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Walgreen Case Clarifies Meal Period Obligations in California

On November 13, 2014, the Second Appellate District for the California Courts of Appeal ordered published *In Re Walgreen Company Overtime Cases*, - Cal.App.4th, - 214 DJDAR 15213. Walgreens was sued in a class action in which the lead plaintiff charged that *Walgreens* violated its employees' rights to meal breaks. The plaintiff moved for class certification on the theory that while the company's stated policy on meal breaks was proper, Walgreens actual practice departed from its stated policy in an illegal and class-wide way.

The *Walgreen* court analyzed the law on meal breaks which was established in the landmark 2012 California Supreme Court decision in *Brinker Restaurant Corp v. Superior Court*, 53 Cal.4th 1004.

Before *Brinker*, California courts were divided over whether an employer must merely make meal breaks *available* or whether an employer must actually *ensure* employees take the breaks. The practical consequences flowing from the aforementioned alternatives are great. Under the *make available* standard, an employer merely must make meal breaks available. That is, the employer must relieve the employee of all job duties for the meal break, and then the employer may allow employees to decide for themselves whether to take the break. As stated by the court in the *Walgreen* case, "this *make available* standard thus allows an employee to choose to skip the break and, for instance, to leave work early instead. If the employer provides a *break opportunity* to the worker, the employer incurs no liability if the employee then decides to skip or delay the break."

Under the alternative but rejected *ensure standard*, an employer must ensure employees take breaks. That is, an employer must make workers take meal breaks whether they want them or not.

The evidence in the *Walgreen* case showed that *Walgreens'* employees occasionally decided to skip or delay breaks. Since meal breaks were taken on unpaid time, many employees simply decided to skip meal breaks in order to leave work early.

The court noted that after the *Brinker* court adopted the *make available standard* and rejected the *ensure standard*, meal break cases became harder to certify on a class basis since the fact of a missed break does not dictate the conclusion of a labor law violation. Under the *make available* test, a plaintiff's attorney must not only determine whether a full thirty (30) minute

meal break was provided but must additionally ask why a worker missed a break. The court re-emphasizing the *Brinker* decision's instruction that an employee is at liberty to use his or her meal break for whatever purpose he or she desires, including working through the meal break. The *Walgreen* court also rejected the plaintiff's suggestion that in the absence of an employer's records showing no meal break for a given shift over five (5) hours, a rebuttable presumption should arise that the employee was not relieved of duty and no meal break was provided. Thus, the court reinforced the plaintiff's burden of proof to conform with the dictates of the *Brinker* decision.

In light of the increased litigation in this area, it is important to remember the law on meal breaks. The basic law on meal breaks is reflected in every Wage and Hour Order required to be posted by virtually every employer in California. Simply stated, a thirty (30) minute meal break must be provided if an employee works five (5) hours in a day, except that when a work period of not more than six (6) hours will complete the day's work, the meal period may be waived by mutual consent of the employer and employee. If an employee works for a work period of more than ten (10) hours in a day, the employee is entitled to a second meal period of not less than thirty (30) minutes, except if the total hours worked is no more than twelve (12) hours, the second meal period may be waived by mutual consent only if the first meal period was not waived. The Wage and Hour Orders also require employers to keep time records showing when the employee begins and ends each work period and the total daily hours worked must also be recorded. However, meal periods during which operations cease need not be recorded.

Whether employers are required to record meal periods has also been the subject of recent litigation in California. In a non-published United States District Court case originating in the Southern District of California, entitled *Lopez v. G.A.T. Airline Ground Support, Inc.* 2010 WL 2839417 (S.D.Cal.) the employer did not document the times its employees began and ended each meal period. Rather, the employer had a system of automatically deducting time from the employees' time cards to account for meal periods, unless the employee affirmatively notified the employer that a meal period was not taken. The class action plaintiffs argued that their employer's automatic deduction practice did not constitute an accurate and legal record of meal periods. However, the court opined that the relevant Wage Order expressly required employers to record when the employee began and ended each work period but did not specify that meal periods must also be recorded with that level of specificity. Rather, the Wage Order merely required that meal periods "shall also be recorded". Hence, the court was not persuaded that the Wage Order required employers to record the actual times that employees began and ended each meal period but rather, employers were only required to record that a meal period was taken.

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