Be Proactive: Avoid Falling Prey to Wage & Hour Lawsuits: Worktime

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What We Will Cover

The amount of money an employee should receive cannot be determined without knowing the number of hours worked. We will discuss the principles involved in determining what hours constitute worktime in the following contexts, comparing federal and California law:

- Portal to Portal
- Doffing & Donning
- On-Call/Standby/Waiting Time
- Call-Back Time
- Reporting Time
- Travel Time
- Training Time
- De Minimis Time
- Volunteer Time
- Comp Time
What is Worktime?

- **Worktime** is the time an employee "suffers or is permitted" to work.

- **Worktime** is work not requested but suffered or permitted.

- **Worktime** means all of the time that employees spend working for an employer.

- **Worktime** is any time that employees spend that benefits their employers - directly or indirectly.

- **Worktime** includes all time, even if an employee is not doing work but is under the control of the employer.
What is Worktime?

- For example, an employee may voluntarily continue to work at the end of the shift.
- The reason is immaterial.
- The employer knows or has reason to believe that an employee is continuing to work. Thus, the time is working.
- Employers must pay employees for all of employees' worktime.
- The Fair Labor Standards Act (FLSA) does not define "work."
- Nor does the California Labor Code or Wage Orders.
- We look to case law to determine what work is compensable.
When both federal and state laws exist on a specific topic, the law which is more restrictive (more favorable to the employee), will govern.
Whether the employee's time is spent primarily for the benefit of the employer.

- *Tennessee Coal, Iron & RR. Co. v Muscoda Local 123*, 321 U.S. 590, 598 (1944)

- And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used -- as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business. \(^{11}\)

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\(^{11}\) Webster's New International Dictionary (2d ed., unabridged) defines "work" as follows: "1. To exert oneself physically or mentally for a purpose . . ." The word "employ" is defined as follows: "2. To make use of the services of; to give employment to; to entrust with some duty or behest."
California

- Whether the employee is subject to the control of the employer.


  - The concept of "control" is narrower than federal standard.
Some general rules:

- **The Portal-to-Portal Act of 1947 ("POP")** (29 USC §§251 et seq.) provides that:
  - travel time “to or from the place of performance of the principal activity”; and
  - "activities which are preliminary or postliminary to such principal activity" are not compensable;
  - unless there is an express agreement or a custom or practice in effect. 29 CFR §785.50

- POP limits compensable time and was a response to Court decisions/DOL extending scope of compensable time. (California does not have its own POP.)

- **Caveat:** In California, time traveling on vehicles the employer provides for transporting workers from the "reporting site" to the job site (where the principal activities occur) is compensable time. *Morillion, supra*, at 578.
The Code of Federal Regulations ("CFR") gives some "guidance" in defining necessary terms under the POP and case law has further interpreted what it means.

For example:

- The term "principal activities" includes all activities which are an integral part of a principal activity;
- "Preliminary activities" do not include "principal activities.”
Some examples include:

- Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.

If an employee in a chemical plant, for example, cannot perform his/her principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.

On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities. (29 CFR §785.24)
"Workday" in general, means the period between "the time on any particular workday at which an employee commences his/her principal activity or activities" and "the time on any particular workday at which he/she ceases such principal activity or activities."
Exertion

- The United States Supreme Court originally stated that employees must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business."

Exertion

- Subsequently, the Court ruled that there need be **no exertion at all** and that all hours are hours worked which the employee is required to give his employer.

  “An employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.”

  “Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity.”
Exertion

“Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.”

Other cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs.
In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Supreme Court determined that, despite the POP language, the FLSA required compensation for any activities that are *integral and indispensable* to the principal work. In *Steiner*, the Court held that the time employees at a battery plant spent "donning" (putting on) and "doffing" (taking off) clothes and showering, which was required by the employer to protect employees from hazardous materials, must be compensated.

In *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956), knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday. The Supreme Court held that these activities are an *integral and indispensable* part of the employees' principal activities.
In *IBP Inc. v. Alvarez*, 546 U.S. 21 (2005), the Supreme Court was asked to decide whether the time meatpacking plant employees spent walking to and from their work stations after donning and before doffing protective clothing was compensable. Assuming the donning and doffing time was compensable under *Steiner*, which IBP did not contest, the Court held that:

1) time spent walking between changing and production areas is compensable under the FLSA;

2) time spent walking to and from the production floor after donning and before doffing as well as time spent waiting to doff is covered by the FLSA; and

3) time spent waiting to don the first piece of gear is a "preliminary" activity and is thereby excluded from the FLSA.
In *Spoerle et al. v. Kraft Foods Global Inc.*, 527 F. Supp. 2d 860 (W.D. Wis 2007), employees at a Kraft/Oscar Meyer meat-processing plant sought compensation for donning and doffing steel-toed boots, hard hats, earplugs, hair- and beardnets, slickers and safety glasses. The Court denied Kraft's summary judgment motion, stating that it had "little doubt" that donning and doffing protective gear was compensable.

The Court also rejected the *Gorman* decision - characterizing *Gorman* as "truly bizarre" because it "appears that the Court is saying that unless the activity is necessary to prevent the employee from actually dying, it is not 'integral' to a principal activity."
Federal Court Cases

On May 9, 2008, the Court granted the employees motion to certify a collective action for the FLSA claims and a class action for their state claims.
In *Bonilla et al. v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), the Court held that the time employees spent at a security checkpoint and on employer-provided transportation from a remote parking lot was not compensable.

Construction employees at the Miami International Airport were required to park several miles from their job site, ride employer-provided transportation and pass through a security checkpoint.
Federal Court Cases

The Court determined that the travel and security time were not "integral and indispensable" to the principal work activities. The Court also observed that the FAA (not the employer) required these pre-work activities, the employer did not particularly benefit from them and the security measure was not integral or necessary to the performance of construction work.
On June 9, 2008, the US Supreme Court declined to weigh in on the “donning and doffing” debate despite conflicting conclusions by several Federal Appeals Courts. The cases it denied certiorari to are: (see next slide)
Cases Denied Certiorari

In *DeAsencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3rd Cir. 2007), Tyson employees contended that, under the FLSA, they were entitled to be paid for the time spent putting on and taking off, as well as washing, their work gear. Tyson required its employees to put on and take off safety and sanitary clothing, and engage in washing activities, six times a day, before and after their paid shifts and two daily meal breaks.

When instructing the jury in this case, the District Court stated that, in considering whether the donning, doffing, and washing was "work" under the FLSA, the jury had to consider whether the activities involved physical or mental exertion. The jury decided the issue of work against the workers.
On review, the Appellate Court concluded that the jury instruction on donning and doffing was erroneous as a matter of law in that it directed the jury to consider whether the gear was cumbersome, heavy, or required concentration to don and doff. This language impermissibly directed the jury to consider whether the workers had demonstrated some sufficiently laborious degree of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer.
The Court relied upon a 2004 9th Circuit case - *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901,910 - that held preliminary and postliminary activities were compensable if **integral and indispensable** to the workers' principal activities.

The impact is that this Court is saying that "exertion" is no longer part of the work test.
In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), the 2nd Circuit held that nuclear power plant employees were not entitled to compensation for the approximately 10 to 30 minutes per day spent passing through layers of security and donning and doffing protective glasses, boots and helmets. In applying *Alvarez*, the Court distinguished between whether the activities in question were "integral" as opposed to "indispensable" to the jobs and held that even though donning, doffing and security time may be "indispensable" or "necessary" to the jobs, they were not "integral" to the employees' principal activities. The Court equated the security-related activities to a modern version of noncompensable "travel time."
The Court then held that, while employees were required by the employer or government regulation to don and doff protective gear, this did not render the tasks "integral" because they were "relatively effortless" and "preliminary." The Court distinguished *Steiner* as being limited to "workplace dangers that transcend ordinary risks," where work was done in a lethal atmosphere and the workplace could not exist without the protective equipment. The *Gorman* Court's focus on the type of protective gear involved and the danger from which it is meant to protect has been subject to criticism.
In *Anderson v. Cagle's Inc.*, 488 F.3d 945 (11th Cir. 2007), the Court denied workers compensation for changing in and out of protective equipment based on the terms of the CBA. Even though the CBA does not mention the issue of compensation for the protective clothes changing, the policy of not compensating for clothes changing satisfied § 203(o)'s "custom or practice" requirement.

- Cagle's is a food processing facility, principally engaged in the slaughtering, deboning, and processing of chickens. Employees are required to report to work prior to the start of their shift in order to dress in protective clothing, which includes, but is not limited to, smocks, hair nets/beard nets, and ear protection. Depending on the precise nature of the job, additional items of clothing are required; i.e., steel mesh gloves, plastic arm guards, rubber gloves, aprons, safety glasses, etc.
Settlements

- BMW recently paid $629,000 in back wages to assembly plant employees for time spent donning and doffing.

- Toyota recently offered $4.5 million in back pay for 5 years [Kentucky statute of limitations] to approximately 1,000 paint shop employees for time spent donning and doffing protective gear and walking to and from their work stations - activities taking approximately eight minutes.
Call-Back Time

- **FLSA**
  - “There may be instances when travel from home to work is worktime. For example, if an employee who has gone home after completing his day’s work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer’s customers, all time spent on such travel is working time.
  - The DOL has not taken a position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.”
    29 C.F.R. § 785.44.
  - DOL - if compensation is for "showing up" and not for hours worked, it is excludable from regular rate of pay under the FLSA.
Call-Back Time

California

- “If an employee is required to report for work a second time in any one workday and is furnished less than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours at the employee’s regular rate of pay, which shall not be less than the minimum wage.” Wage Order 4, § 5(B)
Call-Back Time

- “The Division does not take the position that simply requiring the worker to respond to call-backs is so inherently intrusive as to require a finding that the worker is under control of the employer.”

- “The factors to be considered are: (1) geographical restrictions on employee’s movements; (2) required response time; (3) the nature of the employment; and (4) the extent of the employer’s policy would impact on personal activities during on-call time.”

- “The bottom line is the amount of “control” exercised by the employer over the activities of the worker.” DLSE Manual § 47.5.6.1

- Thus, California employers must consider compensation for travel time to work necessitated by a call-back on case-by-case basis.
Reporting Time

- **FLSA**
  - Employee Immediately Sent Home
    - “If an employee is told upon reporting for work that there is no work available and is immediately sent home, he/she will not be considered to have spent any time working.”
  - Employee Sent Home After A Period of Waiting For Work
    - “If, however, the employee reports for work at the scheduled place at the prescribed time and is not immediately sent home but is suffered or permitted to wait for work after the regular shift was scheduled to begin, the time spent in waiting between the scheduled commencement of the shift and the time the employee starts work or is sent home is counted as working time.” DOL Field Operations Handbook § 31a00
Reporting Time

California

- “Each workday an employee is required for work and does report, but is not put to work or is furnished less than half of the employee’s usual or scheduled day’s work, the employee shall be paid for half the usual or scheduled day’s work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee’s regular rate of pay, which shall not be less than the minimum wage.” Wage Order 4, § 5(A)

   - DLSE Enforcement Advice: “Required meeting is scheduled for a day when the worker is not usually scheduled to work. The employer tells all of the workers in attendance at the meeting that it is mandatory and a one- or two-hour shift is ‘scheduled’ for this meeting. For those workers not ‘regularly scheduled’ to work, the employee must be paid at least one-half of that employee’s usual or scheduled day’s work.” DLSE Manual § 45.1.4
Reporting Time

- Exceptions to the reporting time pay requirements if situations such as those listed below arise which are out of the control of the employer:
  - Inability of its operations to commence or continue because of threats to employees or to property, or because of the recommendation of civil authorities;
  - Failure of the sewer system or of public utilities to supply electricity, water or gas;
  - Interruption of work caused by an act of God or other cause outside of the employer’s control;
  - Where an employee reports to work unfit.
Reporting Time

- Unscheduled Work Day - employee may agree to work an unscheduled work day of less than 2 hours w/o requiring employer to pay the 2 hour minimum.
On-Call Time

- When is the Employee "Engaged To Wait vs. Waiting To Be Engaged"?

- Why You Want to Know:
  - When employees are waiting to work, they must be paid if this waiting time is "on-duty," but not if it's "off-duty" waiting time. (DLSE Enforcement Policies §43.2.2; 29 CFR §§785.14-785.16)

- Whether waiting time is time worked will depend upon the specific facts. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." (29 CFR §785.14; Skidmore v. Swift, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (Central Mo. Tel. Co. v. Conwell, 170 F. 2d 641 (C.A. 8, 1948))
On-Duty

- Time spent on duty during unplanned inactivity and employee is unable to use the time effectively for his or her own purposes and the time is *controlled* by the employer.
  - A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity.
On-Duty

The rule also applies to employees who work away from the company. For example, a repair man is working while he waits for his employer's customer to get the premises ready. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (29 CFR §785.15)
“Idle” time during which an employee is completely relieved from duty and which is long enough to enable the employee to use the time effectively for his or her own purposes.

- employees must be told that they can leave the job site;
- employees must be told when to return to work; and
- the break must be long enough for employees to use the time for personal pursuits.

(29 CFR §785.16(a))
A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is "engaged to wait." Waiting is an integral part of the job.

If the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 p.m., and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip, the idle time is not working time. He is “waiting to be engaged.”
On-Call Time

- Controlled on-call is worktime.
- Uncontrolled on-call is not worktime.
- It is considered controlled on-call if the employee’s ability to effectively use the time for personal pursuits is interfered with – waiting can be work.
- If controlled on-call, must pay at least minimum wage but can pay less than normal rate and may have to pay overtime.
- If uncontrolled on-call, no need to pay or pay at any rate – less than minimum wage.
On-Call Time

FLSA

- “An employee who is required to remain on-call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while “on-call.”

- An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on-call.”

29 CFR § 785.17
On-Call Time

- **California***
  - To determine whether on-call may be hours worked consider:
    - Whether there are excessive geographical restrictions on employees’ movements;
    - Whether the frequency of the calls is unduly restrictive;
    - Whether a required response time is unduly restrictive;
    - Whether the on-call employee can easily trade his or her on-call responsibilities with another employee; and
    - The extent of personal activities engaged in during on-call time.

DLSE Manual § 46.6.4; *Berry v. County of Sonoma*, 30 F. 3d 1174 (9th Cir. 1994))

*Not defined in Labor Code or Wage Orders
XYZ Company provides its employees with a 30-minute break for lunch and are not required to work but required stay on company property. **Is this worktime?**
Worktime

- George is an nonexempt employee who works from 8 a.m. to 5 p.m. (9 hours). Is this worktime? Is George entitled to overtime? What if George travels during the day, attends a training program or a company-sponsored event?

- What if George, without asking permission, continues to work for an extra two hours every Friday to be ready for Monday and "catch up".

- **Is any of this worktime that XYZ Co. has to pay for?**
Standby/On-Call Time/Callback

- *XYZ Company* requires George, its IT nonexempt employee, to have his blackberry on during after hours and on weekends to respond to calls from co-workers. **Is this worktime? Is this standby time?**

- Does it make a difference if George has to stay within 10 miles of the office?

- Does it make a difference if George has to return to work within 30 minutes vs. two hours?

- Does it make a difference if George is called back one time vs. five times?

- Does *XYZ Co.* have to pay George for his travel time? What if George is not at home but at his parent's home 50 miles away?
Standby/On-Call Time/Callback

- George works the day shift and John works the night shift. John calls in sick and George is requested to cover John's shift. If George agrees to work, what must XYZ Co. pay George?

- George worked his normal 8 a.m. - 5 p.m. day, with 1 hour lunch break. After George leaves for the day, XYZ Co. requests George to return to work. He returns to work - which takes him 30 minutes each way - and works 1 hour. What must XYZ Co. pay George?
Travel Time

- Normal travel time to and from work – not considered hours worked

- Travel during work day is hours worked
  - An employee travels from job site to job site/customer to customer during the workday. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. **29 CFR 785.38**
Travel Time

- One-day assignment to another city – all time included except travel time to point of departure and meals.
  - George - who works in Irvine/Orange County from 9 a.m. to 5 p.m. - is given a special assignment in San Francisco, with instructions to take the 8 a.m. flight. He arrives in downtown SF at 10:30 a.m. for his client meeting which ends at 3 p.m. George arrives back in OC at 7 p.m. and goes home. How much time does he get paid for?

![Airplane](image.png)
Travel Time

- Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in § 785.36), or like travel that is all in the day's work (see § 785.38). All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible. (29 CFR 785.37)
Travel Time

- Extended travel - time spent traveling after hours to destination which exceeds normal commute time but does not include taking a break from travel such as eating/sleeping (CA/not Fed).
  - Rate of pay may be different provided not less than minimum wage and employee is informed prior to the travel. (Regular rate of pay for overtime will be determined by a “weighted average”) DLSE Manual § 46.3.2
  - Work performed while traveling - Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.
Lectures, Meetings and Training Programs

- Not counted if:
  a) Attendance is outside of the employee's regular working hours;
  b) Attendance is in fact voluntary;
  c) The course, lecture, or meeting is not directly related to the employee's job; and
  d) The employee does not perform any productive work during such attendance.

(29 CFR 785.27)

- Caveat: Independent training - if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.
XYZ Co. offers training classes regarding various topics. George wants to learn about computer programming. George attends the classes after hours. Is this worktime and does XYZ have to pay George?

What if XYZ told George attending the computer programming may advance his "career." Is this worktime and does XYZ have to pay George?

What if XYZ told George "you don't have to attend the computer programming training program, but I think you should be there."
What about the mandated California sexual harassment prevention training to supervisors?

What about if the law requires employees to undergo training to keep their jobs?

What if:

- The law requires employers to provide the training to employees, or
- The company sets out specific requirements not mandated by the law; i.e., where the training must be taken?
Federal and California - Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked. 29 CFR §785.44.

- California does not have a specific statute.
It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.
De Minimis Time & Rounding Practices

- Courts generally consider four factors in determining whether an activity is *de minimis* as a matter of law:
  1. The amount of daily time spent on the additional work;
  2. The administrative difficulty in recording the time;
  3. The size of the aggregate claim; and
  4. The regularity of the work.
De Minimis Time & Rounding Practices

See Lindow v. United States, 738 F.2d 1057, 1062-63 (9th Cir.1984) and 29 C.F.R. § 785.47 ("An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable working period of time he is regularly required to spend on duties assigned to him").

- Email and vmail – an attendant impact on exempt employees.
Unless a private sector employer is not subject to FLSA, “comp time” does not exist in California because FLSA does not recognize “comp time”.

- DOL has exercised its discretion not to prosecute.
- Public-sector employers are allowed to provide “comp time” – at the request of the employee.
Comp Time

- Labor Code § 513 – make-up time not to exceed 11 hours per day/40 hours per week in same week.

- Labor Code § 204.3 – permits a nonexempt employee to receive compensating time if:
  - written agreement with employee;
  - employee has requested it;
  - employee is regularly scheduled for 40 hours in a workweek; and
  - employee has accrued $\leq 240$ hours “comp time” off.
Comp Time

- DLSE has taken the position that private employers cannot provide “comp time” in lieu of overtime pay if the employer is subject to the FLSA.

Meal and Rest Periods

  - Payments for meal and rest period violations are wages and not penalties. Consequently, employees have a longer statute of limitations for filing claims asserting violations of meal and rest period requirements.
Hypothetical: Meal and Rest Breaks

- Peter goes to work as a store manager for a well-known coffee shop. Although nobody tells Peter not to take meal breaks, he voluntarily skips the breaks because he’d rather just keep working.

- Peter then quits his job, and sues his employer in federal Court for failing to provide him with legally required meal breaks. His employer argues that it did “provide” the breaks by making them available, and is not responsible if Peter decided, on his own, not to take them.

- Who wins the lawsuit?
Rest / Lunch Period Battle

- White v. Starbucks Corp. (9th Cir. 2007)
- Perez v. Safety Kleen System, Inc. (N.D.Cal. 2007)
- Cicairos v. Summit Lodge (CA 3rd Dist. 2005)
- Brinker Restaurant Corp. v. Superior Court (CA - 4th Dist. July 22, 2008)
Meal and Rest Breaks: Federal Court Rulings

- **In Federal Court, the employer wins!**
  
  A California Federal Court has held that as long as an employer offers meal breaks to its employees and does not discourage the employees from taking them, it has “provided” the breaks under Labor Code § 512 and is not subject to penalties. (White v. Starbucks Corp.)

Meal and Rest Breaks: California Court Ruling

- **In State Court, the employer wins! Well – Maybe!**

- In *Brinker*. Plaintiffs filed a class action for violation of meal and rest break requirements. Trial Court held that the case could proceed as a class action.

- Court of Appeal reversed, holding:
  - while employers cannot impede, discourage or dissuade employees from taking rest periods, they need only provide, not ensure, rest periods are taken;
  - employers need only authorize and permit rest periods every four hours or major fraction thereof and they need not, where impracticable, be in the middle of each work period;
  - employers are not required to provide a meal period for every five consecutive hours worked;
  - while employers cannot impede, discourage or dissuade employees from taking meal periods, they need only provide them and not ensure they are taken;
Meal and Rest Breaks: California Court Ruling

- while employers cannot coerce, require or compel employees to work off the clock, they can only be held liable for employees working off the clock if they knew or should have known they were doing so;
- because the rest and meal breaks need only be “made available” and not “ensured,” individual issues predominate and, based upon the evidence presented to the Trial Court, they are not amenable to class treatment; and
- off-the-clock claims are also not amenable to class treatment as individual issues predominate on the issue of whether Brinker forced employees to work off the clock, whether Brinker changed time records, or whether Brinker knew or should have known employees were working off the clock. (Brinker)
Meal and Rest Breaks: Where are We?

- This is just one Court of Appeal’s decision.
- Have a meal and rest period policy.
- Advise/require employees to take breaks.
- Keep a record that breaks are being taken.
- Employee’s counsel called the ruling “a horrible decision for employees.”
- Stay tuned: SB 1192 and AB 1034 and potential appeal of *Brinker* Supreme Court.

*See July 25, 2008 DLSE Memo – Labor Commissioner mandates following *Brinker*. 
Penalties

- **FLSA**
  - Section 16
    - “Any person who willfully violates any of the provisions of [the Act] shall upon conviction...be subject to a fine of not more than $10,000, or to imprisonment for not more than six months.” 29 USC § 216(a).
    - “Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” 29 USA § 216(b).

- **California**
  - Labor Code (Sections 203, 210, 225.5, 226(e), 226.3, (226.7), 256, & 558)
Penalties

- Private Attorney General Act Penalties (PAGA)
  Labor Code § 2699(a):

  “Notwithstanding any provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.”
Individual Liability

Are individual officers/shareholders/directors liable for the employer’s failure to pay overtime wages?

FLSA - YES!

- 29 U.S.C. § 203 (d).) "Taking an 'economic reality' approach to the facts of this case, ...[w]e review the liability of corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions, including compensation of employees, and who personally made decisions to continue operations despite financial adversity during the period of nonpayment...[under these circumstances we agree with the District Court's holding that appellants were employers within the meaning of the Act chargeable with personal liability for failure to pay minimum and overtime wages as required by the FLSA."  Donovan v. Agnew (1st Cir. 1983) 712 F.2d 1509, 1514
Individual Liability

California - **NO!** (OR NOT YET...)

- *Jones v. Gregory* 137 Cal.App. 4th 798
- *Reynolds v. Bement* 36 Cal. 4th 1075

**However:** Individual liability may exist for penalties in actions under Labor Code sections 558 & 2699.
Communicate
Questions?

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