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Breaking Developments In Labor and Employment Law

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The Most Important Ten Minutes: The Oregon Court of Appeals Creates a Private Right of Action for Missed or Short Rest Breaks

The Oregon Court of Appeals has decided that an employee has a private right of action against an employer for unpaid wages if the employer fails to provide paid *rest breaks* to the employee as required by Oregon law. However, the employee does not have a private right of action against the employer for failure to provide unpaid *meal breaks*.

In *Gafur v. Legacy Good Samaritan Hospital and Medical Center,* 213 Or.App. 343, 161 P.3d 319 (2007), the plaintiffs brought claims against their employer for regular and penalty wages based on allegations that the employer failed to provide paid rest breaks and unpaid meal breaks. The plaintiffs also alleged a breach of contract claim based on the theory that mandatory meal and rest breaks were inherent in their employment contract.

Oregon law requires an employer to provide rest and meal breaks for its employees. Employers must provide an unpaid 30-minute meal break and paid ten-minute rest breaks based on the number of hours worked by the employee.

The plaintiffs alleged that because Oregon Administrative Rules entitle them to paid ten-minute breaks for every four hours (or major fraction thereof) worked, and they did not receive those breaks, the employer paid them less than the wages to which they were entitled. The Oregon Court of Appeals held that this allegation, if proved, would establish the employer's liability to its employees and create a private right of action.

As for meal breaks, the Court of Appeals disagreed with the plaintiffs' argument. Reasoning that because Oregon law does not require an employer to provide paid meal breaks, only unpaid meal breaks, there was no failure to pay wages. The court left open, however, the question of whether an employee has cause of action for breach of contract on the theory that meal and rest breaks mandated by law are inherent in the employment contract.

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What *Gafur* Means for Employers.

The *Gafur* decision is significant for employers. It stands for the proposition that employees who do not receive paid rest breaks, as required by Oregon law, may sue their employer to recover the wages they were not paid for during the extra time worked. More importantly, the decision means that an employee who has not received lawful rest breaks — and quits or is terminated — may have a claim for failure to pay wages at termination. This penalty can amount to 30 days wages for that employee (eight hours a day x 30 days).

Employers must ensure that its employees are aware of their rest break rights and have the opportunity to take their lawful rest breaks. Anything less will expose employers to wage claims and penalties.

Less Freedom for Employers to Contract: the Oregon Legislature Toughens Laws on Noncompete Agreements

On August 6, Governor Ted Kulongoski signed Senate Bill 248 into law, making more onerous the requirements for a valid noncompetition agreement between employers and their employees. Oregon law now makes noncompete agreements voidable unless all of the following four requirements are met:

1. The employer informs the employee that a signed non-compete agreement is a required condition of employment. This notification must be given to the employee in a written employment offer at least two weeks before the employee's first day of work.
2. The employee is an individual engaged in administrative, executive, or professional work who: (a) performs predominately intellectual, managerial or creative tasks; (b) exercises discretion and independent judgment; and (c) is paid on a salary basis.
3. The employer has a "protectable interest." A protectable interest means either (a) has access to trade secrets; (b) has access to competitively sensitive confidential business or professional information (i.e., product development plans, product lunch plans, marketing strategy or sales plans); (c) on-air talent.
4. The total amount of employee's gross salary and commissions on an annual basis at the time of termination exceeds the median family income for a family of four as determined by the United States Census Bureau.

The new legislation also contains a somewhat ambiguous provision. The bill provides that a noncompetition agreement is enforceable for up to two years, notwithstanding the employee's position or annual compensation if the employer continues to pay the employee — for the full term of the agreement — either (a) 50 percent of the employee's annual gross salary and commissions at the time of the employee's termination, or (b) 50 percent of the median family income as set by the U.S. Census Bureau, whichever is greater.

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It is not yet clear how this provision will be interpreted. As written, this provision appears to indicate that a noncompete agreement may still be valid even if the employee is not an "individual engaged in administrative, executive, or professional work," and is not paid at least the median income for a family of four, if the employer continues to provide compensation to the employee for the term of the noncompete agreement. However, the other two requirements for a valid noncompete — notification and a "protectable interest" — must still be in place.

One positive for employers in the new law is that the requirements do not apply to a covenant not to solicit employees of the employer, or solicit or transact business with customers of the employer. Employers can still have their employees sign these covenants as long as they are separate from the noncompete agreements.

The effective date for this legislation is January 1, 2008.

What Senate Bill 248 Means For Employers.

The employer should notify the employee that a signed non-compete agreement is required in a written offer of employment at least two weeks before the employee's initial start date, or before an employee's bona fide promotion.

For employers who are promoting an employee into a position where a noncompete agreement is necessary, a signed noncompete agreement can be valid if it is entered upon a bona fide advancement. The safest course for employers would be to offer the new position to an employee in writing, at least two weeks before the employee begins the new position, stating that the noncompete agreement is a requirement of the promotion.

This law will only apply to agreements signed after the effective date of this law. Because of the more onerous requirements of the new law, employers will need to make sure to review their noncompetition agreements and work with legal counsel to review their current policies regarding noncompete agreements to ensure that they conform to the new requirements.

For more information, please contact the Labor and Employment Law Practice Group at Lane Powell:

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