KOUMAS LAW GROUP

Legal Update

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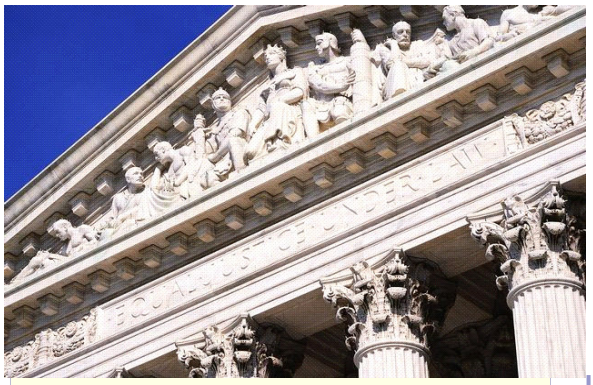


INSIDE THIS ISSUE:

New Decision Eases Employer Obligations on Meal Breaks

As a result of the recent appellate court decision in the case of *Brinker Restaurant Corporation v Superior Court,* employers are less burdened with respect to employee meal breaks. The main claim asserted in the case was that Brinker's policy violates Labor Code sections 512 and 226.7, and IWC Wage Order No. 5, by failing to provide or make available to Brinker's hourly employees a 30-minute uninterrupted meal period for every five consecutive hours of work. Related to this claim was plaintiffs' assertion that Brinker's "most egregious meal period violations" stem from its practice of early lunching, under which Brinker allegedly requires its hourly employees to take their meal periods soon after they arrive for their shifts, usually within the first hour, and then requires them to work in excess of five hours, and sometimes more than nine hours straight, without an additional meal period.

In what it initially termed an "advisory" opinion, the trial court held that a meal period "must be given before [an] employee's work period exceeds five hours." (Italics added.) The court also stated that 'the DLSE wants employers to provide employees with break periods and meal periods toward the middle of an employee[']s work period in order to break up that employee's 'shift.'" (Italics added.) The court further stated that Brinker "appears to be in violation of [section] 512 by not providing a 'meal period' per every five hours of work.'" (Italics added.) Two weeks later, at an ex parte hearing, the trial court issued a minute order (the July 2005 order) stating the "advisory ruling" was "confirmed by the court as an order." (Italics added.)

However, the Appeal's Court concluded that the trial court's rolling five-hour meal period ruling in its July 2005 order was erroneous. Section 512, subdivision (a) (hereafter section 512(a)), which governs an employer's obligations with respect to the "providing" of meal periods to its hourly employees, provides:

"An employer may not employ an employee for a work period

(Continued on page 2)

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." (Italics added.)

Employers need not ensure meal breaks are actually taken, but need only make them available.

In *Brinker,* Plaintiffs contended, and the trial court ruled in its July 2005 order, that Brinker's written meal policy violated section 512(a) and IWC Wage Order No. 5 (specifically, Cal.Code Regs., tit. 8, § 11050, subd. 11(A)) because it allows the practice of early lunching and fails to make a 30-minute meal period available to an hourly employee for every five consecutive hours of work.

Here, however, the appellate court held the interpretation of section 512(a) given by plaintiffs and the trial court was erroneous as a matter of law, and per the appellate court must be avoided because it renders surplusage the provisions of that subdivision governing the question of *when* an employer must provide meal periods to an hourly employee. Citing *California Hotel & Motel Assn. v. Indus trial Welfare Com*. (1979) 25 Cal.3d 200, the court stated in its order that "[t]he California Supreme Court has interpreted wage orders to require a meal period for each five-hour period an employee works," and "a meal period of 30 minutes per five hours of work is generally required." The appellate court in *Brinker* went on to comment, that case, however, is distinguishable as it involved an IWC wage order (No. 5-76) that is not involved in the *Brinker* case. (*California Hotel & Motel Assn.*, supra, 25 Cal.3d at p. 205, fn. 7.) As summarized by the Supreme Court, the pertinent provision of that wage order provided that "[a] meal period of 30 minutes per 5 hours of work is generally required." (Ibid.) As already discussed, however, section 512 (a), which governs here, provides in 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." The distinction between the two provisions is of critical importance. Whereas IWC wage order No. 5-76 generally required a meal period for every "5 hours of work," section 512(a) generally requires a first meal period for every "work period of more than five hours per day."

In support of their claim that lunch breaks must be provided in the middle of a shift, the *Brinker* plaintiffs also relied upon a June 14, 2002 DLSE opinion letter. However, as pointed out by the Appeals' Court, that opinion letter has since been withdrawn and therefore cannot be relied upon to support plaintiffs' claims. As discussed, the wage order pertaining to rest breaks provides that, to the extent practicable, rest periods should be scheduled in the middle of a work period. No such restriction on the timing of meal periods is contained in the wage order concerning meal periods.

The Appeals' Court concluded the trial court abused its discretion in certifying the class in this matter to the extent it relied on an erroneous interpretation of section 512(a).

Second, the *Brinker* plaintiffs claimed that employers have an affirmative duty under IWC Wage Order No. 5 to ensure that hourly employees are relieved of all duty during meal periods, or be in violation of Labor Code sections 512 and 226.7, and IWC Wage Order No. 5, by failing to ensure that its hourly employees "receive" or "take" their meal periods. However, the Appellate Court further concluded that employers need only make meal breaks available, not "ensure" they are taken, and provided the following rationale.

As stated, section 512(a) provides that 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" and, if the employee's work period is less than six hours, "the meal period may be waived." ""To ascertain the common meaning of a word, "a court typically looks to dictionaries."""" (*Arocho v. California Fair Plan Ins. Co*. (2005) 134 Cal.App.4th 461, 466, fn. omitted.) The term "provide" is defined in Merriam-Webster's Collegiate Dictionary (11th ed. 2006) at page 1001 as "to supply or make available." (Italics added.) Thus, from the plain language of section 512 (a), meal periods need only be made available, not ensured, as plaintiffs claim. Moreover, plaintiffs' interpretation of section 512(a) is inconsistent with the language allowing employees to waive their meal breaks for shifts of less than five hours.

The Appeal's Court further explained, in *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080 (Starbucks), the United States District Court for the Northern District of California rejected the notion that employers must ensure their employees take meal breaks: "The interpretation that *White* advances—making employers ensurers of meal breaks—would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts. Accordingly, the court concludes that the California Supreme Court, if faced with this issue, would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was forced to forego [sic] his meal breaks as opposed to merely showing that he did not take them regardless of the reason." (*Starbucks*, supra, 497 F.Supp.2d at pp. 1088-1089.)

More recently in *Brown*, supra, 2008 WL 906517, the United States District Court for the Central District of California considered a motion to certify a class of former and current Federal Express drivers who allegedly had been deprived of rest and meal periods in violation of sections 512 and 226.7.

The plaintiffs in *Brown* asserted that "California law requires employers to ensure that meal breaks are actually taken." (*Brown*, supra, 2008 WL 906517 at *4.) The district court rejected this argument, holding that section 512 and the applicable wage order did not support plaintiff's position. (Brown, supra, at *5.) The court explained that section 512's statement that employer must "provide" meal periods "does not suggest any obligation to ensure that employees take advantage of what is made available to them." (*Brown*, supra, 2008 WL 906517 at *5.) The court also noted that the California Supreme Court "in characterizing violations of California's meal period obligations . . . repeatedly described it as an obligation not to force employees to work through breaks." (Ibid.,

fn. omitted.) The court also noted that "[r]equiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous . . . . It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws." (Id. at *6.)

Based on the foregoing, the Appeals' Court found the reasoning in *Starbucks* and *Brown* persuasive and concluded that employers need not ensure meal breaks are actually taken, but need only make them available. [Note: The current rule relating to rest periods was also addressed in the *Brinker* case but not recited here.]

Federal Contractors Must Use E-Verify

President Bush recently issued Executive Order 12989 to require *all* federal contractors to use the Department of Homeland Security's (DHS) E-Verify system to confirm the employment eligibility of employees who perform work on a government contract. The Executive Order mandates that as a condition of each contract, the contractor must agree to use E-Verify to verify employment eligibility of: 1) all individuals hired during the contract term by the contractor to perform employment duties within the United States, and 2) all individuals the contractor assigns to perform work within the United States on the federal contract. The order is expected to take effect later this year, once implementing rules are approved. This is the first time that the federal government is mandating that private employers use E-Verify, although some states have required certain employers to use the system.

E-Verify is currently the best means available for employers to electronically verify the employment eligibility of their newly hired employees. Employers with federal government contracts should determine which of their employees/worksites are affected by the new order and put procedures in place to ensure that E-Verify is part of the employment verification process.

IRS Raises Mileage Reimbursement Rate

As a result of the continuing high cost of gasoline, the IRS has raised the standard mileage reimbursement rate for the final six months of 2008. From July 1, 2008, through Dec. 31, 2008, the new rate for business mileage is 58.5 cents a mile, up from the 50.5-cent rate that took effect in January 2008.

New I-9 Form

The U.S. Citizen and Immigration Services (USCIS) has released a new version of the Form I-9, which is used to verify eligibility to work in the United States. The new form has an expiration date of 06/30/09 in the upper right corner. Although the new form does not contain any substantive changes, it is now the only version the government will accept. Please see Firm website to access new form.

Court Rejects Challenge To Gay Marriage Initiative

Proposition 8 Will Appear On November Ballot

KNSD-TV updated 3:32 a.m. PT, Thurs., July. 17, 2008

The California Supreme Court has refused to hear a case seeking to keep a gay marriage ban initiative off the November ballot.

The justices' decision not to take up the case means Proposition 8 will stay on the ballot barring further legal action. It also clears the way for the secretary of state to print voter information pamphlets on the issue. The initiative seeks to amend California's constitution to ban same-sex nuptials in the state. It would overrule a May decision by the state Supreme Court legalizing gay marriage. Gay marriages began taking place legally on June 16.

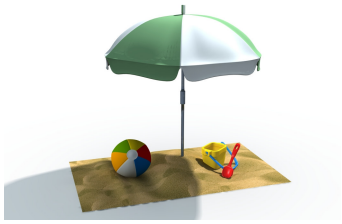
"This was a frivolous lawsuit. It was a desperate attempt to try to keep the voter initiative off the ballot in November," said Glen Lavy, an attorney with the Alliance Defense Fund representing the measure's sponsors.

Equality California filed a petition last month arguing that the signature petitions used to put the proposal on the ballot were misleading. The group also says Proposition 8 is a constitutional revision rather than an amendment, which would make it improper to put before voters.

Workers' Comp Claim Forms Must Be Provided Promptly

A new case underscores the need for employers to brush up on the rules regarding when injured employees must be provided a workers' comp claim form. In the case, a California appeals court rejected an argument that a sign painter for the Claremont Colleges in Southern California, should be denied workers' compensation benefits for a back injury because he waited almost seven years to file his comp claim.

According to the appellate court, the statute of limitations for filing a claim stopped running, or tolled, because the Claremont Colleges never gave the employee a workers' comp claim form even though it was aware of his injury. This "tolling" of the statute of limitations does not occur when a worker is aware of the right to file a claim, despite not receiving a claim form. But in this case, the court found that the evidence was not strong enough to establish that the employee knew about his workers' comp rights even though he had filed previous comp claims.



Dress Code Violations Are Heating Up This Summer

The rise in temperatures this summer has created an increase in dress code policy violations as a result of inappropriately dressed or scantily clad employees. Such attire can lead to flirtatious behavior and sometimes a general decline in office professionalism. Here are some tips for employers to keep dress code standards up when the heat is climbing:

1. **A written dress code.** Be specific as to what is prohibited, but be sure to state the list of unacceptable clothing is not comprehensive. Emphasize the fact that every employee's attire will be reviewed for appropriateness on a case-by-case basis. Also, make sure your dress code does not discriminate against employees who wear certain clothing for religious reasons or who dress consistent with their intended gender.

2. **Consider keeping sweaters available.** Consider having personnel manager keep sweaters or other cover-ups available for employees whose attire is not appropriate for work. Employees can also be instructed to go home to change into more professional clothing.

3. **Be specific but sensitive.** When counseling an employee about a dress code violation, explain why the attire is objectively inappropriate without personally criticizing the employee's values or lifestyle. Focus on the attire rather than on the employee, in order to reduce the possibility of subjecting yourself up to a discrimination lawsuit.

FUTURE SEMINARS

LEAVES OF ABSENCE

Elizabeth Koumas has presented this valuable seminar for the past 5 years, and continuing.

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:

*	CFRA	*	Workers Compensation Leaves
*	FMLA	*	Disability Related Leaves
*	PDL	*	Other Statutory Leaves of Absence

This seminars will be presented through Lorman Educational Service. For complete agenda, and for registration information, contact Elizabeth J. Koumas.

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