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Just When You Thought It Was Safe to Go Back into California: Meal and Rest Period Claims Remain Certified on Remand in Brinker

Companies with employees in California will recall last year's landmark California Supreme Court decision in Brinker v. Superior Court (April 12, 2012), which confirmed that employers need only "permit" hourly employees to take meal periods in compliance with state law. By rejecting the stricter "ensure" standard, the Court made it more difficult for plaintiffs to certify meal period claims, as consideration of individual issues will typically be required to determine if certain class members simply chose not to take a meal period.

While the majority of courts applying the "permit" standard have denied class certification, the San Diego Superior Court on remand in Brinker has again certified the plaintiffs' meal period claim and denied decertification of their rest period claim. See Hohnbaum v. Brinker Restaurant Corporation (Sept. 25, 2013). This ruling reminds employer that the plaintiffs' bar and a number of California judges very much like wage and hour class actions and will not give them up easily. Thus, employers must remain vigilant in drafting, communicating, implementing, and enforcing their policies.

Meal Period Certification

In certifying the plaintiffs' meal period claim, the San Diego Superior Court in Hohnbaum focused on Brinker's uniform written policy, or at times lack thereof, and downplayed the individual circumstances involved in particular employees' taking or not taking meal periods.

The plaintiffs first stressed that before 2002 (yes, the case has been litigated so long that this time period is at issue) Brinker had no meal period policy. Next, the plaintiffs argued that Brinker's policy between 2002 and May of 2012 was deficient because it (1) did not inform employees of their right to take a meal period by the end of their 5th hour of work or a second meal period by the end of their 10th hour, (2) it only allowed employees to take a first meal period after 5 hours of work and a second meal period after ten hours of work, and (3) it did not inform employees of their right to a second meal period at all. While Brinker argued that the California Department of Fair Employment and Housing had approved the policy at the time, the California Supreme Court in Brinker clarified the meal period timing requirement, in one part of its decision that favored employees. Finally, the plaintiffs argued that Brinker's current policy is deficient because of the first two reasons listed for the prior policy. For its part, Brinker argued that its current policy fully tracks the Supreme Court's ruling.

In certifying the meal period claim, the Superior Court declined to rule on the validity of Brinker's policies, rather assuming for class certification purposes that the plaintiffs could prove that the policies violated California law. The court then focused on the uniform nature of the written policies, rather than examining circumstances unique to individual employees and variations in how the policies have been implemented and applied in multiple restaurants.

Beyond the meal period policies, the plaintiffs argued that Brinker interfered with employees' taking meal periods through (1) a tip forfeiture policy that requires employees on a meal break to transfer all open tickets to another server and forfeit

tips, (2) a policy requiring employees to obtain permission before going on break, rather than having breaks scheduled in advance, and (3) a policy that makes employees responsible for their cash drawers even while on break. The court, in granting class certification, again declined to focus on variations in how these policies affected individual employees.

Rest Break Certification

Employers also need only "permit" employees to take paid rest breaks in compliance with California law. Still, the plaintiffs in Hohnbaum argued that Brinker's policy failed to permit employees to take a second rest break if they worked a shift longer than six but shorter than eight hours (*i.e.*, a "major fraction" of a second four-hour period). In declining to decertify this claim, the Superior Court again focused on the uniform nature of Brinker's written policies and downplayed variation between different restaurants and class members.

Guidance for Employers

Although Brinker was a victory for employers in reducing class action risks, California employers should not let down their guard. Rather, these employers should review their meal and rest period policies, train employees on these policies, and take steps to ensure that employees are taking meal and rest periods and not working off the clock. Despite an employer's best intentions, full compliance will remain difficult. For example, an employee may prefer to take a meal period later in a shift because he or she is busy earlier or simply is not hungry yet. The employee may clock out by the book, but other records, such as computer activity, may show that he or she performed work while off the clock. As highlighted in Hohnbaum, an employer should consider how other policies, such as forfeiture of tips, may impact meal periods. Finally, an employer may audit its records for compliance.

You may click here to see the full text of the decision. For more information concerning this decision or any class/collective action questions, please contact Brad Harvey or any member of our Class & Collective Action Practice Group.

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