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EMPLOYMENT LAW UPDATE

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JUDICIAL

California

California Supreme Court Upholds $90 Million Class Action Judgment Against Employer who Required Employees to Remain "On-Call" During Rest Periods

In *Jennifer Augustus v. ABM Security Services, Inc.*, the trial court granted employee Jennifer Augustus' ("Plaintiff") motion for summary judgment against her employer, ABM Security Services ("ABM"). The court awarded a judgment of $90 million in statutory damages, interest, and penalties. The judgment was subsequently reversed on appeal, and made its way to the California Supreme Court. The Supreme Court found that ABM had violated state law, which requires employers to provide their employees with rest periods that are free from duties or employer control, including the obligation to remain on-call. As a result, the judgment against ABM was reinstated.

ABM employed thousands of security guards at residential, retail, office, and industrial sites throughout California. The guards' primary responsibility was to provide "an immediate and correct response to emergency/life safety situations" and "physical security for the building, its tenants and their employees by observing and reporting all unusual activities. In essence, a guard is the eyes and ears of the site." In 2005, Plaintiff filed a putative class action lawsuit and subsequent motion for summary judgment on behalf of all ABM security guards. Plaintiff's motion alleged that ABM failed to consistently provide uninterrupted rest periods as required by state law. In response, ABM acknowledged that it required guards to keep their radios and pagers on, remain vigilant, and respond when needs arose, such as escorting tenants to parking lots, notifying building managers of mechanical problems, and responding to emergency situations. However, ABM argued that it required guards to remain on-call "only in case an incident arose." ABM offered evidence that class members regularly took uninterrupted rest breaks while on-call. The trial court found ABM's evidence did not relieve it of its duty under state law, and it granted Plaintiff's motion for summary adjudication as to the rest break violation.

On appeal, the Court of Appeal found that state law did not require employers to provide off-duty rest periods, and that simply being on-call did not constitute performing work. The appellate court therefore reversed the judgment. However, the California Supreme Court granted review of the appeal in order to address two issues: (1) whether employers are required to permit off-duty rest periods under Labor Code section 226.7 and Wage Order 4; and (2) whether employers may require employees to remain on-call during rest periods. In this case, the Supreme Court definitively concluded that state law requires off-duty rest periods, and prohibits on-call rest periods, citing *Brinker Restaurant Corp. v. Superior Court*.

The California Supreme Court relied on the basic definition of "rest," which is "freedom from activity or labor," and used *Brinker's* definition of the term "off-duty rest

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period," which is the "time during which an employee is relieved from all work-related duties and free from employer control." The Court found that an employer cannot satisfy its obligation to relieve employees from duties and employer control during rest periods when an employee is on-call. Employees forced to remain on-call must invariably fulfill certain duties: carrying a cell phone or pager, responding to the employer if summoned, and performing work upon request by the employer. Employers who cannot relieve an employee of all duties during his or her rest period can either provide the employee with another rest period to replace the interrupted rest period, or pay the premium pay set forth in section 226.7 and Wage Order 4.

This case demonstrates the importance of ensuring that employees have the opportunity to take ***uninterrupted*** meal and rest breaks. A rest period, in short, must be a period of rest, with no work-related interruptions or on-call arrangements.

Compliant Meal Break Policies and Procedures Save a California Employer from Class Action Liability

In a decisive victory for California employers, a California Court of Appeal determined that an employer's compliant meal break policies, coupled with a practice of granting requests for off-duty meal breaks and providing one hour of pay for missed breaks, satisfied the requirements of state law.

In *Driscoll v. Granite Rock Company*, a class of concrete trucks drivers argued that their employer, defendant Granite Rock, failed to provide them with meal periods as required by law. The trial court determined that Granite Rock had, in fact, provided adequate meal breaks and entered a verdict in favor of the company. On appeal, the drivers argued that the trial court erred: according to the drivers, Granite Rock did not relieve them of all duty or relinquish any control over them, and therefore failed to provide the requisite meal breaks.

Granite Rock's drivers load, deliver, and pour concrete at construction sites. Because concrete is a perishable product that will harden and lose its integrity if not properly monitored, drivers must pay careful attention the rotation of the truck drum. In light of this, Granite Rock provided its drivers with optional on-duty meal agreements.[1] Granite Rock further advised drivers that if they did not sign an on-duty meal agreement and were asked to work through a meal, they would receive an hour of pay. All drivers acknowledged receiving and reviewing this policy. Further, Granite Rock posted the applicable Wage Order at each Granite Rock branch. Drivers testified that they understood that they could revoke the on-duty meal agreement at any time, and the three drivers who did revoke the agreement were provided an hour's pay.

The Labor Code requires that employees be provided with uninterrupted 30-minute meal breaks for shifts of more than five hours, and prohibits employers from requiring an employee to work during a meal break. (Labor Code, §§ 226.7, 512.) If an employer fails to provide an employee with a meal break, the company must pay the employee an additional hour of pay for each workday in which a meal break is not provided. (Labor Code, § 226.7; *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1102.) As the Supreme Court stated in the seminal *Brinker* decision, an employer satisfies its obligation to provide meal breaks—and therefore does not incur the penalty of one hours' pay—if it "relieves employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040.)

[1] California law permits written agreements to take an on-the-job, paid meal break if the nature of the work prevents the employee from being relieved of all duty.

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The Court of Appeal upheld the trial court's verdict in favor of Granite Rock, finding that substantial evidence supported the trial court's finding that Granite Rock had provided meal breaks in accordance with California law. First, the drivers received a legally compliant meal break policy that informed them of the availability and right to take a 30-minute off-duty meal break, and all drivers acknowledged receipt of this policy. Second, Granite Rock posted the applicable Wage Order, which further notified the drivers of their rights regarding meal breaks. Third, there was no evidence that any drivers were denied an off-duty meal break when requested. Fourth, the evidence showed that drivers who did not sign an on-duty meal agreement, or who revoked their agreement, were given one hour of pay as required by law. Therefore, because the drivers were aware of their rights and exercised those rights in requesting and receiving off-duty meals when they wanted them, Granite Rock satisfied its legal obligation to provide meal breaks.

The *Driscoll* decision demonstrates the importance of maintaining and disseminating compliant meal break policies, requiring employees to sign off on such policies, and tracking and providing appropriate penalties when employees miss a meal break. Employers can face significant exposure for failing to provide appropriate meal and rest breaks; thus, taking the time to update break policies and notify personnel of their rights and the company's procedures is critical for human resources professionals.

Court of Appeal Chastises Employer for Poorly Drafted Arbitration Agreement

In *Flores v. Natures' Best Distribution*, a California Court of Appeal confirmed the need for mandatory arbitration agreements to be clearly drafted.

Julie Flores ("Flores") was employed for over ten years by Nature's Best Distribution ("Nature's Best"). In September 2001, at the outset of her employment, Flores purportedly signed an arbitration agreement ("the Agreement") which noted Flores' willingness to submit to binding arbitration all claims against Nature's Best related to her employment.

In early 2014, Flores injured her back while on duty. She continued to work for several months until her condition worsened and she was placed on medical leave in May 2014. Flores' leave was extended to August 15, 2014 and, upon returning to the doctor on that date, Flores learned that she would not be cleared to return to work until September 1, 2014.

Flores did not receive a doctor's note detailing the extension to her leave until August 18, 2014, at which time she faxed a note to Nature's Best (which Nature's Best denies receiving). When Flores attempted to hand deliver the note, she was informed that her employment had been terminated on August 21, 2014 for failure to return from medical leave.

Flores filed suit, alleging claims for disability discrimination, failure to engage in the interactive process, failure to provide a reasonable accommodation, failure to prevent discrimination, and wrongful termination in violation of public policy. Nature's Best petitioned the Court to compel arbitration based on Flores' execution of the Agreement and Flores opposed the petition.

Under California law, arbitration agreements are examined to determine the existence of procedural unconscionability (addressing the manner in which the agreement is made) and substantive unconscionability (addressing the terms of the agreement itself).

In the presence of an undue amount of unconscionability, a petition to compel arbitration will not be granted. Here, the trial court focused primarily on the apparent substantive unconscionability of the Agreement and denied Nature's Best's petition. Nature's Best appealed.

On appeal, the appellate court affirmed the decision of the lower court based on its consideration of three main factors. First, it noted that the Agreement failed to define either the "Employee" or "Employer" to whom the Agreement applied. While Flores purportedly signed the portion of the Agreement marked "Employee," the "Employer" portion was left blank. This failure was deemed improper. Second, the Court noted that the Agreement failed to clearly state the types of claims subject to arbitration. While the Agreement made reference to a Collective Bargaining Agreement ("CBA") under which certain claims would be exempt from arbitration, Nature's Best failed to address the CBA, or analyze whether Flores' claims might apply, in its initial moving papers. Third, the Court addressed the Agreement's failure to identify which set of rules would apply to the arbitration. While the Agreement referred generally to use of the American Arbitration Association's written rules, no specific reference was made to those rules in the Agreement, nor did Nature's Best attach a copy of the purported rules (which were not drafted until 2013, over ten years after the execution of the Agreement) to its petition.

Flores highlights the tremendous importance of well-drafted arbitration agreements. By failing to review or revise the Agreement in the over a decade which elapsed since its initial execution, Nature's Best was forced to rely on a document which did not meet the stringent standards applied to arbitration agreements by today's courts. California employers should therefore be certain that their arbitration agreements are in compliance with current law.

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