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### California Supreme Court Rules Employees Must Be Off Duty During Rest Breaks; Action Steps for Employers

The California Supreme Court has issued a new decision, [Augustus v. ABM Security Services, Inc.](#), S224853 (Dec. 22, 2016), confirming that employers have the same obligations regarding rest breaks as they do regarding meal periods: the employer must relieve the employee of all duties and relinquish any control. Employers generally cannot require employees to remain on-duty or on-call during meal breaks, and likewise, they cannot require employees to be “on-duty” or “on-call” during rest periods.

#### **Background**

ABM provides security guard services. In 2005, the plaintiff, a security guard, filed a class action alleging that ABM failed “to consistently provide uninterrupted rest periods,” as required by law. ABM admitted that it did not relieve guards of all duties during rest periods. In particular, 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 emergencies.

Plaintiffs moved for summary judgment, arguing that it was undisputed that ABM’s policy violated state law. ABM argued that its policy did not violate the law because it merely required security guards to be on-call in case an incident required a response. But the trial court granted plaintiffs’ motion, concluding that ABM’s policy was to provide guards with rest periods subject to employer control and the obligation to perform certain work-related duties. The court reasoned that a rest period subject to such control was indistinguishable from the rest of a workday; in other words, an on-duty or on-call break is no break at all. The court subsequently granted plaintiffs’ motion for summary judgment on damages, awarding approximately \$90 million in statutory damages, interest, and penalties. The Court of Appeal reversed, holding that state law does not require employers to provide off-duty rest periods, and moreover, simply being on-call does not constitute performing work.

#### **The California Supreme Court’s Ruling**

The California Supreme Court overturned the Court of Appeal’s holding. First, the Supreme Court clarified that an employer’s duties regarding rest breaks are the same as they are for

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meal periods -- the employer must relieve the employee of all duties and relinquish any control over how the employee spends the time.

The Court held that this interpretation was consistent with the language of the applicable wage order, the statutes relating to the wage order, and the DLSE's opinion letters. Second, the Court held that an employer cannot require employees to be on-call during their rest periods: "[O]ne cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods." The Court recognized, as a practical matter, that employees would need to stay close to the employer's premises during their rest breaks. While that did not establish employer control, placing an affirmative duty to be "on-call" in some fashion did.

### ***What To Do Now***

The *Augustus v. ABM Security Services, Inc.* decision is not a dramatic departure from, or change to, prior law regarding rest breaks for non-exempt employees. Indeed, the Court reached its decision based on the language of the applicable IWC Wage Orders and Labor Code, as well as its prior holding in *Brinker Restaurant Corp. v. Superior Court*.

The takeaway for employers is that they should treat their employees' rest breaks in the same manner that they treat their meal periods. Employers should carefully review their break policies and practices to make sure they do not require employees to stay on premises or at a certain location, or to carry cell phones or pagers, or perform any duties whatsoever during breaks. Note, that we have seen some employer policies that require employees to remain at or near the premises during rest breaks. Such provisions should be eliminated and policies should simply make it clear that non-exempt (hourly) employees will be authorized to take their rest breaks at the required intervals, and that during those breaks they will be completely relieved of all duties and employer control.

Also, employers should note that if an employee is called back to work during a rest break or the break is otherwise interrupted, the employer can avoid problems by allowing the employee another opportunity to take a full 10-minute off-duty rest break within that same work period (the requirement is one 10-minute rest break for each 4-hour work period). Otherwise, the employer will be liable to pay the employee a missed rest break "premium," equal to one hour of pay at the employee's regular rate.



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