

LITIGATION



September 9, 2022

Via E-mail: civiljuryinstructions@jud.ca.gov.

Mr. Eric Long
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 22-02

Dear Mr. Long:

The Jury Instructions Committee of the California Lawyers Association's Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 22-02) and appreciates the opportunity to submit these comments.

1. CACI No. 601. Legal Malpractice--Causation

Agree.

2. CACI No. 730. Emergency Vehicle Exemption (Veh. Code, § 21055)

Agree

3. CACI No. 1004. Obviously Unsafe Conditions

Agree.

4. CACI No. 1007. Sidewalk Abutting Property

Agree.

5. CACI No. 2525. Harassment—“Supervisor” Defined

a. We agree with the proposed revisions to the instruction.

b. We would delete the words “not just the plaintiff” in the proposed new sentence in the Directions for Use as superfluous and potentially inaccurate. We believe “other employees” in Government Code section 12926, subdivision (t) refers to employees other than the supervisor rather than employees other than the plaintiff.

6. CACI No. 2760. Rest Break Violations—Essential Factual Elements

a. We believe jurors would better understand this instruction if the employer’s rest break obligations were explained prior to listing the elements. We suggest a separate instruction on required rest breaks be given prior to an instruction on the essential factual elements. Our proposed separate instruction is shown below.

b. We would delete the language “as required by law” in the introductory paragraph. All instructions state the law. Referring to “the law” in some instructions but not others might suggest that some instructions are more important than others. Explaining the law before listing the elements, as we propose, would make clear what rest breaks the employee is entitled to and avoid for the need for “as required by law” or any similar reference.

c. We would revise the explanation of the number and timing of rest breaks to which an employee is entitled for greater clarity as shown below. This also avoids the need to include the optional and opaque language “major fraction thereof.”

d. We would explain the nature of a rest break without characterizing that explanation as a definition of “authorizes and permits.” We believe framing this as a definition unnecessarily complicates rather than simplifies this instruction.

e. We believe “An employer has no obligation” is more direct and preferable to “An employer does not, however, have an obligation.”

f. We propose the following language as a separate instruction to be given prior to instructing on the essential factual elements:

CACI No. _____. Rest Break Violations—Employer’s Obligation

[Name of plaintiff] claims that [name of defendant] owes [him/her/nonbinary pronoun] pay because [name of defendant] did not authorize and permit one or more paid rest breaks.

Over the course of a workday, an employee who works at least 3½ hours is entitled to a paid 10-minute rest break, an employee who works more than 6 hours is entitled to a second paid 10-minute rest break, and an employee who works more than 10 hours is entitled to a third paid 10-minute rest break. [Rest breaks must be scheduled, if practical

under the circumstances, in the middle of each four-hour work period. *[Specify any additional timing requirement(s) of the rest breaks at issue if delay is at issue.]*

An employer must relieve the employee of all work duties and relinquish control over how the employee spends time during each 10-minute rest break. An employer cannot require employees to remain on-call or on-site during rest breaks. An employer has no obligation to keep records of employee rest breaks or to ensure that an employee takes each rest break.

“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.

g. We would revise the essential factual elements instruction as follows:

~~*[Name of plaintiff]* claims that *[name of defendant]* owes ~~him/her/nonbinary pronoun~~ pay because *[name of defendant]* did not authorize and permit one or more paid rest breaks as required by law. To establish a rest break violation, *[name of plaintiff]* must prove both of the following:~~

1. That *[name of plaintiff]* worked for *[name of defendant]* on one or more workdays for at least three and one-half hours; and
2. That *[name of defendant]* did not authorize and permit *[name of plaintiff]* to take one or more 10-minute rest breaks to which *[name of plaintiff]* was entitled.

~~An employer “authorizes and permits” a rest break only when it both relieves the employee of all work duties and relinquishes control over how the employee spends time during each 10-minute rest break. This includes not requiring employees to remain on-call or on-site during rest breaks. An employer does not, however, have an obligation to keep records of employee rest breaks or to ensure that an employee takes each rest break.~~

~~An employee is entitled to a paid 10-minute rest break during every four-hour work period~~./, or major fraction thereof.~~ ~~[However, an employee is not entitled to a rest break if the total daily work time is less than three and one-half hours.] This means that over the course of a workday *[name of plaintiff]* was due *[specify which rest breaks are at issue, e.g., a paid 10-minute rest break after working longer than three and one-half hours and a second paid 10-minute rest break after working more than six hours but no more than ten hours]. [Rest breaks must be scheduled, if practical under the circumstances, in the middle of each four-hour work period. [Specify any additional timing requirement(s) of the rest breaks at issue if delay is at issue.]]*~~~~

~~“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.~~

[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for rest break violations separately from claims

for meal break violations. A rest break cannot be combined with a meal break or with another 10-minute rest break. For example, providing an unpaid meal break does not satisfy the employer’s obligation to authorize and permit a paid 10-minute rest break.]

7. CACI No. 2761. Rest Break Violations—Pay Owed

a. We would delete the first sentence of this instruction as unnecessary, verbose, and not helpful. The instruction on essential factual elements given prior to this instruction explains what is required to establish a rest break violation. We would begin this instruction with the second sentence, stating that the plaintiff is entitled to damages for each workday in which there was a rest break violation.

b. The language in the first sentence “did not authorize and permit at least one rest break to which [*name of plaintiff*] was entitled” could be misconstrued to mean that the employer must have failed to allow any rest breaks at all to be liable (i.e., allowing “at least one rest break” avoids a violation). We would find “did not authorize and permit a rest break to which plaintiff was entitled” clearer. In any event, we would delete this sentence, as stated.

c. We would delete the words “for the workday” in the second sentence of the instruction as repetitive and unnecessary in a sentence beginning “For each workday.”

d. We would delete the second paragraph of the instruction, defining workday. This instruction will be given with CACI No. 2760, as stated in the Directions for Use. No. 2760 defines “workday,” so there is no need to define it here.

e. The “regular rate of pay” that will be multiplied by the number of workdays must be expressed in dollars per hour (i.e., one additional hour of pay per workday). We would change “[*insert applicable formula*]” in the last paragraph to “[*insert hourly pay rate*]” to make plain what is needed here. We would add language to the Directions for Use noting that the instruction may be modified if there is a factual dispute regarding the hourly pay rate.

f. We would delete the optional fourth paragraph of the instruction distinguishing rest breaks from meal breaks. The same optional language appears in No. 2760, so it is unnecessary here.

g. We would revise this instruction as follows:

~~To recover pay for a rest break violation, [*name of plaintiff*] must prove the number of workdays during which [*name of defendant*] did not authorize and permit at least one rest break to which [*name of plaintiff*] was entitled. For each workday that [*name of plaintiff*] has proved one or more rest break violations, [*name of defendant*] must pay one additional hour of pay for the workday at [*name of plaintiff*]’s regular rate of pay.~~

~~“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.~~

The “regular rate of pay” for [name of plaintiff] from [insert beginning date] to [insert ending date] was [insert applicable formula]. [Repeat as necessary for date ranges with different regular rates of pay.] Multiply the regular rate of pay by the number of workdays that [name of plaintiff] has proved one or more rest break violations.

~~[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for rest break violations separately from claims for meal break violations. A rest break cannot be combined with a meal break or with another 10-minute rest break. For example, providing an unpaid meal break does not satisfy the employer’s obligation to authorize and permit a paid 10-minute rest break.]~~

g. We would modify the third paragraph in the Directions for Use accordingly:

The definitions of “workday” and “regular rate of pay” may be omitted if ~~they are~~ it is included in another instructions.

8. CACI No. 2765A. Meal Break Violations—Essential Factual Elements

a. We believe jurors would better understand this instruction and No. 2765B if the employer’s meal break obligations were explained prior to listing the elements. We suggest a separate instruction on required meal breaks be given prior to an instruction on the essential factual elements or rebuttable presumption. Our proposed separate instruction is shown below.

b. We would delete the language “as required by law” in the introductory paragraph. All instructions state the law. Referring to “the law” in some instructions but not others might suggest that some instructions are more important than others. Explaining the law before listing the elements, as we propose, would make clear what meal breaks the employee is entitled to and avoid for the need for “as required by law” or any similar reference.

c. We would revise the explanation of the number and timing of meal breaks to which an employee is entitled for greater clarity as shown below.

d. We would delete “The law requires” in the same paragraph (which we would move to a separate instruction) for the same reasons stated above regarding “as required by law.”

e. We would refer to “one or more” meal breaks in explaining the employer’s meal breaks obligations, as in the rest breaks instruction.

f. We would delete “In this case” in the same paragraph as unnecessary.

g. We would revise the language in the instruction beginning “A properly scheduled meal break” to eliminate references to “the law” and eliminate the numbered list of 5 items in favor of a more narrative paragraph.

h. We propose the following language as a separate instruction:

CACI No. _____. Meal Break Violations—Employer’s Obligation

[Name of plaintiff] **claims that** *[name of defendant]* **owes** *[him/her/nonbinary pronoun]* **pay because** *[name of defendant]* **did not provide one or more meal breaks.**

Over the course of a workday, an employee who works more than 5 hours is entitled to an unpaid 30-minute meal break, and an employee who works more than 10 hours is entitled to a second unpaid 30-minute meal break.

An employer must provide a reasonable opportunity for an employee to take [an] uninterrupted 30-minute meal break[s] and cannot impede or discourage the employee from taking [a] 30-minute meal break[s]. An employer must relieve an employee of all duties during a meal break and must relinquish control over an employee’s activities during a meal break, including allowing the employee to leave the premises.

An employer need not ensure that an employee takes a meal break or ensure that an employee does no work during a meal break.

i. We would delete “that complies with the law as described below” at the end of element 2 as unnecessary.

j. We would revise this instruction as follows assuming an introductory instruction as set forth above:

[Name of plaintiff] **claims that** *[name of defendant]* **owes** *[him/her/nonbinary pronoun]* **pay because** *[name of defendant]* **did not provide one or more meal breaks as required by law. To establish a meal break violation, [name of plaintiff] must prove both of the following:**

- 1. That [name of plaintiff] worked for [name of defendant] for one or more workdays for a period lasting longer than five hours; and**
- 2. That [name of defendant] did not provide [name of plaintiff] with the opportunity to take [a/an] [timely] uninterrupted meal break of at least 30 minutes [for each five-hour period worked] ~~that complies with the law as described below.~~**

~~The law requires the employer to provide meal breaks at specified times during a workday. [Specify any scheduling requirement(s) of the meal breaks at issue if delay or interruption is at issue.] In this case, [name of plaintiff] was entitled to a 30-minute unpaid meal break for each period of work lasting longer than five hours. This means that over the course of a workday, [name of plaintiff] was due [specify which meal breaks are at issue, e.g., a first meal break that starts after no more than five hours of work and a second meal break to start after no more than ten hours of work.]~~

~~A properly scheduled meal break complies with the law if the employer does all of the following:~~

- ~~i. provides a reasonable opportunity to take uninterrupted 30-minute meal breaks;~~
- ~~ii. does not impede the employee from taking 30-minute meal breaks;~~
- ~~iii. does not discourage the employee from taking 30-minute meal breaks;~~
- ~~iv. relieves the employee of all duties during 30-minute meal breaks; and~~
- ~~v. relinquishes control over the employee's activities during 30-minute meal breaks, including allowing the employee to leave the premises.~~

~~The law, however, does not require an employer to ensure that an employee takes a meal break or to ensure that an employee does no work during a meal break.~~

“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.

[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations. For example, providing an unpaid meal break does not satisfy the employer’s obligation to provide an employee with a paid 10-minute rest break.]

9. CACI No. 2765B. Meal Break Violations—Rebuttable Presumption—Employer Records

a. This instruction does not expressly describe the plaintiff’s claim. The first sentence in No. 2765A (“[*Name of plaintiff*] claims that . . .”) is absent here. The reference to “compliant meal breaks” in the second paragraph of this instruction seems out of place without a prior explanation of the employer’s obligation regarding meal breaks. The reference to plaintiffs’ “meal break claim” in the second paragraph has no prior referent. An introductory instruction (set forth above) describing the plaintiff’s claim and explaining the employer’s meal break obligation would provide helpful context to this instruction.

b. This instruction requires the employer to rebut the presumption by proving that it allowed the employer to take compliant meal breaks. But an employer can also rebut the presumption by presenting evidence that the employee was compensated for noncompliant meal periods. (*Donohue*, 11 Cal.5th at p. 77.) We would revise the instruction to include this option.

c. The paragraph beginning “However” and the subsequent paragraph are about damages. We believe they belong in a separate instruction.

d. We would revise this instruction as follows assuming there is an introductory instruction as set forth above:

An employer must keep accurate records of the start and end times of each meal break.
[Specify noncompliance in records that gives rise to rebuttable presumption of meal break

violation, e.g., missing time records, records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday may prove a meal break violation.]

If you decide that [name of plaintiff] has proved that [[name of defendant] did not keep accurate records of compliant meal breaks/[name of defendant]’s records show [missed/ [,or] shortened/ [,or] delayed] meal breaks], then ~~your decision on [name of plaintiff]’s meal break claim must be for [name of plaintiff]~~ you must find that [name of defendant] committed a meal break violation unless [name of defendant] proves all of the following:

- 1. That [name of defendant] ~~provided [name of plaintiff] a reasonable opportunity to take uninterrupted 30-minute meal breaks;~~**
- 2. That [name of defendant] ~~did not impede [name of plaintiff] from taking 30-minute meal breaks;~~**
- 3. That [name of defendant] ~~did not discourage [name of plaintiff] from taking 30-minute meal breaks;~~**
- 4. That [name of defendant] ~~relieved [name of plaintiff] of all duties during 30-minute meal breaks; and~~**
- 5. That [name of defendant] ~~relinquished control over [name of plaintiff]’s activities during 30-minute meal breaks], including allowing [him/her/nonbinary pronoun] to leave the premises].~~**

If you decide that [name of defendant] has proved all of the above for each meal break, then ~~there have been no meal break violations and your decision must be for [name of defendant].~~ that [name of defendant] [provided compliant meal breaks for all meal breaks to which [name of plaintiff] was entitled/compensated [name of plaintiff] for all noncompliant meal breaks.

However, if you decide that [name of defendant] has not proved all of the above for each meal break, then you must still decide how many workdays [name of defendant] did not prove all of the above.

[Name of defendant] must pay one additional hour of pay at [name of plaintiff]’s regular rate of pay for each workday that [name of defendant] did not prove all of the above.

“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.

The “regular rate of pay” for [name of plaintiff] from [insert beginning date] to [insert ending date] was [insert applicable formula]. [Repeat as necessary for date ranges with different regular rates of pay.] Multiply the regular rate of pay by the number of workdays that [name of defendant] did not prove all of the above.

~~[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for meal break violations separately from claims for rest break violations. For example, providing an unpaid meal break does not satisfy the employer’s obligation to provide an employee with a paid 10-minute rest break.]~~

e. *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58 held that the rebuttable presumption applies on summary judgment. We believe this suggests the rebuttable presumption applies at trial as well, and language in *Donohue* seems to suggest this. We would add that language to the Sources and Authority:

“[W]e hold that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage.” (*Donohue*, at p. 61.)

10. CACI No. 2766. Meal Break Violations—Pay Owed

a. This instruction is designed for use with No. 2765A only. We would revise it for use with No. 2765B as well. We would delete the first sentence as duplicative of prior instructions and unnecessary. This instruction should briefly explain how to calculate damages based on those meal break violations established under other instructions without repeating or summarizing any prior instruction.

b. One of the reasons this instruction only works with No. 2765A is that it repeatedly refers to plaintiff’s burden of proof. Nos. 2765A and 2765B explain the burden of proof, so there is no need to say anything about the burden of proof in this instruction. In the second sentence, we would change “For each workday that [*name of plaintiff*] has proved one or more meal break violations” to “For each workday in which you find one or more meal break violations.”

c. We would delete the words “for the workday” in the second sentence of the instruction as repetitive and unnecessary in a sentence beginning “For each workday.”

d. Nos. 2765A and 2765B both define “workday,” so there is no need to define it in this instruction.

e. The “regular rate of pay” that will be multiplied by the number of workdays must be expressed in dollars per hour (i.e., one additional hour of pay per workday). We would change “[*insert applicable formula*]” in the last paragraph to “[*insert hourly pay rate*]” to clarify what is needed here. We would add language to the Directions for Use noting that the instruction may be modified if there is a factual dispute regarding the hourly pay rate.

f. In the final sentence, we would change “number of workdays that [*name of plaintiff*] has proved one or more meal break violations” to “number of workdays in which you find one or more meal break violations” for the same reasons stated above regarding burden of proof.

g. We would revise this instruction as follows:

~~To recover pay for a meal break violation, [name of plaintiff] must prove the number of workdays during which [name of defendant] did not provide the opportunity for one or more uninterrupted 30-minute meal breaks as required by law. For each workday that [name of plaintiff] has proved in which you find one or more meal break violations, [name of defendant] must pay one additional hour of pay for the workday at [name of plaintiff]’s regular rate of pay.~~

~~“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.~~

The “regular rate of pay” for [name of plaintiff] from [insert beginning date] to [insert ending date] was [insert applicable formula hourly pay rate]. [Repeat as necessary for date ranges with different regular rates of pay.] Multiply the regular rate of pay by the number of workdays that [name of plaintiff] has proved in which you find one or more meal break violations.

h. The last sentence in the Directions for use should be revised to reflect the deletion of the “workday” definition:

The definitions of “~~workday~~” and “regular rate of pay” may be omitted if ~~they are~~ it is included in another instructions.

11. CACI No. 2770. Affirmative Defense—Meal Breaks—Waiver by Mutual Consent

a. We would insert language in the instruction to make it clear that the effect of the defense is to negate a meal break violation. We believe use of the words “meal break violation” here as in other instructions would enhance continuity and understanding.

[Name of defendant] claims that there was no meal break violation because [name of plaintiff] gave up [his/her/nonbinary pronoun] right to a [first/second] meal break on one or more workdays. This is called “waiver.” To succeed on this defense, [name of defendant] must prove all of the following:

...

[Name of defendant] claims that there was no meal break violation because [name of plaintiff] gave up [his/her/nonbinary pronoun] right to a second meal break on one or more workdays. This is called “waiver.” To succeed on this defense, [name of defendant] must prove all of the following:

12. CACI No. 2771. Affirmative Defense—Meal Breaks—Written Consent to On-duty Meal Breaks

a. We would insert language in the instruction to make it clear that the effect of the defense is to negate a meal break violation. We believe use of the words “meal break violation” here as in other instructions would enhance continuity and understanding.

b. We would simplify and clarify the language stating that the employee agreed to be on duty.

c. We would revise this instruction as follows:

Name of defendant **claims that there was no meal break violation because *[name of plaintiff]* agreed in writing to give up ~~[his/her/nonbinary pronoun]~~ right to be relieved of all job duties be on duty during meal breaks. To succeed on this defense, *[name of defendant]* must prove the following:**

13. CACI No. 2775. Nonpayment of Wages Under Rounding System—Essential Factual Elements

Agree.

14. VF-2706. Rest Break Violations

a. Question 2 could be misconstrued to ask if defendant authorized and permitted at least one rest break, resulting in no liability if defendant authorized and permitted at least one rest break. We would revise question 2 to clarify the point:

2. Did *[name of defendant]* fail to authorize and permit *[name of defendant]* to take ~~at least one~~ a rest break to which *[name of plaintiff]* was entitled?

b. Question 3 could be misunderstood to ask on how many workdays was plaintiff not authorized and permitted to take any rest breaks, when it should ask on how many workdays was plaintiff not authorized and permitted to take a rest break to which plaintiff was entitled. We suggest this revision:

3 On Hhow many workdays was *[name of plaintiff]* not authorized and permitted to take ~~one or more~~ a rest breaks to which *[name of plaintiff]* was entitled?

15. VF-2707. Meal Break Violations

a. Question 2 could be misunderstood to ask if defendant provided at least one 30-minute meal break, when the question should be whether defendant failed to provide a meal break to which plaintiff was entitled. We suggest this revision:

b. Question 2 refers to some requirements of a compliant meal break (uninterrupted and 30 minutes) but does not cover all requirements (omits unimpeded, not discouraged, relieved of

all duties, and control relinquished). Rather than list all requirements or only some requirements, we believe question 2 should refer to a “compliant 30-minute meal break.”

c. We would revise question 2 as follows:

2. Did [name of defendant] fail to provide [name of plaintiff] with the opportunity to take ~~one or more [properly scheduled] uninterrupted~~ a compliant 30-minute meal breaks of at least 30 minutes to which [name of plaintiff] was entitled?

b. Question 3 could be misunderstood to ask on how many workdays did defendant fail to provide any meal breaks, when the question should be on how many workdays did defendant fail to provide a meal break to which plaintiff was entitled. We suggest this revision:

3. On Hhow many workdays did [name of defendant] fail to provide ~~one or more~~ a meal breaks to which [name of plaintiff] was entitled?

16. CACI No. 4603. Whistleblower Protection—Essential Factual Elements

a. We believe only Labor Code section 1102.5 should be cited in the title and not section 1102.6 because this instruction is limited to the plaintiff’s burden under section 1102.5. The defendant’s burden under section 1102.6 is the subject of another instruction, No. 4604, not this one.

b. Although it is beyond the scope of the invitation to comment, we would delete part of the quoted language from *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66 in the Sources and Authority. The statement that section 1102.5, subdivision (b) does not protect employees who report suspicions directly to their employers does not reflect current law. We would retain the last two sentences of the quotation and delete the rest.

c. Although it is beyond the scope of the invitation to comment, we suggest noting *Scheer v. Regents of University of California* (2022) 76 Cal.App.5th 904 and *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 in CACI Nos. 4601 and 4602.

17. CACI No. 4604. Affirmative Defense—Same Decision

Agree.

18. VF-4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision

Agree.

19. VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision

We agree with the proposed revisions, except we would not delete “*specify*” in question 7. Instead, we would keep it as in VF-4601 question 7.

Sincerely,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
California Lawyers Association’s
Litigation Section