No. S166350

In The Supreme Court of the State of California

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.
Petitioners,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,
Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest

On Review From The Court Of Appeal
For the Fourth Appellate District, Division One, 4th Civil No. D049331
After An Appeal From the Superior Court of San Diego County
Honorable PATRICIA A.Y. COWETT, JUDGE, Case Number GIC834348

APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICI CURIAE* EMPLOYERS GROUP, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA RESTAURANT ASSOCIATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.

[BRIEF OF *AMICI CURIAE*, REQUEST FOR JUDICIAL NOTICE AND DECLARATION OF GUYLYN CUMMINS FILED CONCURRENTLY HEREWITH]

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I. APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, proposed *Amici Curiae* the Employers Group, California Retailers Association, California Hospital Association, California Restaurant Association and National Federation of Independent Business Small Business Legal Center (Amici) respectfully submit the enclosed brief ("Brief") in support of Petitioners BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P. (Petitioners). Amici are composed of California employers from various industries, which collectively employ millions of California employees. Yet, regardless of their specific industry or individual employee policies providing for statutorily-required rest and meal periods, this case presents threshold legal issues of crucial importance that affect them all. (See Petitioners' Answer Brief on the Merits setting forth the issues addressed, pages 2-3 (AB, pp. 2-3).)

A. Amici are:

EMPLOYERS GROUP: Employers Group is the nation's oldest and largest human resources management organization. It represents nearly 5,000 California employers of all sizes and every industry, who employ approximately 2.5 million employees. Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members, for the millions of individuals they employ, and for the public.

Employers Group seeks to promote the stability of industry and employment in California by enhancing the predictability and fairness of the laws and decisions regulating employment relationships. The Employers Group, a California non-profit organization, also provides live helpline assistance, online resources and tools, and in-company human resources consulting services and support to its members, in order to provide customized answers to thousands of employment law questions under California and federal laws.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one. Employers Group has been involved as *amicus curiae* in many significant employment cases.[1]

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[1] Employers Group has participated in this case *Brinker Restaurant Corp. v. Superior Court* (*Brinker*) (2008) 80 Cal.Rptr. 3d 7810; *Jones v. The Lodge At Torrey Pines Partnership* (2008) 42 Cal.4th 1158; *Gentry v. Superior Court* (2007) 42 Cal.4th 443; *Prachasaisoradej v. Ralph's Grocery Co.* (2007) 42 Cal.4th 217; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094; *Pioneer Electronics (USA) Inc. v. Superior Court* (2007) 40 Cal.4th 360; *Smith v. L'Oreal USA, Inc.* (2006) 39 Cal.4th 77; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028; *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264; *Reynolds v. Bement* (2005) 36 Cal.4th 1075; *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319; *State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026; *Konig v. Fair Employment & Housing Commission* (2002) 28

CALIFORNIA RETAILERS ASSOCIATION: California Retailers Association (CRA) is the only trade organization in California that represents a broad base of retail companies, including supermarkets, chain drugstores and general merchandise retailers. It is comprised of member companies that operate over 9,000 stores with sales in California in excess of $100 billion annually. Class action wage and hour litigation is of increasing concern for CRA members given the unsettled state of the law and the tremendous costs associated with class actions, as outlined in the Brief.

CALIFORNIA HOSPITAL ASSOCIATION: California Hospital Association (CHA) represents the interests of hospitals, health systems and other healthcare providers in California. CHA includes nearly 450 hospital and health system members, and more than 200 executive, associate, and personal members. CHA's mission is to improve healthcare quality, access and coverage, and to

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Cal.4th 743; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317; *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163; *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66; *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143; *Reno v. Baird* (1998) 18 Cal.4th 640; *Jennings v. Marralle* (1994) 8 Cal.4th 121; *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083; *Rojo v. Kliger* (1990) 52 Cal.3d 65; *Shoemaker v. Myers* (1990) 52 Cal.3d 1; *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654; and *Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379.

create a regulatory environment that supports high-quality, cost-effective healthcare services. Pursuant to that mission, CHA has consistently consulted on issues that affect the healthcare industry and advocated on behalf of hospitals, health systems, and other healthcare providers. CHA has worked closely and extensively with the Industrial Welfare Commission (IWC) in its process of issuing Wage Orders, and has also worked closely with the California Division of Labor Standards Enforcement (DLSE), the administrative agency that enforces Wage Orders and the Labor Code. The issues presented in this case are of immense concern to CHA and its members, especially given the unique needs of the health care industry regarding meal and rest requirements, some of which are addressed in the Brief.

CALIFORNIA RESTAURANT ASSOCIATION: California Restaurant Association (CRA) is the definitive voice of the California restaurant and hospitality industry, and the largest and longest serving non-profit trade association in the nation. Representing the restaurant and hospitality industries since 1906, it is made up of over 22,000 foodservice establishments in California. Class action wage and hour litigation is also of immense concern for CRA members, because of the uncertainty of the statutory interpretation of the Labor Code provisions at issue and the enormous cost of class action litigation, as addressed in the Brief.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER: National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm, established to be the voice for small business in the nation's courts and the legal resource for small business. NFIB Legal Center is the legal arm of the National Federation of Independent Business (NFIB).

NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide, including 23,000 in California. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses nationwide, such as this important and vital case to California employers. NFIB has a substantial interest in the outcome of this case because their members have been and continue to be the subject of numerous class action lawsuits brought by employees claiming that they were not provided with meal and rest periods in accordance with the law.

B. Amici's Interests

Amici have a substantial interest in the outcome of this case because their members have been and continue to be the subject of numerous class action and other lawsuits brought by employees

claiming that they were not provided with meal and rest periods in accordance with California law. Accordingly, Amici's members have been harmed by the uncertainty that has heretofore existed in how California Labor Code Sections 512 and 226.7 are interpreted and enforced. Amici's members have not only been forced to defend many costly, frivolous lawsuits over the correct interpretation and enforcement of Sections 512 and 226.7, but have also paid substantial premium penalty "buy offs" just to avert even the threat of litigation.

Assisting with the development of a regulatory environment that is both clear and in conformance with the law is a central component of Amici's mission. Amici Employers Group, California Retailers Association, California Hospital Association, California Restaurant Association, and National Federation Of Independent Business Small Business Legal Center therefore respectfully request that they be provided the opportunity to file the enclosed Brief for the Court's consideration.

II. ISSUES IN NEED OF FURTHER BRIEFING

Given the extensive legal briefing already before the Court by the parties on the primary issues to be addressed by the Court, Amici address two related issues, which also compel the conclusion that Labor Code Sections 512 and 226.7 must be interpreted according to their plain terms to allow for flexible meal and rest periods:

1. The staggering cost to California employers of the sweeping epidemic of class actions and individual lawsuits based on the rigid "scheduling and policing" duties the plaintiffs' bar says employers owe regarding meal and rest periods, and in paying the wage premium "buy offs" in an attempt to ward off such costly lawsuits; and

2. The enormous public policy considerations that support interpreting Labor Code Sections 512 and 226.7 in accordance with their plain terms as written by California's Legislature, and militate against imposing the costly, onerous scheduling and policing duties on employers that also deprive employees of the right to choose when to eat and take rest periods.

The enclosed Brief offers unique "real world" cost and policy perspectives on these two issues, illuminated by statistical studies. As the Brief sets forth, both the cost and policy implications of the alleged duties the plaintiffs' bar says California employers owe regarding meal and rest periods would be extremely detrimental not only to California employers, but to the public as well. Amici represent the health care, restaurant, and retail industries, small business, and a host of other California employers, and therefore provide a unique set of perspectives on the issues pending before the Court, particularly as to cost and policy implications.

Amici support the arguments submitted by Petitioners, but do not repeat those arguments in this Brief. Rather, Amici believe the "real world" experiences and policy considerations and statistical studies set forth in its Brief will assist the Court in evaluating from a "real world" perspective the important legal issues presented by this case.

For the reasons set forth in this Brief and by Petitioners, Amici respectfully urge this Court to affirm fully the Court of Appeal's decision in this case.

III. CONCLUSION

For the aforementioned reasons, Amici Employers Group, California Retailers Association, California Hospital Association, California Restaurant Association and National Federation of Independent Business Small Business Legal Center

respectfully submit the enclosed Brief and request that the Court accept the Brief for filing and consideration.

August 15, 2009

By _____

GUYLYN R. CUMMINS
Attorneys for *Amici*
Employers Group, California Restaurant Association, California Hospital Association, California Retailers Association, and National Federation Of Independent Business Small Business Legal Center

Brinker Restaurant Corporation, et al v. San Diego Superior Court,
California Supreme Court No. S166350
Fourth Appellate District No. D049331
San Diego Superior Court No. GIC834348

PROOF OF SERVICE

I am employed in the County of San Mateo; I am over the age of eighteen years and not a party to the within entitled action; my business address is 990 Marsh Road, Menlo Park, California 94025.

On **August 18, 2009**, I served the following document(s) described as **APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICI CURIAE* EMPLOYERS GROUP, CALIFORNIA RETAILERS ASSOCIATION, CALIFORNIA HOSPITAL ASSOCIATION, CALIFORNIA RESTAURANT ASSOCIATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

L. Tracee Lorens Wayne A. Hughes Lorens & Associates APLC 701 B Street, Suite 1400 San Diego, CA 92101	***Attorneys for Plaintiffs, Real Parties in Interest and Petitioners Adam Hohnbaum, et al.***
Timothy D. Cohelan Michael D. Singer Cohelan Khoury & Singer 605 C Street, Suite 200 San Diego, CA 92101	***Attorneys for Plaintiffs, Real Parties in Interest and Petitioners Adam Hohnbaum, et al.***
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Hon. David B. Oberholtzer San Diego County Superior Court Hall of Justice, Dept. 67 330 W. Broadway San Diego, CA 92101	***Superior Court of California, County of San Diego***
California Court of Appeal Fourth Appellate Dist, Division One 750 B Street, Suite 300 San Diego, CA 92101	***California Court of Appeal***

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Menlo Park, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 18, 2009, at Menlo Park, California.

Robin P. Regnier

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I. ISSUES ADDRESSED

Amici curiae Employers Group, California Restaurant Association, California Hospital Association, California Retailers Association, and National Federation of Independent Business Small Business Legal Center (Amici) file this brief in support of Petitioners BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P. (Petitioners). Amici are composed of California employers from various industries, which collectively employ millions of California employees. Yet, regardless of their specific industry or individual employee policies providing for statutorily-required rest and meal periods, this case presents threshold legal issues of crucial importance that affect them all. (*See Petitioners' Answer Brief on the Merits* setting forth the issues addressed, pages 2-3 (AB, pp. 2-3).) Given the extensive legal briefing already before the Court on these issues in which Amici join, Amici address two related issues, which also compel the conclusion that California Labor Code Sections 512 and 226.7 must be interpreted according to their plain terms to allow for flexible meal and rest periods:

1. The staggering cost to California employers of the sweeping epidemic of class actions and individual lawsuits based on the rigid "scheduling and policing" duties the plaintiffs' bar says employers owe regarding meal and rest periods, and in paying the wage premium "buy offs" in an attempt to ward off such costly lawsuits; and

2. The enormous public policy considerations that support interpreting Labor Code Sections 226.7 and 512 in accordance with their plain terms as written by California's legislature, and militate against imposing the costly, onerous scheduling and policing duties on employers that also deprive employees of the right to choose when to eat and take rest periods.

II. SUMMARY OF ARGUMENT

There is no dispute that, by statute and regulation, California employers must provide, and California workers have the right to take, the meal and rest periods allotted by law. The dispute involves whether California employers have the rigid scheduling and policing duties regarding meal and rest periods that the plaintiffs' bar seeks, but which are not contained either in the Labor Code or the Wage Orders.

As the news media correctly report, and as shown below, California employers have been crippled by an avalanche of class actions and individual lawsuits regarding "violations" of these alleged meal and rest period scheduling and policing duties the plaintiffs' bar says employers owe, but which are nowhere found in the Labor Code or Wage Orders. Such litigation has been accurately called a "thriving industry" for the California plaintiffs' bar, because compliance essentially requires employers to hire supervisors or "proctors" to ensure that each of their employees fully take meal and rest periods each day, and that meal periods are accurately documented so as not a single minute error by an employee or otherwise occurs (*e.g.*,

recording a 29, rather than 30, minute meal period, or a meal period offered at five hours and one minute into an employee's shift, rather than at exactly five hours into the shift).

Imposing the rigid scheduling and policing duties on California employers that the plaintiffs' bar requests will continue the onslaught of tremendously expensive, but frivolous, class action and individual litigation on technical compliance issues that currently exists, as well as payment of wage premium "buyoffs" to cure miniscule or technical errors — for little, if any, public benefit. These costs are magnified by class action abuses, such as the pressure on employers to settle even unwarranted lawsuits, *e.g.*, due to the large class size, or the significant legal fees required just to defend them.

With businesses failing by the thousands in this economy, and being driven from California in droves due to the high cost of doing business here, such wasteful and costly litigation should be halted forthwith by interpreting Labor Code Sections 512 and 226.7 according to their clear terms. California employers should not be required to punish or terminate employees who do not want their full 30-minute, unpaid meal periods or rest periods, or to be liable for their employees' choice not to fully take them. Substantial well-reasoned case law supports this result. (*See AB, passim*, including pp. 55-58 [discussing the nine federal court cases aligned with the *Brinker Restaurant Corp. v. Superior Court* (*Brinker*) (2008) 80 Cal.Rptr. 3d 781 decision, previously published at 165 Cal.App.4th 25].)

Substantial public policy considerations also support a plain meaning interpretation of Labor Code Sections 512 and 226.7, and militate against imposing onerous, costly scheduling and policing duties on employers, that also deprive employees of choice and privacy regarding their meal and rest period decisions. As shown below, it is *impossible* for employers to always comply each day with the rigid meal and rest period scheduling and policing duties the plaintiffs' bar desires, especially in certain industries (*e.g.*, the health care industry). The failure to do so means that California employers will be forced to pay substantial wage premium "buyoffs" to eliminate the risk of class action upon class action for their inability to perfectly comply each and every day, if such rules are imposed by this Court.

III. IMPOSING RIGID MEAL AND REST PERIOD SCHEDULING AND POLICING DUTIES ON CALIFORNIA EMPLOYERS WILL ENSURE MORE CRIPPLING LITIGATION, PENALTIES, AND OTHER SOCIETAL COSTS, WHICH SERVE NO PUBLIC INTEREST

California employers have been subject to a staggering sum of class action and individual lawsuits for harmless alleged technical meal and rest period scheduling and policing duty "violations" based on the duties the plaintiffs' bar says employers owe, for at least the last six years. As shown below — in just the courthousenews.com California database alone — California employers have had thousands of such lawsuits filed against them in the last six years, and are forced to either defend them at tremendous expense, or pay costly settlements for even harmless "violations" (*e.g.*,

where employee time cards show a 29, rather than 30, minute meal period).

A. Thousands Of Meal And Rest Period Cases Have Been Filed Over The Alleged Scheduling and Policing Duties Owed By Employers In The Last Six Years, And Will Continue Unless Meal and Rest Period Flexibility Is Allowed

Statistics regarding meal and rest period litigation graphically show why California businesses are being driven from the state for want of clear flexible meal and rest period rules, that mirror the plain meaning of the words chosen by the legislature in Labor Code Sections 512 and 226.7.

Since 2003, California employers have been sued for alleged meal and rest period violations in more than 2,750 lawsuits, according to the courthousenews.com California database alone.[1]

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[1] The statistics have been drawn from Courthousenews.com. Courthousenews.com is a news database created by a network of correspondents who compile comprehensive reports on new civil cases filed in federal and state courts. The statistics cited in this brief were obtained from the California database on June 25, 2009, which includes the following superior courts: Alameda, Alpine, Amador, Butte County, Calaveras County, Colusa County, Contra Costa County, Daily Ledger Court, Del Norte County, El Dorado, Fresno County, Glenn County, Humboldt County, Imperial County, Inyo County, Kern County, Kings County, Lake County, Lassen County, Los Angeles County, Madera County, Marin County, Mariposa County, Mendocino County, Merced Bounty, Modoc County, Mono County, Monterey County, Napa County, Nevada County, Orange County, Placer County, Plumas County,

Many, if not all, of the lawsuits involve the issue of whether "provide" really means employers must "ensure" meal and rest periods are fully taken (*e.g,* not one minute too short), by every employee, every day, and at the exact time the plaintiffs' bar believes they are owed. Of those 2,750 lawsuits, more than 1,750 are costly class actions. The break down is as follows:

- In 2003, 82 class actions were filed against California employers alleging the failure to properly provide meal and rest periods to employees, plus an additional 27 individual lawsuits (that can evolve into class actions), for a total of 109 lawsuits;

- In 2004, the number of class actions more than doubled to 193 lawsuits, with an additional 57 individual lawsuits, for

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Riverside County, Sacramento County, San Benito County, San Diego, San Francisco County, San Joaquin County, San Luis Obispo County, San Mateo County, Santa Barbara County, Santa Clara County, Santa Cruz County, Shasta County, Sierra County, Siskiyou County, Solano County, Sonoma County, Stanislaus County, Sutter County, Tehama County, Trinity County, Tulare County, Tuolumne County, Ventura County, Yolo County, and Yuba County. The database also includes the U.S. Bankruptcy Courts for the Central, Eastern, Northern and Southern Districts of California, and U.S. District Courts for the Central District (including the Santa Ana Division), for the Eastern District (including the Fresno Division), for the Northern District (including the Oakland and San Jose Divisions), and the Southern District. (See http://www/courthousenews.com.) No statistics on meal and rest period violations are available from this database before 2003. Additional lawsuits have continued to be filed since June 25, 2009, which are not included in the above statistics. See declaration of Guylyn R. Cummins filed herewith.

a total of 250 lawsuits filed alleging an employer's failure to properly provide meal and rest periods;

- In 2005, the number of class actions climbed to 213 lawsuits, with 103 individual lawsuits filed, for alleged meal and rest period violations in 316 lawsuits;

- In 2006, the number of class actions for alleged meal and rest period violations again rose by more than 30% to 283 lawsuits, plus 125 individual actions, for a total of 408 lawsuits filed;

- In 2007, the number of class actions rose another 30% to 374 lawsuits, plus 170 individual actions, totaling 544 meal and rest period lawsuits filed;

- In 2008, the number again rose to 408 class actions, with 253 individual actions, for a total of 661 lawsuits filed.

- In the first six months of 2009 (to June 25, 2009), meal and rest period class actions numbered 209, with 256 individual actions, for a total of 465 lawsuits. When these numbers are annualized, the estimated number of class actions approaches 418 this year, with a staggering combined total of nearly 1,000 meal and rest period lawsuits to be filed against California employers by year end.

The cumulative total of class actions filed against California employers for alleged meal and rest period violations will

have risen from 2003 to the end of 2009 by 500 percent, and for individual actions during the same time period by 900 percent. Moreover, where class certification is granted, due to the substantial uncertainty in the law and the enormous cost of litigation presented to employers, settlement occurs in 89% of those cases, with a class trial occurring in only 4% of certified cases.[2]

California cannot afford to continue saddling employers with the crippling cost of defending against these frivolous lawsuits, the majority of which are brought only because of the hypertechnical interpretation of the onerous scheduling and policing duties that the plaintiffs' bar says California employers owe to millions of employees.[3] According to the plaintiffs' bar, an employer violates its scheduling and policing duties every time the employer fails to "ensure" that employees' meal or rest periods are not fully offered, or not fully taken by any employee (as opposed to "offered"), or not

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2 *See Year-End Update On Class Actions: Explosive Growth in Class Actions Continues Despite Mounting Obstacles to Certification*, at http://www.gibsondunn.com/publications/pages/year-endupdateonclassactions.aspx (visited on 6/17/2009) (relying on Willging & Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation*, Federal Judicial Center, 2005, at 50).

3 A Google search of "meal breaks" and California Lawyer yielded 563,000 hits on July 21, 2009, including hundreds, if not thousands, of lawyers willing to handle meal and rest period violations. See also websites like bigclassaction.com (listing an inventory of class action suits and lawyers handling them) and classactionlawsuits.org (same), as well as websites like www.paymeovertime.com/ and www.sueeasy.com.

offered "on time."[4] Defense costs — even where no employee is actually harmed — can be so severe that a single lawsuit can drive an employer out of business.

The average estimated cost to settle such suits is between $5 million and $25 million, depending on the class size and length of the litigation, which graphically illustrates why this is a "thriving industry" for the plaintiffs' bar.[5] Yet, ensuring and documenting meal and rest periods is exceedingly difficult for employers. The task of leaving managers with policing whether employees actually take their full meal and rest periods, and properly record them, is imprecise at best. If a worker eats at his desk, does that qualify as a meal break? Does the worker have to turn off her computer or Blackberry while eating? With large businesses employing thousands of workers, it can be costly and time-consuming to document that all workers take meal and rest periods when they are supposed to and for the exact time they are supposed to take them. If an employer has hundreds or thousands

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4 See also statistical report at http://www.gibsondunn.com/publications/pages/year-endupdateonclassactions.aspx (visited on 2/17/2009) (noting, "Class actions in federal court have risen steadily in recent years, increasing 72% between 2001 and 2007, and averaging 4000-5000 per year as of mid-2007. ... Between July-December 2001 and January-June 2007, labor class actions alone increased an astonishing 228%.")

5 *See* Inside Counsel, October, 2008, *California Courts Rethink Rest Break Rules;* at *http://www.insidecounsel.com/Issues /2008/October%202008/Pages/California-Courts-Rethink--Rest-Break-Rules.aspx,* (visited on July 6, 2009); *see also Sacramento Bee, Meal breaks issue still needs resolution,* at 2009 WLNR 2952646 (visited on July 6, 2009).)

of workers, the cost of ensuring that each employee takes the required meal and rest periods is enormous.

Moreover, many employers automatically pay the wage premium "buyoffs," which the law sets at one hour's wages for every "irregular" meal or rest period, simply to avoid the possibility of litigation whenever any "irregularity" appears. That is a substantial cost burden, even if the employee decided to voluntarily work through or shorten a meal or rest period, as these wage premium buyoffs can amount to millions of dollars.[6]

Hypertechnical interpretations of the scheduling and policing duties owed by employers have also become, by necessity, such a "hot button" for employers that they have spent countless dollars hiring attorneys to audit meal and rest period practices, write handbooks, and run seminars in hopes of warding off potential lawsuits. The reason: Even a single infraction can result in hundreds,

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6 As discussed *infra,* an affiliate of Sutter Health is defending its third class action for allegedly violating the rigid, unwritten scheduling and policing "rules" for meal and rest periods for certain employees. One of the current plaintiffs, a surgical technician who often assists in complex cases that take five or more hours of surgery, says he often misses the required meal and rest periods at the times the plaintiffs' bar says they are to be scheduled. (*See Sacramento Business Journal, Sutter sued a third time over missed meal breaks* (05/23/08) (visited on July 19 at http://sacramento.bizjournals.com/sacramento/stories /2008/05/26/story4.html), *See also* Daily Labor Report News Thursday, February 21, 2008, *Nurses' Class Action Against Sutter Health* at bna.com (visited on July 27, 2009) [noting Sutter Health paid $3.8 million to employees for missed meal periods in 2005, 2006, and 2007).

if not thousands, of claims, and the failure to provide even a 10-minute break can add up to hundreds of hours and thousands (or millions) of dollars in wage premium "buyoffs." (See fn. 6, *supra*.)

Many management lawyers now urge employers to allocate the staffing and budget resources necessary to ensure compliance, including hiring the number of supervisors necessary to supervise each employee, additional payroll clerks to review timecards and pay premiums for every violation (no matter how miniscule), and lawyers to do routine legal audits to ensure compliance. Some even counsel employers to incentivize employees to report out their peers who violate the "rules."

Unfair and inflexible meal and rest period duty rules waste money and cost jobs. Neither is good for business or labor. The court in *Starbucks Corporation v. Superior Court* (2008) 168 Cal.App.4th 1436, underscored the rub of the problem, *i.e.*, allowing "the use of the very process of litigation to precipitate payoffs by private businesses for alleged violations of law having no real relationship to a true public interest." (*Id.* at 1451, citing *Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1216.) In addressing the evils wrought by "lawyer bounty hunter" lawsuits — especially to obtain redress for millions of ***unharmed*** employees — the court stated:

> Given the size of the class, the potential exposure is so large that the pressure to settle may become irresistible. ...This is a valid concern: "Many corporate executives

> are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.... Enhancing the prospects for obtaining a settlement on a basis other than the merits is hardly a worthy legislative objective."

(*Id.* at 1453.) As shown previously, settlement occurs in 89% of cases where a class is certified. (*See* p. 8 and fn. 2, *supra.*)

Unless the plain language of the Labor Code provisions is honored — yielding flexible meal and rest period scheduling, and eradicating onerous policing duties — California employers will continue to face crippling litigation, and substantial costs for premium wage "buyoffs," for any deviation from the rigid duties the plaintiff's bar says are owed. Employers will continue to be forced to "over-comply" and "overcompensate" employees, as they do now, to avoid litigation, thereby adding tremendous unnecessary costs to employers, which are passed on to the public through higher cost products and services.

B. Countless Dollars In Settlement Of Frivolous Meal And Rest Period Cases Have Been Paid In The Last Six Years, And Will Continue Unless Meal and Rest Period Flexibility Is Allowed

Millions of dollars have also been paid to resolve costly lawsuits for alleged violations of meal and rest period duties in the last

six years.[7] A sampling of the thousands of settlements and verdicts that have occurred in the last few years shows the following:

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[7] The results reported are from https://web2.westlaw.com databases described below, obtained on July 6, 2009.)

California Combined Jury Verdicts (CA-JV-COMB): The CA-JV-COMB database contains verdict, judgment, settlement, arbitration and expert witness information from Incisive Media, LRP, Inc. and Trials Digest, a Thomson Reuters/West business. The summaries consist of information such as case type, geographical area where a case was tried, party names, attorneys' names, expert witnesses' names, factual information about the case, and verdict amounts. A document is a summary of a jury verdict, judgment, settlement or arbitration.

California Jury Verdicts All (CA-JV-ALL): The CA-JV-ALL database contains verdict, judgment, settlement, arbitration and expert witness information compiled by jury verdict publishers. The summaries consist of information such as case type, geographical area where a case was tried, party names, attorneys' names, expert witnesses' names, factual information about the case, and verdict amounts. A document is a summary of a jury verdict, judgment, settlement or arbitration.

California Jury Verdicts Plus (CA-JV-PLUS): The CA-JV-PLUS database contains jury verdict, judgment, settlement, arbitration and expert witness information from states in the 9th Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) which have been compiled by jury verdict publishers. The summaries consist of information such as case type, geographical area where case was tried, party names, attorneys' names, expert witnesses' names, factual information about the case, and verdict amounts. A document is a summary of a jury verdict, judgment, settlement or arbitration.

Jury Verdict and Settlement Summaries - California (LRPCA-JV): The LRPCA-JV database contains jury verdict and settlement summaries. The summaries consist of information such as case type, geographical area where a case was tried or settled, party names, attorneys' names, expert witnesses' names, factual information about the case, and verdict or settlement amounts. A document is a summary of a jury verdict or settlement. When available, links to related case law opinions will be provided.

- A 2009 class action settlement for $5,625,000 in *Rochelle Ingalls, et al. v. Hallmark Marketing Corporation* (2009 WL 1749207) (alleging failure to provide proper meal and rest breaks);
- A 2009 class action settlement for $10.5 million in *Michelle Teeter, et al. v. NCR Corporation & First Level Technology, LLC* (2009 WL 1749180) (alleging failure to provide meal and rest breaks);
- A 2009 class action settlement for $1,275,000 in *Martin Bravo, et al. v. Bosman Dairy and Clarence Bosman* (2009 WL 1066837) (alleging failure to provide adequate rest and meal breaks);
- A 2009 class action settlement for $7.4 million in *Neil Weinstein, et al. v. Metlife Inc., et al.* (2009 WL 1404986) (alleging failure to provide mandatory meal and rest breaks);
- A 2008 class action settlement of $3.8 million in *Llamas et. al. v. Cashcall Inc.* (2008 WL 5786945) (alleging failure to provide meal and rest periods);
- A 2008 class action settlement of $4.12 million in *Sharp et. al. v. Next Entertainment Inc.* (2008 WL 5598449) (alleging failure to provide meal and rest periods);
- A 2008 class action settlement of $3.5 million in *Winzelberg et. al. v. Liberty Mutual Insurance Company* (2008 WL 5991097) (alleging failure to provide proper meal and rest breaks);
- A 2008 class action settlement for $5.4 million in *Louie et. al. v. Kaiser Foundation Health Plan, Inc.* (2008 WL 4925697) (alleging class was not given meal and rest breaks as per state law);

- A 2008 class action settlement of $19.75 million in *Chau et. al. v. CVS RX Services, Inc.* (2008 WL 4635306) (alleging failure to provide proper meal and rest breaks);
- A 2008 class action settlement of $2.5 million in *Robinson et. al. v. MJM Investigations, Inc.* (2008 WL 5119851) (alleging inadequate rest and meal breaks);
- A 2008 class action settlement for $475,000 in *Favela v. More Than Closets, Inc.* (2008 WL 5119836) (alleging failure to provide adequate meal periods);
- A 2008 class action settlement for $10 million in *Babasa et. al. v. Lenscrafters* (2008 WL 4792738) (alleging damages for meal and rest periods violations and penalties);
- A 2008 class action verdict for $0 in *Michale Kirk and Kenneth DeCarlo v. Marquee Fire Protection* (2008 WL 4210723) (alleging failure to provide rest and meal breaks);
- A 2008 class action settlement for $8 million in *Mark Ortiz v. Kmart* (2008 WL 4380372) (alleging failure to provide rest periods and meal periods);
- A 2008 class action settlement for $5.8 million in *Lisa L. Connell, et al. v. Sun Microsystems, Inc.* (2008 WL 4210728) (alleging failure to provide meal and rest periods);
- A 2008 class action settlement for $3 million in *Javier Munoz, et al. v. UPS Ground Freight Inc., et al.* (alleging failure to provide rest break opportunities and second meal periods);
- A 2008 class action settlement for $14.6 million in *Mark Slagel, et al. v. State Farm Mutual Automobile Insurance*

Corporation, et al. (2008 WL 4093100) (alleging failure to provide meal and rest periods);

- A 2008 class action settlement for $600,000 in *Angela Badami, et al. v. Grassroots Campaigns Inc.* (2008 WL 5574938) (alleging failure to provide proper meal and rest breaks);
- A 2008 class action settlement for up to $2.5 million in *Ramon Barcia, et al. v. Contain-a-Way Inc., et al.* (2008 WL 4380345) (alleging failure to provide rest and meal breaks);
- A 2008 class action settlement for $1.9 million in *Brandon Price, et al. v. TEKsystems Inc.* (2008 WL 5574932) (alleging unpaid and untaken meal and rest periods);
- A 2008 class action settlement for $400,000 in *Gloria Johnson, et al. v. SPI Field Force Inc., et al.* (2008 WL 4635301) (alleging denial of timely and complete meal periods);
- A 2008 class action settlement for $140,000 in *Hildy Medina and Anna Davison v. Santa Barbara News-Press* (2008 WL 2901943) (alleging failure to provide proper meal and rest periods);
- A 2008 class action settlement for $3 million in *Robert Devoe v. EZ Lube* (2008 WL 4635324) (alleging failure to provide adequate meal and rest breaks);
- A 2008 class action settlement for $15.1 million in *Brewer v. First American Title* (2008 WL 5062633) (alleging failure compensate for missed rest periods);
- A 2007 class action settlement for $1.44 million in *Debra Gring, et al. v. Claire's Boutiques, Inc.* (2007 WL 5018861) (alleging failure to provide meal and rest breaks);

- A 2007 class action settlement for $1 million in *Ronald Prince, et al. v. CLS Transportation, Inc., et al.* (2007 WL 2872295) (alleging failure to provide rest and meal breaks);
- A 2007 class action settlement for $610,000 in *Guillermo G. Melendez, et al. v. La Esperanza Mercado Carniceria, Inc., et al.* (alleging failure to provide meal and rest breaks);
- A 2007 class action settlement for $20,196 in *Castro v. South Bay Rental, Inc.* (2007 WL 4303745) (alleging denial of meal and rest periods);
- A 2007 class action settlement for $13.6 million in *Behzad Mousai, et al. v. E-Loan, Inc., et al.* (2007 WL 686037) (alleging failure to provide meal breaks);
- A 2006 class action settlement for $65,688 in *Lim v. Samho Tour Inc.* (2006 WL 4683148) (alleging failure to provide required meal and rest breaks);
- A 2006 class action settlement for $1.7 million in *Earl F. Smith, Jr., et al. v. Eastwood Insurance Services, Inc.* (2006 WL 3932890) (alleging meal and rest break violations);
- A 2006 class action settlement for $800,000 in *Ignacio Andres, et al. v. Pinoy Pinay Foods, Inc.* (2006 WL 4507783) (alleging failure to provide work breaks and meals);
- A 2006 class action settlement for $3.75 million in *Jaclyn Rippee v. Boston Market Corp.; Geraldine Barile v. Boston Market Corp.* (2006 WL 3491218) (alleging failure to provide meal breaks);

- A 2006 class action settlement for $1.6 million in *Hogue v. WH Smith of Nevada, Inc.* (2006 WL 3196794) (alleging failure to provide rest and/or meal breaks);
- A 2006 class action settlement for $230,000 in *Alfredo Medrano, et al. v. Juaquin Toledo Jr. Dairy* (2006 WL 3491182) (alleging failure to provide rest or meal periods);
- A 2006 class action judgment for $9 million in *Franklin v. Bank of America* (2006 WL 5502396) (alleging failure to pay proper rest and meal break pay);
- A 2006 class action settlement for $6.5 million in *Melissa Laykin, Naoko So v. Ann Taylor Retail Inc., et al.* (2006 WL 4450622) (alleging unpaid meal and rest breaks).
- A 2006 class action verdict for $0 in *David Valles, et al. v. Ivy Hill Corporation* (2006 WL 3054631) (alleging failure to pay for missed meal and rest breaks);
- A 2006 class action settlement for $24.298 million in *Chris Tyler v. Pool Well Services Co.* (2006 WL 4526327) (alleging denial of meal periods);
- A 2006 class action judgment for $34,797 in *Ahrns v. West Coast Digital* (2006 WL 5100550) (alleging failure to pay amounts for meal periods not taken);
- A 2005 class action settlement for $22 million in *Olivas v. Smart & Final Stores Corporation* (2005 WL 3642192) (alleging failure to provide meal or rest breaks);
- A 2005 class action verdict for $172 million in *Andrea Savaglio, et al. v. Wal-Mart Stores, Inc. and Sam's West, Inc.* (2005

WL 3692782) (alleging refusal to make the requisite compensation payments for meal-break violations);

- A 2004 class action settlement for $885,000 in *Rousey v. University Professional and Technical Employees* (2004 WL 3120812) (alleging failure to provide meal and rest periods);

- A 2003 class action settlement for $3.675 million in *Jason Quick, et al. v. State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company* (2003 WL 21695498) (alleging failure to provide meal periods and paid rest breaks);

- A 2002 class action settlement for $4.48 million in *Edward Brehm, et al. v. City of Los Angeles* (2002 WL 32073986) (alleging failure to provide meal periods);

- A 2002 class action settlement for $18 million in *Archie v. United Parcel Service Inc.* (2002 WL 31989252) (alleging improper missed meal and rest periods without being properly compensation).

Other reported settlements include:

- "One of the biggest" against United Parcel Service in 2007 for $87 million to more than 10,000 drivers for meal and rest period violations. (*See Sacramento Bee* (1/24/08) at 2008 WLNR 1440421.)

- A 2008 class action settlement against PetSmart of $1.45 million over allegedly missed meal and rest periods. (*See Sacramento Bee* (12/20/08) at 2008 WLNR 1440421)

The total amount of this brief sampling of reported settlements and verdicts alone well exceeds $500 million, not counting costs of defense and premium wage "buyoffs" paid to avoid lawsuits. There are also numerous confidential or unreported settlements, which would send the $500+ million number substantially higher. Settlements often occur solely because of the current uncertainty in the law and the significant costs to defend class actions.

C. Large Attorney Fee Awards Reveal The Impetus For The Plaintiffs' Bar To Pursue Hypertechnical Meal and Rest Period Class Actions Against Employers, and Will Continue Unless the Rules Are Clarified

As a rule of thumb, attorneys' fee awards in wage and hour class actions approximate one-third of the total recovery achieved. (*See, e.g.,* Request for Judicial Notice, exhibits 1 through 3 [*Order Granting Approval of Class Action Settlement, Class Representative Enhancements, Attorneys' Fees, and Costs* in *Mutuc et. al. v. Huntington Memorial Hospital et. al.,* Superior Court of the State of California, Central District, Case Nos. BC288727 and BC364972 [settlement fund of $36,000,000 with attorney fee award of $10,800,000]; *Notice of Entry of Revised Order Granting Plaintiffs' Request for Attorneys' Fees and Costs* in *Davis et. al. v. Methodist Hospital* of Southern California, Superior Court of the State of California, For the County of Los Angeles, Case No. BC380177 [claim recovery of $11,292,036.64 with attorney fee award of $3,989,087.50]; the *Los Angeles Daily Journal* (08/14, 2009) Verdicts

and Settlements, *Michelle Teeter et. al. v. NCR Corp. et. al.,* Superior Court of the State of California, Central District, case no. 08-cv-00297 SGL-JCR [wage and hour class settlement of $10,500,000, with attorney fee award of $2,660,000].) One-third of the estimated settlement amount of in excess of $500 million would yield attorneys' fee awards of well in excess of $167 million. These statistics show the impetus for the plaintiffs' bar to file even hypertechnical, *i.e.,* frivolous, lawsuits, just for the "bounty" that may result. The size of the "bounty" also shows why wage and hour class actions has been termed a "thriving industry" for the plaintiffs' bar, who profit handsomely from this industry.

As set forth below, in addition to crippling cost considerations, public policy reasons also strongly favor flexible meal and rest periods for both California employers and employees

IV. PUBLIC POLICY REASONS STRONGLY MILITATE AGAINST IMPOSING ONEROUS MEAL AND REST PERIOD SCHEDULING AND POLICING DUTIES ON EMPLOYERS THAT ALSO DEPRIVE EMPLOYEES OF CHOICE

Public policy reasons also strongly militate against imposing onerous scheduling and policing duties on employers, which contravene the actual duties established by California's legislature in the Labor Code, and result in negative consequences to employers and employees alike.

A. Rigid Scheduling And Policing Duties Burden Employers With Unrealistic, Costly Obligations, As Well As Invade Employee Privacy, Lead To Employee Discipline, And Incentivize Employee Misconduct

Employee choice and employer flexibility regarding proffered meal and rest periods is desirable for both employers and employees. As *White v. Starbucks Corp.* (*White*) (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1088, held, employer policing duties "would be impossible to implement" for significant sections of various industries "in which large employers may have hundreds or thousands of employees working multiple shifts." *Brown v. Federal Express Corporation* (*Brown*) (C.D.Cal. 2008) 249 F.R.D. 580, 2008 WL 906517 at p. *6, agreed that requiring employers to police meal periods would place an "undue burden on employers whose employees are numerous," or with whom the employers have "little contact" during the day. It would also impose onerous requirements on employees. (*Ibid.*) With respect to employees whose duties vary significantly by job classification, and who "experience different ebbs and flows in workload during the day," they should be able to schedule breaks during light work periods or when safe conditions allow, and not be forced to take them during time-sensitive periods when customers are inconvenienced or it is unsafe to do so. (*Id.* at p. *7.) Employers with hundreds of workers should also not have to hire numerous supervisors or "proctors" to ensure that each employee fully complies with each meal and rest period offered by the employer every day.

Problems with *policed* meal periods across industries include:

- Employees cannot skip unwanted, unpaid meal periods for family or other personal needs;

- Employees who work multiple jobs, who have jobs where getting paid overtime is desirable, or who just want a shorter work day, cannot forego meal periods to shorten their day;

- Employees with clients in different time zones cannot take meal periods around client needs;

- Employees who work in client-service or non-manufacturing industries who experience significant downtime (such as pharmacists, creative artists, musicians, etc.) cannot take meal periods during downtime;

- Employees in the health care industry cannot take meal periods around surgery, patient needs, staffing requirements of California law, or the idiosyncrasies of round-the-clock work shifts;

- Employees in the transportation industry cannot schedule meal periods around safety concerns, traffic congestion, weather problems, or hazardous product transport requirements;

- Employees in food service industries cannot voluntarily forego or delay meal periods to maximize tips during busy periods;

- Employees in hazardous risk industries (like oil and gas drilling, or fire and police officers) cannot take meal periods around time-sensitive problems or to avoid imperiling property or life; and

- Employees who are working in trades cannot avoid immediately ceasing tasks before completion for scheduled meal periods.

In fact, employees and employers in industries across the board agree it is impossible to implement an inflexible, one-size-fits-all, rule for meal and rest periods. Without flexibility, the state controls this aspect of employees' lives, depriving them of freedom to choose what is convenient and comfortable for them. Employees may also lose income and benefits, as work-shifts are adjusted and additional employees are hired to accommodate policed meal and rest periods. Moral and job satisfaction will also suffer. While employees do not want to be disciplined or fired for turning down offered, but unwanted, meal and rest periods, employers will have no choice to do otherwise — especially in the face of costly litigation. It is also insulting to employee intelligence and professionalism to take away their voluntary choice regarding their meal and rest periods, which are plainly required by law to be "provided," and to impose a government

mandated *policing* duty on employers that invades employee privacy rights. Employees, rather than employers, are frequently the beneficiaries of the requested flexibility.

Employers will also suffer if forced to be meal and rest period "cops." They will be saddled with onerous monitoring and other costly practices, such as lengthening meal periods to ensure a full 30-minute meal period is recorded on employee time cards, or paying wage premium "buyoffs" for any minor technical violation. Employers may have to employ the equivalent of proctors to shadow employees to determine why an employee began or ended an unpaid meal period too early in the day, too late in the day, or for 29 minutes rather than exactly 30 minutes. The reasons could be numerous, *e.g.*, stopping to chat with a friend, mistakenly clocking in a few minutes early or late, wanting to earn more tips or commissions during peak business hours, wanting to leave early from work for a personal errand or appointment, having to deal with a family or personal emergency, or wanting more structured work-time to avoid a bad habit or addiction. Yet, they would be written up and disciplined (or fired) for such infractions, and their income reduced.

As *Brown, supra,* found, requiring enforcement of meal breaks would also "create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws." (2008 WL 906517 at p. *7.) *White* agrees this "cannot have been the intent of the California legislature," declining to find a rule that would "create

such perverse and incoherent incentives." (497 F.Supp.2d at p. 1089 [noting a company may punish an employee who forgoes a break only to be punished itself by having to pay the employee, and that employees could manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes].) California employers cannot continue to pay tens of thousands of dollars or more each month in wage premium "buyoffs" simply to eradicate any basis for technical violations that might arguably give the plaintiffs' bar a incentive to sue.

B. Rigid Scheduling And Policing Duties Will Significantly Burden The Hospital Industry And Pass On Higher Health Care Costs To Society

The industry most hard hit by rigid meal and rest period rules may well be hospitals (or the health care industry), with restaurants, retailers and banks close behind. (*See* Los Angeles Business Journal, *Missing lunch breaks haunt companies*, 2003 WLNR 17382568.) In the hospital setting, scheduling and providing meal and rest periods is a complex ever-changing scenario. The hypertechnical interpretations of Labor Code Sections 512 and 226.7 and Industrial Welfare Commission (IWC) regulations that the plaintiffs' bar seeks would subject health care employers to astronomical wage premium buyoffs for rigid meal and rest period rules that are often impossible to comply with and may not be in the best interest of patients.

Impossible compliance situations generally fall into two categories:

First, the chronic situation where the nature of the work does not permit an off-duty meal period. For example, where a pharmacist is the only individual in the pharmacy for the night shift, that individual may not leave the worksite, and it is impracticable to provide a relief pharmacist so that the on-duty pharmacist can take a rigid 30 minute meal period in the middle of the night.[8]

The second category involves employee positions that may generally allow for a 30-minute off-duty meal period, but on some occasions, that may not be in the best interest of a patient's care or otherwise possible. For example, a scrub tech may be involved in a complex surgery, and it would compromise patient care to relieve that employee for a lunch break at the exact five-hour mark of her shift. Also, surgical staff should not be required to scrub in and out of surgery for precisely schedules meal or rest periods, without regard to how much longer the surgery will last or the desire of the physician for continuity of care.

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8 *See* Wage Order 5-2001, section 11 [allowing for an on-duty meal period, but only if voluntarily agreed to by the employee in a written agreement; the agreement may also be revoked at any time].

Similarly, a change in census or patient acuity, due to legislatively mandated nurse to patient ratios, may mean a nurse or other health care provider may not be provided with a rigidly timed meal period on one day during the week, but the meal period could regularly be provided on other days. For example, a registered nurse generally must have a replacement to take a meal or rest period. While the hospital may have scheduled an extra nurse to perform relief, a change in the patient population may mean that the relief nurse is now required to take a patient load and therefore cannot provide exactly timed relief to other nurses. A hospital or unit secretary in the emergency department may also be scheduled to take a meal period at noon each day, but the influx of patients from a local traffic accident may make that exact time slot impossible on a given day.

These problems are exacerbated by the shortage of workers to fill a number of critical health care positions, including registered nurses, pharmacists, physical therapists and respiratory therapists. The problems are also complicated by the professional duties owed by each health care provider to patients. For example, many health care providers must use their professional judgment when delivering patient care, and rigid meal and rest period rules will often conflict with this obligation. What should a labor and delivery nurse do when her professional judgment indicates she should not take her meal period at the fifth hour because her patient is in active labor? What should an employer do?

Because of the largely unstructureable nature of the health care profession, numerous hospitals and health care systems are currently defending class action meal period lawsuits, despite their good faith efforts to comply with California's rigid meal and rest period rules. As stated previously, an affiliate of Sutter Health has been hit with its third class action, after having voluntarily paid $3.8 million to employees for meal and rest period premium wages. (*See* fn. 6, *supra*.)

As a result, the California Hospital Association has worked very hard to achieve the flexibility required in this profession, and has worked to have the following statutes and regulations implemented:

- Labor Code Section 511 — authorizing continuation of 12 hour straight time shifts through July 1, 2000;

- Labor Code Section 517 — authorizing the IWC to adopt regulations continuing 12 hour straight time shifts in the health care industry after July 1, 2000;

- Wage Order 5(2)(K) — defining "hours worked" for the healthcare industry as provided under the Fair Labor Standards Act;

- Wage Order 5(3)(B)(711) — authorizing 12 hour straight time alternative workweek schedules;

- Wage Order 5(3)(D) — authorizing hospitals to utilize an 8/80 schedule (*i.e.*, overtime is paid for hours over 8 in a shift and over 80 in a bi-weekly pay plan); and

- Wage Order 5(11)(D) — authorizing a health care employee to waive one of the two meal periods when working more than 8 hours (or a 12 hour shift four days per week). Health care professionals who work 12-hour shifts often desire a meal period in the middle of the shift, *i.e.* between the 5th and 7th hours of work. If rigid meal and rest period rules are adopted, compounded by the nurse-staffing ratios and staffing shortages, it is a challenge to ensure sufficient coverage within the small window of time authorized for the meal period.

Moreover, given the prevalence of 12 hour straight time shifts in the health care setting, the issue of scheduling meal periods on such a shift where an employee waives one of the two meal periods has great significance to hospitals. Under the view espoused by the plaintiffs' bar, where the employee waives the second meal period, the first meal period must be taken between the 2nd and 5th hour of work; where the employee waives the first meal period, the meal period must be taken between the 7th and 10th hour of work. Thus, on a 7 a.m. to 7 p.m. shift, the meal period cannot be taken between 12 noon and 2 p.m.—which is, ironically, the time most employees would prefer to take their meal period.

The timing of the meal period urged by the plaintiffs' bar may also be an issue for employees working 8 or 10 hour shifts, where the employee takes the meal period at a time that results in a work period of more than 5 hours upon returning from the meal period.[9] Further complications arise when employees "drift" past the 10-hour mark. For example, a 10-hour employee who arrives a few minutes early or stays a few minutes late will exceed 10 hours and technically be entitled to a second meal period. Should she be forced to stay an extra ½ hour to take an unpaid meal period and then leave? This result makes no sense, but, according to the plaintiffs' bar, would appear to be required to avoid a violation.

It is also widely known that many hospitals are struggling to meet various statutory mandates such as nurse/patient ratios, seismic compliance, and Emergency Medical Treatment and Labor Act (EMTLA) obligations. As noted above, it also is well-accepted that there are significant health care workforce shortages in critical classifications. Hospitals strive to provide excellent patient care in the context of these realities, while at the same time providing appropriate meal and rest periods to employees.

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9 These issues are not limited to the health care industry, as employees in any industry may work in excess of eight hours in a day on a regular or irregular basis.

Hospitals desperately need workable, clear meal and rest period rules. And, hospital employees need to have the ability to eat when they are hungry or can safely do so, not when they are forced to do so by a supervisor attempting to comply with an overly-rigid interpretation of the state's meal period rules.

As the above examples illustrates, these situations do not involve an employer denying employees the opportunity to take a meal period, but the lack of clear rules that are workable in the hospital environment encourage hospitals to make such penalty "buyoff" payments for fear of facing class action lawsuits, with the associated substantial legal fees. The current situation also undermines employee choice and privacy regarding meal and rest periods decisions.

C. Rigid Scheduling And Policing Duties Will Also Significantly Burden The Restaurant Industry And Pass On Higher Food Costs To Consumers

Inflexible meal and rest period rules also significantly burden the restaurant industry, which employs the largest number of employees of any industry in the United States. Such burdens include:

- The fact that restaurants serve meals to the public at the same time when meal periods would normally (or according to the rigid rules the plaintiffs' bar seeks) be taken by employees. Waiters, who make the bulk of their income in tips, often do not want

a "forced" meal or rest period timed during a busy lunch or dinner hour, especially a 30 minute, unpaid meal period, but employers may feel they have no choice but to schedule them in the current environment.

- Rigid meal and rest period timing rules also necessarily increase the length of employees' work day, thereby requiring restaurant workers to work longer days for less money. To eliminate scheduling problems, restaurants may also simply choose to shorten work shifts to five hours to eliminate such problems. This harms employees.

D. Rigid Scheduling And Policing Duties Will Also Significantly Burden The Retail Industry And Pass On Higher Costs Of Goods To Consumers

Similarly, inflexible meal and rest period rules will significantly burden the retail industry:

- Retail clerks peak customer hours coincide with meal time periods for the public, which would be at the same time when employee meal periods would normally (or according to the rigid rules the plaintiffs' bar seeks) be taken by employees. Since retail sales clerks make the bulk of their income in commissions, they also often do not want a "forced" meal or rest period timed during a busy lunch or dinner hour, especially a 30 minute, unpaid meal period.

- Rigid timing rules also necessarily increase the length of employees' work day, thereby requiring retailer workers to work longer days for less money. To eliminate scheduling problems, retailers may also shorten work shifts to five hours to eliminate such problems, again to the detriment of employees.

Employee flexibility should continue to be the rule of law in California. A contrary rule undermines the interests and autonomy of employees to control their breaks, invades their privacy, and saddles their employers with unnecessary burdens and costs. A choice that carries personal and financial consequences should remain in the hands of employees, and employers should remain liable only for meal and rest period violations where knowledge and action on their part caused the violation.

V. CONCLUSION

Meal and rest period lawsuits, and especially class actions, are an increasingly pervasive force for California employers. Many have learned at considerable cost about the "scheduling and policing duties" that the plaintiffs' bar says California employers owe employees, but are *nowhere* to be found in the actual Labor Code or Wage Orders. If California's legislature had wanted such rigid scheduling and policing duties to be imposed on California employers, it would have plainly said so. It did not. As shown above, such rigid scheduling and policing duties will also burden employee choice, as well as saddle society with tremendous unwarranted costs, but will

serve little, if any, public interest. Accordingly, the relief Plaintiffs seek should be denied.

Respectfully submitted,

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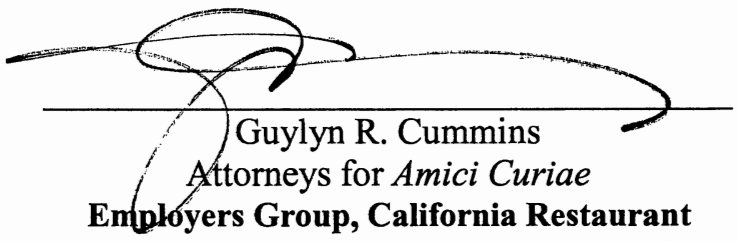
SHEPPARD MULLIN RICHTER & HAMPTON LLP

By 

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