

LITIGATION



March 10, 2023

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 23-01

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 23-01) and appreciates the opportunity to submit these comments.

1. CACI No. 403. Standard of Care for Physically Disabled Person

Agree.

2. CACI No. 512. Wrongful Birth

Agree

3. CACI No. 513. Wrongful Life

Agree.

4. CACI No. 904. Duty of Common Carrier Toward Disabled/Infirm Passengers

Agree.

5. CACI No. 1010. Affirmative Defense—Recreation Immunity--Exceptions

Agree.

6. CACI No. 2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(e)—Plaintiff Alleges Continuing Violation

Agree.

7. CACI No. 2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements

Agree.

8. CACI No. 2600. Violation of CFRA Rights—Essential Factual Elements

Agree.

9. VF-2708. Meal Break Violations—Employer Records Showing Noncompliance

a. Because damages for meal break violations are based on the number of workdays the employer failed to comply with the law rather than the number of missed or noncompliant meal breaks, the latter is unnecessary information. An unnecessary factual finding would complicate the jury’s task and could support a challenge to the verdict if the finding arguably is inconsistent with another finding. We would modify question 3 to ask for the number of workdays on which there was a meal break violation rather than the number of meal break violations, as shown below.

b. CACI Nos. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records* and 2767, *Meal Break Violations—Pay Owed*, approved in December 2022, state that for each meal break violation plaintiff is entitled to one additional hour of pay at plaintiff’s regular rate of pay and include optional language on “regular rate of pay.” The Directions for Use for both instructions state, “The court must determine the method for calculating plaintiff’s regular rate of pay. If different regular rates of pay are at issue, define the plaintiff’s regular rate of pay for all relevant date ranges.”

Thus, according to CACI Nos. 2766B and 2767, the court determines the method for calculating the regular rate of pay. We understand the “method” to mean the “applicable formula” to be inserted in the instruction. The formula should yield a pay rate expressed in dollars per hour, which the jury then multiplies by the number of workdays on which there was a meal break violation to yield a dollar figure.

Regular rate of pay must be expressed in dollars per hour if regular rate of pay times number of workdays is to yield one additional hour of pay per workday, as intended. For the jury to determine damages, the court must either instruct the jury on the pay rate (i.e., \$/hr.) or instruct the jury on the formula to determine the pay rate and instruct the jury to decide the pay

rate. Yet the applicable language on regular rate of pay in CACI Nos. 2766B and 2767 is optional, and there is no mandatory instruction on pay rate.

Neither the optional language on regular rate of pay nor the Directions for Use state that the jury should calculate the pay rate using the formula, which is what the jury should do. Only then can the jury multiply the regular pay rate by the number of workdays as instructed.

We would add a question to the two meal break verdict forms asking the jury to calculate the pay rate, as shown below. Although it is beyond the scope of the current invitation to comment, we believe the same question should be added to VF-2707, *Meal Break Violations* and VF-2706, *Rest Break Violations*.

c. We believe the language “one or more meal breaks that comply with the law” in question 5 could be misconstrued to mean there was no violation if the employer provided at least one break in each workday. We would change this language to “a meal break that complies with the law” and add language to the Directions for Use stating the language should be modified if the plaintiff claims to be entitled to more than one meal break per workday.

d. Our proposed revision:

**VF-2708. Meal Break Violations—Employer Records Showing Noncompliance
(Lab. Code, §§ 226.7, 512)**

1. Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?

Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday?

Yes No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~3. How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?~~

~~—meal breaks~~

~~Answer question 4.~~

43. For each meal break ~~included in your answer to question 3~~, [name of defendant]'s records show as missed, less than 30 minutes, or taken too late in a workday, did [name of defendant] prove [he/she/nonbinary pronoun/it] provided a meal break that complies with the law?

Yes No

If your answer to question 43 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question 54.

54. ~~Considering by workday the meal breaks determined in question 3~~, For how many workdays for which [name of defendant]'s records show a missed meal break, meal break of less than 30 minutes, or delayed meal break did [name of defendant] fail to prove that [he/she/nonbinary pronoun/it] provided one or more a meal breaks that ~~comply~~ comply with the law?

Answer question 65.

5. What was the regular rate of pay for [name of plaintiff] from [insert beginning date] to [insert ending date]?

 dollars/hour

[Repeat as necessary for date ranges with different regular rates of pay.]

Answer question 6.

6. For the workdays ~~determined~~ included in your answer to question 54, what is the total amount of pay owed?

10. VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records

Same comments as for VF-2708, above. Our proposed revision:

VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)

1. Did [name of plaintiff] work for [name of defendant] for one or more workdays for a period lasting longer than five hours?

Yes No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant*] keep [accurate] records of the start and end times for meal breaks?

___ Yes ___ No

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~3. For how many meal breaks were [accurate] records of the start and end times for meal breaks not kept?~~

~~___ meal breaks~~

~~Answer question 4.~~

43. For each meal break ~~included in your answer to question 3,~~ for which [*name of defendant*] failed to keep [accurate] records of the start and end times], did [*name of defendant*] prove [*he/she/nonbinary pronoun/it*] provided a meal break that complies with the law?

___ Yes ___ No

If your answer to question 43 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question 54.

~~54. Considering by workday the meal breaks determined in question 3,~~ For how many workdays for which [*name of defendant*] failed to keep [accurate] records of the meal break start and end times did [*name of defendant*] fail to prove [*he/she/nonbinary pronoun/it*] provided ~~one~~ or more a meal breaks that ~~comply~~ complies with the law?

___ workdays

Answer question ~~65~~.

5. What was the regular rate of pay for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*]?

___ dollars/hour

[Repeat as necessary for date ranges with different regular rates of pay.]

Answer question 6

6. For the workdays ~~determined~~ included in your answer to question 54, what is the amount of pay owed?

\$ _____

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

a. We suggest adding to Sources and Authority some or all of the following quote from *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 713-714, to support the new language in the instruction defining “contributing factor”:

This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action. (See, e.g., *State Comp. Ins. Fund v. Ind. Acc. Com.* (1959) 176 Cal.App.2d 10, 17, 1 Cal.Rptr. 73 (*State Comp. Ins. Fund*) [describing a contributing factor standard as one in which the conduct at issue need not be the “exclusive cause” of the plaintiff’s injuries]; *Rookaird v. BNSF Ry. Co.* (9th Cir. 2018) 908 F.3d 451, 461 (*Rookaird*) [“ ‘A “contributing factor” includes “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision” ’ ”].)

Sincerely,

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