



# New Court Decision Lends Further Guidance To Meal And Rest Period Scheduling

Insights

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California employers continue to struggle with how to comply with their obligation to provide meal and rest periods to their non-exempt employees. Although the California Supreme Court's groundbreaking *Brinker* decision from 2012 provided some guidance regarding the timing of meal and rest periods, specific questions can still be difficult to answer. A recent California appellate court case has provided employers with additional guidance on this issue.

## Labor Code Requirements: Meal Periods

By way of background, the Labor Code requires you to provide your employees with meal periods of at least 30 uninterrupted minutes, including a first meal period to begin no later than the end of an employee's fifth hour of work (before working more than five hours), and a second meal period to begin no later than the end of an employee's 10th hour of work (before working more than 10 hours). Except in limited circumstances, the employee is relieved of duty during a meal period.

The first meal period can be waived by mutual agreement if the employee is working no more than six hours in a work day. The second meal period can be waived under most Wage Orders if an employee is working no more than 12 hours in a work day, but only if the first meal period was not waived that day.

## Labor Code Requirements: Rest Periods

The California Wage Orders generally provide that you must allow all of your non-exempt employees to take rest periods "which insofar as practicable shall be in the middle of each work period." The number of rest periods required is based on the total hours worked daily, at the rate of "10 minutes net rest time per four hours or major fraction thereof."

The *Brinker* case summarized the standard as follows: "an employee would receive no rest break time for shifts of two hours or less, 10 minutes for shifts lasting more than two hours up to six hours, 20 minutes for shifts lasting more than six hours up to 10 hours, and so on."

The following table may be useful:

## Hours Worked for the Day:

3.5 and up to 6 hrs

More than 6 hrs and up to 10 hrs

More than 6 hrs and up to 10 hrs

More than 10 hrs and up to 14 hrs

More than 14 hrs and up to 18 hrs

Additional hours under same schedule

### **Rest Period Compensation for the Day (Non-Cumulative):**

1 rest period (1 x 10)

2 rest periods (2 x 10 = 20 minutes)

3 rest periods (3 x 10 = 30 minutes)

4 rest periods (4 x 10 = 40 minutes)

See above (continue schedule)

### **Juggling The Timing**

It's important to get the timing right because violations can lead to penalties. You are required to pay an employee one hour of pay at the employee's regular rate of pay for any day in which the employee is required to work during one or more meal periods, or during one or more rest periods.

That sounds simple enough, but there's more: the one-hour premium is also due for other violations as to a required meal or rest period. For example: one or more untimely, interrupted, or short meal periods each day, or one or more untimely, interrupted, or short rest periods each day.

Although rest periods have a separate timing requirement, the timing of the meal period may impact when rest periods should be scheduled under the regulations. In *Brinker*, the court stated, "the only constraint on timing is that rest breaks must fall in the middle of work periods 'insofar as practicable.' Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible."

### **New Court Case Answers: What Is A "Work Period?"**

A common question is how you should define the "work period." A recent appellate decision from April 2016, *Rodriguez v. EME, Inc.*, interpreted the *Brinker* standard by noting that each "work period" may be determined, including the middle of such work period, after considering the points in time when meal periods are taken.

As the court said, the term "work period" cannot reasonably be understood to mean the entire length of an employee's shift – for example, an eight-hour shift – as that interpretation would oblige employers to schedule "rest periods" in the middle of the shift (that is, at the four-hour mark). The sentence thus presupposes that the employee's shift already has been divided into "work periods."

For that reason, the court said, "in an eight-hour shift with a single meal break, the preferred schedule requires the provision of a rest break in the middle of each "work period" before and after the meal break." The court said that shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule.

## What Does That Mean?

Some may read that summary and ask what it means that rest periods “shall be” taken under the preferred course in the middle of each work period. The court noted that most Wage Orders do not expressly provide for deviations from the preferred schedule. In the case at hand, the employer scheduled rest periods together in 20 minute blocks of time, either before or after the scheduled meal period, which practice was preferred by many employees.

Rejecting the popular schedule, the *Rodriguez* court declared that the regulation essentially “directs employers to implement the specified rest break schedule absent an adequate justification why such a schedule is not capable of being put into practice, or is not feasible as a practical schedule.”

The court further concluded that a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare, and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule. The court made clear that a departure from the preferred schedule that is merely advantageous to the employer cannot satisfy the requirement.

Rather, “the departure must be predicated on facts demonstrating that the preferred schedule would impose a material burden on the employer, and that the departure is necessary to alleviate such burden.” This makes scheduling serious business.

## Practical Tips For California Employers

In the 2012 *Brinker* case, the court made clear that one rest break should generally fall on either side of the meal break for eight-hour shifts, but shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule. Thus, although exceptions may apply, you should generally do the following when determining how to schedule rest periods for standard eight-hour shifts:

- (a) determine how many rest periods should be provided in light of the total hours worked;
- (b) schedule one (or two) meal periods as required by law (accounting for any waived meal periods as permitted by law);
- (c) determine the length of each “work period” before and after the scheduled meal periods; and
- (d) provide a rest period insofar as practicable in the middle of each work period.

In applying the above guidelines, as long as meal periods are not scheduled too late in the day, you can position them in a manner so that the requirements of both the meal period and rest period regulations can be satisfied. Further, because rest periods generally are not recorded (unless special rates apply), many employers have employees sign acknowledgments each pay period confirming that rest periods, as well as meal periods, have been provided during a pertinent pay period.

Finally, it should be mentioned that the nature of some jobs permits (and sometimes requires) employees to schedule their own rest periods at times convenient to them, or to altogether waive them, if they choose. This is generally permitted as long as the waiver is voluntary.

For practical reasons, including related timekeeping issues, permitting an employee to self-schedule meal periods should be closely evaluated, even though the *Brinker* case said that employers are not required to “police” workers to assure they are not working during meal periods. In any event, the burden of an employer as to meal and rest period scheduling can be lightened somewhat by permitting an employee to self-schedule in appropriate situations.

Where the nature of the work requires you to get involved in formal scheduling of meal and rest periods (manufacturing operations, for example), or if you have constructive notice of significant deviations, you have an affirmative obligation to comply with the requirements of the regulations or be found to have ratified an illegal schedule. Although recent case law does not eliminate all of the gray areas for compliance, the scheduling rules may become even more complicated.

For example, confusion may occur when an employee waives the second meal period, leaving a much longer working period at the end of the day in which to schedule rest periods. Surprises also may occur when unforeseen circumstances render a previously scheduled array of rest periods “infeasible” under the “preferred schedule.” Although courts may find that changing circumstances could make the preferred schedule no longer “practicable,” you nonetheless generally will have the burden to justify any material deviations from the norm.

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