

HOW TO COMPLY WITH MEAL AND REST BREAK LAW AND POLICY

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Why isn't compliance with meal and rest break law and company policy a non-issue? Employers know that employees who take breaks are likely to be more productive. They also know that employees need to eat a meal during long workdays. Why is it so difficult to ensure that employees *receive* their earned rest breaks and meal periods? In addition, why don't all employees *take* their earned meal and rest breaks? Apparently, answers to these questions are not simple, yet the consequences for not providing meal and rest breaks as dictated by law and policy can be highly significant. The recent California Superior Court decision by an Alameda County jury in *Savaglio v. Wal-Mart Stores, Inc.*,¹ which resulted

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in a \$172 million verdict against Wal-Mart for failure to provide meal breaks to nearly 116,000 employees over a four year period, sent shock waves under the feet of employers who have not paid attention to this issue and especially those who know they have not delivered on their promise to employees.

Because meal and rest break compliance has not received the attention that other wage and hour lawsuits have in the last decade (e.g., overtime claims), employers have relatively little experience defending against these lawsuits, and many are scrambling for advice from their counsel to assess potential liability and to make corrections if needed. This article seeks to provide a better understanding of typical problems with meal and rest break compliance and offers a way to evaluate compliance vulnerabilities and minimize the probability of a lawsuit.

RELEVANT FEDERAL AND STATE LAWS

FLSA. The Fair Labor Standards Act (FLSA)² administered by the

US Department of Labor (DOL) does not regulate meal and rest breaks for nonexempt employees. However, DOL does provide guidance on a number of aspects of this employment practice. DOL defines a "bona fide meal period" as a period of time typically 30 minutes in length during which an employee must be completely relieved from duty for the purpose of eating regular meals.³ The employee is not considered relieved if he/she is required to perform any duties, whether active or inactive, while eating. Unless nonexempt employees are free from work during their meal period (e.g., in the office, lunchroom, break room, or off premises), the break is not a bona fide meal period, and the time should not be deducted from the employee's total work hours. For example, office workers who eat at their desks while performing work are not relieved from duty and thus should be compensated for work-time. Also, because the FLSA requires employers to keep accurate records of hours worked and wages earned⁴ an employer could face liability when time is

TABLE 1

STATE LAWS GOVERNING MEAL AND REST BREAKS

STATE†	REST BREAKS	MEAL PERIODS
California	Paid 10-minute rest period for each 4 hours worked or major fraction thereof; as practicable, in middle of each work period.	30 minutes after 5 hours, except when workday will be completed in 6 hours or less and where there is mutual employer/employee consent to waive meal period.
Colorado	Paid 10-minute rest period for each 4-hour work period or major fraction thereof; as practicable, in the middle of each work period.	30 minutes to not more than 60 minutes, after 6 hours, with subsequent meal periods required 6 hours after termination of preceding meal period.
Connecticut	None	30 minutes after first 2 hours and before last 2 hours for employees who work 7.5 consecutive hours or more.
Delaware	None	30 minutes after first 2 hours and before the last 2 hours for employees who work 7.5 consecutive hours or more.
Illinois	Each hotel room attendant shall receive a minimum of two 15-minute paid rest breaks in each workday in which they work at least seven hours.	Each hotel room attendant shall receive one 30-minute meal period in each workday in which they work at least seven hours.
Kentucky	Paid 10-minute rest period for each 4-hour work period.	Reasonable off-duty period, ordinarily 30 minutes but shorter period permitted under special conditions, between third and fifth hour of work.
Maine	None	30 minutes after 6 consecutive hours, except in cases of emergency and except where nature of work allows employees frequent breaks during the workday.
Massachusetts	None	30 minutes if work is more than 6 hours.
Minnesota	Paid adequate rest period within each 4 consecutive hours of work, to utilize nearest convenient restroom.	Sufficient unpaid time for employees who work 8 consecutive hours or more.
Nebraska	None	30 minutes off premises, between 12 noon and 1pm or at another suitable lunch time.
Nevada	Paid 10-minute rest period for each 4 hours worked or major fraction thereof; as practicable, in middle of each work period.	30 minutes if work is for 8 continuous hours.
New Hampshire	None	30 minutes after 5 consecutive hours, unless feasible for employee to eat while working and is permitted to do so by employer.
New York	None	30 minute noontime period for employees who work shifts of more than 6 hours, 60 minutes noontime period for employees who work in factories, an additional 20 minutes between 5pm and 7pm for those employed on a shift starting before 11am and continuing after 7pm.
North Dakota	None	30 minutes, if desired, on each shift exceeding 5 hours.
Oregon	Paid 10-minute rest period for every 4-hour segment or major portion thereof in one work period; as feasible, approximately in middle of each segment of work period.	30 minutes, with relief from all duty, for each work period of 6 to 8 hours, between second and fifth hour for work period of 7 hours or less and between third and sixth hour for work period over 7 hours.
Rhode Island	None	20 minute mealtime within a 6 hour work shift, and a 30 minute mealtime within an 8 hour work shift.
Tennessee	None	30 minutes for employees scheduled to work 6 consecutive hours or more.
Washington	Paid 10-minute rest period for each 4-hour work period, scheduled as near as possible to midpoint of each work period. Employee may not be required to work more than 3 hours without a rest period.	30 minutes if work period is more than 5 consecutive hours, to be given not less than 2 hours nor more than 5 hours from beginning of shift.
West Virginia	None	20 minutes for employees who work 6 consecutive hours or more.

† There are a number of exclusions and specifications that determine applicability of these laws to employers. This table is meant to serve as a quick reference for readers and should not be interpreted as a complete description of these laws.

deducted for unpaid lunch breaks that do not meet DOL's definition of a bona fide meal period.

State Law. Most states do not have meal and rest break regulations, and in these cases, the liability is likely to emerge from allegations of company policy violations where an employer provides meal and rest breaks benefits. Liability may also emerge from violations of 29 CFR Part 516 of the FLSA regarding accurate timekeeping where employers have not accurately and consistently determined when a break should be unpaid. It behooves employers to carefully review their meal and rest break policies and evaluate how these policies are practiced to determine whether they are in compliance and if these policies need to be changed to minimize complaints or potential lawsuits.

Several states have laws that govern meal and rest breaks, and general information about these laws is summarized below. (See Table 1.) Readers can obtain additional information about these state laws at <http://www.dol.gov/esa/programs/whd/state/rest/htm> for rest breaks and at <http://www.dol.gov/esa/programs/whd/state/meal/htm> for meal periods.

California has the most extensive meal and rest break laws, so it is not surprising that the largest verdict against a major employer for violating meal period laws, *Savaglio v. Wal-Mart Stores, Inc.*,⁵ occurred in that state. In addition to the Wage Orders issued by the California Industrial Welfare Commission (described in part above), under California Labor Code 226.7, "No employer shall require any employee to work during any meal or rest period..." and "[i]f an employer fails to provide an employee a meal period or

rest period... the employer shall pay the employee one additional hour of pay, at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." The extra hour of pay is called the "California Premium." This premium is calculated per employee, per day, and is paid to the employee in the same paycheck as his/her paid work time. At this time, it is not clear whether the California Premium is a "penalty" or "wage," but the resolution of this issue will have a significant impact on the amount of liability an employer can face.⁶ Nevertheless, it is clear that poor execution of meal and rest break policies and ineffective compliance efforts could result in many millions of dollars in lawsuits in any state.

REASONS FOR NON-COMPLIANCE

The sources of the non-compliance problem may lie in several places. A brief summary of potential sources are provided below.

1. **Not understanding the requirements.** Clearly, one source is a lack of information about applicable laws and company standards regarding meal and rest breaks. Managers and supervisors who work directly with non-exempt employees are often unaware of what is required. They may not recognize the importance of their specific day-to-day responsibilities on behalf of the company. When compliance responsibilities are not spelled out for managers and supervisors in job descriptions, operations manuals, training guides, company communications, performance appraisals or

other company documents, it is unlikely that managers and supervisors will understand how they create risk for the company.

2. **Understaffing.** Employers that operate with lean labor budgets in an effort to keep labor costs down, run the risk of having an insufficient number of employees to meet the daily work demand. Labor scheduling systems that are based on productivity or workload analyses have the ability to staff stores and other places of business to meet general work demand. Without knowing specifically the ratio of labor hours per unit of work (e.g., sales per labor hour), employers can find themselves understaffed due to several factors such as a bias to err on the side of too few employees rather than too many and not replacing absent employees or vacant positions. Also, without taking meal and rest break time into account when projecting required labor hours, the organization will have too few employees on staff to cover the work demand. When companies are understaffed, violations are likely to occur because (a) there are not enough personnel to relieve employees for breaks and meal periods, and (b) the workload is too great to stop work for breaks and meal periods.

3. **Management too busy to monitor meal and rest breaks.** Employers may have the perception that management has too many

day-to-day responsibilities to closely supervise and verify that meal and rest breaks are appropriately provided and taken. This perception may very well be reality. As companies thin their ranks of managers to cut costs, the remaining managers typically take on more responsibilities and supervise more employees. In addition, day-to-day fluctuations in staffing (e.g., absenteeism) and work demand (e.g., a rush in business) make it difficult for managers to appropriately staff the work throughout the work day. However, the law and company policy are insensitive to span of control issues or fluctuations in work demand, and management is still responsible for compliance regardless of the expansion of duties and direct reports.

4. **Employee self-management.** There may be several reasons why employers prefer that non-exempt employees manage themselves, but the net result of this preference may be increased liability. Self-managed employees can create liability several ways: (a) employees may take their meal and rest breaks in a manner inconsistent with regulations (e.g., outside the window of time allowed, eating while working); (b) employees may be unduly influenced by peer pressure and internal competition to not take meal and rest breaks to produce more on the job; and (c) employees who believe they can may believe improve their chances of advancement in the company

may voluntarily miss their meal and rest breaks. If employers hold employees responsible for taking their meal and rest breaks as required by law, violations can occur for several other reasons: (a) employees may not have the ability to take their meal and rest breaks because they cannot find someone to relieve them from their work duties; (b) employees may not have the authority to leave the work station whenever they want; and (c) employees may have too much work to accomplish to take a break before they leave for the day. While on the surface giving employees discretion to “manage” their workday (including when and how long they take meal and rest breaks) appears desirable, it is a risky strategy. Moreover, making employees responsible for their own meal and rest breaks does not relieve management of its burden of compliance.

5. **Unsupervised field employees.** Employees who work autonomously and independently in the field (e.g., truck drivers, couriers) present unique challenges regarding meal and rest break laws and policy. Because they are largely unsupervised, it is difficult to control when and how long they take breaks. Employers can monitor this behavior by reviewing time records, but violations may already be a fact, leaving employers in the position of chasing down “violators” and attempting to change their behavior. The problem is that these em-

ployees are able to exercise discretion in the timing of their breaks to suit their individual needs and preferences. Unless there are specific controls in place to channel the timing and length of breaks, individual discretion may trump compliance efforts. Despite the difficulty of managing field employees, management still has responsibility for ensuring compliance.

6. **Corporate culture that encourages “gung ho” behavior.** Corporate culture can also contribute to violations when the culture encourages employees to “do whatever is necessary” to meet productivity goals or to deliver high levels of customer service. “Gung ho” behaviors, such as working extraordinary hours, at an accelerated pace, or at higher levels of productivity often appear in conflict with stopping work and taking a break. The stronger the message company leadership sends to employees to work in this manner, the greater the risk of violations. For example, corporate culture that values service to the customer above all else including employees’ needs (e.g., taking a rest break or lunch) encourages employees to skip breaks, and if any take their breaks, these employees are perceived as disloyal and not a valued member of the organization. Social control through corporate culture strongly influences employee behavior, and it can make conformance to meal and rest break laws and policy very difficult.

A FALSE TUG-OF-WAR

Sometimes the problem of compliance with meal and rest break laws and policy is characterized as a tug-of-war between employee interests and management's efforts to comply. "I don't want to be told when I have to take a break or stop work to eat lunch," is a common complaint heard in companies where these laws and policy are poorly integrated with the organization of work and culture. The tug-of-war results when business operations are out of alignment with models of "successful" employees and employee rights.

Most fundamentally, companies want to maximize productivity and profit whenever possible, particularly when a company is under the watchful eye of Wall Street. All U. S. companies must comply with state and federal laws, and these laws directly impact a company's bottom-line (e.g., labor costs as a result of overtime requirements, paid rest breaks, coverage for meal periods). Companies often walk a thin line driving profit while communicating to employees the importance of taking full and timely meal and rest breaks. Some employees interpret corporate communication as "double messages." Employees, wanting to keep their jobs and contribute to company success, may elect to "help" the company by voluntarily missing their meal and rest breaks. So begins the "tug-of-war." It is a false tug-of-war because management without question has an obligation to comply with the law and to facilitate the taking of meal and rest breaks through its actions and words. Tolerance of a perceived tug-of-war is evidence of a company's failure to build the appropriate

structures, processes, and systems to ensure compliance.

A SOLUTION

How do you get management and employees on the same side of compliance? The following is a preliminary (but not exhaustive) list of conditions that facilitate compliance:

- sufficient staffing to permit full and timely breaks
- a daily work schedule that provides for full and timely breaks
- a management team that is committed to ensuring and in fact ensures that full and timely breaks are taken
- a reliable mechanism for recording meal and rest breaks taken
- a place where meal and rest breaks can be taken away from work so that interruptions do not occur
- a reliable mechanism for detecting missed, shorted or untimely meal and rest breaks
- a high integrity process for addressing missed, shorted or untimely meal and rest breaks to minimize or eliminate their future occurrence
- a compensation and reward system that does not encourage working through meal and rest breaks

NO GUARANTEES

Having these elements in place does not guarantee that a company will not have meal and rest break violations or a lower risk of lawsuits. What may make the difference between a company that suc-

cessfully complies with the law and one that could be in compliance but isn't, is the company's commitment to utilizing these elements fully and with integrity to minimize the occurrence of violations and to swiftly remedy situations that cause them to occur. Establishing a culture of compliance is key.

EVALUATING YOUR RISK

How can you evaluate your risk of a meal and rest break lawsuit? Or, if a lawsuit has already been filed against you, how can you evaluate your strengths and weaknesses at trial? Here are some places to look.

1. **How your company makes money.** How a company makes a profit can create conditions that may encourage non-compliance. In general, if a company's business model imposes significant constraints on how and when people work, there is less flexibility for scheduling breaks and ensuring that employees take them. For example, if customer service is primary to a business, the presence (absence) of customers can dictate when employees can take breaks. Similarly, if the business is driven by rigid timelines or deadlines, there are potential constraints on if and when employees can take breaks. Additionally, self-directed work that is performed under intense pressure to make productivity goals or to complete work by end of day creates a situation where stopping work for meal and rest breaks is undesirable. These examples illustrate how the business itself can invite situations in

which compliance with meal and rest break law is difficult without explicit and effective controls in place to ensure meal and rest breaks are protected.

2. How your company is structured to ensure compliance with policies and the law. Several elements of organizational structure are important for compliance:

- a. a clear and consistently enforced meal and rest break policy;
- b. an accurate timekeeping system to verify that meal and rest breaks were taken and when they were missed;
- c. job descriptions for managers that state clearly and unambiguously that management is responsible for ensuring that meal and rest breaks are taken;
- d. a labor budgeting and scheduling system that is designed to adequately cover and adjust to changing work demand;
- e. a selection and training system that results in the delivery of competent employees who are capable of meeting performance expectations;
- f. a responsive employee feedback and grievance system that identifies and remediates in a timely fashion instances of non-compliance; and
- g. a promotion system that takes into account compliance with meal and rest break law.

3. How your company culture supports compliance with policies and the law. If the culture reinforces self-sacrifice to the point of skipping meal and rest breaks and working off the clock to further company success, employees will be disinclined to ask for and take breaks. Conversely, a culture that clearly reinforces compliance with meal and rest break policy and the law through both word and deed will go a long way toward encouraging employees to take their full and timely meal and rest breaks or reporting to management when they were not taken. That culture is developed through the company's stated values, leader and manager behavior, and rewards and recognition for meal and rest break compliance.

4. How your company staffs the work demand. The labor scheduling system can directly impact the occurrence of understaffing in an organization. Understaffing can be reduced by implementing a productivity-based scheduling system, one that directly ties staffing to projected workloads with an established minimum staffing level to avoid insufficient staff to cover meal and rest breaks. Labor scheduling systems that are based strictly on a percentage of sales, for example, without anchoring that percentage on an understanding of minimum staffing needs, may not provide adequate staffing to cover meal and rest breaks.

5. How your company measures productivity and overall success. Performance measurement is critical to company success; performance targets and expectations of achievement should be set at a level that is both motivating and achievable without violating the law. Careful studies of productivity should be carried out to determine appropriate performance targets, and a feedback process should be built into the performance measurement system to allow adjustments in targets given historical trends. Uninformed goal-setting, rigid adherence to preset goals and targets, and the absence of a feedback process regarding the effectiveness of goals and targets are likely to invite "gung ho" behavior which could lead to insensitivity toward meal and rest break compliance. More important, a definition of company success that does not include compliance with all laws is an invitation for violations.

6. How your company compensates and rewards management and nonexempt employees. A major signal to management regarding what the company values comes through the compensation and reward system. If non-compliance is tracked by a performance measurement system and this information is taken into account when promotion and bonus decisions are made, management has a disincentive to violate meal and rest break law. If compliance is tracked and this information is taken into account

when promotion and bonus decisions are made, management has an incentive to comply with meal and rest break law. Either way, compliance must be a factor in a company's compensation and reward system to highlight its importance relative to other managerial behaviors and thus, drive behavior toward compliance.

7. How your company identifies and addresses noncompliance. To identify violations, a company needs a reliable system to detect shorted, late, or missed meal and rest breaks. To avoid the appearance of indifference to the violations, the employer needs to find out the nature and extent of the problem when violations occur. If a meal or rest break was not provided, the occurrence should be investigated by a disinterested or independent party (e.g., internal audit department, outside expert) to reveal the cause of the missed, late, or shorted break. If, through an investi-

gation, a pattern emerges that suggests a common cause, such as staffing, poor adherence to policy, a lack of training in the policy, a rogue manager, a rogue employee, or poor job design, swift remedial action should be taken. Deciding to terminate monitoring of meal and rest breaks or to eliminate identification and investigation of violations is an invitation to more violations. More important, it is a willful act to conceal a problem.

8. How your company deals with bad news. There are two roads to travel when a significant problem emerges. One road leads to concealment of the problem and "spin"; the other road leads to acknowledgement of issues and correction. If it can be shown that a company knew it had a serious problem with violations and executives/management chose to conceal it, a lawsuit will be considerably more costly to the company than would be otherwise because of the

possibility of punitive damages. However, if a company knew it had a problem and took effective steps to correct the problem, then the outcome of a lawsuit will be more favorable.

CONCLUSION

Until the laws change or companies soften their policies regarding meal and rest breaks, liability will be a reality for companies that don't pay attention to this issue. There are ways to make employee interests compatible with state law and company policy, but it will take a critical review of how a company operates and the structures, processes, and systems in place to reveal how to achieve greater compatibility. A path forward is provided here.



NOTES

1. *Savaglio v. Wal-Mart Stores, Inc.*, 2004 WL 2034092 (Cal. Super. Ct. Trial Div. 2004).
2. 29 U.S.C.A. §§ 201 et seq.
3. 29 CFR 785.19.
4. 29 CFR Part 516.
5. *Savaglio v. Wal-Mart Stores, Inc.*, 2004 WL 2034092 (Cal. Super. Ct. Trial Div. 2004).
6. If the California Premium is considered a wage, the liability can go back four years and could involve waiting time penalties.