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California Supreme Court Hears Oral Argument In Key Meal/Rest Period Case

November 11, 2011 by Aaron W. Heisler

On Tuesday, November 8, 2011, the California Supreme Court heard oral argument in the long-awaited case of *Brinker v. Superior Court* (Sup. Ct. Case No. S166350). The case raised a variety of highly litigated and highly contested issues, including: (1) the scope of an employer's meal period obligations to employees; (2) the scope of an employer's rest period obligations to employees; and (3) whether a trial court must or may determine the elements of a plaintiff's claim before deciding whether the claim may proceed on a class-wide basis. While the oral argument briefly addressed issues (2) and (3), it is unsurprising that the bulk of argument pertained to question (1).

Based on the justices' questions, it appears that a majority of them are leaning towards the following holdings:

- that employers are not obligated to ensure that employees take meal periods;
- however, employers have an affirmative obligation to make meal periods available to employees, though what it may take to meet that affirmative obligation is far from clear;
- Labor Code section 512, the statute entitling employees to meal periods, sets a floor for employees' entitlement to meal periods, and does not preclude the Wage Orders from providing more generous meal period entitlements; and
- Section 11 of Wage Order 5-2001 contemplates that meal periods must be made available after every 5 consecutive hours, unless the waiver under Section 11(a) applies (this is often referred to as the "rolling 5-hour obligation," and comparable language appears in nearly all of the other Wage Orders). Rex Heinke of Akin Gump Strauss Hauer & Feld LLP argued for Respondents Brinker Restaurant Corporation, et al. ("Brinker"). Kimberly Kralowec of The Kralowec Law Group and Michael Rubin of Altshuler Berzon, LLP argued for Petitioner and Real Party in Interest Hohnbaum, et al. ("Hohnbaum").

Summary of Hohnbaum Argument

Argument by Kralowec

Almost immediately after Hohnbaum's argument began, Justice Kennard asked whether it is Hohnbaum's position that the different language regarding meal periods in Section 512 and Wage Order 5 could be harmonized and, if they cannot be harmonized, which should control. Hohnbaum responded that the two provisions could be harmonized but, if the Court were to conclude otherwise, Section 512 would not prevent the Wage Order from providing greater protections to employees. In response to follow-up questions from Justices Baxter and Chin, Hohnbaum argued that Labor Code section 226.7 was the most recently-enacted legislation addressing meal periods, and it "specifically incorporated" the meal period standards from the IWC Wage Orders, codifying those meal period standards. Justice Kennard expressed some skepticism for that position, to which Hohnbaum responded that the legislature used the same word "provide" with respect to both meal periods and rest breaks, which clearly have different standards. This is evidence of the legislature's intention to use the word "provide" as shorthand to codify the meal period and rest break standards from the Wage Orders.

Chief Justice Cantil-Sakauye then asked whether *IWC v. Superior Court* (1980) 27 Cal.3d 690 (holding in part that the IWC could adopt more restrictive provisions than provided for in the Labor Code) would affect the Court's interpretation of Section 512. Hohnbaum responded (unsurprisingly) that *IWC v. Superior Court* is consistent with the principle that the Labor Code provides a "floor" for employee protections, but the IWC may adopt more protective standards.

Justices Chin, Liu, Kennard, Baxter, and Corrigan then challenged Hohnbaum directly on the "ensure" standard advocated by Petitioner. Their questions focused on whether an employer is really required to discipline and pay an employee who willfully works through a meal period of his or her own free will, just because he or she wants to. They also questioned the practicality of requiring employers to enforce meal periods, and whether an employee who is completely free from the employer's control for a full 30 minutes and chooses to work, would still have been provided a meal period. Justice Kennard also referenced the number of Court of Appeal decisions and Federal District Court decisions that rejected the ensure standard. Hohnbaum's attorney fell back on familiar arguments: (1) that the Wage Order prohibits an employee from "employ[ing]" a person for a work period of more than 5 hours without a meal period of at least 30 minutes, which incorporates the "suffer or permit to work" definition of "employ;" (2) that employers are obligated to pay and, if they choose, discipline employees who work unauthorized overtime against the employer's instructions; (3) that the IWC allegedly determined that an ensure standard is necessary because, without it, employers will deny meal periods; and (4) allowing an employee to voluntarily decide not to take a meal period would render the waiver

language in Section 11 of Wage Order 5-2001 surplussage. In a final exchange on this issue, Hohnbaum's attorney attempted to dodge questions from Justice Corrigan about whether it is really Hohnbaum's position that an employer's only recourse is to discipline an employee who freely and voluntarily chose to work through a meal period even though the employer told the employee to take it. Hohnbaum finally admitted that it was, and that such willful disobeyance would constitute insubordination like a failure to comply with any other company policy.

Argument by Rubin

Rubin addressed Hohnbaum's class certification contentions on appeal. Specifically, he began by arguing that at least some of Hohnbaum's claims (such as time shaving and failure to require a meal period every five hours) were amenable to class certification because they could be determined with reference to time records. In an exchange with Justice Liu, Hohnbaum admitted that time records could not be used to test the rest period claim, because an employer does not have an obligation to maintain accurate records of rest periods taken. In the course of this exchange, Hohnbaum conceded that the employer's obligation with respect to rest periods is merely to make them available, not ensure that they are taken.

Hohnbaum went on to argue, however, that there was undisputed evidence in the record that Brinker dissuaded employees from taking rest periods on a class-wide basis. Although Hohnbaum admitted that Brinker had a rest period policy since at least 2005, he argued that the policy did not comply with Wage Order 5-2001. Justice Werdegar asked whether that wasn't enough on its own to support certification. Hohnbaum said that it would be. He went on to argue that the only reason Brinker identified for employees choosing to work through rest breaks was that they wanted to keep working to get their tips. Because Brinker does not pool tips, Hohnbaum said that employees who were on break when tips were paid did not receive any share of the tips paid, even though they performed substantial work while not on break. Hohnbaum asserted that this policy effectively penalized employees for taking rest breaks by denying them tips to which they were entitled. Justice Corrigan asked whether Hohnbaum believed that employers were therefore required to implement tip pooling policies or else run afoul of rest break obligations. Hohnbaum back-peddled a bit, and shifted focus to other alleged failures by Brinker to ever pay an employee for a missed rest break or conduct any compliance monitoring.

Justice Baxter asked whether it wouldn't be sufficient to certify the rest period class based on the allegedly common policy of denying employees a second rest period in an 8 hour workday. Hohnbaum said that was part of it, but he again returned to other rest period theories including the tip issue. Justice Liu interjected and asked why employers are not allowed to structure tip compensation policies in any reasonable manner. Hohnbaum responded that they may do so,

and he was not asking the Court to adjudicate the merits of Brinker's tip policy at this time. Nevertheless, he asserted that in "one narrow circumstance," a tip policy may violate meal period and rest break laws where the employer does not give any portion of a tip to an employee who performed work toward the tip, but was on break when the tip was given. Justice Liu agreed that such a policy would "maybe pressure" employees not to take rest breaks, but those employees would nevertheless be collecting tips for other employees who were on break, so asked why such a policy would be unlawful. Hohnbaum concluded by saying that the policy was unlawful because it impeded employees from taking rest breaks, and that it was at least one factor that should be taken into account when considering whether Brinker had a common policy of denying rest breaks.

Summary of Brinker Argument

Justice Kennard opened up Respondent's argument by asking whether Brinker believed the word "provide" to be as important to the meal period analysis as the Court of Appeal did. Brinker responded that the statutory language was critical, as it was adopted by the legislature four times, twice in Section 512 and twice in Section 226.7. Kennard asked why Brinker did not agree that the term "provide" includes an affirmative obligation with respect to meal periods. Brinker clarified that "provide" does impose an affirmative obligation, but the obligation is just to make meal periods available, not ensure that they are taken. Kennard then quoted at length from a portion of the DLSE's amicus brief regarding the IWC's amendments to the 2001 Wage Orders, discussing the need for flexibility in scheduling meal periods, and asked Brinker whether it agreed with the DLSE's analysis. Brinker said that the amendments were intended to toughen up meal period obligations by creating premium payments for violations, but that the amendments were also intended to create flexibility regarding the realities of the modern economy, so Brinker agrees with the DLSE's position on that issue.

In response to questions from Justice Baxter, Brinker said that it could not be determined whether those meal period amendments were in response to the legislature's passage of Labor Code section 512, or whether it was the IWC's intention to mirror the language of Section 512.

Justice Werdegar then interrupted and asked whether the meal period analysis was affected by the Wage Order's language that "[u]nless an employee is relieved of all duty ... the meal period shall be considered an 'on duty' meal period," and what an employer must therefore do to provide a meal period. Brinker responded that the on duty language means that an employer must tell employees that they do not have to work during a meal period, but that there is no language in the statutes or in the Wage Order that an employer must force employees to do no work during a meal period. Justices Werdegar and Liu asked follow-up questions on that issue, to which Brinker responded by clarifying its position that an employer must affirmatively relieve

an employee of all duty, which would include arranging a work day such than an employee could have a 30 minute meal period "without work piling up" in the employee's absence. Justice Kennard finished up this section by "asking" whether it is Brinker's position that the fight is about whether there is any flexibility in the meal period laws; that Hohnbaum's position is that there is not, and that an employee must stop all work at the end of five hours, even if a nurse is providing life-sustaining treatment to a patient, or else the employer must pay the premium. Brinker agreed.

The discussion then turned to the "rolling five hour" issue in a series of exchanges between Brinker and Justices Baxter, Liu, Werdegar, and Chief Justice Cantil-Sakauye. These exchanges focused on Brinker's contention that: Section 11(a) of Wage Order 5 does not refer to a "consecutive" 5 hours of work; the IWC knew how to write a provision that referred to a consecutive five hours of work (discussing Section 11(a) of Wage Order 12 and prior language in Section 11 of Wage Order 5); and the Chief Justice's extended quote from minutes of a meeting of the IWC in 1952 discussing the first use of the current language in which the IWC says that the purpose was to prevent an employer from requiring an employee to work more than 5 hours without a meal period.

Brinker admitted in response to questions from Justice Werdegar that Section 512 discussed the number of meal periods per day, but not the timing of those meal periods. Justice Werdegar asked whether that did not then leave the timing of meal periods up to the IWC. Brinker said that it did, and the IWC knew how to control timing when it wanted. Justice Werdegar referred to the 1952 minutes quoted by the Chief Justice. Brinker discounted those minutes by arguing that the intent discussed in the minutes is not actually reflected in the Wage Order language. Werdegar asked whether Hohnbaum's position is not at least arguably correct based on the language of the Wage Order. Brinker said no, and noted that the IWC amended the meal period language in 1947 to adopt express language regarding meal periods after consecutive hours of work, then changed the language in 1952 to its current form, which should be read as an express rejection of the rolling five hour interpretation.

Justice Liu then challenged Brinker on the following language in Section 11(a) of Wage Order 5: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and employee." In a pointed exchange, Liu strongly implied that he reads that language as unambiguously saying that an employee is entitled to a meal period after each five hour work period, because an alternate reading would render "except that when..." language surplussage. Liu offered the example of an employee who worked from 9:00a - 12:00p, then

from 12:30p - 6:30p, asking whether the employee worked "for a work period of more than five hours" during the 12:30p - 6:30p portion that would have triggered the meal period obligation. Without waiting for an answer, Liu went on to say that the IWC's intent was "made absolutely clear" by the "except that when..." clause, which might be applicable in his example. Brinker responded by again arguing the IWC's legislative history, to which Liu responded by asking whether it was necessary to review legislative history when the regulatory language is unambiguous. Brinker said that Section 512 was a clear expression of the legislature's intent, to which Liu responded by again asking whether Section 512 might just be a "baseline" protection.

Before Brinker could respond, Justice Chin changed topics and asked Brinker whether it was necessary for the trial court to consider the elements of Hohnbaum's claims as part of deciding class certification. Brinker said that it was required to do so under applicable law, and any argument to the contrary is irrelevant given that Hohnbaum asked the trial court to address the issue as part of the class certification ruling.

Justice Baxter then asked whether, given the uncertainty of the law regarding the merits of Hohnbaum's claims, a decision in this case could be prospective only. Brinker's attorney said that he was not prepared to respond, because he had not researched or analyzed that issue. Chief Justice Cantil-Sakauye noted that the Court's practice has been to apply clarifications of law retroactively, and she asked whether Brinker considered the Court's decision on these issues to be clarifications of the law. Brinker said that it did.

Hohnbaum's Rebuttal (by Kralowec)

Hohnbaum began by asserting that, if the Wage Order did not control the timing of meal periods, an employee could be made to take an early lunch, then required to work for another 9 hours without being entitled to a second meal period. Moreover, employers have a number of ways to comply with a rolling five hour meal period obligation, including by scheduling a meal period anytime between the 3rd and 5th hours of work during an 8-hour workday; by ending a shift after 5 hours; by paying the premium; or (in response to a question by Justice Werdegar) by mutual waiver if the conditions are met.

Justice Corrigan asked Hohnbaum to respond to Brinker's contention that the IWC knew how to say that it wanted to impose a "consecutive hours of work" standard. Hohnbaum noted that the 1952 amendment implemented the term "work period," which Hohnbaum asserted is a term of art that incorporates the notion of consecutive hours. Hohnbaum also asserted that the specific language used in Wage Order 12 was used by the IWC to address a specific issue in the motion picture industry, and is therefore not comparable.

Conclusions

As discussed above, a majority of the justices seemed hostile to the idea that employers would be required to force employees to take meal periods. However, it appears highly likely that the Court will at least conclude that employers have an affirmative obligation to do something to make off-duty meal periods available to employees. It is unclear what the scope of that affirmative obligation will be, but employers should, at a bare minimum, implement legally-compliant meal and rest policies if they have not done so already.

A majority of the Court also seemed inclined to find that the Wage Orders require a rolling five hour meal period, which is a more protective standard than what is required by Section 512. Although not all of the Justices asked questions on the issue, the Court did not challenge Hohnbaum very strongly on his position that the Wage Orders may provide for greater meal period entitlements than are afforded under Section 512.

Given the lack of significant discussion on the scope of rest period obligations, or the class certification issues, it is difficult to predict how the Court will come down on these issues.

The most troubling exchanges from an employer's perspectives may be the ones discussing: (1) whether the Court's ruling will be retroactively applicable (which may not become part of the Court's ruling); (2) whether the obligation to provide meal periods may include an obligation to arrange the work day such than an employee could have a 30 minute meal period "without work piling up" in the employee's absence; and (3) whether Brinker's failure to provide for tip pooling could be evidence of a policy of discouraging breaks.

Now that the case has been submitted, the California Supreme Court's deadline to issue a decision is February 7, 2012. All employers with employees in California should stay tuned, though, because the decision could be issued before that deadline.

Aaron W. Heisler is an associate in the Labor and Employment Practice Group in Sheppard, Mullin Richter & Hampton LLP's Santa Barbara office. Please email the author at aheisler@sheppardmullin.com with questions about this article.