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## Washington State Supreme Court Orders Overtime Payment for Missed Breaks

By Daniel Thieme and Breanne Sheetz

Washington's highest court has ruled that missed paid rest breaks count as "hours worked" that trigger overtime obligations for employers. According to the court, employers must add missed rest break time to their employees' hours actually worked, and pay an overtime premium for any resulting hours over 40 in a workweek. Thus, an employee who works 40 hours in a workweek and misses a required 10-minute paid rest break is owed compensation at the overtime rate of one and one half times the regular rate for the missed 10-minute rest break.

### Washington's Meal and Rest Break Regulation

Washington's meal and rest break regulation, Administrative Code section 296-126-092, requires employers to provide a 10-minute paid rest break to non-exempt employees for every four hours of work. Rest breaks should be scheduled as near as possible to the midpoint of the four-hour work period. Non-exempt employees cannot be required to work more than three hours without a paid rest break.

The regulation also requires employers to provide a 30-minute meal period to non-exempt employees for every five hours of work, between the second and fifth working hour. Meal periods generally may be unpaid, but are compensable when, for example, 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.

### The Washington Supreme Court's Recent Rest Break Decision

In *Washington State Nurses Association v. Sacred Heart Medical Center*, 2012 Wash. LEXIS 748 (Oct. 25, 2012), a nurse and her union brought a class action on behalf of 1,200 registered nurses, seeking overtime pay for missed rest breaks under the Washington Minimum Wage Act (WMWA). The nurses' collective bargaining agreement (CBA) required the hospital to provide paid 15-minute rest breaks for every four hours of work. When nurses worked through their rest breaks, they submitted a "Missed Break Request" form and were paid 30 minutes of straight-time pay—15 minutes for their work during the rest break period, and 15 minutes for missing the paid rest break.

The plaintiffs argued that they were entitled to an overtime premium, not just straight-time compensation, for each missed rest break. The plaintiffs brought their claims solely for overtime under the WMWA, and the court held that the claims did not require interpretation of the CBA. Therefore, although the CBA required 15-minute breaks, the decision focused on the 10-minute breaks required by Washington law.

The Washington Supreme Court held that the missed opportunity to rest constituted “hours worked” for which overtime was due. Even though the employees did not actually work more than 40 hours in the week, the employees’ work during their rest breaks was viewed as being equivalent to tacking on 10 minutes of additional “hours worked” per missed rest break. As a result, and because the nurses actually worked at least 40 hours each week, the hospital owed the nurses overtime premium compensation for the first 10 minutes of each missed 15-minute break, or five additional minutes beyond the straight-time compensation the hospital had already paid. If the rule were otherwise, the court reasoned, the employer would have an incentive to employ fewer nurses for each shift and work the nurses harder during busy times. (The decision does not expressly address the question of whether the payment the hospital had already made pursuant to the CBA, of 15-minutes’ pay for each missed rest break, had already satisfied the obligation to provide time-and-a-half overtime pay for the 10-minute rest breaks required by Washington law.)

The court reversed the trial court’s award of double damages under Washington law, finding that there was a “bona fide” dispute because the employer complied with the CBA. Given that there is now a court decision on this issue, however, an employer’s ability to assert this defense in the future may be less certain.

## Additional Rest Break Guidance for Washington Employers

An earlier Washington Supreme Court decision, *Wingert v. Yellow Freight Systems, Inc.*, 50 P.3d 256 (Wash. 2002), held that a non-exempt employee does not have to work a full four hours to become entitled to an additional paid rest break. Rather, an additional rest break is required if the employee works more than three hours without a break.

*Wingert* held that non-exempt employees are entitled to additional compensation for missed rest breaks, but did not resolve the amount of compensation that is due. *Washington State Nurses Association* has now answered that question with respect to overtime compensation. Washington courts have not yet determined, however, whether the proper rate of compensation for a missed *non-overtime* rest break is the employee’s regular rate of pay, or the Washington minimum wage rate.

Although Washington law requires compensation for missed rest breaks, employers should be aware that merely requiring employees to remain on the premises or on call during a rest break does not trigger an additional payment obligation. This guidance is set out in the Washington State Department of Labor & Industries’ (L&I) *Administrative Policy ES.C.6* (June 24, 2005). According to L&I, if an employee is called to duty during the rest break, he or she must receive the remaining break time intermittently within the 4-hour work period. Intermittent rest breaks are permitted, as long as the employee is allowed to rest and relax or perform personal activities during intervals of short duration that add up to 10 minutes every four hours. Intermittent rest breaks must start no later than the end of the third hour of the shift.

Unlike meal periods (discussed below), L&I’s position is that rest breaks required by Washington law cannot be waived.

## Meal Period Guidance for Washington Employers

The *Washington State Nurses Association* decision, addressing rest breaks, comes a year after another important, employee-friendly decision that addressed meal periods. In *Pellino v. Brink’s*, 267 P.3d 383 (Wash. Ct. App. 2011), the Washington Court of Appeals held that the Washington breaks regulation imposes a “mandatory obligation” on an employer to both “provide” meal breaks and “ensure” the breaks comply with the regulation. In *Pellino*, armored truck drivers and guards were “constantly engaged in work activities” during their meal periods. As a result, even though the employer had already paid for the time actually worked, the court found a violation and ordered the employer to pay *again* as the remedy for the missed meal periods (without an award of double damages). By contrast, an earlier state appellate court decision, *Iverson v. Snohomish County*, 72 P.3d 772 (Wash. Ct. App. 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. Thus, while there is usable guidance for the extremes (where an employee is engaged in work for up to 10% of a meal period or for an entire meal period), there currently is no guidance for situations between these extremes.

L&I, in *Administrative Policy ES.C.6*, addresses how employers should handle meal periods when employees are on call or interrupted during their break. It is L&I's position that an employee generally must receive 30 consecutive minutes completely free from duty for the meal period to be unpaid. If an employee is subject to being called back to duty at a moment's notice, then the meal period must be paid. 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.

Under Washington law, employees may waive their meal periods. Although a written waiver is recommended, it is not required. In *Pellino*, the court adopted L&I's interpretation of meal break waivers, but did not find a valid waiver under the circumstances of the case. The *Pellino* court also stated that a waiver must be knowing and voluntary, and that waiver is an affirmative defense on which the employer bears the burden of proof.

## Recommendations for Employers

These recent developments highlight how crucial it is for employers to remain updated on state-specific laws. For example, in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012), the California Supreme Court recently held that California employers must provide employees with an opportunity for meal periods, but need not ensure that employees perform no work. The *Pellino* decision in Washington arguably goes beyond *Brinker* by imposing an affirmative obligation on employers to ensure that meal periods are made available consistent with Washington law. Likewise, the *Washington State Nurses Association* decision has imposed an overtime obligation with respect to missed rest breaks in Washington that does not appear to exist in other states.

In light of these recent developments, employers with Washington employees should audit their meal and rest break practices and consult with counsel to ensure compliance. Examples of issues to consider include: (1) strategies to ensure that employees are taking meal and rest breaks; (2) strategies for documenting the provision of paid rest breaks on an "intermittent" basis; (3) methods for reporting missed meal and rest breaks; (4) proper calculation of pay for missed meal and rest breaks; and (5) implementation of meal break waivers.

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