

TEN MINUTES AT A TIME: WHAT EMPLOYERS NEED TO KNOW ABOUT REGULAR AND OVERTIME BREAK PERIODS

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LEGAL BACKGROUND

You may already be aware that Washington law requires a paid ten minute rest period for each four hours of working time, but did you know that this requirement applies to overtime hours as well? Recently, the Washington Court of Appeals in Wingert v. Yellow Freight Systems, Inc., 104 Wn. App. 583 (2001) rendered a decision stating that WAC 296-126-092(4), which prohibits employers from working its employees more than three hours without a paid ten minute rest period, applies to both regular work hours and overtime hours.

Employers should be familiar with all of the provisions WAC 296-126-092, not just WAC 296-126-092(4), because of the regulation's broad application and enforceability. In a nutshell, WAC 296-126-092 states that:

- (1) employers must allow a meal period of at least thirty-minutes commencing no less than two hours nor more than five hours from the beginning of the employee's shift;
- (2) no employee shall be permitted to work more than five hours without a meal period;
- (3) employees working three or more hours longer than a normal workday must be allowed at least one thirty-minute meal period prior to or during the overtime period;
- (4) employees must be allowed a rest period of no less than 10 minutes, on the employer's time, for each four hours worked; and
- (5) where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each four hours worked, scheduled rest periods are not required.

Although these provisions are fairly straightforward, there are a few key points that employers should bear in mind. For example, be aware that subpart (5) exempts certain employees from the ten-minute rest period requirement of subpart (4). The litmus test to determine whether you need to provide a scheduled ten-minute break every four hours is to ask yourself the following question: Is the employee free to take intermittent rest periods throughout the workday at the employee's discretion which are equal to or greater than ten minutes for each four hours worked? If the answer is yes, then WAC 296-126-092(4) does not apply to that employee. If the answer is no, however, then WAC 296-126-092(4) does apply – for both regular and overtime hours.

Failure to comply with WAC 296-126-092(4) can expose an employer to an action for damages by employees to recover for lost wages. Ten minutes might not seem like much time, but when compounded over the course of a year and multiplied by the total number of affected employees, an employer could face significant liability for non-compliance.

Employers should also be aware of provisions regulating meal breaks. WAC 296-126-092(2) mandates that no employee shall be required to work more than five consecutive hours without a meal break. This means that employers cannot allow their employees to skip meal breaks voluntarily in exchange for an earlier release from work. If employers give their employees more than the mandatory thirty-minute meal period, for example an hour for lunch, the employer may allow the employee to take a half-hour lunch in exchange for leaving work a half-hour early. However, again, the employer cannot allow the employee to take less than a half-hour meal break for every five consecutive hours worked.

PRACTICAL GUIDELINES

Employers should take the following steps to facilitate compliance with WAC 296-126-092:

- Designate and enforce a schedule of rest periods to ensure that no employee works more than four hours without taking a ten-minute break. These schedules should be in writing, e.g., in the employment manual, in the employee's job description, in the employee's schedule or the shift schedule, or posted in the workplace.
- If you give employees more than a half-hour meal break, and you allow employees to leave early in exchange for foregoing a portion of their meal break, make certain that no employee takes less than a thirty-minute meal break for every five consecutive hours worked.
- Make sure that all mandatory rest periods are on the employer's time *i.e.*, not deducted from the employee's wage. If the employee is required to remain on duty on the premises or at a prescribed work site in the interest of the employer during meal periods, then the employee needs to be paid for the meal periods as well.
- Special attention should be paid to employees working overtime hours to ensure that the provisions of WAC 296-126-092 are met.
- With respect to intermittent rest periods, employers should have a system in place to ensure that employees do not work more than four consecutive hours without taking intermittent breaks that add up to at least ten minutes every four hours.
- With respect to meal breaks, WAC 296-126-092(3) specifically states that employees working three or more hours longer than a normal workday must be allowed at least one thirty-minute meal break. This meal break is mandatory and in addition to any meal breaks the employee may have received during the course of the normal workday.

The above suggestions are broad, general comments only. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such Karen Sutherland, Chair of the Employment and Labor Law Practice Group of Ogden Murphy Wallace, P.L.L.C. Karen Sutherland can be reached at (206) 447-7000 or ksutherland@omwlaw.com. Clay Gatens is a summer associate at Ogden Murphy Wallace, P.L.L.C.