



Give It A Rest, Will You? *California Courts Weigh In On Rest Periods*

By Karen L. Gabler, Esq.

California employers are generally aware that employees must be given meal periods and rest breaks under very strict legal requirements. The failure to provide proper breaks to employees can result in single-plaintiff and class action litigation, and employers may have to pay substantial damages and penalties for even minor errors in scheduling breaks. Recent case law provides cautious hope for employers by offering the potential for flexibility in rest break procedures, albeit within very limited circumstances.

What Does the Law Require?

California's Industrial Welfare Commission Wage Orders provide that employers must provide paid rest periods to non-exempt employees, with limited exceptions in certain industries. These rest periods must be a minimum of ten minutes during every four hours of work or major fraction thereof. A "major fraction" of the four-hour period is considered to be anything over two hours. Employers need not provide rest breaks to employees who work three and a half hours or less.

Where Do Employees Take the Rest Period?

Rest breaks are considered paid time, which means that employers may require employees to remain on the premises during the paid rest break. Because rest breaks may be taken on site, employers also must provide suitable rest areas for employees to take their breaks, in a location other than the bathroom. Time spent using the bathroom is not considered a rest period, although an employee's use of the bathroom during the rest period does not generally extend the rest period to longer than ten minutes.

When Must the Rest Period Be Provided?

Rest periods must be uninterrupted and must span ten consecutive minutes. Employees are prohibited from combining their rest periods with the meal period to lengthen the meal period. They also may not skip their rest periods to come in late or leave early. The rest period must be taken in the middle of each four-hour work period "insofar as practicable." This means it must be taken as close to the middle of the work period as possible, although it may be taken at another time during the work period in limited situations if work circumstances prevent the employee from taking the break at the preferred time.

In *Brinker Restaurant Corp. v. Superior Court* (53 Cal. 4th 1004, 2012), the California Supreme Court gave employers clarification on when rest breaks should be taken. Confirming what we already knew, the Court noted that once an employee has worked at least three and one-half hours, he must be provided with a paid ten-minute rest period for each "major portion of four hours worked." The Court analyzed the meaning of

"major portion," and determined that (1) employees working between three and one-half hours to six hours must receive one rest period of ten minutes; (2) employees working shifts from six hours to ten hours must receive two rest periods of ten minutes each; and (3) employees working shifts from ten hours to fourteen hours must receive three rest periods of ten minutes each. The distinction to note is the difference between a "work shift" and a "period of work": an employee who takes a rest break thirty minutes into a six-hour shift is not entitled to another ten-minute rest break after four and one-half hours of work.

Do Employees Have to Record Rest Periods On Their Time Cards?

Because the rest period is paid time, employees need not clock out for this time. Unlike with meal periods, the employer is under no obligation to record the fact that employees took their rest breaks. Unfortunately, this also means that if an employee claims that he missed one or more rest periods, the employer then has no ability to prove that the rest period was taken. To protect from such claims, the employer can require the employee to sign an acknowledgement with each time record or payroll period, noting that the breaks were provided by the employer and taken by the employee.

What Happens if My Employees Don't Get Their Rest Periods?

Awareness of these requirements is critical because if a rest period is late, missed, interrupted or shortened, the employee is entitled to an additional hour of pay at the employee's regular rate of pay for each day in which one or more rest period violations have occurred. See California Labor Code Section 226.7. Rest period penalties are considered "wages" under California law, so a claim related to missed, late, shortened or interrupted rest periods may be brought by an employee within three years of the violation (and four years with the addition of a claim for unfair business practices). Employees may file an administrative claim with the Division of Labor Standards Enforcement, or a civil action against the employer.

What Happens if My Employees Won't Take Their Rest Periods?

The law requires only that employers "provide" rest breaks to their employees, not "enforce" them. Taken at face value, this means that employees could choose to skip their rest periods, and there would be no liability for the employer as long as the rest periods actually were provided and the employee was not prevented from taking a break for work-related reasons. That said, however, it is absurdly easy for an employee who voluntarily skips rest periods to later claim that he was unable to take them due to excessive workload, supervisor or co-worker interruptions, or customer/client needs. This is particularly the case given that an employee who skips his rest period is likely to continue working during that time, as work is the only alternative to break time.

To protect against frivolous (but costly) claims, the safest option is for the employer to require employees to take their rest periods, document that this has occurred as noted above, and discipline employees who fail to take them. If the employer permits employees to skip rest breaks out of personal choice, the employer should send carefully-drafted and detailed documentation to employees on a regular and ongoing basis, reminding the employee in writing that the breaks are available, the employer wants employees to take breaks, the employee should let the company know if he cannot take breaks due to workload or the demands of others, the employee may complain without fear of retaliation, and the

employee's choice not to take a break is purely voluntary and is neither sanctioned nor preferred by the employer.

Do I Have to Provide Rest Breaks Before and After the Meal Period?

The Brinker Court opined that it is not necessary to take meal or rest periods in any particular order, presumably clearing the way for an employee on an eight-hour shift to take a meal period within the first two hours of work and then take two additional rest periods during the next six hours of work. The Court did state, however, that in a typical eight-hour shift where two rest periods would be provided to the employee, one rest period should be taken prior to the meal period and one after the meal period "as a general matter."

In the recent case of *Rodriguez v. E.M.E., Inc.*, 2016 WL 1613803 (2016), the appellate court confirmed that rest breaks in an eight-hour shift should fall before and after the meal period, but added that this was required only "absent factors rendering such scheduling impracticable." The court thus acknowledged that unusual or unique business circumstances could warrant a deviation from this "normal" schedule of breaks.

In *Rodriguez*, the court was faced with the issue of whether employees could combine their two rest breaks into one 20-minute break, rather than taking two separate 10-minute breaks. The court reaffirmed the Brinker standard that rest periods should be in the middle of work periods and separated by the meal break "insofar as practicable" - which the *Rodriguez* court defined as "to the extent feasible." Taking into account the purpose of the California Wage Orders - to protect employee health and welfare -- the *Rodriguez* court then opined that a departure from the usual schedule of breaks could be allowable, only if:

1. The change in schedule will not unduly affect employee welfare; and
2. The change in schedule is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule.

The court opined that a departure from the general break schedule which is "merely advantageous" to the employer is not enough. Instead, the employer must show that the general break schedule would impose a "material burden" on the employer, and that revising the schedule will alleviate that burden.

The employer in *Rodriguez* presented declarations from employees, stating that the deviation in their normal break schedule was preferable and was not harmful to their interests. The company also presented evidence that the nature of their production process required employees to spend a great deal of time preparing for the break, as well as resuming work after the break. The company argued that revising the usual break schedule avoided substantial economic losses arising from lost production time throughout the day. The employee in turn argued that very little time was lost in preparing for or returning from the rest break. Given the evidentiary disputes, the court determined that the decision could not be made on summary judgment, and instead would have to be left to the jury after a trial on the merits.

It is important to note that the *Rodriguez* court did not find that combining breaks would be acceptable, nor did it provide clear guidance on the specific circumstances that would permit such conduct. Instead, *Rodriguez* merely noted that there may be unusual business issues that would warrant a rest break schedule

that deviated from the usual standards, and remanded the case back to the trial court to let a jury decide whether those unusual business circumstances existed in the case.

In the absence of clear authority allowing employees to combine rest breaks or altering the usual rest break schedule, employers should refrain from permitting employees to do so and should instead continue providing a ten-minute paid rest period during every four hours of work in accordance with the schedule laid out in Brinker. Even if an alteration is warranted under Rodriguez, combining breaks may lead to costly litigation while awaiting a jury's decision on whether the business circumstances warranted this deviation from typical rest break procedures. Altering the usual break schedule, or combining rest breaks, is a decision that should be made only after careful review of the relevant business circumstances with employment law counsel.



Karen Gabler is an employment attorney and co-founder of the LightGabler law firm. With over 24 years of experience, she advises businesses and management personnel on day-to-day employment issues, and defends business owners and supervisors against employee claims. For further information, see www.LightGablerLaw.com.

