



LEGAL BRIEFING

Meal and Rest Periods (Revisited)

By Thomas H. Reilly

As discussed in our Second Quarter 2007 newsletter, California employers must “provide” (1) a paid, duty-free rest period of at least 10 minutes for every four hours of work or major fraction thereof, (2) an unpaid meal period of at least 30 minutes when an employee works more than five hours, and (3) a second, unpaid meal period of at least 30 minutes when an employee works more than 10 hours (unless waived by mutual consent). Under Labor Code § 226.7(b), an employer who fails to provide a required meal or rest period must pay the employee an extra hour of wages.

The meal and rest period provisions raise an important question: Does an employer have an affirmative obligation to *require* that employees take meal and rest periods, or does an employer satisfy its obligation by *making them available*? Two recent court rulings bear on this question. In a case decided last August, *Brinker Restaurant Corp. v. Superior Court*, the Court of Appeal ruled that “while employers cannot impede, discourage or dissuade employees from taking rest periods [or meal periods], they need only provide, not ensure, rest periods [and meal periods] are taken.” With respect to the timing of rest periods, the Court ruled that “[a]s long as employers make rest breaks available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance [with regulations].” The Court also ruled that an employer satisfies its meal period obligation by providing a 30-minute meal period to an employee who works between five and 10 hours in a work day, and a second 30-minute meal period to an employee who works more than 10 hours (unless waived).

On October 22, 2008, the California Supreme Court granted review in *Brinker*, rendering the decision no longer citable. Six days later, the Court of Appeal addressed similar issues in *Brinkley v. Public Storage, Inc.*, and, consistent with *Brinker*, ruled that employers must “provide” meal and rest periods, but need not ensure they are taken. Notwithstanding *Brinkley*, until the Supreme Court decides *Brinker*, the full scope of an employer’s obligation to “provide” meal and rest periods will remain undetermined.

Even if the Supreme Court affirms *Brinker* (and by implication, *Brinkley*), employers will continue to have the burden of proving they made meal and rest periods available, and that employees *voluntarily* chose not to take them. If an employee’s right to meal and rest periods is not clearly communicated, or if an employee is dissuaded from taking a meal or rest period by workload, the burden may be insurmountable. Therefore, our previous advice remains essentially unchanged, and employers should take the following steps to mitigate their exposure: (1) inspect meal and rest period provisions in handbooks and policies to ensure compliance with law; (2) train supervisors that meal and rest periods are considered mandatory; (3) ensure that meal and rest periods are completely duty free, e.g., no telephone duty; (4) maintain accurate time records of meal periods taken; and (5) when an employee is unable to take a meal or rest period because of job duties, provide an extra hour of pay as required by Section 226.7.

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Landmark Measure Ties Land Use and Climate Change

By Salman Alam

In September, Gov. Schwarzenegger signed what has been hailed as one of the most significant land-use laws in a generation. Senate Bill 375 (SB 375)—commonly referred to as the “Climate Change Smart Growth Bill”—is set to be the nation’s first law directly linking greenhouse gas emissions, transportation funding, and housing development. The centerpiece of SB 375, certain to affect many different aspects of the California real-estate regime, is its requirement for individual state regions to develop a “Sustainable Communities Strategy” in order to reduce greenhouse gas emissions from automobiles.

The law intends to further California’s ambitious goals laid out in the California Global Warming Solutions Act of 2006, commonly referred to as AB 32. AB 32, noted for its bold targets, requires that the state reduce its total greenhouse gas emissions to 1990 levels by 2020. Because the transportation sector accounts for nearly 40 percent of the state’s greenhouse gas

emissions, SB 375 declares improved transportation and land-use planning as critical to AB 32’s success.

Procedurally, under SB 375 the California Air Resources Board (CARB), an agency already charged with the development and implementation of AB 32, will set regional greenhouse gas reduction targets after consultation with local governments. That target must be incorporated within that region’s Regional Transportation Plan, the long-term blueprint of a region’s transportation system. The resulting model will be called the Sustainable Communities Strategy (SCS). Interestingly, SB 375 does not mandate that the targets actually be achieved. Instead, it aims to create incentives to achieve the targets by allocating funding to transportation projects (nearly \$6 billion a year) consistent with its goals. The Sustainable Communities Strategy for each region will be updated every 4-5 years, depending on the region, to ensure compliance.

SB 375 will impact housing development via each region’s Regional Housing Needs Assessment (RHNA), creating concern for the state’s hard-hit housing sector. Communities use RHNA in land-use planning and in addressing existing and future housing needs resulting from population, employment and household growth. AB 375 requires the RHNA to be

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Congratulations to **Mark Himmelstein**, a litigation partner in our Newport Beach office, who has been appointed to the Executive Committee of the Building Industry Association of Southern California, Orange County Chapter (BIA/OC). Mark takes on the assignment of Associate Member VP, the highest-ranking non-builder officer, and continues to chair the Membership Committee. Mark also was recognized by BIA/SC as “Volunteer of the Year” in the OC Chapter and earned his Life Spike designation for recruiting 25 BIA members.

Newport Beach partner **Jay Freedman** has met the requirements to become a Certified Green building professional under the California BuildItGreen green-rating program. Jay has been advising clients on incorporating green-building elements into their projects.

Six litigation partners from our Newport Beach headquarters were named to the roster of 2008 Southern California Rising Stars, a compilation of the area’s up-and-coming attorneys from the Law & Politics magazine, publishers of Super Lawyers®. All were repeat honorees from 2007: **Shane Coons, Jeff Dennis, Jay Freedman, Laura Watkins Ives, Chuck Krolkowski, and Carol Sherman Zaist**.

Additional kudos to **Laura Ives**, who was re-elected for a second two-year term to the 11-member board of the prestigious Long Beach Yacht Club.

We welcome new associates **Uliana Kozeychuk** and **Leah McKechnie**, both of whom are graduates of Loyola Law School, and **Stephen Nelson**, who earned his degree from Boston University School of Law, to our Newport Beach litigation group.

Newmeyer & Dillion recently completed a major build-out that added an additional 10,000 square feet of space, bringing our

Newport Beach headquarters to a total of 53,000 square feet. Formerly occupying portions of the fourth and first floors (in addition to our original fifth-floor suite), we took over the entire second floor, and all offices underwent a full renovation including design and color changes. With guidance from our Green Committee, we made a concerted effort to achieve an “eco-friendly” renovation that would save money and resources immediately and into the future. Examples include: recycling demolition waste; installing sensor lights; using low “VOC” (fewer harmful chemicals that escape into the air) paints; reusing existing work stations; installing carpet tiles with recycled backing, and specifying only Energy Star® appliances. In addition, we worked with the landlord to maximize the efficiency of the air conditioning system.



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further modified in a manner consistent with each region’s Regional Transportation Plan.

The law does reward a conforming project with expedited environmental reviews if it is consistent with the region’s Sustainable Communities Strategy and incorporates any mitigation measures required by a prior EIR. The EIR in this scenario does not have to consider two critical elements: 1) growth inducing impacts, or 2) specific or cumulative impacts from cars on global warming or the regional transportation network. Further, a specific group of “transit priority projects,” as defined in the bill, will be exempt from CEQA review altogether.

Changes to land-use practice as a result of the legislation are significant, and its far-reaching nature means that impacts on housing are difficult to predict.

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Newmeyer & Dillion LLP, originally formed in 1984, is comprised of creative, highly motivated business attorneys who possess outstanding credentials, training and experience in their respective fields of practice. The firm represents a wide variety of clients, which include national and local financial institutions, real estate development companies, manufacturers and service organizations, as well as individuals.

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 - Business & Professions Code §17200
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 - Lender Liability
 - General Business Disputes
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