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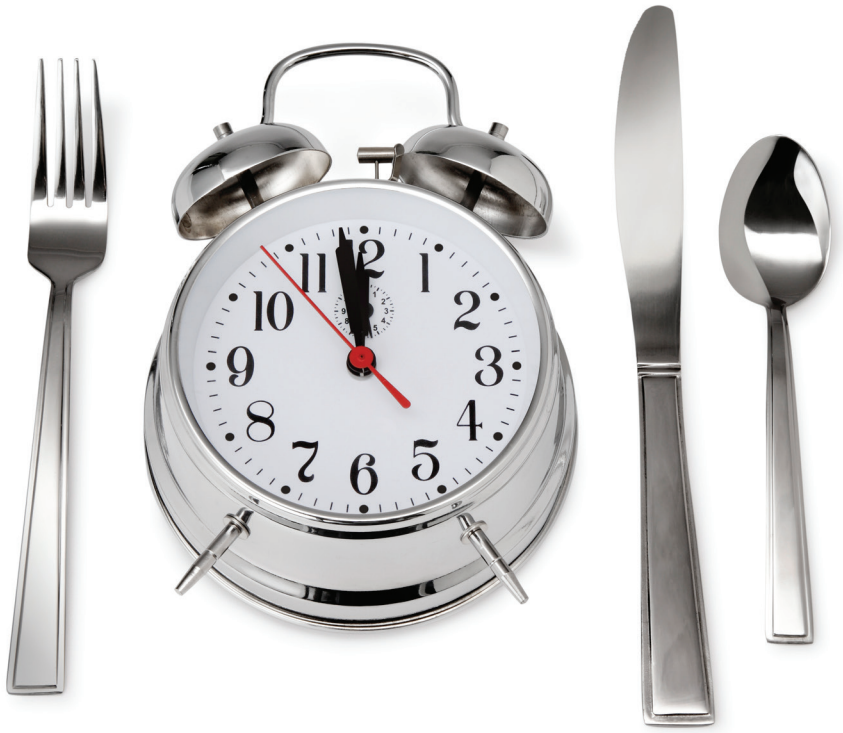

MEAL AND REST BREAK COMPLIANCE IN THE POST-BRINKER ERA

By Karen J. Kubin

In *Brinker Restaurant Corporation v. Superior Court*,[1] the California Supreme Court settled the question of the nature of an employer's duty to provide meal periods to its employees and also the question of the timing of meal periods. The court gave comparable guidance with respect to rest periods, clearly delineating when rest periods must be authorized and permitted. Case law developments in the two-year post-*Brinker* era make it more important than ever for employers to have written compliant meal and rest period policies in place. In this Commentary, the author explains why this is so important and offers a simple approach to ensure that employers' meal and rest period policies are legally compliant. First, a refresher on the legal requirements.

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European Court of Justice: Commissions May Need to be Included in Holiday Pay

By Ann Bevitt

The European Court of Justice (ECJ) has held that the Working Time Directive ("Directive") requires a worker's statutory holiday pay to include commission where commission forms an intrinsic part of the worker's normal remuneration. The Directive provides every worker across the 28 Member States of the European Union the right to four weeks' paid annual leave; it also specifies that each week's leave must be paid at the same rate as paid work.

In *British Gas v Lock*, Mr. Lock, a salesman based in the UK, was paid a basic monthly salary plus commission in arrears. The commission he received amounted to approximately 60 percent of his pay. Mr. Lock took annual leave, during which he could not earn any commission. His employer had calculated his holiday pay based only on his basic salary; as a result, his pay over the following few months was adversely affected. Mr. Lock brought an employment tribunal claim for lost holiday pay.

The tribunal referred the case to the ECJ, which held that where variable elements, such as commission, were intrinsically linked to a worker's normal remuneration, those elements should be included in the calculation of the worker's holiday pay. The ECJ declined to set out the appropriate calculation to be made by employers, and instead ruled that such a calculation was a matter to be decided by the individual Member States' national courts. The ECJ highlighted that the calculation should be considered in light of the Directive's objective to ensure that workers are not penalised when, or deterred from, taking annual leave.

The ECJ's decision is likely to have the greatest impact on employers in the retail and utilities market, where commission forms a substantial part of remuneration. Nonetheless, all employers operating in Member States across Europe will need to ensure that contractual leave arrangements now consider variable elements, such as commission, when calculating a worker's holiday pay.

Meal and Rest Periods: The Legal Requirements.

Meal Periods

Under section 512, subdivision (a), of the California Labor Code,[2] an employer "may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes," and "may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes."[3]

In *Brinker*, the defendant contended that an employer's duty to "provide" meal periods to its employees is met by making meal periods available, and the employer is not additionally obligated to "ensure" that the meal periods are taken as the plaintiffs insisted. The Supreme Court sided with the defendant, holding that an employer's meal period obligation is "to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done."[4] On the related question of meal period timing, the Court held that under both the statute and wage order,[5] "an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work."[6]

Rest Periods

An employer's obligation to provide rest periods derives from the Wage Order, the text of which the *Brinker* Court found dispositive: employees must receive 10 minutes of rest time for each four hours of work or "major fraction thereof" – and "major fraction thereof" means "a fraction greater than one-half" – except that a rest period does not need to be authorized for employees "whose total daily work time is less than three and one-half (3½) hours."[7] This means, the Court explained, "[e]mployees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on."[8]

On the related question of rest period timing, the *Brinker* Court again turned to the Wage Order, holding that employers are "subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible.[9] More specifically, "in the context of an eight-hour shift, '[a]s a general matter,' one rest break should fall on either side of the meal break. [Citation] Shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule."[10]

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Meet Toshihiro So, Tokyo Employment & Labor Partner

What is the best thing about your job?

The opportunity to help non-Japanese clients understand the Japanese labor law requirements, and how they are truly reflective of Japan's unique work environment. For example, in Japan, the majority of workers stay at the same company from when they leave school until they retire, and accordingly, termination of employment by an employer is subject to strict requirements, even in times of economic recession.

What are the hot topics in employment law this year in Japan?

A key current topic is "white collar exemption." Per the request of the Japan Business Federation, the Japanese government has been trying to institute a "white collar exemption," which would legalize overtime work without pay, for the past several years. This is supported by employers, who advocate for deregulation in the field of employment law. However, due to strong objections by labor unions, it will be difficult for the government to institute this reform within this year.

What are the key employment challenges law employers currently face in Japan?

A key challenge is the risk of litigation associated with termination of employment. In Japan, the number of civil lawsuits is relatively small with one exception: labor lawsuits based on a claim for wrongful termination. Employees in Japan understand that Japanese labor law is very employee-friendly in the context of termination of employment, and they do not hesitate to bring wrongful termination suits to court.

What do you do when you are not practicing law?

I enjoy following U.S. baseball and European football—especially rooting for teams with Japanese players!

Why Written Compliant Meal and Rest Period Policies Are So Important

In our April 2012 *Employment Law Commentary*, "The Post-*Brinker* Workplace – What Every Employer Should Know," we advised that employers should have written compliant meal and rest period policies which are disseminated to the employer's non-exempt employees in a manner calculated to ensure that the employees are fully aware of the policies and their rights under the policies.[11] Appellate decisions since *Brinker* underscore the importance of having written *compliant* meal and rest period policies. While there are decisions to the contrary, at least three cases decided by California courts of appeal after *Brinker* have allowed meal and rest period classes to be certified based solely on the absence of a compliant policy.[12] To these courts, an employer's liability arises from having a policy that violates the law, or not having a policy at all, and this supplies the predominating common issue that justifies class certification.

One can take issue with the conclusion reached by these courts, and the author of this *Commentary* certainly does. But until the question they address is definitively settled, it is more important than ever for employers to have written compliant meal and rest period policies – with the emphasis on *compliant*. Particularly is this so in light of the California Supreme Court's just-filed opinion in *Duran v. U.S. Bank National Association*.[13] *Duran* teaches that an employer has the right to present its affirmative defenses to an employee's claim.[14] If an employer's defense is that it provides meal and rest periods and the employee chose not to take them, a written compliant meal and rest period policy may be the foundation on which the defense is built.

So What's an Employer to Do?

The answer to this question should be self-evident. Existing meal and rest period policies should be dusted off and reviewed to ensure they are fully compliant with *Brinker*. Employers who do not already have a written

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policy should promptly put one in place, and above all make sure that it is legally compliant and follows *Brinker* with laser-like precision. A policy stating that an employee is entitled to a 30-minute meal period if the employee works five hours but is silent about a second meal period if he works ten hours, for example, is not a compliant meal period policy – even if shifts are not scheduled to exceed ten hours. A policy that states an employee is entitled to 10 minutes of rest time for each four hours of work and omits "or major fraction thereof" likewise is not a compliant rest period policy. While the employer's *practice* may be to provide a second meal period to an employee who works ten hours or to provide a rest period if the employee works three and one-half hours – and cases have been successfully defended on these facts, which is the right outcome – so long as there are cases such as *Benton*, *Faulkinbury* and *Bradley* on the books, a written compliant meal and rest period policy should go a long way toward avoiding certification of a meal or rest period class.

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To view prior issues of the ELC, click here.

1 53 Cal. 4th 1004 (2012).

2 All statutory references hereinafter are to the California Labor Code, unless otherwise stated.

3 The statute contains two exceptions. First, if the total work period per day is not more than six hours, the meal period may be waived by mutual consent of employer and employee. (Cal. Lab. Code § 512, subd. (a).) Second, if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of employer and employee if the first period was not waived. (*Id.*)

4 *Brinker Restaurant Corp. v. Superior Court*, supra, 53 Cal. 4th at 1017.

5 *Brinker* was decided under Wage Order No. 5, which is the wage order applicable to the restaurant industry. Except for the motion picture industry (Wage Order No. 12) and agricultural occupations (Wage Order No. 14), all industries are subject to the same meal and rest period provisions that are contained in Wage Order No. 5.

6 *Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal. 4th at 1049.

7 *Id.* at 1028.

8 *Id.* at 1029.

9 *Id.* at 1031. The Court declined to say what considerations "might be legally sufficient to justify such a departure." *Ibid.*

10 *Id.* at 1032.

11 We also suggested other steps an employer should consider taking to help ensure meal and rest period compliance, for example, asking employees for a written acknowledgment of receipt of the policies at hire and periodically thereafter, periodic training of supervisors in the proper implementation of the policies, monitoring whether breaks have been taken and, if not, why not, and so on. *Ibid.* (http://media.mofo.com/files/Uploads/Images/120502-Employment-Law-Commentary-April-2012.pdf)

12 *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701; *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal. App. 4th 1129.

13 No. S200923 (Cal. Sup. Ct., May 29, 2014).

14 See also Morrison & Foerster Client Alert, "A New Dawn for California Class Actions," by William L. Stern (May 30, 2014).