

What Does *Brinker* Really Mean?
by John F. McCarthy

So what does *Brinker* really mean? Recently, the California State Supreme Court came down with its much anticipated decision in *Brinker Restaurant Corporation et al., v. Superior Court of San Diego Court*. Defense Attorneys and Employment Groups are trumpeting the decision as, a “major victory for employers”, “a relief for employers” and as “some much-needed clarity.” While employers, and mass media are claiming an all out victory that will, “reduce employers’ exposure to costly and frivolous litigation,” the question is did employers really win?

According the California Chamber of Commerce, “the most critical part of the unanimous ruling is that employers do not have to ensure that employees take their meal breaks, but must merely make them available. The court also provided flexibility to employers with regard to the timing of meal and rest breaks.” This would be great for employers...if it were true. What the Court really said was:

“The employer satisfies [its meal period compliance] 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. 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.” Slip op. at 36 (emphasis added) (citing, *e.g.*, *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005)); *see id.* at 31 (“Employers must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please.”); *id.* at 6, 27 (describing rejected employer argument that “an employer is obligated only to ‘make available’ meal periods”).

As Kimberly A. Kralowec, a wage and hour super lawyer, who argued parts of *Brinker*, wrote on her blog, www.uclpractitioner.com, “Yes, the Court declined to accept the final additional bit of our argument, that employers must also ‘prohibit work’ during meal periods (which, by the way, is not the same thing as ‘policing’ the workplace, which was never part of our argument). Slip op. at 33. But the opinion adopts 90% of what we contended employers were obligated to do to comply with their meal period obligations, while rejecting the employers’ contention that meals need only be ‘offered.’”

So, employers don’t need to ensure that meal periods are actually taken and that they don’t have to provide meal periods every 5 hours. However, employers still need to 1) relieve employees of all duty, 2) relinquish control over their activities, 3) permit them a reasonable opportunity to take an uninterrupted 30-minute break, and 4) not impede or discourage employees from taking an uninterrupted 30-minute break. Hardly a victory.

The Court also looked at meal and rest period class certification issues stating, “[c]laims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class

treatment.” Slip op. at 25. The Court went on to state, “[t]he theory of liability--that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law--is *by its nature* a common question eminently suited for class treatment.” Slip op. at 26 (emphasis added). In so opining, the Court effectively certified the rest period class and provided a road map on how to certify the meal period class. So while *Brinker* may reduce frivolous lawsuits, it also showed that these meal and rest period class action lawsuits are not frivolous.

If *Brinker* is a loss for employee rights advocates, I’d like to see what’s a victory. *Brinker* has ensured that 60,000 employees will be provided the opportunity to have their case heard as a class action and that employers will need to provide adequate meal and rest periods. That's all *Brinker* really means.

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