

A BREAK IS A BREAK: CALIFORNIA SUPREME COURT RULES THAT REST BREAKS MUST BE DUTY FREE

Insights
Dec 22, 2016

Today, the California Supreme Court ruled that employers must provide their workers with duty-free rest breaks or face potentially devastating financial consequences. Most California employers know that state law generally requires you to provide meal and rest breaks to non-exempt employees during their work day, and failure to do so could result in being forced to pay an additional one hour of pay at the employee's regular rate of pay. As today's California Supreme Court decision in *Augustus v. ABM Security Services, Inc.* illustrates, failure to comply with these often onerous requirements can lead to overwhelming financial liability.

By resurrecting a \$90 million award against the employer for failing to provide proper rest breaks to its security guards, today's decision was not only an early Christmas present for the plaintiffs in this case, but for potential plaintiffs across California. The decision has important ramifications for employers in all industries, so you should familiarize yourself with the facts and the holding to avoid a similar fate in the New Year.

COURT CONCLUDES THAT EMPLOYER'S ON-CALL REST BREAK POLICY VIOLATES CALIFORNIA LAW

ABM Security Services employs thousands of security guards at locations throughout California. For the past decade, it has battled a class action lawsuit brought by some of its former security guards alleging that the

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company failed to properly relieve them of all duties during their legally mandated rest breaks.

ABM requires its guards to remain on call even while taking their rest breaks. This means the guards need to keep their cell phones or pagers on during their rest breaks in order to respond when certain needs arise (such as when a tenant wishes to be escorted to the parking lot, or an emergency situation occurs). According to ABM, however, guards are rarely interrupted to perform any of these tasks and are otherwise permitted to engage in various non-work activities during this time, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the internet.

Late in 2014, the Court of Appeal found that this on-call rest break policy was permissible. On December 22, 2016, however, the California Supreme Court reversed the lower court and concluded that the policy violated California's rest break law. The court held "state law prohibits on-duty and on-call rest periods" and "employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." Based on today's ruling, the requirement to relieve employees of all duties now clearly applies to both meal and rest periods.

THE NATURE OF REST BREAKS REQUIRES EMPLOYEES BE RELIEVED OF ALL DUTIES

The concept of a "rest break" is not specifically defined in the Labor Code or Wage Orders. In the absence of a specific definition, the Supreme Court determined the reference to a rest period in Wage Order 4 evokes the ordinary meaning of rest, which one would consider as meaning "an interval of time free from labor, work, or any other employment-related duties." Further, in the court's view, it makes sense that an employer's responsibility to relieve employees of all duties during rest periods is on par with the same responsibility for meal periods.

The Court stated that an employer cannot satisfy its obligations under Wage Order 4 by requiring that employees remain on call. It explained that an on-call rest break is unworkable because employees simply could not use the 10 minutes to take care of other personal matters that require uninterrupted time. Therefore, it determined that requiring an employee to carry a pager or respond when the employer

seeks contact with the employee is irreconcilable with the requirement of duty-free rest periods.

Justice Kruger's concurring and dissenting opinion complained that a requirement to carry a pager does not necessarily prevent an employee from taking brief walks, making phone calls, or otherwise using a rest break for their own personal purposes. Her pleas for a more common sense approach to the issue, however, were rejected by the majority opinion, which frowned upon a requirement to wear a pager during a rest break.

THE MERE POSSIBILITY OF BEING CALLED BACK DOES NOT INVALIDATE BREAKS

California employers should understand that even under the "relieved of all duty" standard, the mere possibility that an employee may be called back to work does not invalidate a meal or rest break. If your policy provides employees with rest breaks where they are relieved of all duties and occasionally these breaks are interrupted, then you must pay the one hour penalty pay on those rare occasions or provide the employee with another uninterrupted rest break. The court distinguished this scenario from the policy in this case, which specifically required its guards to remain on call during their rest breaks.

A LIMITED EXEMPTION PROCESS FOR ON-DUTY REST BREAKS

The Supreme Court did note that employers can seek relief through a Division of Labor Standards Enforcement (DLSE) exemption process. If you can demonstrate that relieving employees of all duties during rest breaks would pose an undue hardship and will not materially affect the welfare or comfort of the employees, you could be relieved of your standard obligations. However, applying for the exemption from the DLSE may trigger an investigation of your break practices, so it is a risky proposition. Also, the exemption is not retroactive and would only apply prospectively from the date it is granted.

ACTION ITEMS FOR CALIFORNIA EMPLOYERS

In light of the Supreme Court's decision, you should make sure your rest break policy does not contain any on-call requirements such as remaining reachable by pager, phone,

or by other similar means. In rare circumstances, it may make sense for you to apply for an exemption from duty-free rest breaks. However, you should seek legal counsel to help evaluate whether it makes sense to apply to the DLSE for an exemption.

It is equally important to consider having counsel review your meal and rest break policy and practices. This will help you assess your organization's risk of a potential crushing financial liability resulting from a relatively technical violation of California's strict break requirements.

If you have any questions about this decision or how it may affect your organization, please contact your Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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