

# CALIFORNIA HR

C O N F E R E N C E <sup>TM</sup>

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**WAGE & HOUR 2015: ON CALL & REST BREAKS--AVOIDING THE BIG UNINSURED CLAIM**

**DATE:** MONDAY, AUGUST 31ST | 7:00 AM TO 8:15 AM

**TRACK:** EMPLOYMENT LAW & LEGISLATION

**CREDIT TYPE:** CALIFORNIA

# State v. Federal Law

- California Labor Code and I.W.C. Wage Orders [CCP 382 Opt Out]
- Fair Labor Standards Act [minimum wage and overtime only] [29 U.S.C. 216(b) Opt In]
- More protective law governs



# Employees v. Independent Contractors

- Presumption that worker is employee
- Depends on circumstances
- Main issue is whether employer has “right to control” as to the work done and manner and means performed
- *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341 [many more factors]

# Minimum Wage

- \$8.00 per hour in California
- \$7.25 per hour under FLSA
- *Armenta v. Osmose*: No averaging under California Labor Code [Okay under FLSA]
- *Ontiveros v. Zamora*: Extends *Armenta* to Piece Rate
- One-Way attorney's fees under LC1194



# Healthy Workplace Healthy Family Act, Labor Code § 245 et seq.

## Eligible Employees Effective July 1, 2015:

1. Employees who have worked in California for 30 or more days within a year from the start of their employment.
2. Employees must have worked for the company for 90 days from their date of hire before they can take paid sick leave.
3. Applies to temporary, full-time, and part-time employees.



# Accrual

- Eligible employees earn one hour of paid sick leave for every 30 hours worked.
- Employers may limit the amount of sick leave used in one year to 24 hours or 3 days of leave.
- Accrued sick leave may be carried to the next year, but may be capped at 48 hours or 6 days of leave.



# Remedies, Labor Code § 248.5

Reinstatement

Back pay (i.e. “wages”)

Payment of sick days withheld (i.e. “wages”)

Administrative penalties:

If sick days withheld, dollar amount of paid sick days withheld multiplied by three or \$250, whichever is greater

If other harm resulted (such as discharge), administrative penalty of \$50 for each day or portion thereof, not to exceed \$4,000



# Qualifying Reasons and Use of Sick Leave

Paid sick leave may be used for the following:

Diagnosis, treatment or care of an existing health condition of an employee or covered family member

Preventative care for an employee or an employee's covered family member

Other specified purposes: when employee is a victim of domestic violence, sexual assault or stalking

# Overtime Issues

- Daily Overtime v. Weekly Overtime
- No Stacking
- Calculating “Regular Rate of Pay”
- Bonuses
- Commission/Piece-Rate Formulas
- Workday and Workweek Rules



# Alternative Workweek Schedules

- Permits 10 hour and 12 hour shifts without overtime premium pay
- Requires secret ballot vote and registration with the DIR
- Check website to find out if registered

# Off-the-Clock Claims

- Engaged to wait or waiting to be engaged
- Class Certification issues
- *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000)
- *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046 (9<sup>th</sup> Cir. 2010)



# Exempt v. Non-Exempt Employees

- All employees are entitled to overtime premium pay
- Unless they're not Administrative, Professional, Executive, Outside Sales, Inside Sales
- Special rules for Government & CBAs

# Meal and Rest Period Compliance

- Must “provide” meal and rest periods in accordance with IWC Orders or pay one hour of pay for each violation (max. one meal and one rest period premium pay per day)
- California Supreme Court decided in *Brinker v. Superior Court*, Case in April of 2012
- Must provide 30 minute, uninterrupted, duty-free (unpaid) meal period, free to leave premises
- Two meal periods for shifts over 10 hours

# Meal and Rest Period Compliance



- On-duty meal periods permitted only if off-duty meal periods not possible or practicable and require signed agreement
- Must authorize and permit a paid 10 minute off-duty rest period for every four hours worked
- Attorney's fees are no longer recoverable by either side (*Kirby v. Immoos*; *McGann v. United Parcel Service, Inc.*)

# Meal and Rest Period Compliance



## *Brinker issues – the new landscape:*

- Can employees waive meal periods or must they take them?
- Must meals be provided within first five hours and without more than five hours before a second period, or can they be provided at the beginning and/or end of shifts?
- Can employees elect to take on-duty meal periods whenever they want?
- Can classes be certified on meal and rest period claims?

# Seating and Other Wage Order Requirements

- *Bright v. 99¢ Only Stores* (November 12, 2010) 189 Cal.App.4th 1472
- *Home Depot U.S.A., Inc. v. Superior Court (Harris)* (December 22, 2010) 191 Cal.App.4th 210

Walmart 

99¢  
only  
STORES.

# Final Pay Issues

- Labor Code Section 203 requirements
- If employee quits, must pay within 72 hours
- If employee terminated, must pay immediately
- Penalty for “willful” violation is a day’s wages up to 30 days until paid: What does “willful” really mean?
- Good faith defense to “willfulness” (reasonable, good faith defense that if successful would preclude recovery)



# Arbitration of Wage and Hour Disputes

- *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,  
129 S.Ct. 2793 (U.S. April 27, 2010)
- *AT&T Mobility, LLC v. Concepcion* (No. 09-893).
- *Sonic-Calabasas A, Inc. v. Moreno* (2/24/11)  
Cal.4th -, 2011 WL 651877



# Settlement Issues

- *Villacres v. ABM Industries, Inc.* (October 22, 2010)  
189 Cal.App.4th 562



# Issues Before The Supreme Court



## Augustus case:

1. Do Labor Code, § 226.7, and Industrial Welfare Commission (IWC) wage order No. 4-2001 require that employees be relieved of all duties during rest breaks?
2. Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833?

# Augustus: The "Rest Break" Case



- Rights of employees and the duties of an employer vs. meal breaks (Brinker decision).

*The employer kept its guards on duty during rest breaks.*

**Issue #1.** Trial Court: Employer violated the law. Court of Appeal: employer did not violate the law because 1) rest breaks are paid anyway and 2) a rest break is valid even if the security guard is required to perform some, but not all, of his/her normal tasks. Thus, the Supreme Court wants to know: must employees be “relieved of all duties” like they would be for meal breaks (the Brinker case)?

# Augustus: The "Rest Break" Case



**Issue #2.** While the Court of Appeal agrees that an employer cannot make an employee perform “work” while on a rest break it said that the security guards in Augustus, while on break, were at work vs. “performing work.”

Issue is not “should the employer pay for the rest break time?” (They are already paid.) Rather, “If the guards are on call, as they were in Mendiola, does that mean they are ‘working?’” If “on call” is “compensable time,” does it also mean that “on call” is “verb working” as well? If the answer is yes, then the Court of Appeal in Augustus is wrong.

# Status of Augustus Case

Opening Brief on the Merits filed on June 29, 2015. Respondent's Brief (opposition brief) due on approximately August 29, 2015 (could be September 29, 2015). Oral argument – perhaps by the Spring of 2016?



# Status of Mendiola Case

- 7-0 unanimous decision by the Cal Supreme Court in January 2015.
- Legal Issue: Is the time a security guard spends “on call” on the premises of the employer considered “compensable time?”  
So, should the employer pay the employee for that time?



# Impact of Mendiola Case

1. Does it affect all California employees who may be “on call?”
2. Are there different levels of being “on call?”





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