Washington Healthcare News

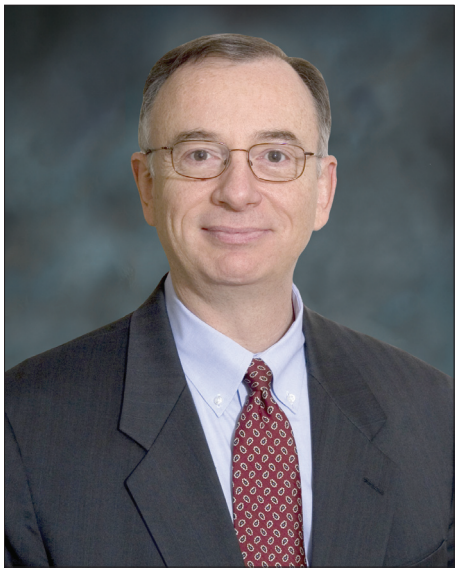
wahcnews.com

Articles, Interviews and Statistics for the Healthcare Executive

VOLUME 5, ISSUE 3 MARCH 2010

Changes Coming for Rest and Meal Breaks?

By Tim O'Connell
Partner
Stoel Rives LLP



For decades, Washington employers have operated under regulations issued by the Department of Labor & Industries that establish the minimum requirements for rest and meal breaks for non-exempt employees. Generally, the regulation requires a 30-minute meal break for an employee working five or more hours and a 10-minute paid rest break for every four hours of work. Washington healthcare providers have been able to provide rest and meal breaks without any documented cases of adverse patient impact, unlike England. ("Man dies as ambulance crews take a break," *London Evening Standard*, May 1, 2007.) That may soon change.

In recent years, rest and meal breaks have generated substantial controversy – and litigation. In its 2002 *Wingert* decision, the state Supreme Court concluded that employees who did not receive required rest breaks were entitled to additional compensation even though they had been paid for the time worked. *Wingert* did not address other rest and meal break issues. Unions and employee advocates have continued to raise claims about "intermittent" breaks, the rate of pay for missed breaks, and whether employers must ensure that employees actually receive breaks. In 2010, two of the main arenas for these disputes will be in agency rule-making and before the legislature.

There is nothing new about these efforts. In the last legislative session, unions representing healthcare workers sought legislation that would have dramatically changed break requirements. Those proposals did not get very far, because of united opposition from providers as well as indications that L&I would review the regulation. L&I's involvement in this controversy was not new either. In 2007, the nurses' union argued to L&I's Employment Law Advisory Committee that the Department should no longer allow "intermittent" breaks. An intermittent break is a short period when the employee is relieved from duty and allowed to rest, for less than the full 10 minutes required by the regulation. The regulation has always allowed intermittent breaks, if the nature of the employee's work allows it and the intermittent breaks add up to at least 10 minutes for each four hours of work. Intermittent breaks have been widely used in healthcare, where employees are able to step away from patients or their duties for a few minutes at a time for needed rest or reflection. To some union leaders, despite the popularity of intermittent breaks, only scheduled "block" breaks are sufficient. Union leaders, however, were able to offer only anecdotal evidence to back up their opinions, and L&I did not revise its regulation.

That is not the end of the story, and may only be the beginning. For at least two years L&I has been informally working on potential revisions to the rest and meal break regulation. The latest version continues to permit intermittent breaks, but requires employers to establish written policies detailing how such breaks can be used. It

remains to be seen what will happen in the rule-making process.

Simultaneously, unions and their allies have again turned to the legislature. The legislature is currently considering several proposals addressing rest and meal breaks. At least one bill, HB 2737, would effectively ban intermittent breaks – requiring any employer that sought to continue to use intermittent breaks to obtain a waiver from L&I. The bill would allow two years for the Department to prepare rules for such a waiver process and for employers to obtain waivers before intermittent breaks would be banned. It is, of course, anyone's guess how the requirement for a waiver would impact a practice used today by the vast majority of employers throughout the state.

Another bill, HB 3024, is applicable only to hospitals. It would require uninterrupted meal breaks, although the effect on rest breaks is unclear. Other proposals would require consideration of staffing for rest and meal breaks in the staffing plan required by RCW 71.41.420, and would mandate coverage of intermittent breaks in the collective bargaining process.

The 2010 legislature is a short (60-day) session, so it is difficult to predict whether any of these proposals will become law. Even if they do, none resolve some of the other controversial issues surrounding rest and meal breaks, such as the appropriate rate of pay for an employee who missed a rest break but was paid for all time actually worked. Healthcare providers, like other Washington employers, will have to wait for further guidance before all the questions that arise from these seemingly simple workday requirements can be answered.

Tim O'Connell is a partner of Stoel Rives LLP. His practice includes representing healthcare providers in NLRB and PERC proceedings, labor arbitrations, equal employment and discrimination cases before administrative agencies and courts, wrongful discharge litigation, wage-and-hour counseling and litigation, and general personnel management. Contact Tim at tjoconnell@stoel.com or 206-386-7562.

Reprinted with permission from the Washington Healthcare News. To learn more about the Washington Healthcare News visit wahcnews.com.