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Meal Break Madness

By Erin K. Tenner, Esq.

The Supreme Court has finally weighed in on meal break requirements, but a lot of confusion is still out there and plaintiff's attorneys are taking full advantage.

The February 2021 Supreme Court Case on meal period pay has left some employers uncertain whether they can ever comply with the meal period laws. In *Donohue v. AMN Services LLC*, 11 Cal 5th 58, the California Supreme Court answered two questions: "whether an employer may properly round time punches for meal periods, and whether time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations." *Id.* at 66. The Court made clear that AMN had in fact overpaid its employees for actual hours worked, and it was only the question of whether it had failed to properly pay premium pay that was at issue. The Court also made clear that the question arises only under California law since the Fair Labor Standards Act does not require meal breaks.

The Wage Order in question, Wage Order 4, made clear that if an employee was not provided a full 30 minutes for a meal break, they are to be paid for a full 30 minutes of additional work. Any reduction in the meal period, no matter how small, is a meal period violation unless it is voluntary. "The legislative history indicates that the meal period provisions are not 'aimed at protecting or providing employees' wages." *Id.* at 71. Rather, Courts construe these laws liberally to ensure minimum meal periods are provided. If violations are resulting from employees returning early from their meal break, a solution may be to increase the allowed time for meal breaks to 35 or 40 minutes so that if they get back early, they are not violating the minimum requirement or disciple employees for returning early unless they request and sign a meal break waiver. Making clear to employees that waiver is an option is a great idea, but doing it as a group is better than doing it individually.

The Court distinguished the practice of rounding for purposes of calculating pay, from rounding for purposes of determining meal break compliance, and made clear that they are not treated the same. While rounding for purposes of calculating pay is acceptable as long as the rounding goes up and down, and not just down, it is not acceptable for purposes of determining meal break compliance because, while pay can be made up and evens out over a week, meal breaks are not the same and the minimum has been determined to be necessary for health and well-being. If an employee's meal break is cut short by even a couple minutes, it could mean being unable to be nourished and return an important call regarding a doctor's appointment or family.

The Court also pointed out that it has never ruled on the validity of rounding for purposes of pay and did not do so in *Donahue*. The Court may be asked to do so in the future and although there is precedent to support rounding, it is at the appeals court level and could be overturned in the future by the Supreme Court.

The Court also made clear that employers, and not employees, are responsible for proper record keeping. If a meal break is not taken or is less than the full 30 minutes, it creates a rebuttable presumption of a meal break violation and the employer must then plead the affirmative defense of waiver of the meal break and prove it. If employees fail to record a meal break, even if they took it, or take a short meal break, but fail to sign a meal break waiver, the employer is responsible for paying for the break time and for one hour of premium pay at the employee's regular rate of pay unless they have some other way of proving that the employee took the break voluntarily. Some evidence might be prior discipline for violating meal break requirements or a written waiver.

The Court also distinguished Labor Code Section 512, which authorizes "waived" meal periods only under limited circumstances, from the affirmative defense of "waiver" of a meal period. The distinction seems to be that the "waived" meal period is rare because it is requested or required by the employer, whereas the "waiver" is voluntary and requested by the employee. A "waived" meal period is only permissible in situations that would "seriously disrupt the operations of the employer." What qualifies for this standard is unclear, but it seems certain a long surgery might qualify, unless the doctors or nurses could be switched out without compromising success, but a long vehicle repair may or may not qualify. Whether a sales negotiation meets this high bar is unclear, but seems unlikely, unless a dealer could show that the negotiation could not be finished before the break, and that bringing in another sales person would be likely to frustrate the sale to the point of losing it. The Court made clear that the rebuttable presumption applies equally to short meal periods as well as to missed meal periods. *Donahue* at 77. The Court also made clear that the rebuttable presumption only arises if the records show short or missed meal breaks with no appropriate compensation (which includes one hour of premium pay) and that the presumption can be rebutted by showing appropriate compensation or by showing waiver of the meal break. *Id*. at 78.

On July 15, 2021, the California Supreme Court further clarified the law on the issue of the rate of pay that is to be used to pay premium pay. The question before the Court was whether the correct calculation of regular rate of compensation is the same rate as the "regular rate of pay" required for overtime or whether regular rate of compensation for purposes of premium pay for meal break violations means the base hourly rate. The Court ruled that regular rate of compensation is calculated the same way for purposes of calculating premium pay for meal break violations as it is for purposes of calculating overtime pay.

Here is what you need to know:

1. Scheduling meal breaks is important because it proves that you were providing a meal break.

2. Meal Break Waiver agreements are important for employees who are voluntarily giving up a meal break, eating while working, or taking a meal break that is less than 30 minutes, because it is evidence that the missed meal break was voluntary.
3. If an employee refuses to adhere to their meal break schedule and returns early from breaks or misses breaks and does not request a meal break waiver, as much as you may not want to discipline them, you have to because if you don't, it could be very costly.
4. Having a clear employment policy stating that managers are not to require employees to miss meal breaks provides evidence the employer did not discourage meal breaks.
5. Premium pay of one hour is required if an employee is required to miss a meal break, and may or may not be enough to satisfy the employer's legal obligations because the law is unclear when an employer may require a meal break to be waived.
6. The burden of proof is on employers to provide uninterrupted 30 minute meal breaks. If meal breaks are scheduled, the burden used to shift to the employee to prove the missed or reduced break was required. That has changed. If an employee does not take a meal break, or clocks in early from lunch, the burden is now on the employer to prove the missed meal break was voluntary. A meal break waiver provides evidence the waiver was voluntary.
7. Whenever an employee misses a meal break or clocks in early from lunch, thereby taking a meal break that is less than 30 minutes, the employee must be paid for the entire 30 minutes.
8. If an employee involuntarily misses a meal break or takes a break less than 30 minutes, one hour premium pay is required in addition to pay for the missed break.
9. If an employee misses, or returns early from two meal breaks in one shift, the employer must pay for both missed meal breaks and one hour of premium pay.
10. If the additional time for the meal break, when added to other hours worked, is enough to entitle the employee to overtime, overtime must be paid.
11. All calculations for meal break premium pay are to be at the regular rate, calculated in the same way it is calculated for overtime.

While these rules are general statements of current law and not legal advice, the law is in a state of flux and two more cases (*Naranjo v. Spectrum Security Services* and *Grande v. Eisenhower Med. Ctr.*) are currently before the Supreme Court which will further define 1) whether providing premium pay reduces penalties payable to the state in a PAGA case for other violations (such as accurate wage statements) arising out of the meal break violations and 2) whether a class of workers can settle with a staffing agency and then sue its client for the same obligations. If you have questions about what is required, check with your attorney. Everything you do to try to comply with the law, regardless of how unclear it is, will help your case if you ever are sued. This is especially true in light of the new law criminalizing intentional failure to pay wages which goes into effect January 1, 2022.

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