

*A common sense approach
to the practice of law*

EMPLOYER BEST PRACTICES

Avoiding the Meal and Rest Break Lawsuit

California requires employers to provide meal and rest breaks to non-exempt employees. Employers are experiencing a tidal wave of lawsuits based on meal and rest violations. This tidal wave has been influenced by strict laws providing employees with an extra hour of pay for missed breaks, and ambiguities in the law. One significant ambiguity is whether employers are strictly liable when employees fail to take breaks, even when the opportunity to take breaks has been provided.

A recent California Court of Appeal decision may stem the tide of such lawsuits. In *Brinker Restaurant Corp. v. Superior Court of San Diego County*, the California Court of Appeal for the Fourth District clarified a number of murky issues regarding meal period and rest break obligations under California law.

“Employers that do not follow sound practices regarding employee breaks will remain targets for such claims.”

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ESTATE PLANNING IDEAS

Planning Tips for Incapacity or Death

Many of us are concerned about how our affairs will be managed in the event of our incapacity as a result of accident, debilitating medical condition or our death. Here are some tips to be sure your estate plan will provide for the dignity and privacy of you and your loved ones in the event of incapacity or death.

Be sure you have a comprehensive estate plan that includes a living trust. A will does not speak until one dies. A living trust is a living document that can provide instructions for your care in the event of incapacity.

Be sure the successor trustees (money managers) you have identified in your trust is up to date.

Be sure your living trust is funded. Once you establish a living trust, it is important to transfer your assets to the trust. If an asset is not titled in the name of the trust, it cannot be managed by your successor trustee. PLEASE REMEMBER THAT RETIREMENT PLANS (IRA's, 401(k)'s, 403(b)'s, profit sharing plans and the like) MUST

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“The emergency health care plan consists of an Advanced Health Care Directive, HIPAA Release and school specific documents that are accessible for the health-care providers allowing them to talk to parents.”

Read more on page 2. (PEACE OF MIND)

WELCOME TO NEW TEAM MEMBER, NEW CLIENTS

McDowall Cotter has added an experienced Estate Planning & Administration Specialist to the team: Becky Anderson. Becky comes to us with nearly three and a half years assisting attorneys and comforting

clients in the administration of probates and trusts.

Becky handled all aspects of the administration process — inventory, accountings, petitions and orders, handling life insurance claims

and other death benefit claims, transfer or re-titling of assets, and deed preparation and appropriate exclusions. She also assisted in the preparation and execution of incapacity planning documents.

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AVOIDING THE MEAL AND REST BREAK LAWSUIT

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The plaintiffs sued Brinker Restaurant Corporation (“Brinker”) for violations claiming Brinker: (1) discouraged employees from taking rest breaks and not specifically scheduling rest breaks in the middle of each work period; (2) allowed “early lunches” and not “ensuring” that employees take their meal breaks; (3) forced employees to “work off the clock” and (4) engaged in a practice of “shaving time” from the payroll records to reflect less than a five-hour shift.

The Court made significant clarifi-

cations of California law:

Employers are not strictly liable when employees fail to take required rest or meal breaks. Employers must provide the opportunity for such breaks, and cannot impede, discourage or dissuade employees from taking them.

While employers cannot coerce, require or compel employees to work off the clock, they can only be held liable for employees working off the clock if the employer knew or should have known the employees were doing so.

California law would allow (under

some circumstances) an employer to provide the employee’s meal break *before* the employee’s first rest break.

Employers are not required to provide a rest break for a work period that is 3.5 hours or less, but only for a work period that *exceeds* 3.5 hours; also, the rest break does not need to be in middle of the work period if impractical.

Although employers must provide a meal period whenever an employee has a work period of more than five hours in a day, there is not a requirement to provide a meal period every

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PLANNING FOR INCAPACITY

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remain in the name of the participant/employee. If you were to transfer a retirement plan to your trust you would LOSE the tax deferral offered by your retirement plan. Also, we do not place automobiles in the trust.

Be sure you have an Advance Health Care Directive and that the health care agents you have identified in the Directive are up to date. Be sure you have an up to date HIPAA Authori-

zation so that your health care agents can talk with your doctor about your condition if you are not able to do so.

Be sure you have an up to date Power of Attorney for finances. Not all assets go in the trust and not all our financial affairs involve our assets. An agent on a Power of Attorney for finances can deal with retirement plans, credit cards, tax matters, the post office, your pets and matters such as club memberships.

If you have *prepared* a compre-

hensive estate *plan*, you will have a team of trusted persons in place, ready *and able* to assist you in the event of your incapacity or your family in the event of your death.

Is it time to review and update your estate plan and its incapacity planning components?

PEACE OF MIND FOR PARENTS, PROTECTION FOR YOUNG ADULTS IN A MEDICAL EMERGENCY

Last fall, my daughter suffered a severely dislocated thumb while playing for her college’s field hockey team. She was taken to Student Health, from where she called me asking for help. **Unfortunately, the health care providers were prevented from discussing or making simple recommendations to me.** The reason: Sarah did not have an emergency health care

plan in place. To compound matters, it was after hours and they could not find the forms for her to sign to allow them to discuss her health care with me.

Most students want parents’ assistance during a medical crisis. Both the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountabil-

ity Act (HIPAA) govern student “education records,” which include health records. FERPA and HIPAA limit the use, disclosure or release of health care information. The acts protect an individual’s rights, but in so doing prohibit the parents from helping in a medical emergency without an emergency health care plan in

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MEAL AND REST BREAKS—AVOIDING LAWSUITS

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five “rolling” hours (note, however, that the employer must provide 2 meal periods whenever an employee has a work period of at least 10 hours in a day).

Although the *Brinker* case may reduce the surge of rest and meal break class actions, employers that do not follow sound practices regarding employee breaks will remain targets for such claims.

Employers can implement a few “Best Practices” to reduce the risk of such. Employers should consult with counsel regarding questions about compliance of

their existing break policies, and before making changes to their break

BEST PRACTICES

- publish a meal and rest break policy to make it clear that employees are provided with the opportunity to take the requisite breaks;
- have an internal complaint procedure for employees to raise concerns about denial of breaks;
- periodically post and/or distribute reminders of company policies on breaks;
- provide legal compliance training to managers as to these and other wage and hour law requirements for non-exempt employees, and looking out for situations in which employees are not taking required breaks.

policies based on *Brinker*.

David Rosenbaum can help with your Best Practices.

PEACE OF MIND

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place. The emergency health care plan consists of an Advanced Health Care Directive, HIPAA Release and school specific documents which allow health care providers to talk with parents.

With a few exceptions, the agent appointed by an Advanced Health Care Directive has legal authority in virtually all health care matters including selection and discharge of health care providers and institutions, and in approval or disapproval of diagnostic tests, surgical procedures, and medi-

cation. If a person lacks decision making capacity, the HIPAA Release authorizes health care professionals to disclose or release protected health information to the patient’s HIPAA Agent, allowing the agent to discuss with, and obtain advice from, others or to facilitate decisions regarding their health care when the young adult otherwise may not be able to do so.

DocuBank is one of several companies that provide 24/7/365 access to the documents. The DocuBank I.C.E. program is designed to protect

the healthcare wishes of students while keeping parents informed in case of a true medical emergency.

The following spring when Sarah rolled her ankle, she had an emergency health care plan in place. We were kept informed about her medical treatments and results.

McDowall Cotter can prepare an emergency health care plan for your young adult.

WELCOME

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Becky will continue with those duties at McDowall Cotter. She will also assist Bob Vale and Brett Lytle with Trust Document preparation.

Welcome Becky!

Our litigation team is excited to have two new partners — Safeway Stores and the University of California, Santa Cruz.

Safeway has asked for our counsel in handling lawsuits against its local stores. We have also been working with top Safeway officials in evaluating and seeking changes to Medicare legislation.

The Regents of University of California has appointed McDowall Cotter to its Panel Counsel. In this role, McDowall Cotter will defend U.C. Santa Cruz in liability lawsuits.

Welcome Safeway and U.C. Santa Cruz!

Finally, for anyone who has an interest in the sport of Fencing, our business counseling team has been engaged to incorporate, review contracts and provide employer counseling to a new start-up, Mulciber, Inc.

Welcome and good luck to Mulciber, Inc.

WHAT DO YOU DO WHEN A LOVED ONE DIES?

McDowall Cotter assists you with the complexities of managing and distributing the estate of your loved one.

**CONTACT US FOR A FREE
DVD
AND TO SCHEDULE
A
CONSULTATION**



A Common Sense Approach to the Practice of Law

McDowall Cotter has served clients in the greater San Francisco Bay Area for more than half a century. In that time, we have established a reputation, in the courts and in the community, for ingenuity, integrity, and a common-sense approach to the practice of law.

It has been said that in some ways we are an old-fashioned law firm. We believe in civility, value long-term relationships, cultivate a healthy work environment, and provide the highest quality legal representation in matters large and small. And we agree — we are old-fashioned, but then again we've been old-fashioned for more than fifty years and still somehow we remain ahead of our time.

Our services include:

- Defending Civil Lawsuits
- Estate and Trust Planning
- Assisting Trustees in the Administration of Trust
- Probate of Wills
- Will Contests
- Trust Contests
- Trustee Challenges
- Employer/Employee Relations
- Personal Injury Lawsuits
- Partition Actions
- Construction—Mechanic's Liens
- Trademark Applications
- Corporation, LLC Formation

McDowall Cotter

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