

**June 29, 2007**

**EMPLOYMENT ALERT**

**Recent Decision Opens Door for Employees to Sue for Wages for Rest Periods Worked**

On June 13, 2007, the Oregon Court of Appeals issued a decision that opens the door for employees and former employees to sue for missed break periods. In *Gafur v. Legacy Good Samaritan Hospital and Medical Center*, Plaintiffs Elizabeth Gafur and Linda Wing filed a complaint on their own behalf and on behalf of similarly situated employees alleging in part that their employers paid them “less than the wages to which [they were] entitled” under ORS 653.261 and ORS 653.055. Their complaint was dismissed at the trial court level. The Court of Appeals, however, held that although violation of the meal break rule may be enforced only through administrative sanctions by BOLI, violation of the rest break rule is enforceable in a lawsuit by employees who may sue employers for unpaid wages for each missed break. This decision will in all probability lead to an increase in claims for failure to pay wages for missed rest break periods.

**Discussion**

To understand the Court’s reasoning, we must first look to ORS 653.261 which authorizes BOLI to regulate meal and rest breaks. That statute provides:

“(1) The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, \* \* \* as may be necessary for the preservation of the health of the employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, \* \* \*”

Pursuant to this statute, BOLI issued OAR 839-020-0050, which specifies that employers “shall provide” appropriate meal and rest periods. Under that rule, rest periods are described as periods:

“of rest of not less than ten minutes for every segment of four hours or major part thereof worked in one work period **without deduction from the employee’s pay**. The period of rest must be in addition to and taken separately from the time allowed for the usual meal period. Insofar as feasible,

considering the nature and circumstances of the work, such period of rest is to be taken by an employee approximately in the middle of each four hour (or major part thereof) segment. The rest period is not to be added to the usual meal period or deducted from the beginning or end of the work period to reduce the overall length of the total work period.” [Emphasis added.]

Plaintiffs in the *Gafur* case alleged that when they missed their breaks, they provided ten minutes of services for which they were entitled to be compensated but did not receive. Their argument was based on OR 653.010 which defines “wages” as “compensation due to an employee by reason of employment”. Plaintiffs also alleged that under ORS 653.055, an employee has a private right of action against an employer that does not pay wages to which the employee is entitled under ORS 653.010.

The Court of Appeals agreed with the plaintiffs that the defendants had paid them “less than the wages to which [they were] entitled.” In other words, based on OAR 839-020-005, employees are entitled to four hours’ pay for every three hours and fifty minutes they work. For each rest period the employee misses, the employer owes the employee an additional ten minutes’ pay.

BOLI has always had (and continues to have) administrative enforcement authority to enforce its rules on meal periods and rest breaks. Prior to the *Gafur* decision, however, it was undetermined whether an employee had a private right of action to sue for missed rest breaks. Now it is clear that employees can sue an employer directly for “unpaid wages” if rest breaks are not provided. Further, not only will the employer need to pay wages for each missed break, it is potentially liable for additional penalties under ORS 652.150 if the employee’s employment has ended and the employer has failed to pay all wages owing upon termination of employment.

The *Gafur* case did not create a private right of action for employees to sue for missed meal periods. Violations of BOLI’s meal periods’ rule are still only subject to administrative enforcement by BOLI.

### **Action Plan**

Require employees to take rest breaks as required by law. Inform supervisors that under the law, employers have an affirmative obligation to ensure that employees actually receive rest breaks as required by law.

If you do not already have a written break and meal periods policy, develop one and communicate it to employees.

If your operations prevent you from maintaining regularly scheduled meal or rest break periods, contact counsel for advice.

Use a Final Paycheck Acknowledgment form when feasible. The form should provide a breakdown of the components of the final paycheck (wages, vacation pay, other),

contain an acknowledgment of receipt of the final paycheck and contain an acknowledgment by the employee that, to the best of his/her knowledge, there is no additional money owed to the employee by the employer at that time.

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