WAGE AND HOUR UPDATE

by: Laura K. Sitar, Esq.

California employers continue to await the California Supreme Court's decision in *Brinker Restaurant Corp. et al. v. Superior Court of San Diego*. This wage and hour class action is anticipated to resolve the critical questions of (1) whether employers must *ensure* that employees take meal periods or simply *provide* them, (2) whether a second meal period must be provided within five hours of the first meal, rather than after ten hours of work per day, and (3) whether these types of wage and hour claims are amenable to class treatment. The Court's decision in *Brinker* will undoubtedly have a significant impact on the current wage and hour litigation frenzy in California either by adding fuel to the fire or by providing employers some much needed relief.

The California Supreme Court heard oral argument on November 8, 2011, and while predicting the outcome of the case from the tenor of the Justices' questions at oral argument is a treacherous business, observers anticipate a mixed result for employers. On the whole, most observers agree the Court was sympathetic to the argument that an employer's only obligation is to make a meal period available to employees, not to force employees to take a meal period against their will and on pain of disciplinary action. On the other hand, the Court appeared less sympathetic to the argument that a second meal period need only be provided after ten hours per day rather than after each five hour work period. A decision in favor of plaintiffs would require employers to provide a second meal period on a "rolling five hour" basis.

The Court gave little indication of their thoughts on whether these cases are amenable to class action treatment. Presumably, a decision that employers must only *provide* meal breaks leaving employees the freedom to do as they choose would run counter to class certification.

While the Court's decision was initially anticipated by early February, the Court ordered additional briefing on the issue of whether any decision could only be applied prospectively. Their decision is now likely to be issued by mid-April. California employers are waiting anxiously. We look forward to addressing what the Court's long awaited decision means to California employer at our May Long Term Care Conference.

About the Author:
A shareholder at Wroten & Associates, Laura Sitar defends medical malpractice, employment, and elder abuse cases. She litigates cases on behalf of doctors, dentists and long-term care facilities involving all types of employment actions including sexual harassment, wrongful termination, retaliation and wage and hour claims. She also provides employment related risk management services to help clients avoid litigation. Ms. Sitar became an attorney after a 15-year career in corporate management where she directed the human resource function of a 2000 employee, $100 million region. Since commencing a second career in law 10 years ago, she was a senior associate with a prestigious healthcare defense firm before joining Wroten & Associates, where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, were she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in the U.S. District Court for the Central District of California.

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