

# If They Don't Break, You Buy It

By **Steve Marmaduke, Esq.**

**T**he door opens in the morning and the scramble starts. Clients with sick and injured pets show up without appointments. The carefully planned schedule for the day is quickly forgotten. Fortunately, there is a strong culture of teamwork and staff diligently cover for each other, support the emergency surgery, and do whatever is necessary to make it through the day. Only when the doors close and the veterinarians, technicians, and staff "take a deep breath," it is realized that everyone worked non-stop and the unopened lunch bags in the refrigerator are noticed. But, it was a good day. The team was great. The culture of teamwork is great. And, despite the best planning, tomorrow will likely be just like today.

Is this a familiar scenario? It is a scenario fraught with peril.

Generally, California law requires that employees working more than five hours per day must have an unpaid meal period of not less than 30 minutes. Further, the law mandates that employees must have a paid 10-minute rest break for each period of three and one-half to four hours worked. If an employee is not provided an appropriate meal period, that employee is entitled to an extra hour of pay. If an employee is not provided both of the rest breaks required for an eight-hour shift, that employee is entitled to an extra hour of pay. And, if the employee is provided neither, he/she is entitled to two extra hours of pay at his/her regular rate.

Claims alleging that an employer failed to provide an appropriate meal period and/or rest break are the present darling of web-based attorney firms. The claims are generally made by disgruntled employees after termination. As the statute of limitations is three years, claimants will attempt to reach back for the duration of their employment up to this limit. Even at an hour or two a day, the amount can add up quickly for a long term employee. Additionally, penalties for failure to include this amount in the employee's final payment will be claimed. Most problematic is that claimants are entitled to their attorney's fees if they prevail. In case they have not gotten your attention, the lawyers will then threaten to contact the other employees and advise them of their claims if the pending matter is not resolved.

Without proper policies and record keeping, meal period and rest break claims can be difficult to defend. Although the employee has the burden of proof, all the

employee needs to do is allege that these breaks did not occur and the burden shifts to the employer to prove that they did. This is not a desirable position for the employer.

The purpose of this article is to outline the legal parameters for meal periods and rest breaks and suggest means of reducing the likelihood of liability from claims arising from the failure to provide these breaks.

## Meal Periods

Under California law, an employee working more than five hours per day is entitled to a meal period of not less than 30 minutes. Generally, if the employee works more than 10 hours in day, that employee is entitled to a second meal period. Unless the employee is relieved of all work duties during the 30-minute meal period, the meal period shall be considered "on duty" and payable at the employee's regular rate of pay. The employee must be permitted to leave the place of work during the meal period. If the employee is required to remain at the workplace during the meal period, the meal period must be paid and the employer must provide a suitable place for employees to eat, even if the employee is relieved of all job responsibilities. If the meal period occurs on a shift beginning or ending at or between the hours of 10 PM and 6 AM, facilities must be available for securing hot food and drink or for the heating of food or drink.

There are several exceptions to the meal period requirement. If an employee is working only six hours per day, that employee may agree, in writing, to waive the meal period requirement. This agreement must be voluntary and can be revoked by the employee. Similarly, an employee working a day longer than 10 hours may enter into a written waiver of the second meal break. An "on duty" meal break may be permitted if the nature of the work prevents an employee from being relieved from all duties; the employee agrees, in writing, to this arrangement; and the meal period is paid. This "on duty" exception is limited to those situations where, by an objective review, the employee cannot be relieved of his/her duties. Examples of such a situation are a sole worker in an all-night convenience store or a security worker at a remote site, where it would be impracticable to relieve them of their duties. Rotating an employee to phone duty or a reception role during the meal period when there are other employees on site will not meet this objective standard.

Are the job functions of some employees so significant that they do not have to be provided a lunch break or are permitted to eat lunch while on the job? For example, veterinary technicians and other staff may not be able to leave a surgical procedure to be relieved of all duties for a timely lunch. Like the sole worker at a convenience store or a remote security guard, does the nature of the work prevent these employees from being relieved of all responsibilities and thus permit them to take an "on duty" (and paid) lunch? Possibly, although the bar is high and the risk is real. For an on-duty meal period to be permitted, the nature of the work must prevent the employee from being relieved of all duties during the lunch period. Prevention requires an objective finding that it is "virtually impossible" for the employee to have a lunch break based upon a multi-factor test that includes consideration of the type of work; the availability of other employees to provide relief; consequences to the employer (or the work being done) if the employee is relieved from work; and the ability of the employer to anticipate the need for the employee and make scheduling adjustments. In very limited situations would the "virtually impossible" standard be met, particularly if scheduling and available relief options are considered. Even then, the employee must have agreed to waive his or her lunch break, by a revocable written waiver.

Is the employer liable if the opportunity of the meal period is provided but the employee fails to take the meal period? Maybe. Maybe not. The California Supreme Court has said that the employer is only obligated to provide the employee the opportunity to take a timely, off-duty meal period. As a result, an employee can essentially waive this opportunity. The Supreme Court has also articulated that an employer cannot coerce, encourage, or incentivize an employee not to take meal breaks. Further, if the employer is aware that the employee has voluntarily waived the meal period, the employer must pay for the time worked, but is not obligated to pay the one hour premium pay for a missed meal period. Obviously, there is large degree of subjectivity between "encourage," "coerce," and a voluntary waiver of a meal period. As a practical and protective measure, an employer should not look the other way if he or she is aware that an employee is missing meal

periods, and take assertive action to encourage, if not require, that the employee to take the meal period.

### Rest Breaks

Non-exempt employees are entitled to a 10-minute rest break for each shift between three and one-half hours to four hours in length. These rest breaks should occur during the middle of the work period, if practical. If it is impractical to time the rest break in the middle of the shift, it should be as close to the middle as possible. The rest break is to be 10 minutes "net," meaning the 10 minutes does not start until the employee reaches a location where it is appropriate to rest. Bathroom breaks are not considered rest breaks. Smoking breaks are rest breaks. Lactation breaks are to run concurrently with rest breaks, if possible. (Lactation breaks are subject to guidelines that are beyond the scope of this article.) Rest breaks are on paid time. The failure to provide a rest break results in the obligation of the employer to pay the employee one hour's pay at the employee's regular rate, regardless if one or two breaks are missed. "Working through" a break does not entitle an employee to leave work early or arrive late.

During a rest break, an employee must be relieved of all duties and the employer relinquishes control over how they spend their time. The employee is free to leave the premises (although the 10-minute limitation makes this difficult) and is free from requests from the employer, such as whether to answer the phone if it rings, or to lend a hand. The employee are free to text, smoke, read, or do what they like as long as it is not disruptive to the workplace. If a rest break is interrupted, the employer may provide a



replacement break rather than pay the one hour premium payment. The employer is free to stagger rest breaks to ensure continuity of work flow as long as a break does not end up at the beginning or the end of a shift where it would not satisfy the intended purpose of providing for rest.

Key to the employer's duties is to make certain that the rest breaks are authorized and permitted. There is some flexibility and schedules may be adjusted where practical considerations make it infeasible to adhere to a schedule. The failure to account for rest periods when scheduling and assigning tasks, however, may be deemed a failure to "permit" rest periods. Further, the failure to have a rest period policy (written or unwritten) may be deemed a failure to permit rest breaks. Similar to meal periods, an employer should not ignore, and should affirmatively address, situations when employees are not taking breaks.

Can the employer force an employee to take rest breaks? No. Again, the employer's duty is to authorize and permit. These are subjective standards. The danger is that an employee who is "too busy" to take a break may claim he or she was not "permitted" to take a break.

### Conclusions and Recommendations

Non-exempt employees working the requisite number of hours in a veterinary practice must be permitted meal periods and work breaks. The rules are relatively straight forward. Implementing and enforcing the policies supporting meal period and work breaks in a dynamic workplace environment is not always easy. The risks associated with not doing so, however, are real and could become costly.

Assuming that a \$15 per hour employee is not permitted to take meal periods or work breaks over the three year statute of limitations, the employee's claim would be \$23,400, plus penalties and attorney's fees. Add a few other employees to the claim and the claims can become foreboding. The claims may be brought by the labor commissioner or by private attorneys.

In an effort to limit the potential for claims, it is suggested that employers take the following steps:

1. **Implement policies** supporting meal periods and rest breaks. These policies should be placed in the employee manual, posted in a conspicuous place, and reemphasized at staff meetings.
2. **Schedule** meal periods and breaks as part of the work schedule. Flexibility is permitted but the schedule provides a daily reminder of the importance of the breaks.
3. **Require employees to "clock in" and "clock out"** for meal periods, providing a record of breaks taken and allowing the employer to identify those not taking meal periods.
4. **Pay** employees who miss meal periods or rest breaks the one hour premium, particularly if the failure to take the break was at the insistence or convenience of the employer.
5. **Require employees who miss a meal period or a rest break to report** this fact to management. This should be part of the policies that are implemented.
6. **Don't look the other way!** Be proactive!

With knowledge, policies, and vigilance, liability can be limited. Keep in mind, if your employees don't break, you buy it!

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Mr. Marmaduke is part of the CVMA's Legal Services Program, a program designed to assist CVMA member veterinarians with workplace safety, legal issues, and laws and regulations that affect the veterinary profession.