

# Employment Law Webinar: A Whole New Look At Break Compliance

October 14, 2021

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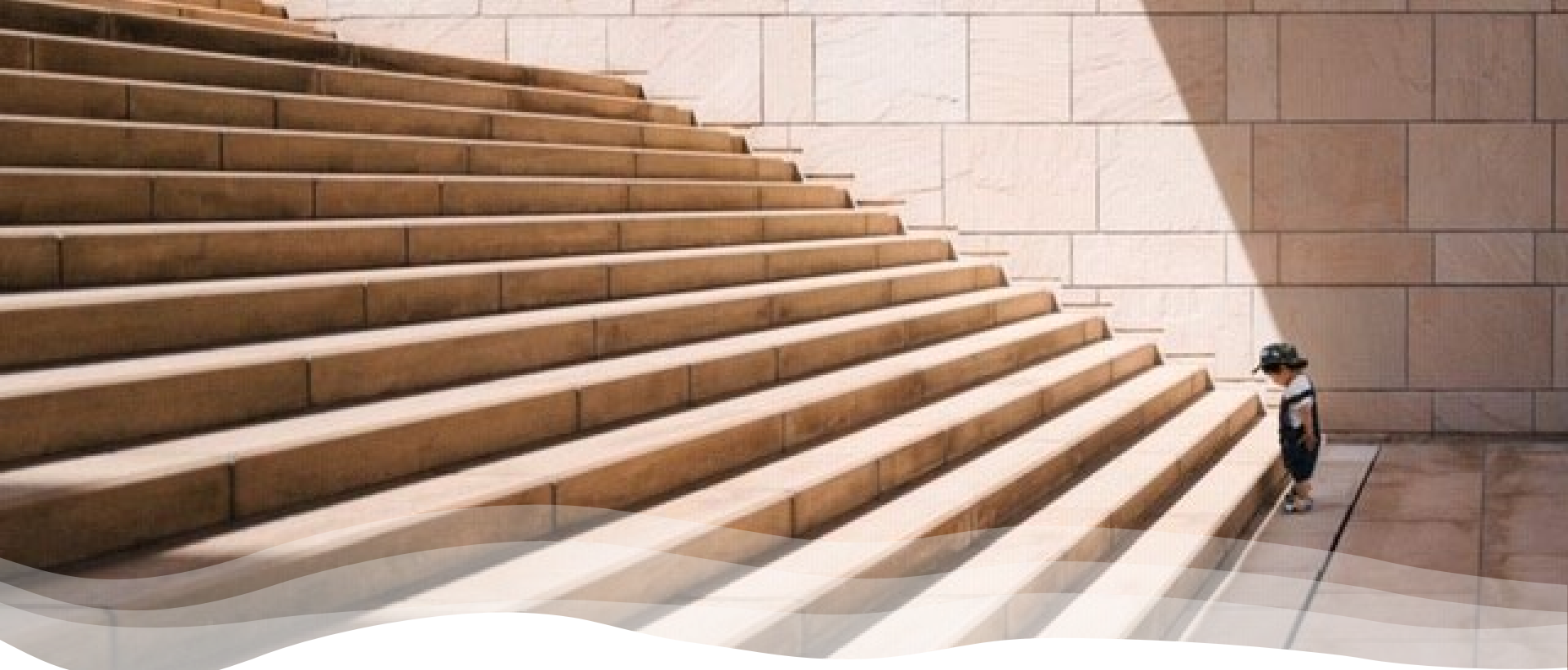


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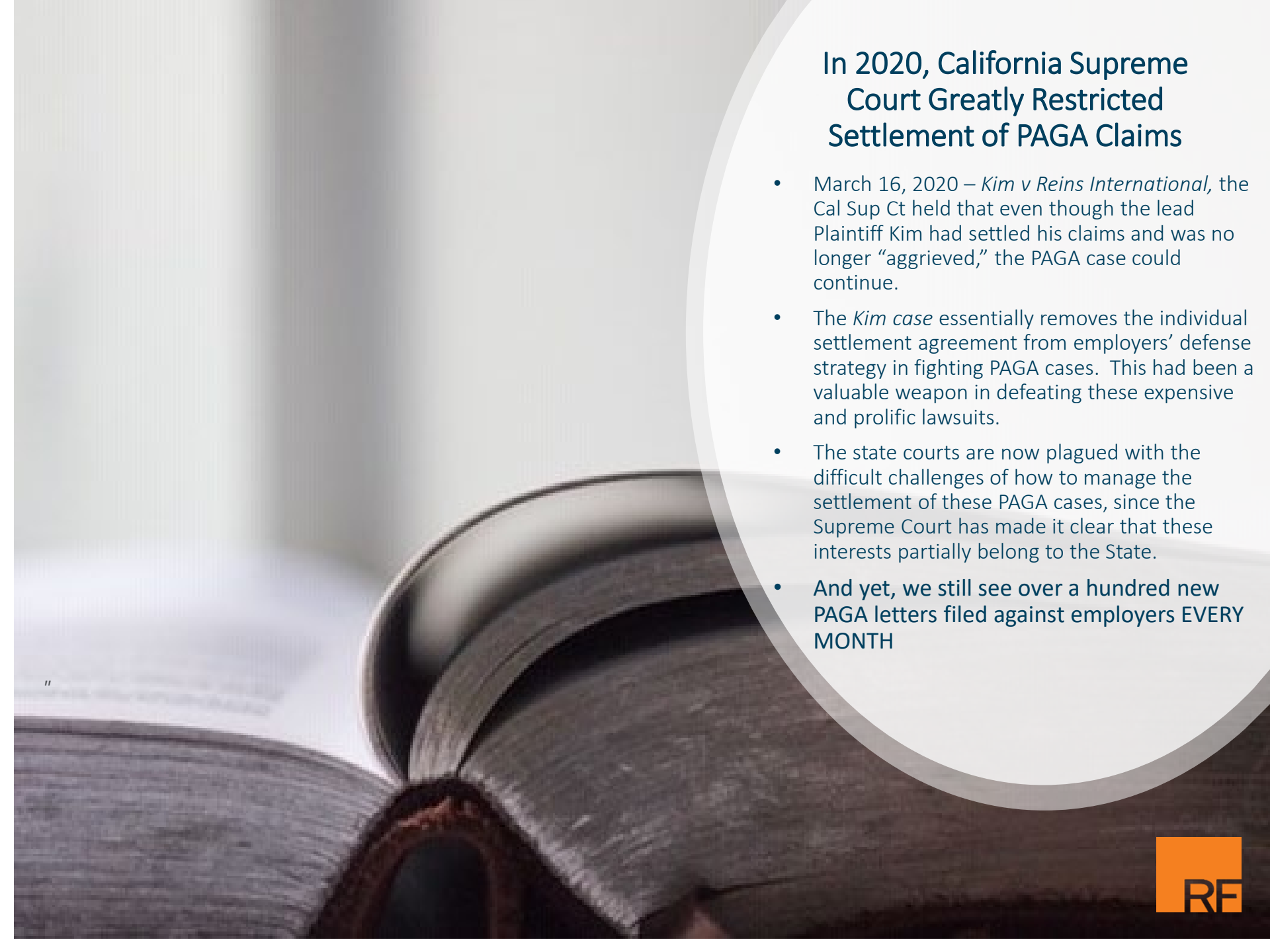


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## Employers Dealing with Legal Compliance



## In 2020, California Supreme Court Greatly Restricted Settlement of PAGA Claims

- March 16, 2020 – *Kim v Reins International*, the Cal Sup Ct held that even though the lead Plaintiff Kim had settled his claims and was no longer “aggrieved,” the PAGA case could continue.
- The *Kim case* essentially removes the individual settlement agreement from employers’ defense strategy in fighting PAGA cases. This had been a valuable weapon in defeating these expensive and prolific lawsuits.
- The state courts are now plagued with the difficult challenges of how to manage the settlement of these PAGA cases, since the Supreme Court has made it clear that these interests partially belong to the State.
- **And yet, we still see over a hundred new PAGA letters filed against employers EVERY MONTH**

# What is a PAGA Lawsuit Again?

- PAGA stands for Private Attorney General Act, Labor Code Sec 2698, et seq
- Allows one employee to bring a “representative action” on behalf of “all other aggrieved employees” for violations of various Labor Code Sections that previously only the Labor Commissioner could enforce.
- Penalties are awarded on a “per payroll” basis for such conduct as inaccurate paystubs, break violations, record keeping violations, but calculated on a per employee basis. Penalties can be stacked and can add up to millions of dollars.
- Portion of award (75%) paid to the State, (25%) split amongst all “aggrieved” or harmed employees, even if they did not do same work as representative employee, and even if rep did not suffer same harm. And attorneys get their fees.





WE ARE HERE TO HELP

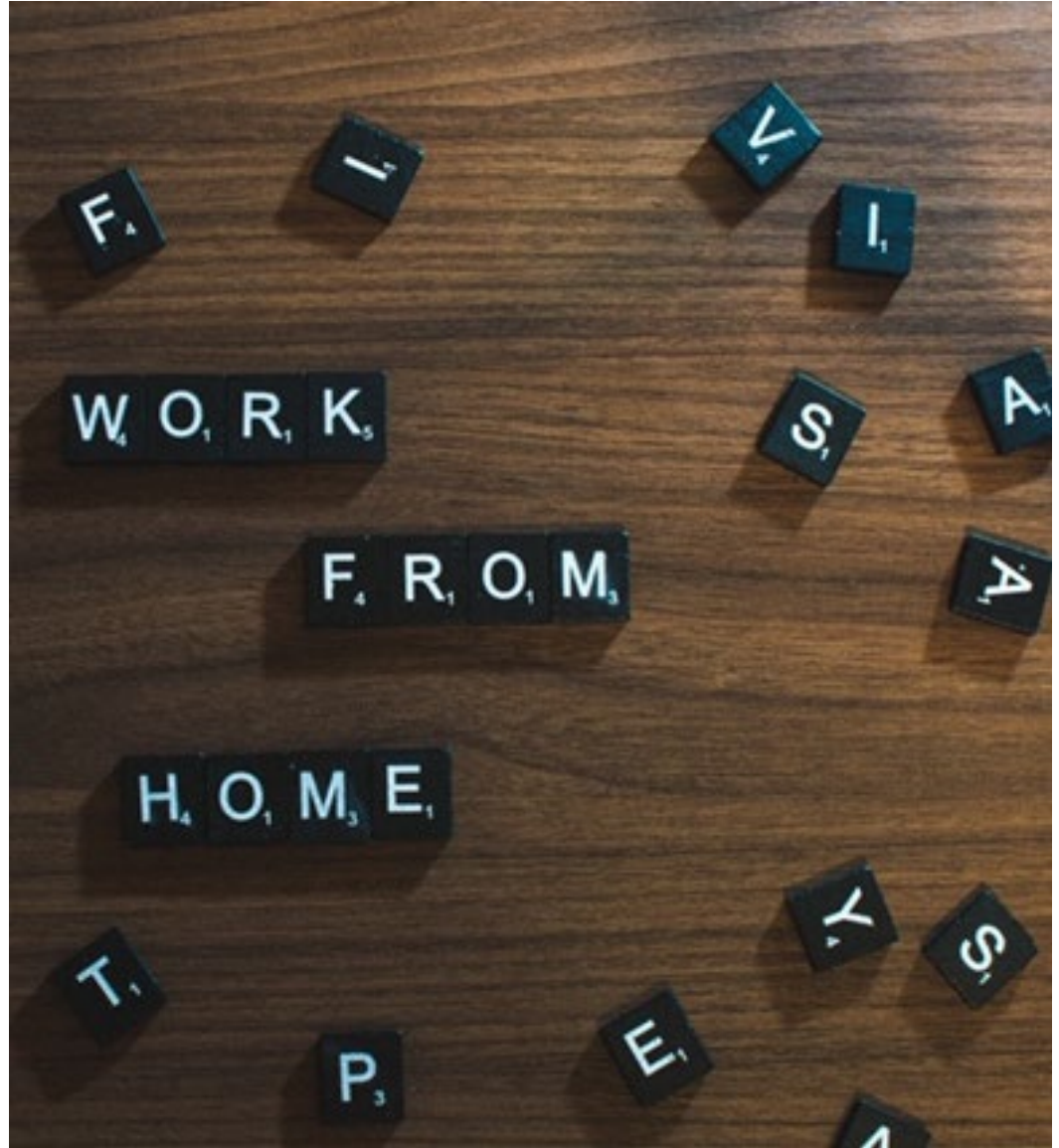




## Issues Related to Remote Work

Remember wage and hour compliance:

- Track hours and breaks carefully, even when people are working from home
- Watch “off the clock” work
- Reimburse for out-of-pocket expenses (Labor Code Sec 2802) Wi-Fi, cell phone, possible equipment costs
- Converting “salaried employees” to hourly
- If an employee “permanently” converted to remote status and then drives to office or anywhere else, drive time must be compensated





# Refresher Course on the Law: MEAL BREAKS

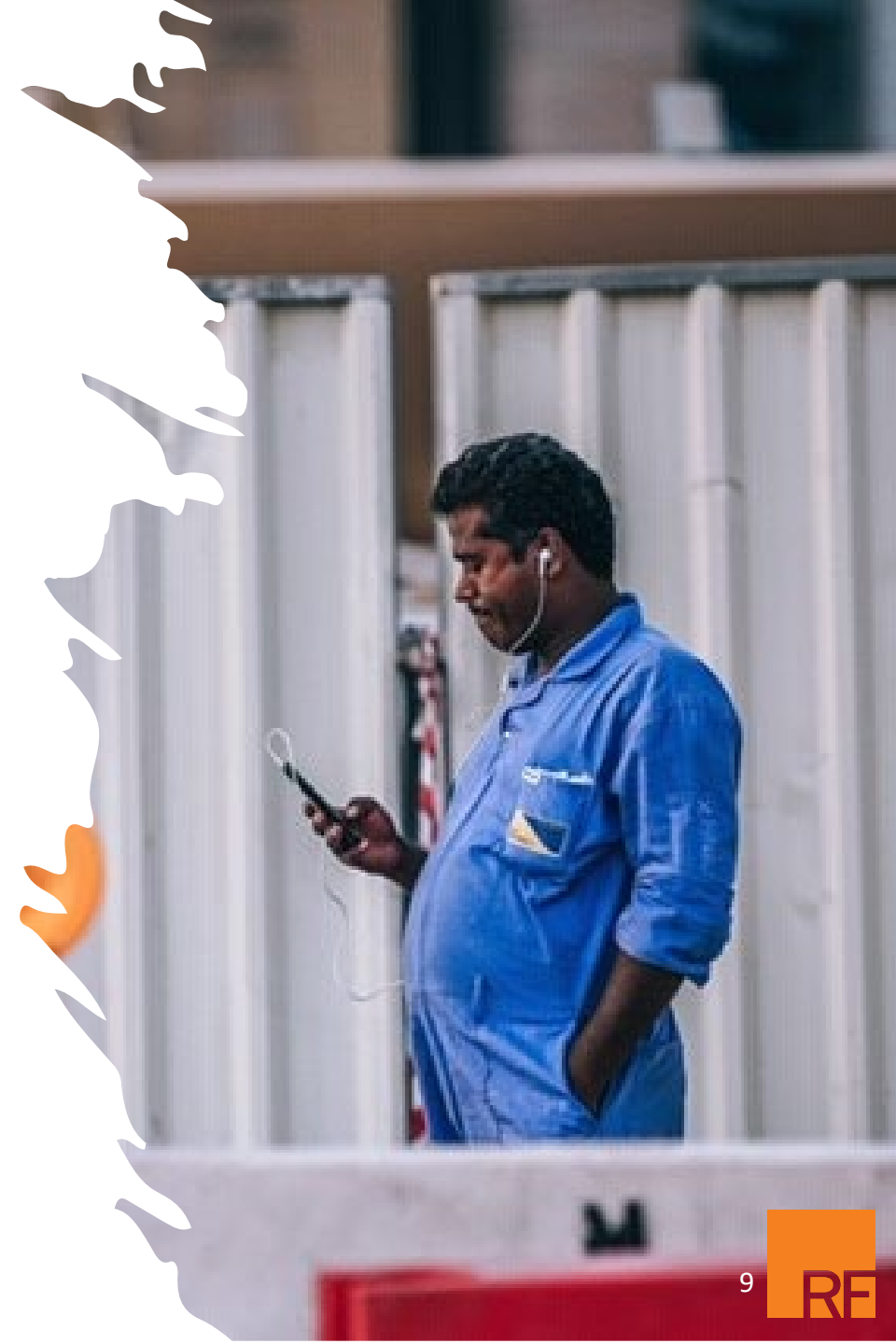
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- 30-minute, uninterrupted meal break for every five hours worked
- Meal break must be “provided” no later than the end of the fifth hour of work
- Meal break can be waived by mutual consent if shift is no more than six hours
- Second meal break can be waived (up to 12 hours) so long as first meal break is not waived



# Refresher Course on the Law: MEAL BREAKS

- Meal break need not be paid so long as completely relieved of duty
- Don't confuse the five- and six-hour marks
- Failure to timely provide fully compliant meal break results in **one-hour premium pay**
- No, more likely than not, you do not qualify for an "on duty meal break waiver"



# Refresher Course on the Law: REST BREAKS

- 10-minute paid rest break for every four hours worked “or major fraction thereof”
- 3.5 to 6 hours = 1 rest break; 6.1 to 10 hours = 2 rest breaks; 10+ hours = 3 rest breaks
- The *Augustus v. ABM* effect: Employees must be completely relieved of all duties and permitted to leave the premises
- Failure to provide rest break ALSO, or have compliant policy ALSO results in **one-hour premium pay**



# Theories that Keep Break Claims in Play

- **The Safeway effect:** courts now assume the requirement of having a policy of automatically paying premium pay for missed breaks (at least meal breaks). What is your company practice?
- **The ABM impact:** watch for policies that impede employees on rest breaks or being able to leave the premises, either expressly or by impact (responding to calls/texts, donning and doffing, rules about leaving the premises);
- **The Starbucks and Apple impact:** be mindful about those minutes after clocking in or out, or waiting in line for bag checks, for gates to open, for security. Every second counts.
- NEVER auto-deduct your employee's meal period!

## Should You Implement an Automatic Break Pay System? Maybe . . .

- An automatic meal period penalty/premium pay reduces administrative burden and potential for human error but can be costly. Hospitality, manufacturing, retail – high risk industries, safe bet
- If payment is not automatic, prepare to regularly and timely investigate meal break violations – REGARDLESS OF INDUSTRY.
- This means meals that are LATE, SHORT, or INTERRUPTED.





# What To Do About Rest Breaks?

- Should employees clock in and out for all rest breaks? Most likely than not, no, but?
- Should have systems in place to pay rest break premiums, just like meal break premiums
- Paying SOME rest break premiums can be the difference in these major litigations
- Consider strategies such as post shift POS questions, assessments of busy shifts, employee surveys and hotlines



# RETHINK YOUR RELATIONSHIPS WITH BREAKS

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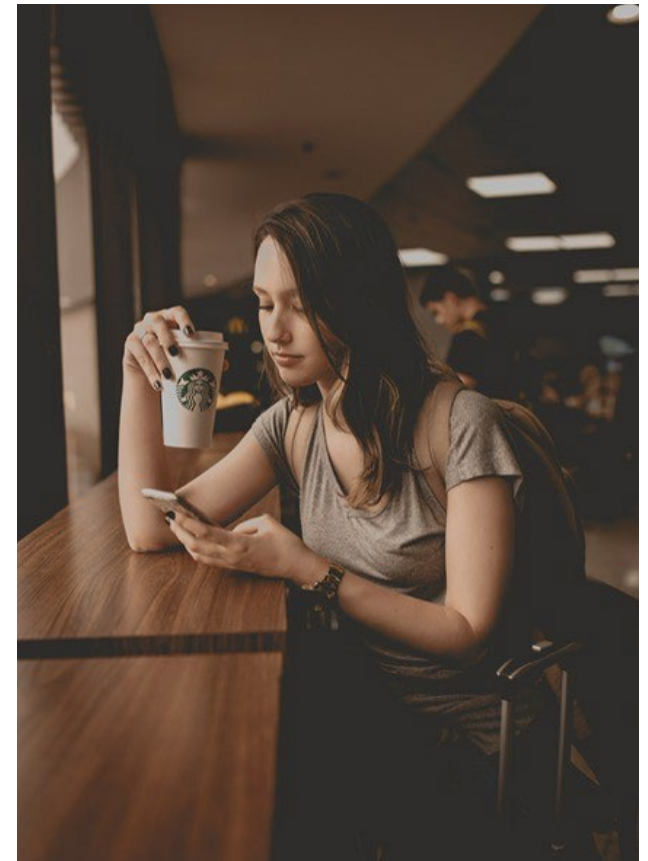




# EMBRACE THOSE BREAKS

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- Breaks at work tend to have a bad image.
- Employers often view them as an excuse for employees to waste valuable time, be unproductive, or interrupt coworkers.
- **But breaks have been provided for a reason.** Research supports the idea that work breaks should instead be embraced as part of employee wellness.
- Now especially, as employees battle the stress of working during COVID, or perhaps working from home, providing a break from work is more important than ever.





# THE IMPORTANCE OF BREAKS

- One study found that breaks to use social media for non-work purposes can be re-energizing and enhance work engagement later in the day.
- Research indicates that relaxing and socializing during lunch breaks can reduce afternoon exhaustion and enhance afternoon work engagement.
- Yet another study found relaxation exercises over lunch can enhance concentration and lower strain and fatigue in the afternoon.

# Resources



10 MINUTE BREAK CHALLENGE

## 10 THINGS YOU CAN DO

Meditation session

Listen to a story

Podcast, comedy, book review, celebrity news... you pick!

Go outside, take a walk

Go outside, look for 10 things you didn't notice before



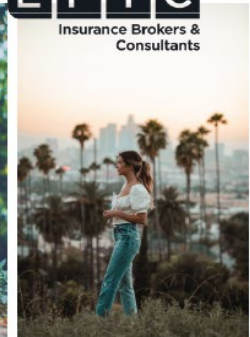
Chair stretches

Text a friend

Take some pictures of nature

Write a note of appreciation or thanks

Make a call to someone who makes you happy



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## Rethinking Your Break Culture Will Need to Start At The Top

- **Must include a commitment from Owners to Executives down through all levels of Management**
- **Needs to appear in training classes and materials**
- **Reinforced in budgets and bonuses**

**GOOD  
NEWS  
IS COMING**

We Are Here to  
Help





# Key Points for Compliance

## Create, implement, and distribute

Create, implement, and distribute legally compliant handbook policies

## Remind

Remind employees of right to meal and rest breaks frequently

## Develop

Develop anonymous reporting avenues ([www.kendr.com](http://www.kendr.com))

## Attest

Have employees review time records on daily/weekly basis to ensure accuracy and/or attest to the ability to receive breaks at the conclusion of their shifts

## Pay

Put systematic plan in place to investigate meal period violations when they occur and pay penalties when appropriate – conduct your own random audits or put in auto-pay systems



# Compliance, Part Two


- Audit and update all other written policies, wage stubs, forms and agreements, and toss old ones! Don't let managers distribute random forms or policies
- Go electronic. It's nearly 2022
- Audit all other your wage and hour practices, including exempt/non-exempt classifications
- Immediately implement an arbitration agreement with a class action waiver (AB 51 is being challenged, we still have faith)
- Management training, early and often. Nothing matters otherwise. You're only as strong as your weakest link





## FINALLY . . .Nothing Is More Important Than Just Treating Your Employees Well

- Employees who are not happy find reasons to seek out lawyers
- Lawyers will find a reason to file a lawsuit, for any or none of the issues we have discussed above (which is why those breaks are SOOOO important!)



# To Vaccinate or Not - What's the Status?

- Employers are generally permitted to have mandatory vaccination policies, so long as they provide exemptions for (a) legitimately held religious beliefs, and (b) medical disabilities confirmed by a doctor.
- Mandates in effect for state healthcare workers, state employees, teachers. Federal employees and contractors.
- City mandates include West Hollywood, Palm Springs, San Francisco, Berkeley. Los Angeles County for bars, nightclubs, live entertainment only.
- Los Angeles city for certain indoor venues, but only for patrons, not employees.
- Biden Administration has tasked OSHA to promulgate guidelines for federal mandate for all private employers over 100,. Draft rule issued JUST this week for comment.
- Meanwhile, COVID numbers are falling, so urgency may be decreasing. But winter is looming. Vaccine policies have been upheld legally throughout the country. Individual exemptions may be the only issue left to challenge.
- Will be an issue about paid time off for vaccines with FFCRA and Cal Supplemental COVID pay expiring as of end of September.

# Employer Risk & Human Capital Resources

## Employment Practices Resources

- Understand The Exposures and Severity of an EPL Lawsuit
- Updated Protocols and Policies - Distribute!
- EPL Carrier Employer Hotline

## Employee Benefits Resources

- Follow Your Plan Documents
- ThinkHR
  - Compliance Updates
  - Learning Modules
  - Update on State Requirements
  - Summaries
- Support Employees
  - Carrier Resources
  - Benefits Consultant

The collage features three overlapping documents from EPIC:

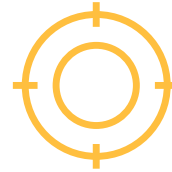
- Compliance Alert:** Titled "Cafeteria Plans Series: Health FSAs and Health Savings Account Interaction" dated April 1, 2018. It includes a "Quick Facts" section with bullet points about Health Flexible Spending Accounts (HFSAs) and Health Savings Accounts (HSAs), and a "What is a Health FSA?" section.
- EPIC CLIENT | HIPAA Privacy & Security:** A document dated June 30, 2018, identified as a "Compliance Resource Toolkit".
- Compliance Resource Toolkit:** A document titled "WRAP PLAN DOCUMENT AND SUMMARY PLAN DESCRIPTION" with "PLAN NUMBER: 501", "EFFECTIVE: January 1, 2018", and "DRAFT: 1".

# EDUCATION TO ACTION



## Mental Health Awareness Training

MHFA, Resiliency, Peer Support, Emotional Care, Leadership Skills



## Identify All Benefit Resources

Review all your carrier resources, create a list of all tools and resources available to your employees



## Identify Opportunities

After resources are identified look for opportunities to enhance or expand your mental and behavioral health offerings



## Establish Benchmarks for Success

Employee surveys and feedback, program utilization reports, employee retention and recruitment



## Communication Strategy

Create a communication strategy educating employees on resources and how to access benefit programs

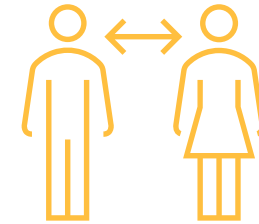
# De-stigmatize



**Verbal**



**Written**



**Non-verbal**

- Use of clinical terms
- Open unbiased discussion
- Empathy and compassion
- Avoid judgement
- Education and training

**Resource:** Mental Health America – [2021 Mental Health Toolkit](#)





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Q&A  
Thank You!