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The Current State of Meal and Rest Break Law in Washington State

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This article summarizes certain aspects of the current Washington State law of meal and rest breaks, taking into account the latest appellate ruling on the topic, *Brady v. AutoZone Stores, Inc.*, 188 Wn.2d 576, 397 P.3d 120 (2017). The requirements described here apply to non-exempt adults in non-agricultural employment.

The Washington Meal and Rest Break Requirements

Washington is one of eight states¹ mandating rest breaks in addition to meal breaks. Washington's breaks requirements are stated in Washington Administrative Code § 296-126-092:

1. Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.
2. No employee shall be required to work more than five consecutive hours without a meal period.
3. Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.
4. Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.
5. Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required.

¹ The others are California, Colorado, Kentucky, Minnesota, Nevada, Oregon, and Vermont.

Employer's Obligation to “Ensure” Compliant Breaks

One heavily litigated issue in Washington and other states is whether employers are required to merely “provide” breaks or “ensure” that employees take the required breaks. With respect to meal breaks, the Washington Supreme Court, in the new *Brady* decision, adopted the standard that employers have a “mandatory obligation” to both “provide” meal breaks and “ensure” the breaks comply with the law. Employers are not, however, strictly liable for missed meal breaks, the court stated, because under Washington law employees may waive their meal breaks.

This standard differs from that adopted by the California Supreme Court in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 273 P.3d 513 (2012), where the court held that an employer's obligation to provide mandatory meal breaks (which in many cases are not waivable under California law) is only to offer employees a “reasonable opportunity to take an uninterrupted 30-minute break.” It is not yet resolved what additional steps, if any, are required by Washington's “ensure” standard for meal breaks, as compared to the California “provide” standard, in light of employees' ability under Washington law to waive any and all meal breaks.

With regard to rest breaks, the Washington Court of Appeals has applied the same “ensure” standard that the *Brady* court adopted for meal breaks, except that under Washington law, rest breaks may not be waived by employees. For example, in *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 688, 267 P.3d 383 (2011), the court stated that “employers have a duty to provide meal periods and rest breaks and to ensure the breaks comply with the requirements of WAC 296-126-092.”

In light of these decisions, we recommend that employers with employees in Washington make meal and rest break compliance a priority by: (1) ensuring that the company has a compliant meal and rest break policy in writing that is distributed to and signed by all non-exempt employees; (2) training employees and managers about break requirements; (3) specifically scheduling meal and rest breaks whenever practicable, and requiring managers to enforce breaks; (4) recording meal time and monitoring time records to ensure non-exempt employees are taking their full 30 minutes; (5) avoiding the practices of automatic deduction for meal breaks and rounding of meal or rest break time; and (6) requiring non-exempt employees to certify break compliance on a daily basis and report missed breaks.

Issues Specific to Meal Breaks

WAC 296-126-092 requires employers to provide a 30-minute meal break to non-exempt employees for every five hours of work, between the second and fifth working hour. Meal breaks generally may be unpaid if employees are relieved of all duties for the entire period. Meal breaks are compensable, however, when employees are required to remain on duty on the premises or at a prescribed work site in the interest of the employer. Employees who work three or more hours longer than a normal workday must be allowed at least one 30-minute meal period prior to or during the overtime period. The position of the Washington Department of Labor & Industries (L&I) is that the “normal work day” for this purpose is the employee's regularly scheduled shift, which may be longer than eight hours.²

An employee generally must receive 30 consecutive minutes completely free from duty for the meal period to be unpaid. Employees who remain on the premises on their own initiative and keep their pager, cell phone, or radio on during a meal period are not working as long as they are under no obligation to respond to a call or return to work. If, however, an employee is subject to being called back to duty at a moment's notice, then the meal period must be paid.³

² L&I Administrative Policy ESC.6 (June 24, 2005).

³ *Id.*

If an employer provides a paid meal period, it still must make every effort to provide an uninterrupted meal period, and if the meal period is interrupted it should continue after the interruption until the employee has received 30 minutes of total meal time.⁴

Meal Break Waivers

As held in *Brady*, employees may voluntarily waive their meal breaks in Washington. Meal break waivers must be “knowing and voluntary.” To meet this requirement, it is advisable that there be a benefit to the employee in waiving the meal break, such as the ability to leave work early. It is uncertain whether an employee’s waiver of a meal break will be upheld if it is prompted by work demands.

As stated in *Brady*, waiver is an affirmative defense on which the employer bears the burden of proof. Therefore, although written waivers are not mandatory in Washington, they are highly recommended if the employer may want to assert the affirmative defense in litigation.

Issues Specific to Rest Breaks

WAC 296-126-092 requires employers to provide a 10-minute paid rest break to non-exempt employees for every four hours of work, which should be scheduled as near as possible to the midpoint of the four-hour work period. In addition, non-exempt employees cannot be required to work more than three hours without a paid rest break. Because of this latter requirement, relatively modest periods of extra time worked at the end of an eight-hour shift, or a lengthy period between an employee’s meal break and rest break, can trigger an obligation to provide an additional 10-minute paid rest break.

Where the nature of the work allows employees to take intermittent rest breaks, scheduled rest breaks are not required. Intermittent breaks are intervals of short duration where employees are allowed to relax or engage in personal activities. L&I has stated that a series of 10 one-minute breaks is not sufficient, and when the nature of the work is continuous, such as on a production line, intermittent rest periods are not permitted.⁵

Unlike meal breaks, rest breaks cannot be waived.⁶

Merely requiring employees to remain on the premises or on call during a rest break does not trigger an additional payment obligation. If an employee is called to duty during the rest break, he or she must receive the remaining break time intermittently within the four-hour work period.⁷

Damages Resulting from Missed Breaks

In *Pellino*, armored truck drivers and guards were “constantly engaged in work activities” during their paid, on-duty meal periods. As a result, even though the employer had already paid for the time worked, the court found a violation and ordered the employer to pay again as the remedy for the missed meal periods. By contrast, an earlier state appellate court decision, *Iverson v. Snohomish County*, 117 Wn. App. 618, 72 P.3d 772 (2003), held that an employee who performed work duties for up to 10% of the time during paid meal periods was not entitled to additional pay. In light of *Pellino* and L&I’s guidance, the best practice is for employers to ensure that employees with paid meal breaks continue their meal time after any interruptions so they receive 30 total minutes of meal time. For employees with unpaid meal breaks, they should receive 30 consecutive minutes of uninterrupted meal time.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

According to an earlier Washington Supreme Court decision, *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), employees are entitled to damages for missed rest breaks even when they have been paid for all hours worked. Otherwise, according to the court, the employer receives 10 extra minutes of labor for free. In *Washington State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012), the Washington Supreme Court announced that employers must pay for missed rest breaks as additional time worked. If the additional work time is overtime (i.e., it pushes the employee beyond 40 hours for the week, or the employee has already worked more than 40 hours in the week), the missed rest breaks must be compensated at the overtime rate. The appellate courts have not yet directly addressed whether these principles extend to meal breaks.

In light of these obligations, employers in Washington may wish to consider instituting automatic payment to employees for missed breaks. This could be done by requiring employees to report missed and shortened breaks using electronic timekeeping systems or a separate missed breaks form. The employer would then provide payment at rates designed to preempt litigation. While many aspects of the calculation of damages for missed breaks are not yet resolved in Washington, the following would mirror amounts a plaintiff would be likely to claim as back pay:

- If an employee receiving unpaid meal periods receives an interrupted, shortened, or completely missed meal break, credit the employee for the time worked, plus an additional 30 minutes. This includes paying at the normal hourly rate (not minimum wage), and paying any associated overtime pay that results from counting this extra time toward hours worked for the week.
- If an employee receiving paid on-duty meal periods is not able to effectively eat a meal while on duty, credit the employee for the time worked (including the paid meal period), plus an additional 30 minutes. As in the first example, this includes paying at the normal hourly rate (not minimum wage), and paying any associated overtime pay that results from counting this extra time toward hours worked for the week.
- If an employee receives a shortened or completely missed rest break that results in the employee receiving a total of less than 10 minutes of rest break time, credit the employee for an additional 10 minutes (in addition to the usual 10-minute payment for the rest break). This includes paying at the normal hourly rate (not minimum wage), and paying any associated overtime pay that results from counting this extra time toward hours worked for the week.

Paying for Rest Breaks for Piece-Rate Workers

An additional wrinkle applicable to the rest breaks requirement applies to piece-rate workers. The Washington Supreme Court held in *Demetrio v. Sakuma Brothers Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015), that agricultural employers must provide separate payment for rest breaks to piece-rate workers at a special “regular rate.”⁸ The hourly payment rate for rest breaks in this situation is calculated by taking the total piece rate earnings and dividing them by hours worked, not including rest break time. If the calculated “regular rate” is less than minimum wage, the minimum wage must be paid instead. L&I’s Administrative Policy ES.C.6.2 (August 11, 2016), provides examples of how to calculate this “regular rate” and takes the position that non-discretionary bonuses must be included in the calculation.

Two federal district courts, *Mendis v. Schneider National Carriers Inc.*, 2016 U.S. Dist. LEXIS 156695 (W.D. Wash. Nov. 10, 2016), and *Helde v. Knight Transportation Inc.*, 2016 U.S. Dist. LEXIS 56162 (W.D. Wash. Apr. 26, 2016), have extended the *Demetrio* ruling to non-agricultural piece-rate workers.

8 See Breanne Martell, [Washington Piece-Rate Workers to Receive Separate Rest Breaks](#), Littler ASAP (July 23, 2015).