

Meal and Rest Breaks: The Next Wave of Wage and Hour Class Actions?

By Joanne Deschenaux

Class-action litigation claiming denial of meal and rest breaks is “definitely hot right now,” Samantha N. Hoffman, an attorney in the Orange County, Calif., office of Jackson Lewis, told *SHRM Online* in a July 18 interview. About half of her current cases, she said, deal with this issue.

This “litigation explosion” in California follows an April 2007 California Supreme Court ruling ([*Murphy v. Kenneth Cole Productions*](#)) that employers that violate the mandatory meal and rest period requirements of state law are liable for up to three or four years of back pay to compensate for the missed breaks and not one year, as employers had argued.

“Employment law is about emotions and money,” said Michael Lotito, an attorney with the Jackson Lewis office in San Francisco and a former SHRM board chair. Before the state supreme court decision, he said, “there was not enough money to sustain plaintiffs’ lawyer’s contingency fee in a class-action lawsuit if you were going to limit the suit to one year. Now, there’s enough money in it to bring a claim.”

But employers in California are not alone in struggling with compliance with break laws and regulations and in facing expensive lawsuits that may result in damages, as well as penalties and attorney fees, for failure to give employees the required rest or meal periods.

An Oregon appellate court ruled on June 13 that employees may sue in court for alleged violations of the Oregon rest break (but not meal break) requirements ([*Gafur v. Legacy Good Samaritan Hospital*](#)). In the past, J. Kent Pearson Jr., an attorney in the Portland, Ore., office of Bullard Smith Jernstedt Wilson told *SHRM Online* on July 18, employers had successfully argued that the exclusive remedy for the failure to provide a required meal or rest break was an administrative penalty assessed by the Oregon Bureau of Labor and Industries.

Two Violations Cost a Quarter of a Billion

And then there is the Wal-Mart litigation. The company’s 2007 Annual Report, released in March 2007, acknowledged that Wal-Mart was a defendant in dozens of lawsuits in which current and former hourly associates were alleging, among other wage and hour claims, that the company failed to provide legally required work breaks. In fact, Wal-Mart has already had two jury verdicts entered against it in break cases. In December 2005, a California jury awarded \$172 million to Wal-Mart workers for violations of the lunch and break provisions of the state wage and hour laws. In October 2006, a Pennsylvania jury found the retailer liable for at least \$78.5 million for violating Pennsylvania labor laws by forcing employees to work through rest breaks and off the clock.

A pivotal issue in each missed break case is whether the trial court will permit it to proceed as a class action or whether the court will deny class certification and require that each worker’s claim be heard individually. If class-action status is denied, individual employees may not be

able to pursue their claims at all because it would not be worthwhile for a plaintiffs' attorney to continue with the case, Hoffman said.

According to Pearson, the grant or denial of class-action status turns on the nature of the claim. "It depends," he explained, "if employees can show that the denial of the breaks was done pursuant to a company policy. If the issues are individualized," the company will be more likely to be successful in winning the class certification battle. "That's where the real fight is," he observed.

Penalties Under State Law: Oregon and California

In Oregon, the meal and rest break regulations generally require that employers provide paid rest breaks of not less than 10 minutes, and unpaid meal periods of 30 minutes or more. The number of meal and rest breaks depends on the number of hours an employee works.

In the *Gafur* decision, the appellate court ruled that because the regulations require employers to provide employees with a paid rest period, the failure to provide the paid break denies the employees 10 minutes of pay for each rest break missed. The court concluded that there was no cause of action for failure to provide the unpaid meal period.

Although this may not amount to very much money for any one employee, if you multiply it by the number of affected employees, it can come to quite a large sum, Pearson noted. In addition, an employer's failure to pay employees for this 10 minutes can also subject an employer to statutory penalties, and, of course, a successful plaintiff's attorney will likely be awarded attorney fees. "The battlefield," Pearson said, "is not so much about the unpaid break time. It's a penalty wage issue and attorney fees issue."

Pearson said that since the Oregon court decision, he is aware of pending class-action litigation in which rest breaks claims were added to the previous wage and hour claims, such as claims for unpaid overtime or minimum wages. He said that he expects to see more claims in the future.

In California, if an hourly employee fails to get a rest break, he or she is entitled to an extra hour's pay. If the employee also does not receive a lunch break, he or she is due another hour's pay, Hoffman explained. Taking into account the number of employees who may be missing breaks, and the fact that, since the April supreme court decision, employees may be entitled to pay for three or four years of missed breaks and lunch periods, an employer's potential liability can be huge, Hoffman said. She added, that because of this fact, "very few of these cases go to trial. When push comes to shove, the company gets nervous" and settles the lawsuit.

In California, she said, as in Oregon, she is seeing missed breaks claims added to other wage and hour litigation over such things as missed overtime. She is also seeing, she said, cases being brought that advance only missed break claims.

Because wage and hour laws vary by state, the types of damages and penalties available to employees claiming missed breaks also vary. It is therefore important for an HR professional to become familiar with his or her own state's wage and hour laws.

Employers Must Monitor and Document

Even before the recent court decision in Oregon, Pearson said that he had been advising employers “that it is imperative that there be some mechanism to keep track of rest breaks taken.” If the company uses a time clock, employees should clock in and out. Or, in the absence of electronic verification, supervisors’ should keep track, he noted.

And if an hourly employee asks to skip a break, “just don’t do it,” Hoffman said. “Don’t let employees waive breaks.” She further suggested that, in order to avoid litigation, HR should look at all the employers’ policies and practices and make sure that they are in compliance with the law. Further, she concluded “document everything.” Make sure that there is documentation that employees are taking all of their required rest and meal breaks.

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