

Beating The Heat With Calif.'s New 'Recovery Period' Law



Law360, New York (June 02, 2014, 11:25 AM ET) -- New this year, the California Labor Code's existing requirements for one additional hour of pay when a meal or rest period is not provided have been extended to "recovery periods" (i.e., short breaks in the shade when working outdoors in high temperatures provided for by Division of Occupational Safety and Health ("DOSH") regulations).

Although recovery periods themselves are not new, until now there was no monetary remedy available to employees. As this financial incentive will surely spur litigation over recovery periods in the coming years, it is important for employers with employees who work outdoors in hot weather to ensure that their policies and procedures are in compliance. And it is all the more important now as the warm summer months begin.

Recovery Period Requirements

The California Occupational Safety and Health Standards Board adopted Section 3395 of the California OSHA regulations in 2005 in order to address the health risks of heat exposure for employees working outdoors in high temperatures. Section 3395 requires that employees "shall be allowed and encouraged to take a cooldown rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times."

These "cooldown" periods are part of Section 3395's general requirements for providing access to shade. If the temperature in the work area exceeds 85 degrees Fahrenheit, the employer must provide access to a shaded area throughout the workday. This shaded area must be open to the air or ventilated and large enough for 25 percent of the employees on shift at any given time to sit without being in physical contact with each other. The area must also be "as close as practicable" to where the employees work. When the temperature is below 85 degrees Fahrenheit, employers must either provide shade as described above or "provide timely access to shade upon an employee's request." [1]

The cooldown periods and other provisions of Section 3395 apply to all outdoor places of employment.

DOSH interprets the standards as applying “at all times when employees are at work outdoors.” This includes not only employees who commonly work outdoors, but also those who only occasionally work outside.

Employers are also required to have written procedures for complying with the regulation’s heat prevention standards and must train employees on these procedures and heat-illness prevention before they begin work that “should reasonably be anticipated to result in exposure to the risk of heat illness.”

Although Section 3395 has required cooldown periods since 2005, there was no provision for private enforcement until the amendments to Labor Code Section 226.7 effective this year. Section 226.7, which prohibits employers from requiring employees to work through mandated meal and rest periods, and allows employees to recover one additional hour of pay for each workday that a meal or rest period is not provided, has now been extended to cooldown periods. Section 226.7 refers to these cooldown periods as “recovery periods.”

Application of Meal and Rest Period Standards to Recovery Periods

Although the requirements for meal and rest period compliance may be familiar to California employers, the peculiarities of recovery periods raise a number of challenges and unanswered questions for how those rules will be applied to them. The following are some key issues to be considered.

Off-Duty Recovery Periods

As with meal and rest periods, Section 226.7(b) states that an employer “shall not require an employee to work” during a recovery period. Although OSHA regulations describe the recovery period as a period of “rest,” they do not expressly require that they be fully “off duty.”

This arguably constitutes a substantive change to how recovery periods are to be provided. For example, whereas OSHA regulations might previously have allowed a supervisor to meet with an employee to go over work instructions while the employee was taking a recovery period in the shade, Section 226.7 would now seem to prohibit that, the same way an employee could not be required to meet during a rest or meal period. This also probably means that an employee cannot just be sent to work indoors (e.g., to do paperwork) when he requests a recovery period, without being given at least five minutes to actually rest free from work.

Number and Scheduling of Recovery Periods

Whereas the California Labor Code and Wage Orders specify exactly how many meal or rest periods an employee is entitled to take based on the number of hours worked, the number of required recovery periods is not defined and there is no express limit on the number of recovery periods an employee must be allowed to take. Rather, employees must be allowed to take a recovery period “when they feel the need to do so” to protect from overheating, so it is up to the employees to decide for themselves how many recovery periods to take and when to take them.

Furthermore, although the regulations mandate that recovery periods be “no less than five minutes,” an employee is arguably entitled to more time if needed to cool down. This lack of concrete rules creates obvious opportunities for abuse. It also creates challenges for planning work, because when an employee will need a recovery period cannot be scheduled in advance.

Combining Recovery Periods with Meal or Rest Periods

The law is clear that an employer cannot require employees to combine their meal and rest periods. It is not as clear whether the same is true of recovery periods. For example, if an employee requests a recovery period shortly before a meal or rest period is scheduled to begin, can the employer simply ask the employee to take the meal or rest period then, in lieu of a recovery period? Arguably, the answer is no. While sending an employee on an early rest or meal period might provide the immediate relief from the heat intended by the OSHA regulations, the need to spend part of that time “cooling down” in the shade might be seen as interfering with off-duty meal or rest periods. Therefore, combining recovery periods with meal or rest periods is not recommended, unless extra time is included to take the recovery period into account.

Encouraging Recovery Periods

The OSHA regulations require not just that employees be “allowed” to take recovery periods, but also that they be “encouraged” to do so. But what form this “encouragement” must take is unclear. Beyond possibly advising an employee who is visibly suffering from heat illness to take a break, training and written policies that encourage recovery periods may be sufficient. Arguably, though, an employer’s obligations could go beyond that to include, for example, periodic reminders about recovery periods during hot weather. It is also unclear whether any failure to “encourage” recovery periods that are otherwise “allowed” can form part of a violation for purposes of Section 226.7.

Compliance Recommendations

The first step to complying with the recovery period requirements is ensuring that proper shade (or alternative procedures, if permitted) is provided in accordance with the regulations. Because recovery periods must be provided “in the shade,” it would not be possible to comply unless shade is available. Also, because shade must be provided “as close as practicable” to where the employees are working, multiple shade areas might be needed for large worksites.

Section 3395 specifically requires employers to have written policies describing their compliance procedures if their employees’ work “should reasonably be anticipated to result in exposure to the risk of heat illness.” This presumably includes written procedures for recovery periods as well. These procedures should state not only that employees are allowed to take recovery periods when needed to avoid overheating, but that they are encouraged to take them as well. They should also describe how shade will be provided. Employers should implement or review their written policies as soon as possible to make sure that they comply with the standards.

Section 3395 also requires employees and supervisors to be trained on heat-illness prevention, before they begin work that may expose them to the risk of heat illness. The specific topics to be covered in the training are detailed in the regulation and should include training on the employer's policies and procedures for providing shade and recovery periods. Employers may also want to consider written employee acknowledgments of the training and procedures for documentation purposes, as well as periodic reminders or refresher training.

While the need for written policies and training in industries where employees commonly work outdoors may be obvious, it is not as clear when workers only occasionally work outdoors. The safe approach would be for all employers with workers who might spend any significant amounts of time working outdoors, even infrequently, to have a written policy for providing recovery periods during times of outdoor work and to communicate that policy to those employees.

They should likewise ensure that shade is available for employees when working outside. This might not be an issue for employees who are working outdoors near their regular indoor place of work, such as a store or office, which would likely provide the requisite shade. But in the event employees are working off-site during warm weather, the employer should ensure that there will be shade. Whether training is required depends on the degree to which employees are expected to work outdoors during warm weather. Training is not required for all employees, but only those performing work that "should reasonably be anticipated to result in exposure to the risk of heat illness."

Maintaining proper policies and procedures will be key to defending against litigation, especially class litigation. The subjective nature of, and numerous variables affecting, recovery periods would seem to make class certification a daunting task. Differences in shade and temperature between worksites would make statewide classes difficult and whether a particular worker "felt the need" to cooldown and variations in weather conditions throughout the year at even a single worksite would be highly individualized.

Consequently, class litigation over recovery periods will likely focus on whether the employer has provided sufficient shade and whether its written policies and training properly allow and encourage recovery periods, which plaintiffs may argue are prerequisites to providing compliant recovery periods that allow them to avoid individualized questions about whether particular employees actually needed or took them. This makes the careful implementation of shade and recovery period policies and procedures all the more important.

Controlling Abuse

The subjective nature of the recovery period rules, which allow employees working outdoors to take recovery periods whenever they "feel the need to do so," creates many opportunities for abuse. However, there are measures that employers can take to control abuse.

Although recovery periods need to be "off duty," that does not mean that employees must be given

total freedom to do or go where they want when they take them. Because they are defined as a “rest in the shade,” an employer should be able to require that employees remain in the shade area during recovery periods. This can help distinguish between someone who is taking a genuine recovery period, versus someone who is just “slacking off” and potentially distracting others who are still working.

If an employer suspects that employees are abusing recovery periods and taking more than needed, it may want to begin documenting when and how frequently employees are taking them, and even the outdoor temperatures. This could be helpful evidence in demonstrating that the breaks were excessive, and that the employee’s need for them was not genuine, if an employer feels it is necessary to take further action to curb an abuser.

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[1] The regulation provides for some flexibility in satisfying the shade requirements by permitting (1) alternative procedures, if they give equivalent protection and “the employer can demonstrate that it is infeasible or unsafe to have a shade structure, or otherwise to have shade present on a continuous basis,” and (2) except in the agricultural industry, “cooling measures other than shade (e.g., use of misting machines) . . . if the employer can demonstrate they are at least as effective as shade in allowing the employees to cool.”