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Employment Law Commentary

The Post-*Brinker* Workplace – What Every Employer Should Know

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This month the California Supreme Court announced its long-awaited decision in *Brinker Restaurant Corporation v. Superior Court*,[1] holding that employers must provide their non-exempt employees uninterrupted 30-minute meal periods, but need not additionally ensure that the employees take them. But in addition to finally deciding the headline "provide v. ensure" issue that has exposed employers to countless class action lawsuits over the last decade, the Court decided a number of other important meal and rest period compliance and timing issues. And on the all-important question of whether meal and rest break claims can be litigated classwide, the Court addressed several critically important issues that will guide future trial courts in deciding whether or not to certify wage and hour lawsuits as class actions. Here are the key takeaway points from *Brinker* and what they mean for California employers.

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Meal Periods Must Be Provided, Not Ensured.

The marquee issue in *Brinker* was whether employers must *provide* their non-exempt employees uninterrupted 30-minute meal periods, as Brinker contended, or additionally *ensure* that the meal periods are taken, as the *Brinker* plaintiffs argued. Agreeing with Brinker, the Supreme Court held that "[a]n employer's duty with respect to meal breaks under both [Labor Code] section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so."[2] "On the other hand," the Court said, "the employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay under Wage Order No. 5, subdivision 11(B) and Labor Code section 226.7, subdivision (b)."[3]

The Court declined to specify what is enough to satisfy an employer's obligation to provide meal periods in a particular workplace. Rather: "What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law."[4] But regardless of the industry, at a minimum employers should have a written *compliant* meal period policy that is disseminated to its non-exempt employees in a manner calculated to ensure the employees are fully aware of the policy and their rights under it – for example, by asking them for a written acknowledgment of receipt of the policy at hire and periodically thereafter. Meal period policies that already exist should be dusted off and reviewed to ensure they are fully compliant with *Brinker*. Employers who do not already have a written policy should promptly put one in place. Other steps that help ensure meal periods are provided include periodically training supervisors in meal period compliance, shutting down operations for the required period, scheduling break times for non-exempt employees, asking employees to periodically acknowledge in writing that they have been provided their meal breaks, and monitoring (for example, by periodically reviewing employee time records and following up as needed) whether breaks have been taken and, if not, why not, to ensure that supervisors have not impeded or discouraged employees from taking their breaks. While *Brinker* makes clear that employers are not obligated to police meal breaks, and ensure no work is performed during them, employers still must make sure breaks are provided.

When Must A Meal Period Be Provided?

The plaintiffs in *Brinker* argued that under Labor Code section 512 and Wage Order No. 5 employers must provide a meal period after each five consecutive hours of work – the so-called "rolling five" argument.[5] Thus, under plaintiffs' theory, if an employee took a 30-minute meal break after the first hour of work, the employee would be entitled to a second meal break five hours after the conclusion of his first meal break, or after six and one-half hours. The Court rejected this argument, holding there are no meal timing requirements beyond those in section 512. "Under the wage order, as under the statute, 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] Nothing more.

This holding is more good news for both employers and employees, who want flexibility in timing meal breaks to meet their respective needs. It requires an employer to provide its employees a meal period no later than the start of the sixth hour of work – for example, if an employee begins her shift at 8:00 a.m., she must be provided a meal period that starts by 1:00 p.m., and not a minute later; to account for unexpected demands and thereby ensure compliance, the employer might consider starting this employee's meal break at 12:30 or 12:45. But so long as the meal break is provided no later than the start of the sixth hour, an employer may schedule breaks flexibly to meet the needs of its employees and the business without concern that a second meal break will be owed five hours after the first one has ended.

How Many Rest Periods Must Be Provided?

Brinker also lays to rest the question of the rate at which an employer must authorize rest time. The Court found that the text of the wage order is 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]

Employers should have a written rest period policy that complies with this formulation. Employers who already have written rest period policies in place should promptly review and update them if they are not compliant. Employers who do not already have a written rest period policy should

[1] *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (Apr. 12, 2012, S166350), ___ Cal.4th ___, 2012 WL 1216356.
[2] *Id.* at *18.
[3] *Ibid.*
[4] *Ibid.*
[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] *Id.* at *24.
[7] *Id.* at *9 (quoting Wage Order No. 5, subd. 12(A)).
[8] *Brinker Restaurant Corp. v. Superior Court, supra*, at *10.

promptly adopt one – taking due care that it accurately states the employer's obligation. As with meal period policies, employers should disseminate their rest period policy to their employees in a manner calculated to ensure the employees are fully aware of the policy and their rights under it, and supervisors should be trained in the proper implementation of the policy. While these actions are not meant to be exclusive of possibly others, just taking these few small steps can make a world of difference in defending a rest break class action.

When Must A Compliant Rest Period Be Provided?

The *Brinker* plaintiffs argued that employers must permit their employees a rest period before any meal period. Not so, said the Supreme Court. The Court turned again to the wage order, noting its "only constraint on timing is that rest breaks must fall in the middle of work periods 'insofar as practicable.'"[9] "Employers are thus 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."[10] 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."[11]

Under this interpretation of the wage order's rest period provision, employers should include in their written policies that rest periods are to fall in the middle of a work period insofar as practicable and they should make a good faith effort to follow that timing, authorizing as a general rule one rest break on either side of the meal break in the context of an eight-hour shift. But if shift length or other factors make this scheduling impracticable, the employer has a defense under *Brinker* – and notably, that defense should go a long way toward defeating class certification of rest break claims.

Brinker's Impact On The Future Of Wage-Hour Class Actions

Much has been written in the few short weeks since *Brinker* was decided about what it means for the future of wage and hour class actions. Plaintiff lawyers, predictably, claim the future is theirs; defense lawyers quite the opposite. But regardless of the side of the courtroom on which one sits, it is indisputable the Supreme Court said several important things that will guide trial courts in deciding whether to certify a wage and hour lawsuit as a class action – or not – in the future.

First, the Court for the first time weighed in on "overbroad" classes that embrace potentially large numbers of individuals who have no claim and made clear that such classes cannot be certified. Specifically, the Court found the plaintiffs' meal break subclass was overinclusive in light of the Court's rejection of the plaintiffs' theory that meal periods must be provided for each consecutive five hours of work – it thus included "individuals with no possible claim" – and accordingly remanded the question of meal subclass certification to the trial court for reconsideration in light of the Court's decision.[12] Given that the proposed classes in wage and hour lawsuits are typically marked by such overinclusiveness, the importance of this point cannot be overstated.

Second, the Court underscored that the merits of a claim may properly be considered at the class certification stage. Indeed, "[t]o the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them."[13] Thus, the Court has provided defendants with a powerful weapon to counter the persistent claim of class action plaintiffs, especially those with dubious cases, that the merits may never be considered at the class certification stage.

As notable for what the Court says about the barriers to classwide litigation of wage and hour claims is what it does not say, as emphasized by Justice Werdegar, author of both the majority and concurring opinions. In particular, the concurring opinion notes that the Court has "encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated",[14] citing *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339-340 for this unremarkable point. The concurring opinion goes on: "Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability",[15] citing *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 749-755, for this proposition. But *Bell* only addressed the use of statistical evidence at the damages phase, not to prove liability. Importantly, neither point received the majority's imprimatur, suggesting this Court is not amenable to the notion that employers' due process right to defend these claims on a case-by-case basis can be trumped for the sake of expediency.

In sum, *Brinker* provides welcome clarification of California's meal and rest break laws, to the benefit of employers and employees alike. And while the final chapter of wage and hour class action litigation has yet to be written, we believe *Brinker* raises the bar considerably for plaintiffs attempting to pursue wage and hour claims on a classwide basis.

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[9] *Id.* at *11 (quoting Wage Order No. 5, subd. 12(A)).
[10] *Brinker Restaurant Corp. v. Superior Court, supra,* at *11. The Court declined to say what considerations "might be legally sufficient to justify such a departure." *Ibid.*
[11] *Id.* at *12 (quoting Opinion Letter No. 2001.09.17 at p. 4).
[12] *Brinker Restaurant Corp. v. Superior Court, supra*, at *25.
[13] *Id.* at *7.
[14] *Id.* at *28.
[15] *Ibid.*