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## **Failure to Provide Cal-OSHA-Required Recovery Periods to Avoid Heat Illness Now Results in Premium Pay – And More Class Action Litigation**

By Ben Huggett and Brian Dixon

California's now familiar one-hour-of-pay premiums for missed meal and rest periods will gain more "heat" on January 1, 2014, when a one-hour-of-pay premium will be required for each day an employer fails to provide "recovery periods" to avoid heat-related illness for employees who work outside. The new pay premiums pose compliance challenges for employers because of the open-ended obligation to provide recovery periods.

### **Pay Premiums for Recovery Periods**

Since August 2005, Cal-OSHA regulations have required employers operating in California to protect outdoor employees from the hazard of heat illness. The Cal-OSHA regulations were promulgated in response to a number of cases of serious heat illness in the workplace, including a number of deaths. Under the regulations, employers must provide access to shade to all employees who work outside and must arrange for access to nearby shade when the temperature exceeds 85 degrees. All employees who work outside must be "allowed and encouraged" to take cool-down periods in the shade for not less than five minutes at a time whenever employees feel the need to do so to protect themselves from overheating. There is no limitation in the regulations on how often employees can take such cool-down periods and no indication in the regulations as to when an employer could deny additional cool-down periods as excessive.

On October 10, 2013, Governor Brown signed into law SB 435, which provides for one hour of premium pay for missed "recovery periods." A "recovery period" is defined in apparent reference to the Cal-OSHA regulations as "a cool down period afforded an employee to prevent heat illness." The new law specifies that an employee cannot be required to work during a recovery, meal or rest period.

SB 435 amends Labor Code section 226.7, which has required employers to provide one hour of pay for missed meal and rest periods. An employee is due a single hour of premium pay for however many required meal periods are missed in a day and a separate hour of premium pay for however many rest periods are missed in a day. The obligation to provide premium pay for missed meal and rest periods has spawned innumerable class actions against California employers for premium pay, statutory penalties, and civil penalties under the Private Attorney's General Act (PAGA).

Employers will face greater challenges when attempting to comply with the obligation to provide recovery periods than with meal and rest period compliance. While the number of meal and rest periods due in a day is now defined in relatively precise terms, the obligation to provide “recovery periods” is nearly open ended. There is no set formula for when recovery periods must be provided. Recovery periods must be provided throughout a day when employees “feel the need to do so to protect themselves from overheating.” As a result, an employee can subjectively determine when a recovery period is needed. If any one or more of an employee’s desired recovery periods is missed in a day, the employee can claim an additional hour of pay for that day.

## Recommendations for Employers

Employers should scale their compliance efforts with the knowledge that SB 435 will spawn more class actions for premium pay and that the potential premium-pay liability may be multiplied by statutory and civil penalties. Employers with employees who work outdoors should review their Heat Illness Prevention programs to ensure that they are compliant with the Cal-OSHA regulations. Such programs, which Cal-OSHA has always required be in writing, should be reviewed to ensure that they provide procedures to provide shade, for employees to request recovery periods, to ensure that recovery periods are provided when appropriate, and that employees and supervisors are timely trained with respect to these and other heat-related safety issues. Certifications on time cards and in electronic timekeeping systems which verify that all required meal and rest periods have been provided should be updated to address the provision of recovery periods.

Employers should be mindful that paying premiums for missed recovery, meal and rest periods does not avoid potential PAGA penalties. Unlike the payment of overtime, which discharges an employer’s obligations with respect to overtime work by an employee, the payment of premiums for missed recovery, meal and rest periods does not make lawful the failure to provide such periods. The payment of premiums for missed recovery, meal and rest periods may be used as proof that such periods were not provided and that PAGA penalties are due. Accordingly, employers’ compliance efforts must be directed, first and foremost, to providing recovery, meal and rest periods when such periods are required and documenting the provision of such breaks from work.

Finally, employers should be sensitive to the other employment law ramifications of the new law. Employers that pay employees by piece rates should anticipate additional costs under a series of recent court decisions which have so far culminated in the conclusion that piece rate pay plans do not provide compensation for rest periods. That line of cases may also result in the conclusion that piece rate pay plans do not provide compensation for recovery periods. Employers should also anticipate that the recent broadening of the definition of protected disabilities may require special attention to the recovery-period needs of certain employees. Employers must approach the termination of employees who take excessive cool-down periods with caution as such adverse action could provide the basis for wrongful termination claims.

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