

# NOW WE KNOW: California Law Prohibits On-Duty and On-Call Rest Breaks

By Deborah Saxe, Esq., JAMS

**I**n December, the California Supreme Court issued a long-awaited decision answering the question of whether or not California law permits on-duty or on-call rest periods for non-exempt employees. See *Augustus v. ABM Security Services, Inc.* This decision is important for all businesses that employ non-exempt employees in California.

Rest breaks for California **employees** are mandated by Wage Orders issued by the Industrial Welfare Commission and California Labor Code section 226.7, which prohibits employers from requiring employees to work during a meal, or rest or recovery period mandated by an applicable

Wage Order. The *Augustus* case involved Wage Order 4, which applies to employees in professional, technical, clerical, mechanical and similar occupations. Wage Order 4 requires employers to provide rest breaks for non-exempt California employees at the rate of 10 minutes net rest time per four hours or major fraction thereof. It does not say that employers are (or are not) required to relieve such employees of all duties or that they are (or are not) required to relinquish all control over such employees during such breaks.

The case was a class action involving thousands of security guards employed by ABM Security Services, Inc. The security guards alleged that ABM failed to provide required rest



breaks because, during such breaks, it required them to keep their pagers and radio phones on, to remain vigilant, and to respond to calls when needs arose, such as escorting tenants to parking lots, notifying building managers of mechanical problems, and responding to emergency situations. The trial court granted summary judgment to the plaintiffs, awarding them

\$90 million. It held that rest periods subject to such control were indistinguishable from the rest of the work day; in other words, an on-duty or on-call break is no break at all. The California Court of Appeal reversed that decision, concluding that California law does not require employers to provide off-duty rest periods and that “simply being on call” does not constitute performing work.

The California Supreme Court, in a 5-2 decision, reversed the Court of Appeal, finding that the trial court correctly understood the law. According to the Supreme Court, the Defendant’s rest break policy had three features that, in the aggregate, violated Wage Order 4: while on a rest period, the employee was required to: (1) carry a pager or radio; (2) “remain vigilant;” and (3) respond to calls if necessary. These restrictions, on their face, violated the law, according to the Supreme Court, even though the evidence showed that employees did not routinely

receive calls or have rest periods interrupted. The judgment was based not on actual interruption of rest breaks, but on the fact that employees were required to carry their pagers or radios and remain vigilant – that is, to be on-call (on-duty) during the rest breaks. ABM argued that an on-call rest period is lawful as long as the employee is not interrupted. However, the Supreme Court stated, “one cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during the ten minute rest periods.”

The Supreme Court concluded that Wage Order 4 requires employers to “relinquish any control over how employees spend their break time, and relieve their employees of all duties – including the obligation that an employee remain on call.

A rest period, in short, must be a period of rest.”

The Supreme Court’s ruling in *Augustus* does not apply to some employees covered by Wage Order 5, which applies to employees in the public housekeeping industry. Wage Order 5 expressly permits on-duty rest breaks for employees who are in sole charge of certain children, or elderly, blind, or disabled people living in 24-hour residential care facilities. However, the *Augustus* decision obviously will have application to others covered by Wage Order 5 and to employees covered by the many other Wage Orders containing the same rest break language as Wage Order 4.

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