rather, the Court ruled that compensable “work” under the FLSA in terms of donning and doffing activities relate to whether the activity is “integral and indispensable” to an employee’s principal activity, not

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<sup>22</sup> *Steiner v. Mitchell*, 350 U.S. 247 (1956).

<sup>23</sup> *See IBP, Inc. v. Alvarez*, 546 U.S. 21.

<sup>24</sup> *Garcia v. Tyson Foods, Inc.*, 474 F. Supp.2d 1240, 1247 (D. Kan. 2007).

<sup>25</sup> *Burks v. Equity Group-Eufaula Div., LLC*, 2008 U.S. Dist. LEXIS 61162 (M.D. Ala. – N.D. 2008).

<sup>26</sup> *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

<sup>27</sup> 29 U.S.C. § 203(o). Many collective bargaining agreements will state the amount of time the employer will pay for certain tasks, such as washing, to prevent “lollygagging” in the shower. These “measured times” are typically an average time duration taken from Union and management time measurements of the task during representative shifts.

<sup>28</sup> *De Ascencio v. Tyson Foods, Inc.*, 2007 U.S. LEXIS 21289 at p. 29 (3d. Cir. 2007) (quoting *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9<sup>th</sup> Cir. 2004)).

<sup>29</sup> *Abbe v. City of San Diego*, 2007 U.S. Dist. LEXIS 87501 (S.D. Cal. Nov. 9, 2007); *Bamonte v. City of Mesa*, 2008 U.S. Dist. LEXIS 31121 (D. Az. 2008) (holding time spent by police officers donning and doffing their police uniform and safety gear was not compensable because neither law nor workplace policy mandated that the officers dress at work); Wage & Hour Adv. Mem. No. 2006-2 (May 31, 2006) (“Donning and doffing of required gear is within the continuous workday only when the employer or the nature of the job mandates that it take place on the employer's premises.”); *but see Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1206 (N.D. Cal. 2007) (donning and doffing) (disagreeing with the location limitation used by other courts, and holding that the donning and doffing of a police officer's uniform and equipment may be compensable even if performed off the employer's premises).

<sup>30</sup> *Id.* at p. 32.

whether the employee expends any level of physical or mental exertion or that the activity is cumbersome or difficult.

Moreover, during a continuous workday, the FLSA will treat as “work” any donning and/or doffing that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity.<sup>31</sup> Under *Alvarez*, then, the key factual issues underlying plaintiffs' claims are whether standard protective clothing and gear are "integral and indispensable" to the work performed by production employees and what compensable activities define the last principal activity of the workday.

## **G. *De Minimis* Time**

### **1. Federal Law**

The Court of Appeals for the Ninth Circuit has held that, “in determining whether otherwise compensable time is *de minimis*, we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.”<sup>32</sup> Alternatively, in determining whether *de minimis* time is actually compensable time, the Second Circuit Court of Appeals looks to: (1) the capability of the employer’s payroll system to record the additional time; (2) the burden of implementing a system if the flow of small overtime vouchers increased dramatically; (3) the frequency with which such overtime occurs; (4) how often it is recorded; and (5) the aggregate of time actually worked and uncompensated.<sup>33</sup>

“When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours . . . such trifles may be disregarded[, for] [s]plit-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA].”<sup>34</sup> In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are “*de minimis*.” This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes’ duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.<sup>35</sup>

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<sup>31</sup> *Garcia, supra*, 474 F. Supp.2d. at 1245.

<sup>32</sup> *Lindow v. United States*, 738 F.2d 1057, 1063 (9<sup>th</sup> Cir. 1984).

<sup>33</sup> *Scott v. City of New York*, 2008 U.S. Dist. LEXIS 67477 (S.D.N.Y. 2008).

<sup>34</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

<sup>35</sup> 29 C.F.R. § 785.47.

## 2. California Law

For enforcement purposes, the DLSE considers (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional activity. DLSE Manual § 46.6.4.

### H. OSHA Inspection Time

#### 1. Federal Law

The time an employee spends accompanying an OSHA investigator on a “walk around” during an inspection is not considered hours worked.<sup>36</sup> However, where there is no authorized employee representative, any time the OSHA investigator spends consulting with employees concerning the safety and health at their workplace is “hours worked.” DOL Field Operations Handbook § 31b16. Significantly, Section 8(e) of OSHA does not require an employee representative to accompany the investigator on OSHA “walk arounds,” nor does it impose a duty on the employer to require an employee to accompany the investigator).

#### 2. California Law

Unlike the federal law, time an employee spends participating in a walk-around tour under the California Occupational Safety and Health Act is compensable as work time.<sup>37</sup>

### I. Training Time

Employers often require their employees to attend conferences or seminars intended to benefit the employer. Federal law mirrors California state law as to training time. Both laws require the employer to compensate an employee for attending such training. However, the federal regulations establish that attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all of the following criteria are met:

- a. Attendance is outside of the employee’s regular working hours;
- b. Attendance is in fact voluntary;
- c. The course, lecture, or meeting is not directly related to the employee’s job; and
- d. The employee does not perform any productive work while attending.<sup>38</sup>

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<sup>36</sup> *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 467 (D.C. Cir. 1980).

<sup>37</sup> *Division of Labor Standards Enforcement v. Texaco, Inc.*, 152 Cal. App.3d Supp. 1, 17 (1983).

<sup>38</sup> 29 C.F.R. § 785.27.

The question whether an employer must compensate its employee usually rests with the second element related to “voluntary” attendance. Federal regulations are clear that attendance at training is not voluntary if the employee is led to believe that his or her working conditions or continuance of employment would be adversely affected by non-attendance.<sup>39</sup> In other words, it is improper for an employer to threaten disciplinary action if the employee does not subscribe to the training.

Several federal courts look to the employee’s state of mind at the time of his or her initial decision to attend the course to determine whether attendance was voluntary.<sup>40</sup> However, where the employer explicitly requires the training, it is unnecessary to proceed to this level of investigation, since requiring the training negates any pretense of volunteerism.<sup>41</sup>

FLSA regulations define training as “directly related” (Factor 3, above) if it is designed to make the employee handle his or her job more effectively (as distinguished from training him or her for another job).<sup>42</sup> The fact that the training relates to a principal activity of the employee supports a finding that the employer must compensate the employee’s training. Specifically, case law establishes when statutes require an employee to be knowledgeable in certain types of activities, training of employees in these activities is compensable since knowledge is a requirement of the position.<sup>43</sup>

There is also an exception from the otherwise obligation of the employer to pay for training time for employees who establish, for the benefit of their employees, a program of instruction corresponding to courses which independent bona fide institutions of learning offer.<sup>44</sup> Rather than force employees out to find classes at, perhaps, a local college or university, federal law is sufficiently flexible to allow the employer to offer the course “in-house” without also triggering overtime requirements.

Additionally, individuals participating in an organized program as part of an apprenticeship are subject to a special enforcement policy the federal Wage and Hour Division deploys pursuant to the FLSA. Specifically, an employer may exclude an apprentice’s training time in the absence of a contrary written agreement if: (1) the employer employs the apprentice under a written apprenticeship agreement or program in substantial compliance with the standards of the Bureau of Apprenticeship and Training within the U.S. Department of Labor;

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<sup>39</sup> 29 C.F.R. § 785.28; see also *Fowler v. Incor*, 2008 U.S. App. LEXIS 10213 at pp. 25-26 (10<sup>th</sup> Cir. 2008).

<sup>40</sup> *DeBraska v. City of Milwaukee*, 189 F.3d 650, 652-653 (7<sup>th</sup> Cir. 1999); *Price v. Tampa Elec. Co.*, 806 F.2d 1551 (11<sup>th</sup> Cir. 1987); *Seever v. Carrols Corp.*, 528 F. Supp. 2d 159, 168 (W.D.N.Y. 2007) (time spent attending training, orientation, and manager’s meetings not compensable because employer never suggested that employee would be fired if she refused to go, even though employer did pressure and encourage employees to attend).

<sup>41</sup> *Chao v. Tradesmen Int’l.*, 310 F.3d 904 (6<sup>th</sup> Cir. 2002).

<sup>42</sup> 29 C.F.R. § 785.29.

<sup>43</sup> *Wilson v. County of Santa Clara*, 68 Cal. App.3d 78 (1977).

<sup>44</sup> 29 C.F.R. § 785.31.

and (2) the apprentice's time does not involve productive work or performance of the apprentice's normal duties.<sup>45</sup>

## **J. Commute and Travel Time**

“When does work begin” issues seamlessly merge into employee travel and commute requirements. This issue includes not only commuting travel necessary to arrive at work, but travel to the place where the individual's principal duties occur, and travel that may be part of his or her duties.

### **1. Federal Law**

The Portal to Portal Act of 1947 amended the federal Fair Labor Standards Act. It provides that no employer shall be subject to any liability or punishment for time an employee spends walking, riding, or traveling to and from the actual place of performance of the “principal activity” the employee performs. Thus, walking and commute time before work begins and after work ends is not compensable time, unless by express contract or by custom or practice not inconsistent with an express contract.

Thus, normal travel time to and from work from home is not considered hours worked for purposes of the FLSA. Further, employees required to perform some *de minimus* job-related duty during their commute will not be compensated for their commute time unless the employer's restrictions hinder the employee's ability to use their commuting time as they otherwise would have had there been no work-related restrictions.<sup>46</sup> However, federal regulations have established several exceptions to the general statutory presumption that travel is not compensable work time:

Where an employer calls an employee who has returned home after the workday to travel a substantial distance to perform an emergency job for a customer. 29 C.F.R. § 785.36.

Special one-day work assignment in a separate city allows for compensation for time from point of departure or arrival to the location of the special assignment. 29 C.F.R. § 785.37.

Travel as part of an employee's principal activity (i.e., traveling from jobsite to jobsite during the work day). 29 C.F.R. § 785.38.

Travel that keeps an employee away from home overnight when it cuts across an employee's regular workday and corresponding hours on non-working days (though as an enforcement policy, the U.S. Department of Labor will not consider as work those hours an employee spends as a passenger on public transportation). 29 C.F.R. §§ 785.39, 785.40.

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<sup>45</sup> 29 C.F.R. § 785.32; see also *Merrill v. Exxon Corporation*, 387 F. Supp. 458, 465 (S.D.Tex. 1974).

<sup>46</sup> *Singh v. City of New York*, 2008 U.S. App. LEXIS 9228 (2d Cir. Apr. 29, 2008) (holding that the mere carrying of inspection documents without any other active employment-related responsibilities while commuting was not work under the FLSA, even though it benefited the employer and resulted in a slight increase in the employee's commute time).

Work the employee is required to perform while traveling. 29 C.F.R. § 785.41.

These exceptions arise given their relation to the performance of the employee's duties. Specifically, because these activities described in the regulations are so closely related to an individual's principal activities, they must be considered travel done for the benefit of the employer rather than the employee.<sup>47</sup> The question then is "what is a principal activity that can give rise to compensable time for travel?"

One factor to help determine whether the travel is related to the employee's principal activity is the ability of the employer to maintain records of the time expended.<sup>48</sup> If there is no ability for the employer to properly maintain records of the time, it would be prejudicial to impose liability on the employer for that time. This is because an employer's inability to track such time demonstrates the employer lacks control over the employee. Thus, federal courts have recently held that travel time was not compensable based on its conclusions that the plaintiffs' travel time was not integral and indispensable to the plaintiffs' principal activities and that the plaintiffs' travel time did not otherwise fall within the continuous workday.<sup>49</sup>

Thus, normal travel time to and from work from the employee's home is not considered hours worked for purposes of the F.L.S.A. regardless of whether the employee works at a fixed location or at different jobsites, even if the employer agrees to pay for the time. 29 C.F.R. § 785.34 and § 785.35. Travel need not occur frequently to be "normal" or "ordinary." *E.g.*, *Irrzada v. City of Hercules*, 138 F.3d 1294, 1297 (9th Cir. 1998) (travel to mandatory off-site training occurring only a few times a year is non-compensable home-to-work travel, even though that time exceeds the employee's regular commute). Rather, "normal" or "ordinary" travel represents a subjective standard, defined by what is usual within the confines of a particular employment relationship.<sup>50</sup>

There is an exception to the general rule that travel time between home and work is not hours worked if an employer calls an employee who has returned home after his or her work day to travel a substantial distance to perform an emergency job for one of the employer's customers. However, the D.O.L. has elected not to take a position on whether travel to and from work by an employee who receives an emergency call outside of regular hours to report back to his or her regular place of business constitutes hours worked. 29 C.F.R. § 785.36 (2001).

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<sup>47</sup> *Reich v. New York City Transit Authority*, 45 F.3d 646, 650 (2d Cir. 1995)(the more the preliminary (or postliminary) activity is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable. Commuting and similar activities are generally not compensable).

<sup>48</sup> *Reich, supra*, 45 F.3d at 650.

<sup>49</sup> *Smith v. Aztec Well Servicing, Inc.*, 462 F.3d 1274 (10<sup>th</sup> Cir. 2006).

<sup>50</sup> *Id.* at 1287.

## 2. California State Law

California law is more expansive (better for employees) than federal law because it will compensate all time subject to the control of the employer.

In *Morillion v. Royal Packing Co.*, 22 Cal. App.4th 575 (2000), for example, the Court held that an employee's travel time on employer-provided transportation from a location the employer required the employee to report to catch the bus to the jobsite where the employee performed the principal activities of his or her position was compensable hours worked. This is despite the federal perception that such time would neither constitute performance of "principal activities" "nor service" integral and indispensable to the principal activity, rather, the employee is merely waiting to begin his or her duties. In *Morillion*, California law interpreted this time to be "under the employer's control" since the employer required employees to use the bus, and thus such time was done for the benefit of the employer.

In contrast, the California Supreme Court held that time spent on employer-provided transportation which the employer did not require the employee to use was not compensable time.<sup>51</sup> Use of the company parking lot shuttle was voluntary. Thus, rather than just looking to see if an employee is performing the principal activities of the position, or an integral and indispensable part of such principal activities as the federal law dictates, California simply looks at the control the employer exhibits over the employee's time.

Thus, California law will require employers to treat overnight travel during regular working hours, or in addition to regular working hours as compensable time, rather than just time during an employee's regular work day, as the federal law does.<sup>52</sup> Also, the employer may pay a lower rate of pay for travel time below the employee's normal regular rate of pay, so long as that rate is not less than the minimum wage and the employee is aware of the difference. Finally, claims for compensation of compulsory travel time are a right state law confers on individuals, and thus are not preempted by the federal Labor Management Relations Act.<sup>53</sup>

### a. Travel Expense Reimbursement Regulations

California enacted Labor Code section 2802 in 1937. It provides that employers must indemnify employees for expenditures necessarily incurred in the discharge of the employees' duties. Little case law has developed under the statute, and, until DLSE's recent proposal, no attempt to further regulate employers under this section.

If adopted (and there is no indication that they will not be at CCR sections 13700-13706), these DLSE rules will govern mileage reimbursement, per diem expenses, and reimbursement for other travel expenses. The regulations also mandate additional record keeping, remedies for non-compliance and, attorneys' fees and costs for successful prosecution of non-compliance.

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<sup>51</sup> *Overton v. The Walt Disney Co.*, 136 Cal. App.4th 263 (2006).

<sup>52</sup> DLSE Manual § 46.3 (2002) (but compensable travel time does not begin until the travel time exceeds the employee's ordinary commute time).

<sup>53</sup> *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053 (9<sup>th</sup> Cir. 2007).

According to the DLSE, due to the lack of case law, they needed to explain to employers the requirements and methods for employers to reimburse employees for travel expenses, (2) define key terms for consistency, (3) define what records employers must keep, (4) alert employers to potential consequences, and (5) create procedures to enforce the regulations.

Moreover, the DLSE expressly indicated that it considered allowing employers to simply pay a higher base salary or commissions to employees that would be inclusive of expenses. However, the DLSE soundly rejected this methodology (something that would have significantly simplified matters for most employers) as it would not have been possible to determine whether employees were actually being indemnified for their full expenses.

b. Payment

Employers must reimburse employees their expenses either when wages are paid, or one time per calendar month and, in no event, later than the end of the calendar month after the month in which expenses were incurred or in which the employee turned in the reimbursement request. So, if the employee incurred the expense and requested it at the end of January, the employer must pay by the end of February.

c. Recordkeeping

Employers now have clear guidance for recordkeeping in this area. Employers must keep, for three years, written records of the number of miles employees drive for work purposes in personal vehicles. The records must be hard copy, in ink, dated and should show the month, date and year.

Moreover, the proposed regulations also add to the already lengthy “pay stub requirements” under Labor Code 226. Now, employers must either return a copy of all mileage requests with an explanation for any rejected claims or changes or an itemized statement explaining the computation of the mileage reimbursement.

d. Per Diem Expenses – Business Travel

Employers must, in advance of any travel, notify each employee, in writing, of its policies for reimbursement of travel related expenses. If no notice is given to the employees, the employer must reimburse actual expenses. Employers may create written guidelines restricting or preventing the purchase of first class airfare, luxury hotels, or high-end car rentals. However, any restrictions must not be below the actual costs associated with the travel item in the market where that cost is incurred. Failing to notify employees, in advance of travel policies, will render the employer liable to reimburse the full costs incurred.

However, employers now are specifically authorized to pay a “per diem” rate instead of reimbursing for actual meal, lodging and incidental expenses of employees. The proposed regulations adopt the IRS’ per diem rate for the location to which the employee travels. Paying a per diem rate to employees will obviate the need to pay and track expenses associated with lodging, meals and “incidental expenses” which include fees and tips for bellhops, maids, and other similar services.

However, paying a per diem does not eliminate certain “other travel costs” such as tolls, parking, laundry, vehicle rentals, airfare, dry cleaning, taxes and phone calls that will continue to qualify as reimbursable travel costs. Indeed, travel costs are expressly defined to include the costs of the employee’s travel from and to his or her home, place of business and the airport.

e. Record Keeping and Payment

As with mileage, employers must maintain the records of per diem and other travel related expenses for three years. Pay stubs will be required to reflect the amount of the per diem or, in the alternative, a copy of the reimbursement claim indicating what was paid and what was rejected by the employer. And, payments must occur by the end of the month after the employee incurred the expense or turned in the reimbursement request. So, if incurred and requested at the end of January, the employer must pay by the end of February.

### III. Meal And Rest Periods In California

#### A. Introduction

Over the course of the last few years, one of the largest areas of wage-hour litigation in California comes from the alleged failure of employers to provide meal and rest breaks required under the law. Settlements of meal and rest period class claims in the last couple of years include, among many others, \$87 million against United Parcel Service, \$45 million against UBS Financial Services, and \$42 million against Morgan Stanley. The total number of claims being made, as well as the dollar value of meal and rest period litigation, has resulted in new and continuous changes in what courts believe the law requires, making meal and rest period law a subject worthy of increased scrutiny. We first describe what federal law (the Fair Labor Standards Act of 1938 or “FLSA” 29 U.S.C. § 201, et seq.) requires and permits. Thereafter, we discuss California state law and then compare and contrast coverage.

#### B. Meal Periods

Neither federal nor state law requires meal periods to be paid time to an employee. However, the effect of failing to provide meal periods is much more punitive under California law.

##### 1. Federal Law

Under federal law, meal periods are not compensable “hours worked” if the employee’s time is not spent predominantly for the benefit of the employer.<sup>54</sup> The employee uses a meal period effectively for his or her own purposes, and thus is not subject to compensation, based upon the restrictions placed upon the employee, the extent to which these restrictions benefit the employer, the duties of the employee during the meal period, and the frequency of interruption.<sup>55</sup>

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<sup>54</sup> *Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 64 (2d Cir. 1997).

<sup>55</sup> *Bernard v. IBP, Inc.*, 154 F.3d 259, 266 (5<sup>th</sup> Cir. 1998).

## 2. California Law

### a. What is the Law?

The law governing meal periods can be found both in California statutory law and in applicable Industrial Welfare Commission (“IWC”) Wage Orders. Generally, California Labor Code § 512 and the Wage Orders require that an employer 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. If the employee is scheduled to work not more than six hours, the employer and employee may mutually waive the meal period.<sup>56</sup> Furthermore, “an employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes.” However, if the employee works no more than 12 total hours, the employee may waive the second meal period, but only if s/he did not waive the first meal period.”<sup>57</sup>

The Wage Orders recognize various exceptions, however. For example, employees in the manufacturing industry covered by a valid Collective Bargaining Agreement may agree to take a meal period that commences after the fifth hour of work begins (but no later than the end of the sixth hour of work).<sup>58</sup> Employees in the health care industry under Wage Order No. 4 or Wage Order 5 may voluntarily waive their right to their first meal period if they work a shift in excess of eight total hours.<sup>59</sup> Wage Orders 12 and 14 do not require the provision of a second meal period to those employees in the motion picture industry or in an agricultural occupation.<sup>60</sup>

### b. On-Duty Meal Agreements

One area of flexibility is the provision in the Wage Orders for paid “on-duty” meal breaks (i.e., employee eats “on-the-fly” while juggling work assignments). Every Wage Order, except Wage Order 17, permits an employer to require employees to work through their meal breaks if the employee executes an On-Duty Meal Agreement. These are written agreements between the employer and employee for an on-duty meal period where the workday exceeds six hours and the nature of the work prevents the employee from being relieved of all duty for 30 minutes.<sup>61</sup> The On-Duty Meal Agreement must be in a writing that the employee has the right to revoke, in writing, at any time, and the employer must now pay the employee for the meal period (because s/he is working while eating).<sup>62</sup> **Attachment 1** hereto contains a sample On-Duty Meal Agreement.

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<sup>56</sup> Cal. Labor Code § 512(a); *cf* Wage Order No. 4-2001(11)(A) [“No employer *shall* employ an person for work period of more than five hours without a meal period of not less than 30 minutes...”]. (Emphasis added).

<sup>57</sup> *Id.*

<sup>58</sup> Wage Order No. 1-2001(11)(A).

<sup>59</sup> Wage Order No. 4-2001(11)(D); see also Wage Order No. 5-2001(11)(D).

<sup>60</sup> Wage Order No. 12-2001(11); see also Wage Order No. 14-2001(11).

<sup>61</sup> See, for example, Wage Order No. 4-2001(11)(A).

<sup>62</sup> *Porter v. Quillin*, 123 Cal. App.3d 869 (1981).

c. Enforcement of the Law

While the safest solution for employers is to provide a thirty minute meal period for all employees (exempt and non-exempt), the California Industrial Wage Orders issued pursuant to the California Labor Code appear to dilute the seeming Labor Code requirement and seem to imply that employers need not provide meal periods to exempt employees. While there are no case law decisions interpreting California Labor Code § 512's apparent requirement that employers provide even exempt employees meal period allowances or interpreting the contrary Wage Orders, most employers allow exempt employees to take or not take meal periods as they please and, of course, rarely have systems to document whether employees have taken meal breaks (going four years back). Since the Labor Code does not authorize the (now defunct) Industrial Wage Commission to override the Labor Code through Wage Orders, there is potential legal risk to employers which do not document that exempt employees are taking their meal periods.

California Labor Code § 512, seemingly applicable to all employees, provides:

“(a) 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, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived...”.

The Industrial Welfare Commission Order No. 4-2001 (Updated January 1, 2004), is written (see “emphasis-added” flags) in many places as though it addresses only non-exempt employees. But see the first sentence reference to “any person.” Wage Order No. 4-2001 specifically provides:

“(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked (emphasis added). An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation (emphasis added) for each workday that the meal period is not provided.

(C) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

(D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one (1) day's written notice. The employee shall be fully compensated for all working time (emphasis added), including any on-the-job meal period, while such a waiver is in effect."

In short, because the Labor Code "trumps" contrary Wage Orders (which may not be inconsistent with law...and the courts have stricken down many Labor Commissioner positions found inconsistent with authorizing statutes)<sup>63</sup>, Plaintiff lawyers are positioned to argue that

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<sup>63</sup> Upon election to office in 2004, one of Arnold Schwarzenegger's first acts as Governor was to issue an Executive Order directing all executive branch agencies to identify outstanding opinions or rulings of general application not submitted for review through the formal administrative process the California Administrative Procedures Act ("CAPA") establishes. Governor Schwarzenegger ordered that pending review, agencies could only use such opinions and rulings as advice in specific cases, and that they do not have the full binding force and effect of law. The Governor's order did nothing more than to adopt the reasoning of various court rulings that have long struck down the Division of Labor Standards Enforcement's ("DLSE") overly expansive interpretations of the Industrial Welfare Commission's ("IWC") Wage Orders.

To further its primary function of enforcing the state's labor laws, the California Labor Code vests the DLSE with the authority to promulgate necessary regulations and rules of practice and procedure. California Labor Code § 98.8. However, the DLSE previously attempted to expand this power beyond its intention by promulgating opinion letters and an Enforcement Manual interpreting the IWC Wage Orders. The courts recognized that these efforts violated the CAPA; therefore, the DLSE's interpretations of IWC Wage Orders are not entitled to any deference. *See California School of Culinary Arts v. Lujan*, 112 Cal. App.4th 16, 25 (2003) (Labor Code does not empower the DLSE to engage in special rulemaking procedures outside of regulations).

While the CAPA specifically exempts the IWC from the formal rulemaking process, the DLSE is not exempt. Accordingly, numerous DLSE interpretations embodied in opinion letters and its Enforcement Manual are not expressions of the current state of the law. This is because the CAPA states that no state agency shall issue, use, enforce, or attempt to enforce a regulation without complying with the Act's notice and comment provisions. *See Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 577 (1996) (striking DLSE policies determining  
[Footnote continued on next page]

California employers must provide all employees working at least five hours in a day with a meal period. All agree that failure to provide a meal period to non-exempt employees will result in the one-hour premium pay penalty set forth in the Wage Order (for each separate violation). Failure to provide a meal period to any employee may also result in a private attorney general action under the new California Labor Code § 2699 (“PAGA,” i.e., “Bounty Hunter” law).

While there is variance as to “whom” an employer must provide meal breaks, the “where” and “when” of meal breaks is now well-settled. First, meal breaks may be taken either on-site or off the work premises. However, an employer cannot require employees to take their meal breaks on-site without paying the employee for his/her lunch.<sup>64</sup> This is because such requirement would exhibit sufficient employer control over the employee to make the time compensable.

As to “when” an employer may schedule a meal break during the five-hour meal window, there is no requirement that the employer must schedule the mandated meal periods toward the middle of an employee’s work schedule.<sup>65</sup> The DLSE’s 2002 opinion that an employee’s meal break should occur toward the middle of a workday rested on a June 14, 2002 DLSE opinion letter that has since been withdrawn and thus bears no legal significance.

#### d. Documentation of Meal Breaks

Regardless of which employees must take a meal break under the law, the law does require employers to document the meal periods an individual takes unless an employer’s entire business operations cease during the meal period.<sup>66</sup> California Labor Code § 1174 requires that employers keep, for a period of at least two years, payroll records showing the hours worked daily and the wages paid to an employee. Section 7 of the applicable Wage Orders have

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[Footnote continued from previous page]

whether IWC wage orders applied to maritime employers); *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 581 (2000) (DLSE interpretation of “hours worked” in 1989 Operations and Procedures Manual given no deference); *Bell v. Farmers Ins. Exchange*, 87 Cal. App.4th 805, 815-816, fn. 10 (2001) (DLSE interpretation of “administrative capacity” in 1989 Operations and Procedures Manual given no deference).

Also where the administrative agency’s action is inconsistent with the statute itself, courts may set aside the administrative agency directive. For example, in the recent case *Bearden, et al. v. U.S. Borax, Inc.*, 138 Cal.App.4th 429 (2006), the California Court of Appeals invalidated an IWC-created exception to the meal period requirements found in California Labor Code § 512(a). In invalidating the action of the IWC, the court found that a collective bargaining exception the IWC had recognized to the meal period requirements was inconsistent with the purpose of Labor Code § 512(a), and that the IWC could not create additional exemptions from the meal period requirement beyond those the Legislature provided.

<sup>64</sup> *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App.4th 968 (1995). If the employer requires the employee to remain at the work site or facility during the meal period, the meal period must be paid even if the employee is relieved of all work duties during the meal period.

<sup>65</sup> *Brinker v. Superior Court*, 165 Cal. App.4th 25, 52 (2008). Early lunching is permissible, otherwise “the term ‘per day’ in the first sentence of section 512(a) would be rendered surplusage, as would the phrase ‘[a]n employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes’ in the second sentence of that subdivision.”

<sup>66</sup> See, for example, Wage Order No. 4-2001(7).

interpreted this requirement to include recording of meal periods.<sup>67</sup> Failure to document meal periods establishes a presumption in favor of the employee as to whether the employee took meal periods or not during his or her employment. Employers would do well not to take the recordkeeping requirement lightly; recent dicta appears to suggest that California courts might even impose a common law duty on employers to undertake periodic self-audits<sup>68</sup> **Attachment 2** is a sample timecard outlining the various breaks we recommend employers cause employees to record.

Employers use this documentation requirement as an opportunity to record an employee's actual hours of work to insure accurate pay records and to obtain an acknowledgement of meal (and rest) periods taken during the workday in an attempt to avoid later liability over false employee claims the employer failed to provide meal periods. However, employee acknowledgements included on timecards are valid only if the hours recorded on the timecard are true and correct. Governor Schwarzenegger signed AB 2075 into law on August 1, 2008, to be effective on January 1, 2009.

AB 2075 amends California Labor Code § 206.5, which currently prohibits employers from requiring employees to execute a release of claims or rights for wages due, or to become due, unless payment of those wages has been made. AB 2075 adds section 206.5(b), "execution of a release" to require "**an employee, as a condition of being paid, to execute a statement of the hours he or she worked during a pay period which the employer knows to be false.**" (Emphasis added.) Thus, the protections warranted as to settlements or severances now extends to timecard acknowledgements confirming the accuracy and truthfulness of the time an employee records. The legislative history of AB 2075 specifically addresses the concern that some employers have reportedly required employees to fill out false time sheets and to sign false statements about hours worked and meal and rest periods received.

With the passage of AB 2075, forcing employees to sign acknowledgements on timecards that the employer knows contain inaccurate records of an employee's time is a misdemeanor and renders any release of claims based on the acknowledgements to be null and void.<sup>69</sup>

e. "Provide" vs. "Ensure"

While California's meal period rules are set forth in Labor Code § 512 and the various Wage Orders, there is uncertainty whether the statutory and regulatory language requires an employer to affirmatively "ensure" an employee takes a meal period or whether the employer need only provide its employees an opportunity to take a meal break (which opportunity the employee may forego).

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<sup>67</sup> *Id.* ("Every employer shall keep accurate information with respect to each employee including the following . . . (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be included").

<sup>68</sup> *Murphy v. Kenneth Cole Productions*, 40 Cal.4th 1094, 1114 (2007).

<sup>69</sup> Cal. Labor Code § 206.5(a).

In suggesting that employers must affirmatively ensure employees take their meal breaks, employees rely on the language contained in the Wage Orders. Specifically, the Wage Orders note that no employer “*shall*” employ a person for a work period of more than five hours without a meal period.<sup>70</sup> However, only one case has interpreted this language to mean that employers have “an affirmative obligation to ensure” that employees take meal breaks.<sup>71</sup> In other words, merely providing meal breaks in a written policy to employees is insufficient; employers would be obligated to strictly enforce its policies and take proactive measures to prevent employees from doing any work during meal breaks. This “duty to ensure” meal breaks was also the DLSE’s position until recently.

What changed has been that several recent federal and state case decisions have held that an employer need only “provide” meal breaks pursuant to the terms of Labor Code § 512.<sup>72</sup> Labor Code § 512 provides in relevant part, “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 . . .” (Emphasis added). The language of the statute would appear to nullify the phrasing in the Wage Order, since the Wage Order is a mere regulation that cannot exceed the statutory authority.<sup>73</sup>

Thus, in three federal cases decided after January 1, 2007, the United States District Court for the Northern District and Central District of California, applying California law, held that an employer meets its obligations related to meal breaks if it merely makes meal breaks available to its employees.<sup>74</sup> One court noted that requiring affirmative enforcement of meal breaks “would place an undue burden on employers.”<sup>75</sup>

In 2008, the Second Appellate District for the California Court of Appeals held that employers need only “provide” meal breaks in two separate cases.<sup>76</sup> In reviewing the trial court’s grant of class certification as to restaurant employees alleging that the Brinker Corporation failed to provide meal and rest breaks, as well as failed to pay for off-the-clock work, the court held:

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<sup>70</sup> Wage Order No.4-2001(11)(A) [Emphasis added.]

<sup>71</sup> *Cicairos v. Summit Logistics*, 133 Cal. App.4th 949, 962 (2005).

<sup>72</sup> *Brinker v. Superior Court*, 165 Cal. App.4th 25 (2008). The Court of Appeals in *Brinker* later interpreted the *Cicairos* decision to hold only that the at-issue employer had an obligation to provide a meal break but had not done so, in fact. See also *Brinkley v. Public Storage*, 167 Cal. App.4th 1278 (2008) [“The meal period laws do not obligate employees to take meal periods or employers to ensure that meal periods are taken. . . An employer need only make rest periods available”].

<sup>73</sup> *Bearden v. U.S. Borax, Inc.*, 138 Cal. App.4th 429 (2006). Where the administrative agency’s action is inconsistent with the statute itself, courts may set aside the administrative agency Wage Order.

<sup>74</sup> *White v. Starbucks*, 497 F. Supp.2d 1080 (N.D. Cal. 2007); see also *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008); see also *Kenny v. Supercuts, Inc.*, 2008 U.S. Dist. LEXIS 43073 (N.D. Cal. 2008).

<sup>75</sup> *Brown, supra*, 249 F.R.D. at 585.

<sup>76</sup> *Brinker v. Superior Court*, 165 Cal. App.4th 25 (2008), and *Brinkley v. Public Storage*, 167 Cal. App.,4th 1278 (2008). Both cases were appealed to the California Supreme Court, with *Brinkley* designated a companion case to *Brinker*. Oral argument was held on November 8, 2011 in regard to the *Brinker* matter, with a written decision from the California Supreme Court due within 90 days of the hearing unless the California Supreme Court deems *Brinker* to be an “unusual” matter.

- (1) Employers need only “provide” meal periods and need not ensure that meal breaks are taken;
- (2) Rest periods need not be in the middle of each work period if impracticable;
- (3) Employers are not required to provide a meal period for every five consecutive hours worked;
- (4) Employers can only be liable for off-the-clock work if the employer knew or should have known employees were working off-the-clock; and
- (5) Since employers need only provide rest and meal breaks, individual issues predominate and are not amenable to class treatment.<sup>77</sup> Thus, an employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them.<sup>78</sup>

Similarly, in *Brinkley*, the Court of Appeal affirmed the trial court’s granting of summary adjudication in favor of the employee on claims involving meal and rest period requirements and alleged paystub violations. *Brinkley* involved claims brought by Fred Brinkley, a property manager for Public Storage, on behalf of himself and those similarly situated. Mr. Brinkley asserted class action and individual claims for violations of Labor Code § 226 (requiring accuracy of paystubs) and § 226.7 (meal and rest period requirements). With respect to the allegedly unpaid meal periods, the Court of Appeal held that employers need only make meal periods available to employees, rejecting the plaintiffs’ assertion that an employer must ensure (and not just make available) the required meal and rest periods.

Based on the court’s ruling in *Brinker* and *Brinkley*, the DLSE has recently altered its position and now allows employers to merely “provide” meal breaks to its employees. **Attachment 3** is a copy of the July 25, 2008 memo from Labor Commissioner, Angela Bradstreet, to all DLSE staff instructing them that an employer need only “provide” a meal period to its employees. Moreover, Commissioner Bradstreet’s memo instructed DLSE personnel to act in compliance with the ruling in *Brinker* in all pending matters, including wage claims filed with the DLSE.

### C. Rest Periods

While federal law does not require the provision of rest periods to employees, the California Wage Orders establish rest periods as “hours worked” the employer must provide. Unlike meal breaks, authority for rest periods can be found solely in the IWC Wage Orders. The Wage Orders provide that employees are entitled to a rest period of a net ten minutes for every four hours worked, or “major fraction thereof.” Only employees working less than three and one-half hours do not have a right to a rest period.

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<sup>77</sup> *Id.* at 31.

<sup>78</sup> *Id.* at 55 (quoting *White v. Starbucks*, 497 F. Supp.2d at pp. 1088-1089).

Wage Order No. 4 also permits rest periods to apparently only non-exempt employees working for a specific number of hours, as outlined below (see emphases added as to exempt/non-exempt entitlement issue).

“(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. (Emphasis added.)

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation (emphasis added) for each workday that the rest period is not provided.”

While the Wage Orders provide that rest periods should occur towards the middle of each work period as practicable,<sup>79</sup> *Brinker* held that employers are not required to place rest breaks in the middle of a work shift.<sup>80</sup>

Also contrary to the requirement with respect to meal breaks, employers are under no obligation to document an employee’s rest breaks.<sup>81</sup>

#### **D. Damages for Failure to Provide Meal and/or Rest Periods Under State Law**

Failure to abide by either the meal period or rest period regulations (outlined below) will entitle the non-exempt employee to one hour of pay for each workday during which the meal period is not provided, and an additional hour of pay for each workday during which a rest period is not provided.

While still a disputed point of law, it is unlikely that a plaintiff-employee may “stack” the one hour of pay penalty for every missed break occurring in a single workday. Specifically, employees have long believed that a one hour of pay (statutory) penalty existed for missed meal breaks and a wholly separate one hour of pay penalty existed for rest breaks missed during the same workday based on the separate penalty provisions for each type of break stated in the Wage Orders. However, the one hour of pay appears to be the full penalty for any missed breaks during a single day. In other words, an individual is entitled to one hour of pay regardless of

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<sup>79</sup> Wage Order No. 4-2001(12)(A).

<sup>80</sup> *Brinker, supra*, 165 Cal. App.4th at pp. 46-47.

<sup>81</sup> Wage Order No. 4-2001(7) [“meal periods during which operations cease and **authorized rest periods** need not be recorded”]. (Emphasis added).

whether they failed to receive one meal break, two meal breaks, one meal break and one rest break, one rest break, or two rest breaks, or any combination of missed meal and rest breaks in the same workday.

California Labor Code § 226.7(b) provides, “If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.” (Emphasis added). One court has interpreted this language to mean that an employee is entitled to only one hour of pay for missing any break during a singular workday.<sup>82</sup>

Furthermore, it is now clear that the penalties for failing to provide a meal or rest period are “wages” under California law. Specifically, courts had competing opinions about whether the penalties under the Labor Code were “penalties” for purposes of the statute of limitations (which the California Code of Civil Procedure limits to one year), or “wages” as the Division of Labor Standards Enforcement interpreted the Labor Code which would increase the statute of limitations up to three years (and up to four years with any Business & Professions Code §17200 claim) .

While most of the California Courts of Appeals that decided the issue took the position that the potential economic sanctions were a “penalty” as opposed to a wage, on April 16, 2007 the California Supreme Court settled this dispute in the decision of *Murphy v. Kenneth Cole Productions, Inc.*<sup>83</sup> In *Murphy*, the California Supreme Court reversed the judgment of the California First Appellate Court of Appeals and held that payments under California Labor Code § 226.7 were wages, not penalties, and thus subject to a three year statute of limitations.

Looking to the specific language of the statute, the Court found that the statute requires that employees be paid “one additional hour of pay” for each workday their employer required them to work through a meal or rest period. Noting that “pay” is defined as “money [given] in return for goods or services rendered,” the Court determined this definition was in keeping with the Labor Code definition of “wages” and thus applied the longer three-year statute of limitations.<sup>84</sup> The Court also relied on the administrative and legislative history of the remedy to find that the payment to the employee contained in the original version of the bill was independent of (and different from) its penalty provision.<sup>85</sup> The Court rejected defendant’s assertions that the Labor Code provision was a “penalty” since it sought to shape employer behavior and courts impose the penalty without reference to any actual damage.

Finally, it is important to note that it is not the employee’s burden to request his/her meal and/or rest periods. Even if the employee insists on waiving such periods (for example, to complete a pending project), the approach with the least legal risk, but with great administrative

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<sup>82</sup> *Mills v. Superior Court*, 135 Cal. App.4th 1547, 1554 (2006) [remanded on other grounds, the court held that “if all of the break periods in an eight-hour shift are missed, an entire hour’s pay is due”].

<sup>83</sup> *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007).

<sup>84</sup> *Id.* at 1104.

<sup>85</sup> *Id.* at 1106-1107.

and cost burden, is to require employees to take their meal and rest periods. Otherwise, the employer risks potential economic liability as a result of not supplying them. Moreover, as noted previously, it is prudent to require employees to sign (accurate) timecards acknowledging both that they took their meal periods and that their timecards are accurate.