



THE UNSETTLED STATUS OF MEAL AND REST PERIODS....AGAIN

The California Supreme Court has granted review of the recent *Brinker Restaurant Corp.* decision. Please see the firm's prior newsletter (October) for a summary of the *Brinker* decision.

As a result of the high court's grant of review, the appellate decision is essentially wiped off the books and is no longer good law. Thus, what California Labor Code section 512 and the IWC orders mean with respect to meal and rest periods, employers will have to wait until the California Supreme Court issues its own *Brinker* decision, which will take some time.

Immediately after the appeals court decision was issued in July, the California Division of Labor Standards Enforcement (DLSE) changed its enforcement position and directed the DLSE staff to follow the *Brinker* decision. However, just days after the Supreme Court granted review, the DLSE has issued a *new* memo retracting reliance upon the earlier memo—but this new memo still directs the DLSE staff to continue to follow *Brinker's* reasoning (interpreting California law to only require that employers make meal and rest periods available) while the Supreme Court review is pending.

Despite the DLSE's position, the current law on meal and rest periods is unclear. Therefore, to avoid legal problems while the issue is pending with the high court, employers should take a conservative approach to meal and rest periods.



INSIDE THIS ISSUE:

- The Unsettled Status of Meal and Rest Periods....Again. 1
- Legislation: What's In Store for 2009? 2
- Expanded Cell Phone Prohibitions— No Text Messaging Either 3
- Upcoming Seminars 4

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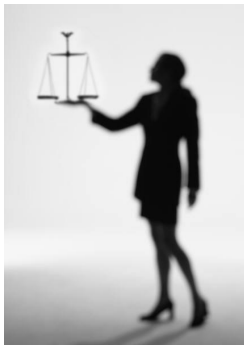
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Take Away Tips

1. Have a meal and rest break policy containing "must" and "shall" to emphasize that you authorize employees to take meal and rest periods.
2. Review internal procedures to determine whether there are impediments to employees taking their required breaks.
3. Require employees to record on time cards the stop and start times of their meal breaks, and review time cards to ensure compliance.
4. Have employees acknowledge on time cards that they actually took their meal periods of at least 30 minutes and were provided time to take rest periods.

For assistance with drafting such policies, you can contact Elizabeth Koumas, at (619) 398-8301, or ejk@koumaslaw.com.



LEGISLATION: WHAT'S IN STORE FOR 2009?

With 2009 closing in, Governor Schwarzenegger completed his review of pending legislation, after an 85 day historic delay in passing the state budget. While many workplace-related bills were approved by the state Senate and Assembly, Gov. Schwarzenegger vetoed all but a handful of them. In fact, the governor vetoed 35 percent—a record—of all bills sent to him, following the historic 85-day delay in passing a state budget and the governor's vow not to sign any legislation until the impasse ended.

When a budget was finally reached, the governor had just 10 days to review bills on his desk, and he announced that the time crunch forced him "to prioritize the bills sent to my desk at the end of the year's legislative session. Given the delay, I am only signing bills that are the highest priority for California."

The standoff between the governor and legislature means that California employers will have to contend with just a few new laws come January 2009. The new laws include:

A.B. 10 amends the Labor Code to add an annual income restriction for exempt computer software professionals who are paid on salary. Under existing law, to qualify as exempt, computer software pros must be paid at rate of at least \$36/hour, on an hourly basis. The amendment also permits exemption where the employee is paid an annual salary of at least \$75,000, paid at least monthly, and in a monthly amount of not less than \$6,250.

A.B. 2181 makes changes to the way that reports of occupational injury or illness are filed. The Division of Workers' Compensation is charged with publishing a new form for this purpose. Employers will be required to report injuries/illnesses on the form, and the insurer (or self-insured employer) will then have to report the information electronically to the DWC.

(Continued from page 2)

A.B. 2654 harmonizes anti-discrimination provisions in a range of state laws—including those dealing with discrimination in contracting, insurance, and workers' compensation—to ensure that the anti-bias protections track those in the Unruh Civil Rights Act and the Fair Employment and Housing Act.

S.B. 28 expands existing prohibitions on using cell phones while driving to bar text messaging, emailing, and instant messaging while driving. (See next page for details.)

Some of the bills submitted for consideration, which would have impacted businesses, but were *vetoed* by the Governor include the following:

- A.B. 2279 would have created protections from discharge for employees who use medical marijuana prescribed by a physician. It was intended to overturn the California Supreme Court ruling that existing laws do not limit an employer's authority to discharge employees for violating federal drug laws.
- A.B. 2874 would have wiped out the \$150,000 cap on damages that the FEHC could award in administrative hearings.
- A.B. 2918 would have limited the circumstances under which an employer could obtain a consumer credit report for applicants or employees.
- A.B. 3063 would have expanded the California's background check restrictions to prohibit employers from asking applicants about *certain* criminal convictions.
- S.B. 1661 would have held that an individual who was discharged or quit as a result of taking baby-bonding leave under California's paid family leave insurance program, left the job with good cause for purposes of qualifying for unemployment insurance benefits.
- S.B. 840 would have created a single payer health care system in California, funded partially by employer contributions.
- S.B. 1583 would have imposed penalties on non-attorney consultants who knowingly provided erroneous advice on classifying workers as independent contractors to avoid employee status.

EXPANDED CELL PHONE PROHIBITIONS— NO TEXT MESSAGING EITHER



Effective immediately upon passage, Senate Bill 28 expands existing prohibitions on using cell phones while driving to bar text messaging, emailing, and instant messaging while driving and imposes a \$20 fine for the first offense and \$50 for subsequent violations.

The new law makes it an infraction to drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text message. This covers any use of an electronic

wireless communications device to manually communicate with any person using a text-based communication, such as text messages, instant messages, or e-mail. "Electronic wireless communications device" is a broad term that includes BlackBerries, iPhones, iPod Touch devices, pagers, cell phones, laptop computers, and the like.

There is a key exception to the ban: A person won't be deemed to be "writing, reading, or sending a text-based communication" if he or she is simply reading, selecting, or entering a phone number or name in a device in order to make or receive a phone call. Also, the new law doesn't apply to emergency services personnel operating an authorized emergency vehicle in the course of their job duties.

Take Away Tip

Employers should make sure they have a policy setting forth the legal rules of using cell phones while driving for business reasons. Such a policy **should** prohibit employees from using (personal or company-issued) hand held cell phones while driving in company vehicles or during company time entirely, or at a minimum, only with a hands-free device. For assistance with drafting and implementing such policy, contact Elizabeth Koumas at ejk@koumas.lawcom or (619) 398-8301.

UPCOMING SEMINAR

LEARN MORE ABOUT LEAVES OF ABSENCE

Elizabeth Koumas, along with other knowledgeable attorneys, will present a day long training seminar on FMLA, CFRA, and other protected employee leaves.

Date: November 13, 2008

Time: 8:30 a.m. to 4:30 p.m.

Location: The Handlery Hotel, 950 Hotel Circle South, San Diego

Topics Include:

- Federal Family And Medical Leave Act (FMLA) And California Family Rights Act (CFRA)
- California Pregnancy-Related Disability Law Length Of Leave Entitlement
- Interaction Between Family Leave Laws And Disability Laws
- Workers' Compensation
- Strategies For Handling Employee Leaves
- Other Protected Leaves, including the *new* benefits for spouses of military members.

The seminar will be presented through Lorman Educational Service. For a complete agenda, and for registration information, please visit the firm website at www.koumaslaw.com.

