

LEGAL *Issues***Knowing the Consequences****Do Employees Have to Take Breaks and Meal Periods?**

By Deborah H. Petito

Class action lawsuits are becoming a trend in employment litigation. These are filed on behalf of all of the organization's employees (this could include multiple locations). Lately, these class action lawsuits have begun to center on wage and hour claims. The most significant rise has been in the areas of rest period breaks and meal periods. California law requires that employers allow a paid break to non-exempt employees of 10 minutes for every four hours worked. These breaks are to be taken as near the middle of the four hour period as possible and are counted as hours worked. The only exception is if an employee works only three and one-half hours daily. Employers are required to "authorize and permit" breaks and will be required to prove that they have done so.

Under California law, employers must require non-exempt employees to take a meal period of 30 minutes for a work period in excess of five hours. An exception is that, if the work period is not more than six hours, the meal period may be waived by mutual consent of the employer and employee. The meal period is an unpaid period and does not count as hours worked. The employer is required to provide meal periods and will be required to prove that meal periods were taken.

The penalty imposed for not providing these breaks and meal periods is payment of one hour at the employee's rate of pay for each

violation. One hour times approximately 250 days per year (for one employee assuming one daily break or meal period violation and accounting for two weeks of vacation) can be costly for the employer and make these cases attractive to attorneys filing class actions. In addition, the attorneys are drawn to these cases because they can obtain attorneys' fees if they are successful. The attorneys' fees could easily outweigh the actual amount due to the employees.

Currently, there is a debate about whether the one hour imposed by the Legislature is a penalty or a wage. If it is a penalty, the statute of limitations is one year. If it is a wage, the statute of limitations may be up to four years.

These cases are difficult to defend and employers should take steps to avoid this type of claim. The following are some steps to help insulate you from liability:



Deborah H. Petito

How to Protect Your Business:**ESTABLISH A WRITTEN POLICY**

Establish a written a policy that states that non-exempt employees are required to take meal periods and that non-exempt employees are authorized and permitted to take breaks. This policy should set forth the law as to how often the meal periods and breaks are to be taken.

DOCUMENT BREAKS & MEAL PERIODS

For employees who punch time cards, make sure they punch out for their required meal period. For employees who fill out time sheets, have employees document both their breaks and meal periods. Remember that breaks are paid by the employer. If employees sign their time cards or time sheets, a statement could be added having the employee acknowledge that the employee took the meal period and was authorized and permitted to take their breaks.

HOLD SUPERVISORS ACCOUNTABLE

Hold supervisors accountable for ensuring that meal periods are taken and that employees have the ability to take a 10 minute break during every four hour period worked. The supervisors should be reviewing the time cards or time sheets weekly. It is much easier to fix the time card or time sheet and have the employee initial it at the time than it is to argue that an employee who never punched out for lunch actually took a lunch period each day for the last four years. Remember, it is the employer who is responsible for being able to prove that employees are taking their meal

periods and given the opportunity to take breaks. Managers should also be spot checking the time cards and time sheets.

BREAK & MEAL LOCATION

Make sure that you have a location available where employees can take their breaks and meal periods. Providing a suitable place for meal periods is required by California law.

ANNUAL MEMO

Send out a memo each year, pick the first of the calendar year or fiscal year, to remind employees that they should be taking their breaks and meal periods. Provide the name of your HR person or someone who is not an employee's direct supervisor and ask that any employees who are not taking their breaks or meal periods report this situation to that person to prevent the claim that the supervisor just never let them have their breaks periods or, the more common claim, that they ate at their desks while they worked.

Note: Requiring exempt employees to document their breaks and/or meal periods may affect their exempt status. Also, the failure to provide a meal period may have overtime consequences for employees who, for example, work from 8 a.m. to 5 p.m. and do not take a meal period. These employees are really working nine hours per day, entitling them to one hour per day of overtime at one and one-half times their hourly rate because in California hours worked over eight in a day (twenty-four hour period) are counted as overtime.

In This Issue:

Do Employees Have to Take Breaks and Meal Periods?

New Labor Laws for 2007

Why Smart Businesses Should Exercise Care with Equipment Leases

Anti-Sexual Harassment Training

Employer Bulletin



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Coming in the next Legal Issues!

Electronic Discovery – How technology is changing the process of litigation

New Labor Laws for 2007

By Leonard Brazil

1. INCREASE IN MINIMUM WAGE

As you probably know, California's minimum wage was increased to \$7.50 per hour effective January 1, 2007, and will be increased to \$8.00 per hour as of January 1, 2008.

Keep in mind that the minimum wage increase also results in an increase in the baseline salary an employee must earn to maintain his or her "exempt" status. Under the Executive, Professional and Administrative classifications, an employee must earn an equivalent of at least twice the minimum wage, which equates to an annual salary of \$31,200 in 2007 and \$33,280 starting in 2008, in order for such employee to be an "exempt" employee.

Inside salespersons designated as exempt are required to earn 1½ times the minimum wage which equates to a salary of \$23,400 for 2007 and the sum of \$24,960 starting in 2008.

What You Should Do

- Be sure salaries to exempt employees in 2007 satisfy the increased baseline salaries required to maintain their exempt status.
- Remember that the new minimum wage will require an update of your minimum wage poster and wage orders. When they become available, the minimum wage poster and wage orders can be obtained at www.dir.ca.gov/wp.asp.

2. EMPLOYER OBLIGATIONS TO DOMESTIC PARTNERS

Much has been written in the last few years regarding the rights of domestic partners and the California Legislature has now weighed in on the subject. It is critical for employers to recognize their obligations to employees who have domestic partners.

California's Domestic Partnership Rights and Responsibilities Act provides domestic partners with many of the same rights and privileges provided to spouses under California law. The Act is codified in California Family Code §297.5(a). It states that registered domestic partners have the same rights and responsibilities under statutory and case law as provided to spouses. As a result, domestic partners are entitled to the benefits of the California Family Rights Act ("CFRA"). An employee may use a 12 week leave entitlement under the CFRA to care for a domestic partner, just as an employee might care for a spouse.

The domestic partner laws also impact an employer's obligation to provide insurance benefits. An employer which offers insurance for an employee's spouse must also offer coverage for an employee's domestic partner on the same terms and conditions. It does not

matter whether the employer is out-of-state. A California employee working for an out-of-state employer is entitled to the protection of California law.

What You Should Do

Review your employment practices and procedures to determine whether employees with spouses are entitled to greater benefits than employees with domestic partners. The review process should also include a review of your Employee Handbook. If there are differences between the rights afforded between the two groups, you should consult with counsel as to whether the distinction creates a liability risk.

3. EMPLOYEE DRIVERS AND CELL PHONE USAGE

The Governor has signed legislation which will require motorists to use hands-free devices for cell phones while driving. While the law does not go into effect until July 2008, its passage suggests potential employer liability if an employee is driving and using a cell phone for a business purpose which is a contributory cause to an auto accident. While there is no California case specifically on point, a court in the state of Virginia held that cell phone use by an employee may subject the employer to liability for a fatal auto accident allegedly caused by an employee who was driving and became distracted while using a cell phone for a business call.

What You Should Do

The most cautious approach is to prohibit the use of a cell phone for a business call while driving, although such a rule may be unrealistic. Do not establish a rule which will not be enforced.

A more realistic approach may be to consider implementing a company policy that requires an employee to utilize a hands-free cell phone device if driving a car in the course and scope of employment (regardless of whether the call is personal or business related) and for all business related calls, even if the employee is not driving a vehicle for a business related reason. The implementation of such a policy should be included in your Employee Handbook.

If you require employees to use a hands-free device such as an earpiece, you must pay for the cost of the device.

Why Smart Businesses Should Exercise Care With Equipment Leases

By Judith Ilene Bloom

A company (B.C.B.U.) that operates nursing homes in Utah learned the hard way not to sign an equipment lease before the lease transaction is closed and the equipment has been received and approved. It is a lesson worth remembering.

While in the middle of negotiating a lease for computer equipment with Crocker Capital, B.C.B.U. signed the proposed lease and gave the signed original to Crocker in reliance on Crocker's representation that it was common industry practice to execute documents in advance without dating them and in reliance on Crocker's promise to hold them in escrow until the deal was finalized.

B.C.B.U. signed the documents and its principal signed a personal guaranty. The documents included a statement that B.C.B.U. had received the equipment in good condition. Right by that signature line the form stated: "Important: This document has legal and financial consequences to you. Do not sign this document until you have actually received all of the equipment and are completely satisfied with it."

Crocker assigned that lease along with a number of others to Wells Fargo as part of a securitization transaction. Thereafter, B.C.B.U. and Crocker were unable to reach an agreement and, as between themselves, they rescinded the lease. B.C.B.U. did not make any payments on the lease and, for a time, thought it was free of any obligation to do so. So when Wells Fargo sued B.C.B.U. for nonpayment, B.C.B.U. did not have to pay, right? WRONG.

On September 27, 2006, the court of appeal ruled, in a published opinion, that B.C.B.U. was liable for \$107,656.24 plus interest and the principal was liable on his guaranty for that full amount even though B.C.B.U. never received the equipment and even though Crocker agreed to rescind the lease.

The law protects third party purchasers such as Wells Fargo from defenses such as the defense B.C.B.U. had against Crocker unless Wells Fargo had notice of that defense when it acquired the lease. The purpose of this rule is to promote commerce and the ease with which such leases can be securitized and traded. The willingness of an investor such as Wells Fargo to buy packages of leases is enhanced by the knowledge that it need not be concerned with the underlying details of the leases. The leases become commodities that can be freely traded. The only defenses one can raise against such an investor are infancy, duress,

lack of legal capacity, illegality of the transaction, fraud or discharge in bankruptcy. Failure of consideration, defect in the equipment and breach of warranty are defenses that cannot be raised against the third party investor. That has always been the law.

B.C.B.U. argued that, since it had rescinded the lease and had received nothing, it was an innocent party who should not be obligated to pay. "Hogwash!" was the literal response of the court of appeal. As between B.C.B.U. and Wells Fargo, it was B.C.B.U. who "had the ability to protect itself and prevent the instant loss." B.C.B.U. could simply have refused to sign the documents until the deal was finalized. Instead, it signed the documents and ignored the printed warning not to sign until the equipment had been received and approved. The court apparently thought that falling for the "everybody signs lease documents before the deal is finalized" line was indefensible.

(continued on page 4)



Judith Ilene Bloom

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Announcement re Anti-Sexual Harassment Training: AB 1825

Under California law, employers are strictly liable for sexual harassment by supervisors, managers and executives. Governor Schwarzenegger signed Assembly Bill 1825 in 2004 which requires all employers who have 50 or more employees to provide two hours of "effective and interactive" sexual harassment training to their supervisors every two years. The first such training was required to be completed by December 31, 2005. This training must be completed by all supervisors again by December 31, 2007.

The law also requires that all newly promoted or hired supervisors be trained within six months of the time they are hired or promoted to a supervisory role within the organization. Employers should create and maintain a tracking system that records each supervisor's training and alerts the administrator when additional training is required.

C&T wants to make it easy for businesses to comply with confidence. The first step is determining which employees qualify as supervisors who must receive the training. Then the training must be scheduled to ensure all supervisors have been trained by December 31, 2007.

C&T can provide this training at your business location. We suggest that you schedule this training early in the new year to ensure that all supervisors are trained in compliance with the law.

To find out more about AB 1825 or Clark & Trevithick's Anti-Sexual Harassment Training Program for Employers, please contact Leonard Brazil or Deborah H. Petito at (213) 629-5700, lbrazil@clarktrev.com, dpetito@clarktrev.com.

New Faces at C&T...

We are grateful for the legal talent that joined the C&T team last year:



Deborah H. Petito

Deborah H. Petito – “I derive great satisfaction from transforming a developing employment problem into a practical solution without protracted litigation.”

Deborah H. Petito joined C&T, Employment Practice - February 2006



Rajnish Puri

Rajnish Puri – “Comprehensive understanding of client needs and prompt communication with them is essential for providing timely and cost-effective legal representation.”

Rajnish Puri joined C&T, Business Practice - June 2006



James Q. Fisher

James Q. Fisher – “My goal is to prepare your estate plan with the same level of care that you used to create your estate.”

James Q. Fisher joined C&T, Estate Planning & Taxation Practice - July 2006

Equipment Leases

(continued from page 3)

B.C.B.U. and its principal probably have valid claims against Crocker in theory, but an award against Crocker is undoubtedly uncollectible. The records of the California Secretary of State show that Crocker’s corporate charter has been suspended. In the meantime, Wells Fargo is free to collect against B.C.B.U. and its principal.

Don’t let this happen to you! The good news is that this problem is easy to avoid. First, *never* sign lease documents (or any loan documents for that matter) until you have agreed on all of the material terms. If the leasing company representative assures you that “Everyone does it this way” don’t believe it. Second, *never* sign the Acknowledgement and Acceptance of Equipment or other acceptance certificate until you have received all of the equipment listed *and* inspected it. Signing the acceptance in a hurry and firing up the equipment two days later to find out that a key component is missing or defective could be extremely expensive. You should assume that the leasing company will sell your lease to a bank or other investor against whom you will have no recourse.

If you want a copy of this opinion from the court of appeal, or have questions about your equipment leases, Clark & Trevithick is happy to help.

Recent C&T Results:

Donald P. Clark and **Dean I. Friedman** on December 31 concluded a successful reorganization of a corporate client whose annual sales are in excess of \$100 million.

Alexander C. McGilvray recently represented a client who successfully completed the sale of its business for approximately \$37 million in an all-cash transaction. Alex also recently represented a client who raised \$6 million in venture capital funding and contemporaneously used a portion of those proceeds to acquire another company.

Rajnish Puri represented a privately-held information technology company in the sale of its outstanding securities to a publicly held corporation for approximately \$8.5 million. Mr. Puri also represented an emerging growth company in the apparel industry in the issuance of approximately \$1 million of privately-held debt securities.

Kevin P. Fiore, Rajnish Puri and **Scott D. Page** represented a privately-owned real property enterprise in multiple Section 1031 transactions involving commercial properties located in Southern California and valued, in the aggregate, in excess of \$40 million.

Congratulations to **Philip W. Bartenetti** for prevailing in a recent three week jury trial. The jury found that the plaintiff, who had claimed to be an employee, actually was an independent contractor and that our client’s termination of his contract was valid. Phil obtained summary judgment in our clients’ favor in a different matter involving similar questions of breach of contract and independent contractor versus employee classification.

In litigation involving 10 different causes of action, and claims for over \$1 million in compensatory damages and unspecified punitive damages, **Philip W. Bartenetti** and **James E. Daniels, II** obtained summary judgment for an individual defendant. This successful outcome was the result of a combined argument that the claims were prohibited by law, were brought too late and were not supported by the evidence.

Leslie R. Horowitz and **Stephen E. Hyam** successfully defended a judgment creditor’s attempt to levy property that was owned by a third party and obtained sanctions against the creditor. Les and Stephen also obtained a dismissal in concurrent litigation the creditor initiated based on claims that the debtor and third party were alter ego.

Stephen E. Hyam, relying on principals of jurisdiction, secured a court ordered dismissal of three out-of-state individual defendants against whom plaintiff sought to pierce the corporate veil and hold them individually liable for an alleged corporate breach of contract.

CLARK & TREVITHICK

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