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Employer Solutions Law

Gimme A Break! Employer's Exposure to Class Action Wage Claims

Why Washington Employers Should Pay Attention

Washington employers are suffering an onslaught of class action wage claims over alleged missed breaks or meal periods for hourly workers.

The number of class action wage cases has increased over ten-fold in the last three years. Two California law firms have filed hundreds of class action cases this year alone. Those firms are sending unsolicited letters to workers encouraging them to bring wage claims.

All that is required is a single worker who will say they regularly missed breaks or meals and the lawsuit becomes a class action incorporating every worker for the prior three years. Missed breaks or meals mean time worked that is unpaid, which cascades into unpaid overtime and miscalculated sick leave. Washington statute awards double damages for failing to pay proper wages without a bona fide dispute*. Judgments in these class action wage cases in the last few years have been in the millions**. Depending on the number of your workers, liability can add up quickly.

REST BREAK: 10 Minutes for Every 4 Hours

MEAL PERIOD: 30 Uninterrupted Minutes After 2 Hours & Before 5 Hours

WAC 296-126-092 requires an employer provide to their employees:a ten (10) minute rest break for every four (4) hours worked and a thirty (30) minute meal period after two hours and before five hours worked. Employees working eleven (11) or more hours in a day must be given at least one additional thirty (30) minute meal period. Meal periods can be waived by the employee***, but rest breaks cannot. The rest break should occur as close to the middle of the work period as possible. Rest breaks may be intermittent short breaks adding up to the ten minutes required.

Making Breaks Available is Not Enough

Employers have an affirmative duty to make sure that their employees receive their rest breaks and meal periods.**** It is not enough for an employer to simply schedule time throughout the day for rest breaks or meal periods if the employee chooses. In reality, this duty flips the burden of proof when an employee claims to have missed a rest break or meal period.

The Best Defense

There is no statute or code specifically requiring that an employer keep records of meal periods. However, the obligation to keep records of all hours worked under WAC 296-126-050 essentially results in showing that meal periods were taken or waived. The Department of Labor and Industries also recommends that any waiver of a meal period be in writing. There is no requirement that an employer keep records of rest breaks. However, if an employer does not document rest breaks and meal periods, the employer is exposed to a single worker claiming they missed breaks or meals and a law firm can file a class action law suit.

Steps Employers Can Take Now

There is no silver bullet to protect against wage claims, but employers can and should take immediate steps to better protect against these expensive class action lawsuits. First, Employment Practices coverage is not a standard part of commercial liability policies and the employer should consider adding it. Next, to meet its affirmative duty, an employer should have:

1. A written policy that will reasonably ensure rest breaks and meal periods are taken;
2. Documented communication to the employee of rest break and meal period policy;
3. Actions taken to audit or confirm the taking of rest breaks and meal periods;
4. An easy method for an employee to report a missed rest break or meal period.
5. Documentation of corrected pay for missed rest breaks or meal periods.

Document! Document! Document!

Where employees self-report their hours, an affirmation that the employee took all breaks and meals should be added to the reported hours. Where time clocks are used, an employer should require clocking in and out for breaks and meals. Finally, employers may consider adding to every pay stub an affirmation that by accepting payment the employee verifies their hours are correct and they took all breaks and meals. Since an employer cannot withhold pay, this last procedure may prove unenforceable, but at least it is something that may deter the class action firms from pursuing a quick pay-off.

The Bottom Line

Washington's meal and rest break requirements are not new, but the increasing frequency and cost of class action wage claims make compliance and documentation more important than ever. Employers should not wait for a claim to find out whether their policies and practices provide adequate protection.

Now is a good time to review meal and rest break policies, timekeeping procedures, employee acknowledgments, and actual workplace practices. No single measure can eliminate the risk of a wage claim, but clear policies, consistent practices, and reliable documentation can put an employer in a much stronger position if a claim arises.

* RCW 49.52.050 and 070
** Androtikus
*** Department's Administrative Policy No. ES.C.6 (the Policy), issued to interpret WAC 296-126-092
**** Pellino v. Brink's Inc., 164 Wash.App. 668, 267 P.3d 383 (2011),
******Lopez Demetrio v. Sakuma Bros. Farms, Inc.* , 183 Wash.2d 649, 658, 355 P.3d 258 (2015).

Contact us if you would like to discuss your current practices or have questions about Washington's wage and hour requirements.

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