SUBJECT

Meal Periods.

KEY ISSUE

Should the Legislature extend the time in which an employee can take a meal period, redefine the employer’s responsibility for providing his or her employees a meal period, codify and expand qualifying circumstances for on-duty meal period agreements, and restrict the ability of employees to revoke on-duty meal period agreements?

PURPOSE

To grant employers greater flexibility to provide meal periods, expand the number of qualifying circumstances for creating on-duty meal period agreements, and exempt collective bargaining agreements from meal period law.

ANALYSIS

Existing law requires, with certain exemptions, that all employees receive a meal break of 30 minutes before the start of the 5th hour of work, unless the work period is no more than six hours and both the employer and the employee choose to waive the meal period by mutual consent.

Existing law requires that if the work period is more than ten hours, a second meal period of 30 minutes must also be granted to an employee. This second meal period can be waived by the mutual consent of the employer and employee, but only if the work period is no more than 12 hours, and the first meal period was not waived.

Existing law states that if an employer fails to provide a meal break, the employer must give the employee one hour of additional premium wages at the employee’s regular rate of compensation for each workday that a meal period was not provided. If unpaid, existing law requires that this wage accrues for 30 days and the statute of limitations on its collection runs for 3 years.
Existing Wage Orders, which are regulations established by the Industrial Welfare Commission, allow for on-duty meal periods where the employee is not relieved of work responsibilities, but the employee is allowed to eat while they work. An on-duty meal period may only be taken if the nature of the work prevents an employee from being completely relieved of work, or if the employee falls under the following circumstances:

a) Employed in the Public Housekeeping Industry and has direct responsibility for children under 18 years of age or who are not emancipated from the foster care system and are receiving 24 hour residential care;

b) Employed in the public housekeeping industry and work at a 24 hour residential care facility for the elderly, blind or developmentally disabled individuals and regulations or law require it, or if the meal is provided at no charge to the employee and the employee eats with the residents or is in sole charge of the residents.

All on-duty meal period agreements must be in writing, and the employee may revoke the on-duty meal period agreement at any time.

This bill would:

1. Require an employer to provide an off-duty meal period to his or her employee if the employee is covered by an Industrial Welfare Commission wage order before the conclusion of the sixth hour of work, unless the employee works no more than six hours and both the employer and employee agree to waive the employer’s responsibility to the meal period;

2. Remove the requirement that a second meal break given to an employee who works more than 10 hours can only be waived if the first meal period was taken, and instead requires that only one of the meal periods needs to be taken;

3. Define an employer responsibility to provide a meal period as “making available to the employee”;

4. Exempts all employees covered by collective bargaining agreements from meal period requirements if the collective bargaining agreement covers meal periods;

5. Permits the use of an on-duty meal period instead of an off-duty meal period if all of the following requirements are met:

a) The employer and the employee have entered into a written agreement for an on-duty meal period which the employee may revoke in writing with no less than three business days’ notice to the employer if the applicable Industrial Welfare Commission wage order authorizes the employee to revoke the agreement.

b) The employee has an opportunity to eat while on duty, the on-duty meal period is counted as time worked, and the nature of the work prevents the employee from being relieved of all duty.
6. Provides that the “nature of work” requirement for on-duty meal periods only applies if one of more of the following conditions exist:

   a) The employee works alone or is the only person in the employee’s job classification who is on-duty at the location or in the department, or there are no other qualified employees who can reasonably relieve the employee of all duty.

   b) State or federal law imposes a requirement that the employee remain on-duty at all times.

   c) The nature of the work or the relevant circumstances makes it unreasonable or unsafe for the employee to be relieved of all duty.

   d) The work product or process will be destroyed or damaged by relieving the employee of all duty.

   e) The employee has direct responsibility for children who are under 18 years of age or who are not emancipated from the foster care system and who, in either case, are receiving 24-hour residential care, or is an employee of a 24-hour residential care facility for the elderly, blind, or developmentally disabled individuals.

COMMENTS

1. Legislative Background:

   In 1999, AB 60 (Knox) became law, which included the codification of the Industrial Welfare Commission (IWC) Wage Order requirement that all employers provide a meal period for their employees. Prior to AB 60, meal periods had been required by the regulatory IWC Wage Orders, but, with the exception of a few industries, were not statutorily required. The following year, AB 2509 (Steinberg) created the monetary punishment for employers who do not provide a meal period for their employees.

   In 2002, the Department of Labor Standards Enforcement (DLSE) enforcement manual interpreted the requirement of the employer to provide a meal period as a responsibility that falls directly on the employer to ensure that the employee takes a meal period, much as it is the employer’s responsibility to ensure that his or her employee is paid the minimum wage.

   Two years later, the DLSE sought to create emergency regulations to define the requirement to provide a meal period to “supply” or “make available”. These regulations were withdrawn in 2005, and the DLSE decided to not move forward with further meal period regulations in 2006. This left the 2002 DLSE interpretation intact.

   However, on July 22, 2008, the California Court of Appeal in Brinker Restaurant Corporation v. Superior Court of San Diego County (Hohnbaum) (2008) interpreted existing
law and the IWC Wage Order meal period provisions as a requirement for employers to provide meal periods by making them available, but need not ensure that they are taken. Employers, however, cannot impede, discourage or dissuade employees from taking meal periods.

On October 22, 2008, the California Supreme Court granted review of the California Court of Appeal decision in *Brinker Restaurant Corp. v. Superior Court of San Diego County* (Hohnbaum). The Supreme Court’s grant of review supersedes the Court of Appeal’s decision. The Supreme Court is expected to confirm, among other things, whether the meal period laws and regulations impose upon employers a responsibility to ensure that employees actually take the meal period or rather, that the employer’s obligations is simply to make that meal period available to the employee and afford the employee the opportunity to take the meal period.

Until the Supreme Court can clarify the meaning of Labor Code §512, the new position of the DLSE is that “[t]aken together, the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken.” (Emphasis added.)

**SB 287** would codify the Appeal’s court interpretation of an employer’s responsibility to provide a meal period, as well as codify, expand, and ease the rules on the use of on-duty meal periods.

2. **Staff Comments:**

   1) **Defining “provide” and the issue of enforcement:**

Before the Committee today are two meal and rest period bills, SB 287 and SB 807 (Benoit), that seek to redefine the term “provide” in Labor Code §512. The relevant language in §512 reads as follows:

“An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes....” (Emphasis added.)

SB 287 seeks to define an employer responsibility to provide a meal period as “making available to the employee”, which closely follows the interpretation the *Brinker* court reached in defining what it means to provide a meal period.

The *Brinker* court ruled that, while employers cannot “impede, discourage or dissuade” employees from taking a meal period, they do not need to ensure meal periods are taken. As was stated above, the Division of Labor Standards Enforcement (DLSE) has also taken the position that employers do not need to ensure that meal periods are taken.

As the Committee looks at these issues, it may want to take into account issues that the *Brinker* court did not--- how would the State enforce the availability of meal periods? What
does it mean to “impede, discourage or dissuade” employees from meal periods? If the discouragement or dissuasion of meal periods was passive, would that violate existing meal period law? What if it came from co-workers or was a part of the culture of the workplace? As the responsibility of providing the meal period is shifted from the employer to simply being an available option for an employee, these questions become germane and difficult to answer. The Committee may want to consider if we are simply swapping the question of the meaning of the word “provide” for the words “impede, discourage or dissuade”.

2) What is the status of exempt employees under SB 287?

The Department of Labor Standards Enforcement (DLSE) Enforcement manual states that, since Labor Code § 512 does not exclude any class of employee, all employees of the state of California fall under its requirements, though premium wage penalties do not apply for employers who fail to provide a meal period to an exempt employee. Exempt employees include executives, administrators, supervisors, managers, and professionals.

Exempt employees also include any employees directly employed by the State or any political subdivision thereof, including any city, county, or special district. While there is limited case law on if Labor Code §512 applies to public sector workers, it is probable that it does not, though this area of the law remains largely untested.

Since SB 287 would amend Labor Code § 512 to specifically reference employees who are covered by Industrial Welfare Commission (IWC) wage orders, and IWC wage orders do not cover exempt employees, SB 287 would prevent meal period laws from covering exempt employees.

3) The role of the Legislature and Meal Periods

With the passage of Proposition 14 on June 8, 1976, the people empowered the Legislature to provide for the general welfare of all employees, and that these powers may be conferred onto a commission. Since that time, that role has been given to the Industrial Welfare Commission (IWC), which promulgates regulatory wage orders for general industrial categories of employees. While the IWC has not been funded for several years, the Commission does still exist. The Committee may wish to consider if binding meal period law to a regulatory process that the Legislature has limited control over would best serve the employer and employee communities.

3. Possible Amendments:

1) On page 4, line 15-20, the bill instructs the Industrial Welfare Commission (IWC) to reprint all IWC wage orders to be consistent with this law. On line 20, however, the line requires that the IWC “shall make no other changes to the wage orders”. This language could prevent the IWC from taking any future action or establishing wage orders. The Committee may want to consider striking line 20, which would prevent this problem.

2) On page 2, lines 22 and 23, and page 3, lines 1-4, the language is as follows:
Except as authorized by an Industrial Welfare Commission wage order in effect as of January 1, 2009, if an employee works no more than 12 hours in a workday, the employer and employee may agree to waive the employer's duty of providing the employee with either the first or the second meal period, but not both.

This language is confusing for several reasons:

a) The phrase “Except as authorized by an Industrial Welfare Commission wage order in effect as of January 1, 2009”, is non-specific and confusing, as all of the Wage Orders currently authorize a different process from what is set down in SB 287. However, Wage Orders 4, 5, 12, and 14 do differ from what is currently in Labor Code §512 and SB 287 appears to be referencing these Wage Orders with this language. The Committee may wish to consider specifically listing Wage Orders 4, 5, 12, and 14 in order to clarify which industries are being exempted.

b) Outside of its context, this language could be confusing, as it could be read to allow an employee to waive their meal period if they work less than 12 hours. Since many of California’s workers work less than 12 hours, this could be read to deprive them of their sole meal period. The Committee may want to consider the insertion of “more than 10 hours, but” after the word “works” on line 1, page 3, which would read as follows:

Except as authorized by an Industrial Welfare Commission wage order in effect as of January 1, 2009, if an employee works more than 10 hours, but no more than 12 hours in a workday, the employer and employee may agree to waive the employer’s duty of providing the employee with either the first or the second meal period, but not both.

4. **Proponent Arguments:**

Proponents argue that SB 287 would provide clarity and guidance for compliance with meal period laws and regulations by clarifying an employer’s obligation to provide a meal period and an employer’s ability to enter into on-duty meal period agreements. Proponents argue that this clarity is needed due to the multiple interpretations of what an employer’s obligation is to provide a meal period, as well as the disruptive nature in the workplace of policies compelling employees to take their meal periods in order to avoid liability and litigation. Finally, proponents note that over 1,500 lawsuits regarding meal periods were filed from January 2005 to December 2008, and that California’s employers cannot sustain this level of expensive litigation, particularly in this current economic climate.

5. **Opponent Arguments:**

Opponents argue that SB 287 jeopardizes the fundamental right of a meal period by an employee by shifting the responsibility from the employer to the employee, who is at will and is unlikely to feel free to take a meal period when facing the threat of possible unemployment or employer coercion. Opponents argue that this change will particularly hurt the most vulnerable members of California’s workforce, as they will not feel empowered and
able to request a meal period. Opponents also argue that the on-duty meal period provisions in SB 287 are too broad and could lead to understaffing and pressure of workers to increase productivity. Finally, opponents argue that current law sets a reasonable balance between employers and employees, and that changing the definition of providing a meal period will only create more confusion, rather than clarity.

6. Current Legislation:

SB 807 (Benoit) would grant employers greater flexibility to provide meal periods, and also reduce the punishment for failing to provide a meal period. This bill will be heard in the Senate Labor Committee today.

SB 665 (Cedillo) would allow an employer of a registered security officer to provide on-duty meal periods if the officer is covered by a valid collective bargaining agreement containing specified terms or has a written on-duty meal period agreement with his or her employer containing specified terms. This bill will be heard in the Senate Labor Committee today.

SB 380 (Dutton) would grant employers greater flexibility to provide meal periods, expand the number of qualifying circumstances for creating on-duty meal period agreements, exempt collective bargaining agreements from meal period law, and state these amendments are declarative of existing law, and would not be considered amendatory of existing law. The hearing of this bill was cancelled at the author’s request.

AB 569 (Emmerson) would exempt employees in the construction and transportation industry that are covered by a collective bargaining agreement from meal period requirements. This bill was heard in Assembly Labor and Employment on April 22nd and was passed out and sent to Assembly Appropriations Committee.

7. Prior Legislation:

SB 1539 (Calderon) of 2008 sought, among other things, to allow the employer to satisfy the requirement to provide a meal period if the meal period is available to an employee. SB 1539 was heard in this Committee, amended to intent language, and sent to the Senate Rules Committee.

SB 1192 (Margett) of 2008 sought to allow the employer to satisfy the requirement to provide a meal period if the meal period is available to an employee, as well as change the punishment for an employer failing to provide a meal from a premium wage to a penalty. The initial hearing for SB 1192 was cancelled at the author’s request.

SB 529 (Cedillo) of 2008 would have exempted utility workers, construction workers, and security officers from certain meal and rest period requirements. SB 529 was held in the inactive file on the Assembly Floor.

AB 1711 (Levine) of 2007 would have allowed an employee to complete his or her meal period before the conclusion of the 6th hour or work. The initial hearing for AB 1711 was cancelled by the author.
AB 60 (Knox) Statutes of 1999, Chapter 134 codified the meal period for all California employees.

AB 2509 (Steinberg) Statutes of 2000, Chapter 876, created the wage premium penalty for an employer who fails to provide a meal period.

SUPPORT

California Chamber of Commerce (Sponsor)
California Farm Bureau Federation (Sponsor)
California Hotel & Lodging Association (Sponsor)
California Manufacturers & Technology Association (Sponsor)
California Restaurant Association (Sponsor)
California Retailers Association (Sponsor)
Employers Group (Sponsor)
National Federation of Independent Business (Sponsor)

ABM Industries Incorporated
Acclimation Insurance Management Services
Adventist Health
Airline Industrial Relations Conference
Alfred’s Steakhouse, San Francisco
Alvarado Hospital
Associated Builders and Contractors of California
Associated General Contractors
Banner Lassen Medical Center
Bay Area Maintenance Contractors
Beacon Concrete, Inc.
Building Owners and Managers Association
California Association of Health Facilities
California Association of Health Services at Home
California Association of Joint Powers Authority
California Attractions and Parks Association
California Beer and Beverage Distributors
California Business Properties Association
California Chapter of the American Fence Contractors' Association
California Children’s Hospital Association
California Construction & Industrial Materials Association
California Dump Truck Owners Association
California Fence Contractors' Association
California Framing Contractors Association
California Grocers Association
California Hospital Association
California Independent Grocers Association
San Joaquin Sand & Gravel
Sherman Oaks Hospital
Sonora Regional Medical Center
St. Joseph Health System – Sonoma County
St. Joseph’s Behavioral Health Center
Talley Oil, Inc.
Talley Transportation
Tenet Healthcare
The Civil Justice Association of California
Valley Aggregate Transport, Inc.
Valley Farm Transport Corp.
Ventura County Agricultural Association
Vulcan Materials Company, Western Division
West Anaheim Medical Center
Western Electrical Contractors Association
Western Growers
Zephyr Truck & Equipment
1 individual from Corte Madera, CA

OPPOSITION

Amalgamated Transit Union
California Conference of Machinists
California Labor Federation, AFL-CIO
California Nurses Association/National Nurses Organizing Committee
California Teamsters Public Affairs Council
Consumer Attorneys of California
Engineers and Scientists of California
IFPTE Local 21
International Longshore and Warehouse Union
National Right to Work Committee
San Diego County Court Employees Association
Strategic Committee of Public Employees, Laborers' International Union of North America
UNITE HERE!
United Food and Commercial Workers Union, Western States Council
United Nurses Associations of California/Union of Health Care Professionals

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Hearing Date: April 29, 2009
Consultant: Gideon L. Baum

Senate Committee on Labor and Industrial Relations