

# One Minute Memo®



## California Supreme Court Puts On-Call Breaks To Rest

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**Seyfarth Synopsis:** In what many employers will see as a “break” from workplace reality, the Supreme Court, in *Augustus v. ABM Security Services, Inc.*, announced that certain “on call” rest periods do not comply with the California Labor Code and Wage Orders. The decision presents significant practical challenges for employers in industries where employees must respond to exigent circumstances.

### The Facts

ABM Security Services, which employed thousands of security guards at sites throughout California, required guards to keep their radios or pagers on during rest periods and to respond if the need arose.

The Plaintiff, Jennifer Augustus, filed a class action on behalf of all ABM security guards in California. After the trial court granted class certification, the plaintiffs moved for summary adjudication on their claim that ABM’s on-call policies required them to continue working and thus unlawfully denied them their rest periods. The trial court granted the motion and awarded the class \$90 million in damages, interest, and penalties.

### The Court of Appeal Decision

When ABM appealed the judgment, the Court of Appeal reversed, noting that neither the Labor Code nor the Wage Orders require that employees be relieved of all duties during rest periods. The requirement that employees be “relieved of all duty” applies only to meal periods. Further, the statutory language provides that employees cannot be required to “work” during rest periods, and merely requiring an employee to be on call, without more, does not constitute requiring the employee to work.

### The Supreme Court’s Opinion

The California Supreme Court reversed the Court of Appeal, finding that rest periods by their very nature must be “duty free,” and reasoning that an employee on a rest break who must be “at the ready, tethered by time and policy to particular locations or communications devices,” is not “duty free.”

The Supreme Court determined that being “on call,” in the manner that ABM’s security guards were, “compels employees to remain at the ready and capable of being summoned to action” and requires employees to fulfill certain duties during the break, including “carrying a device or otherwise making arrangements so the employer can reach the employee during a break, responding when the employer seeks contact with the employee, and performing other work if the employer so requests.” The Supreme Court noted examples of personal activities that employees would not be able to engage in during an on-call rest period, such as going for a ten-minute walk, pumping breast milk, or completing a phone call to arrange child care.

Responding to ABM’s argument that this holding is “radical,” the Supreme Court claimed that its holding did not preclude employers from “reasonably rescheduling” rest periods when needed. The Supreme Court also suggested that employers could seek an exemption from the DLSE from duty-free rest period requirements as provided in the Wage Orders, as ABM itself had done previously.

## The Dissent

An incisive dissent by Justice Kruger, joined by Justice Corrigan, rejected the majority’s approach and reasoned that “a bare requirement to carry a radio, phone, pager, or other communications device in case of emergency does not constitute ‘work’ in any relevant sense of the term[.]” Instead, on-call rest periods should be analyzed as courts analyze on-call time in other contexts: “[u]nder this approach, which focuses on whether the employer has imposed restrictions that interfere with the employee’s ability to use the time for his or her own purposes, some on-call arrangements will amount to work for purposes of the wage-and-hour laws, while others will not.”

## What *Augustus* Means for Employers

The holding that “on call” rest periods are not legally permissible should prompt employers to evaluate their rest-break practices. In industries where employees must remain on call during rest periods, employers should consider seeking an exemption from the Division of Labor Standards Enforcement.

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