



## Legal Alert: Back to Brinker: California's Meal Period Riddle Will Soon Be Answered

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**Executive Summary:** On November 8, 2011, the California Supreme Court will hear oral arguments in *Brinker Restaurant v. Superior Court (Hohnbaum)*, 165 Cal.App. 4th 25 (2008), to determine whether, under California law, a company may simply "provide" employees with the opportunity for a meal period, or whether it must affirmatively "ensure" that those meal periods are taken.

### **Background:**

In October 2008, the California Supreme Court made the decision to review *Brinker Restaurant v. Superior Court (Hohnbaum)*, 165 Cal.App. 4th 25 (2008). Now, at long last, with the appointment of Justice Goodwin Liu, the Court has a full panel and will hear oral arguments in *Brinker* on November 8, 2011.

The issue – of which all Californians are probably aware – is: May a company simply "provide" employees with the opportunity for a meal period, or must it affirmatively "ensure" that those meal periods are taken? Unless post-hearing briefing is ordered, we will have an answer by February 6, 2012 (90 days following submission at oral argument).

Since October 2008, many lower courts have "voted" for their favorite answer to the "provide vs. ensure" challenge. No less than seven such California appellate opinions are in line behind *Brinker* for review, as courts have struggled with the appropriate standard while running tired of waiting for the Supreme Court. Of particular interest to us will be the Court's treatment of one of those cases, specifically *Faulkinbury v. Boyd & Associates, Inc.*, as described in more detail in the bio for author [Curtis A. Graham](#).

In the majority of appellate opinions since 2008, including the one on review in *Brinker*, courts have supported California companies who treat employees as responsible adults who are mature enough to take their own meal periods without being physically forced to do so. Those courts also have demonstrated their uneasiness with a one-size-fits-all approach to meal period litigation, opting for individual analysis instead of class-wide analysis of the claim. We hope our Supreme Court follows the trend.

No matter which direction the Supreme Court goes with *Brinker*, it will significantly change wage-and-hour litigation in California, particularly those

cases alleged as class actions. So, stay tuned for further updates as *Brinker* progresses.

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