

MEAL PERIOD RULES AND OTHER TRAPS FOR CALIFORNIA EMPLOYERS - BEWARE!

BY ROBERT A. LEVINSON

The meal period rules for California businesses have always been a major challenge, especially for the restaurant industry because of the lack of a normal "slow" period during which to offer this required break. Many California restaurants have used the informal approach of offering meal breaks to their employees, who naturally do not want to take the breaks because of the heavy volume of customer business (and resulting tips) during the busy meal periods. Unfortunately, neither informality nor accommodation is permitted under California's confusing meal period break laws, and both can result in a heap of trouble for the employer.

Currently, the meal period breaks as set forth in the Industrial Welfare Commission ("IWC") Order #5, which governs the Public Hospitality (i.e., restaurant and clubs) businesses, a minimum of a half-hour meal break is required for every employee who works more than 5 hours in a day. By written agreement the employee may agree to waive this period if the total amount worked does not exceed 6 hours per day. It currently cannot be waived if the hours worked exceed 6 hours. Moreover, the meal period must be a time in which all work has ceased. No "working through the meal" is allowed except with another written agreement that the IWC's enforcement arm, the Department of Labor Standards ("DLSE") has been now challenging, even though such written agreements are distinctly permitted in the IWC regulations! When must this break be taken? DLSE interpretations are between the 3rd and 5th hour of work. Is there flexibility? Under the current interpretations, very little.

The penalties of not complying with this meal break are substantial and cumulative. One hour is assessed for all meal periods not provided for as per the regulations. While individually this may not seem unduly harsh, these claims are not being brought individually but as class- action claims by plaintiff lawyers who are targeting the restaurant industries because of the large number of employees employed (past or current - it does not matter) and the four years that the law provides to seek recovery of such claims. Multiple 4 years times a few hundred employees per year times thousands of missed periods per year - you get the picture. Remember - the employer's good faith is not an issue with the amount owed; it may protect the employer against imposition of punitive damages, but will not protect the employer against the full penalties, interest and attorneys fees which are automatically awarded in these cases!

This scenario is not simply a scare tactic. In the past couple of years, the restaurant chains of California Pizza Kitchen, Cheesecake Factory, Carl Karcher Enterprises (Carl's Jr.), Claim Jumper, Marie Callenders (certain franchises) and Johnny Rockets (certain franchises) have all been hit with these types of claims. These claims not only target larger operations but smaller chains or single site restaurants as well. (For example, our office has already been involved in the defense of meal period practices of certain Marie Callender's franchises as well as other small and smaller chains as well as single-site restaurants). In the case of the larger chains named above, the settlements on meal period claims have exceeded the million dollar level and almost always exceed the six figure level.

Help is on the way, but it is not clear when it will arrive. On December 20, 2004, as a result of a court of appeal ruling that invalidated one of the DLSE's regulations, the DLSE withdrew all of its published interpretations of when the required meal periods have to be taken. Since that time, under the leadership of Governor Schwarzenegger's staff, new regulations have been proposed which would provide tremendous flexibility for both employers and the employees in this troubling area. The new regulations propose:

- a. That the employer and employee could set the time of the meal break when convenient to the employee;
- b. That the meal period could theoretically be waived by the employee once certain notification requirements are met;
- c. That the four year statute of limitations would be reduced to one year, since the lost meal period would be reclassified as a penalty;
- d. That only one meal period is required if the employee works up to and including 10 hours a day, and this can be increased by agreement to up to 12 hours per day if the first period was not waived

While these regulations were first proposed in January 2005, they were rewritten and re-proposed in April, setting back the enactment process. Currently, if not changed again, they could go into effect perhaps in June. However, the old law with all of its problems and uncertainties remains in effect until a formal change is made!

There are additional areas where the restaurant industry is particularly vulnerable. Because of its large number of employees and high turnover, sexual harassment policies must be kept up to date. The new AB1825 law mandates sexual harassment training for all employers with 50 or more employees. You had better believe that plaintiff's attorneys will be targeting this training (or more precisely, a lack of this training) for potential lawsuits. Restaurants also provide a target rich environment for ADA claims, as a "cottage industry" exists of lawyers and their disabled clientele who target clubs and restaurants for alleged ADA non-compliance, as trivial as the non-compliance may be, even to a point of not having bathroom mirrors lowered to the correct levels. A \$4,000.00 fine for that + attorneys fees!

What can the restaurant industry do? First, have your policies checked to ensure compliance. As restaurants are key target areas of the plaintiff's bar, they need to have their own employment counsel review their policies to ensure current compliance and to guide the industry in working through the web of conflicting and confusing laws. Second, employment law insurance is available and the rates are competitive as more and more carriers offer this type of needed coverage. Some carriers, but not many, even offer ADA claims insurance without the need of having the building certified as compliant by an Architect. We can provide names of specialists in this area with whom we have worked for many years. In almost every case, this insurance has saved the clients tens of thousands of dollars of costs over and above the premiums paid, and in some cases has provided six figures of savings.

Levinson, Arshonsky & Kurtz offers employment law services to management in all industries with a large client base in the California restaurant industry, including Marie Callendar franchisees, Johnny Rockets franchisees, small restaurant chains, high end single location restaurants and dozens of others. We serve all California's businesses from our location in the San Fernando Valley at 15303 Ventura Blvd. Suite 1650, Sherman Oaks, CA 91403 (818) 382-3434. Contact Robert A. Levinson for your needs.