

# Human Resources & Employee Issues

## California Wage and Hour Claims Soar

By Cathy Arias, Burnham Brown

One of the greatest exposures for California employers is class action liability for alleged wage and hour violations. Wage and hour class actions usually involve one of the following:

### Misclassifying a Group of Employees as Exempt from Overtime

California provides that certain jobs are exempt from overtime, including outside sales, commissioned sales, and “white collar” employees. California also uses a quantitative analysis, which asks whether the employee spends more than fifty percent of their time performing exempt duties.

### Failure to Pay for All Hours Worked

The term “hours worked” is defined as the time an employee is subject to the control of the employer. Employers must pay all hours worked or face liability for employees “working off the clock.” Such situations can include: failure to pay hourly rates when employees travel to/from job sites in employer-provided transportation, when changing into required uniforms, or simply failing to capture all hours an employee works for the employer.

### Failure to Provide Overtime

Across the country, employers pay “time and one half” for all hours worked beyond forty hours in a workweek. However, California also requires “time and one half” for all hours worked beyond eight in a single workday and the first eight hours worked on the seventh consecutive day worked in a workweek. Additionally, employers must pay double-time for hours worked beyond twelve in a single workday and hours worked beyond eight in the seventh consecutive day worked in a week.

*(EUCA Note: Union employees' overtime pay is governed by their collective bargaining agreement provisions.)*



### Poor risk management can leave any company in a vulnerable position.

There's no shortage of risks in today's construction industry. To protect your company, you need specialists who truly understand your evolving exposures. At Travelers, our insurance and surety experts offer a deep knowledge of construction. So whether they're assessing your job site or poring over a big contract, they'll help protect you from unintended risks. Find out how it feels to work with a company that's in-synch with your industry. Talk to an independent Travelers agent today.

**TRAVELERS**  
Insurance. In-synch.<sup>SM</sup>  
travelers.com

©2009 The Travelers Companies, Inc. All rights reserved. The Travelers Indemnity Company and its property casualty affiliates. One Tower Square, Hartford, CT 06183

## Failure to Provide Breaks to Non-Exempt Employees

Employers face substantial penalties if they do not comply with regulations concerning the timing and duration of meal and rest breaks. Generally, employees must receive a 30-minute meal break for every five hours of work. They must be relieved of all duty and free to leave the premises. Employees are also entitled to paid rest periods of at least ten minutes for every four hours of work. California employers are closely monitoring whether the California Supreme Court will stem the tide of class action litigation. Among the issues the Court is reviewing is whether employers must simply permit employees to take meal breaks or whether they must also ensure the employee takes the offered break (see additional details on this subject in the next article).

## “Use it or Lose it” Vacation Policies

Other states traditionally permit “use it or lose it” policies wherein an employee forfeits vacation if not used. However, California treats earned but unused vacation time as a form of vested compensation, which cannot be forfeited and is payable upon separation.

Employers can easily commit wage and hour violations. To minimize the risk, it is recommended that employers start with the following:

- Audit job descriptions to ensure classifications are appropriate.
- Ensure employees accurately record (and employers accurately pay) hours worked.
- Make sure handbooks advise employees of their right to meal/rest breaks and train supervisors to comply with break laws.
- Pay any penalty for a missed meal and rest break in the same payroll period in which it occurred.
- Maintain employee time records for at least four years. ♦

*Cathy Arias is the chair of Burnham Brown’s Employment Law Department and specializes in counseling and defending employers. She can be reached at 510/835-6806 or carias@burnhambrown.com. Allyson Cook is a member of Burnham Brown’s Employment Law Department and can be reached at 510/835-6811 or acook@burnhambrown.com.*

# New Meal and Rest Break Requirements

## California Labor Code Section 226.7

*By Roger M. Mason, Esq., and Caitlin E. Kaufman, Esq., of Sweeney, Mason, Wilson & Bosomworth*

All employers, no matter how small, must provide unpaid meal periods and paid rest breaks in accordance with the applicable Industrial Welfare Commission (IWC) Order. Under most IWC Orders, employees must receive one thirty (30) minute meal break for lunch if their work period is more than five hours, and one ten (10) minute rest break per four hours of work.



Labor Code Section 226.7 states that an employer may not require an employee to work during a meal or rest period. In the event that an employee works through a meal period, this time will be considered an “on duty” period and counted as time worked. An “on duty” meal period is only permissible when the nature of the work prevents an employee from being relieved of all duty and both the employer and employee agree to an “on duty” meal period in writing.

Labor Code Section 226.7 provides that an employee receives one additional hour of pay for each violation, i.e. each day when a rest or meal period is not provided.

### *Brinker Restaurant Company v. Superior Court*

The Division of Labor Standards Enforcement (DLSE) originally recognized a critical distinction between an employer’s duties with respect to meal and rest periods. Initially DLSE took the position that an employer had an affirmative responsibility to ensure that workers were actually relieved of all duties, were not performing work, and were free to leave the employer’s premises during their meal period. On the other hand, an employer did not incur liability under Labor Code §226.7 as long as it authorized and permitted its employees to take a rest break, regardless of whether they actually took the rest break.<sup>1</sup>

A recent California case, *Brinker Restaurant Company v. Superior Court* (July 2008), modified the law. *Brinker* holds that meal and rest breaks are to be treated the same. Thus, the law currently requires only that employers “authorize and permit” both meal and rest periods. However, the case is currently on appeal to the California Supreme Court.

*Continued on next page*