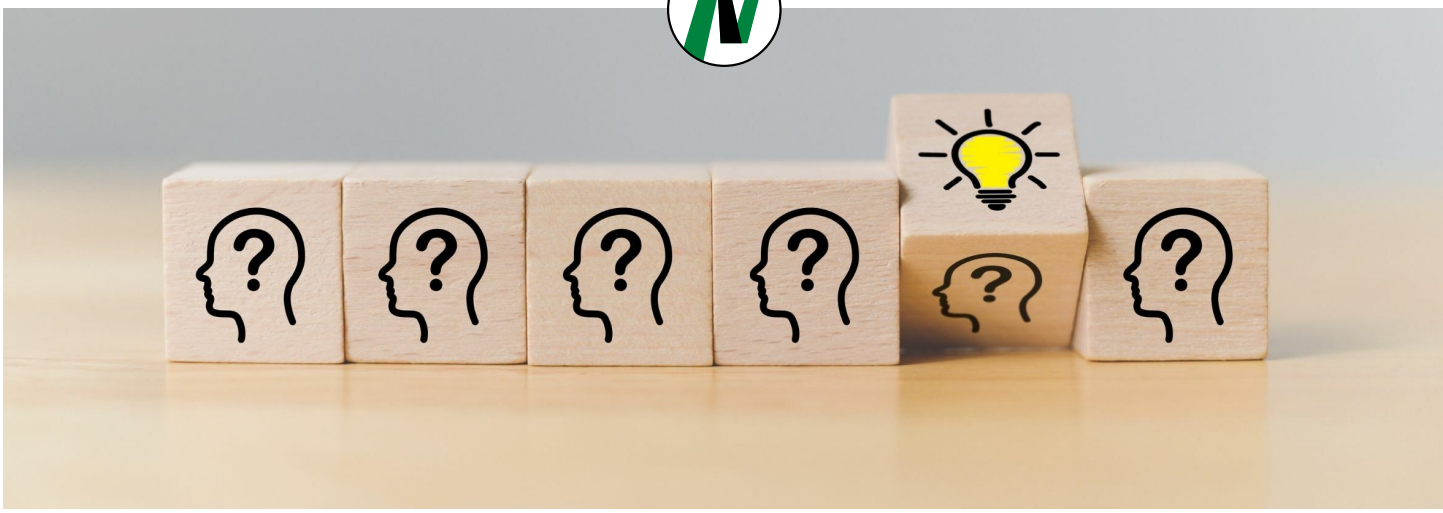

Mealtime Waiver Decision is Good News for California Healthcare Employers Hungry for Clarity

05.11.2017

In a rare move, the California Court of Appeal reversed itself and validated a California hospital's policy of allowing healthcare workers to waive an otherwise mandatory second meal period on shifts longer than 12 hours. In reversing itself, the California Court of Appeal in *Gerard v. Orange Coast Memorial Medical Center* (*Gerard II*) held that its previous decision in *Gerard v. Orange Coast Memorial Medical Center* (*Gerard I*) [see our prior discussion re *Gerard I* here], partially invalidating healthcare meal waivers, was incorrect.

California Labor Code section 512(a) requires that two meal periods be provided for any employee working shifts longer than 12 hours. However, Industrial Welfare Commission (IWC) Wage Order No. 5 carves out an exception to this requirement for employees in the healthcare industry. The Wage Order permits healthcare employees to waive one of their two meal periods on shifts longer than 8 hours even when their shift exceeds 12 hours.

In *Gerard I*, the Court found that IWC Wage Order No. 5 was partially invalid to the extent it authorized second meal break waivers by healthcare workers on shifts longer than 12 hours. Thus, *Gerard I* invalidated these meal period waivers. In response to the uncertainty created by *Gerard I,* Governor Brown signed SB 327 as an emergency measure on October 5, 2015, effective immediately. Although SB 327 confirmed that employees in the healthcare industry who worked shifts longer than eight hours could voluntarily waive their right to one of their two meal periods, even where shifts lasted longer than 12 hours, it only affected meal period waivers entered into on or after October 5, 2015.[1] Now, as a result of *Gerard II*, healthcare employers in California will not face retroactive liability if they used such waivers prior to October 5, 2015.

Gerard I

Three healthcare workers filed a class action against their hospital employer, alleging numerous California

wage and hour violations. The crux of their appeal was that the hospital's policy of allowing its employees to waive their second meal periods on shifts longer than 12 hours violated California Labor Code section 512(a).

In *Gerard I*, the California Court of Appeal held that the IWC exceeded its authority and found the Wage Order invalid to the extent it authorized healthcare employees to waive their second meal periods on shifts longer than 12 hours because this was in direct conflict with the language of section 512(a). In so holding, the Court relied on an amendment to Labor Code section 516(a) (referred to as SB 88) that removed the IWC's authority to adopt wage orders inconsistent with section 512(a).

Response to *Gerard I*

The Court's ruling in *Gerard I* created uncertainty for the healthcare industry regarding healthcare employee scheduling. Healthcare employers had long relied on the industry exception set forth in Wage Order No. 5. Not only did *Gerard I* invalidate this reliance, but it also left open the question of whether its decision would be retroactive – potentially exposing healthcare employers to substantial liability.

In response, the California Legislature passed emergency legislation later in 2015 (SB 327) which was intended to repudiate the Court's holding and make clear that Wage Order No. 5 should remain in full force and effect. Additionally, the California Supreme Court granted the hospital's petition to review in *Gerard I*, and transferred the case back to the Court of Appeal with instructions to vacate its decision and to reconsider the issue in light of the enactment of SB 327.

Gerard II

Recently, the Court of Appeal issued its opinion in *Gerard II*, reversing *Gerard I* and validating the second meal period waiver as set forth Wage Order No. 5. In so holding, the Court recognized that its initial decision in *Gerard I* was incorrectly decided on two grounds.

First, the Court recognized its error in relying upon SB 88 in *Gerard I.* The language of SB 88 took away the IWC's authority to *adopt* wage orders inconsistent with the second meal period requirements of Labor Code section 512(a) as of September 19, 2000. However, the IWC adopted Wage Order No. 5 on June 30, 2000, several months prior to the effective date of SB 88. The Court concluded that the IWC did not exceed its authority in adopting [the Wage Order], and [the] hospital's second meal period waiver policy does not violate section 512(a).

Second, after analyzing SB 327, SB 88, and the parties' respective arguments, the Court concluded that SB 327 merely clarified existing law, rather than changing it. Thus, second meal period waivers signed by plaintiffs were valid and enforceable on and after October 1, 2000 and continue to be valid and enforceable.

What This Means for California Healthcare Employers

Gerard II is important to California healthcare employers because they will not face retroactive liability if they used waivers prior to October 5, 2015.

Employers should take this opportunity to carefully review all their wage and hour related policies including, but not limited to, meal and rest period policies to ensure they are compliant with California law.

How Nossaman Can Help

Nossaman can assist employers in reviewing/auditing employers' current wage and hour policies and procedures to ensure compliance. Our employment attorneys provide litigation, counseling, advice, and training services to private and public companies and public entities throughout California, as well as

meeting their out-of-state-needs. The scope of our representation runs the full gamut from defending class action wage and hour actions to prosecuting misappropriation of trade secrets and drafting policies and procedures. We have also been on the front line of e-discovery, privacy rights, cybersecurity, data breach and workplace violence. We stay on top of emerging employment issues and are well prepared to counsel our clients on how to address and control related issues. Nossaman provides client-focused, high caliber legal services that exceed our clients' expectations while staying within their legal budgets.

[1.] Notwithstanding SB 327 contained legislative findings that Wage Order 5 was valid and enforceable on and after October 1, 2000, the Court of Appeal still had to address the issue of retroactivity. The interpretation of a statute is an exercise of the judiciary.