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Employer Services Group

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California Employers Enjoy A Collective Sigh Of Relief Thanks To Brinker

Nine years after starting its odyssey through California courts, the *Brinker*[1] case has reached its much anticipated end, and it's an end that should not disappoint California employers.

In the event you may have missed the hundreds of articles, MCLE courses and blog entries about *Brinker* during the past nine years, there were two primary issues at stake in this California Supreme Court review: (1) must an employer ***ensure*** that its employees take the 30 minute meal period mandated by the California Labor Code, or does the employer's obligation end at ***providing*** an opportunity for the break, with taking it left to the employee; and (2) must a meal period be allowed for each five hour period an employee works in scheduled work days exceeding six hours, termed a "rolling five hours", or is it enough to provide a single meal period at some point within (a) the first five hours of work for an eight hour shift or (b) anytime within an eight hour shift? The answer to either and both issues has significant impact on existing and future litigation over meal periods, particularly in stemming or fostering the rising tide of class action wage and hour litigation. And today, the California Supreme Court answered these questions.

To the first point, the employer's obligations as respects *providing* or *ensuring* employees take meal periods as required, the Court made a long and detailed review of the history of relevant Labor Code sections and IWC Wage Orders[2] before summarizing its holding that an "employer satisfies the obligation [to provide meal periods] if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an un-interrupted 30-minute break, and does not impede or discourage them from doing so."[3] The Court did not explain how that might apply in the many varied contexts of employment, but it did allow that "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 …. "[4]

While the ultimate affect of this holding will play out through rulings in the many trial and appellate cases stayed pending this decision, the immediate impact is to interject another consideration for assessing the viability of class claims for missed meal periods, as the issue of whether or not an employer provided an opportunity for a meal period an employee did not take could be argued as the type of individualized inquiry precluding class adjudication, i.e., determining liability would require inquiry into the circumstances of each missed meal break. Anticipating just that, in a brief concurring opinion Justice Werdegar pointedly explained that employers have an obligation to both

relieve their employees of duty *"and* to record having done so."[5] Justice Werdegar went on to write, "If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided."[6] Thus, it is key that employers continue to document the scheduling of meal periods and, to the extent possible, employees clocking in and out for meal periods.

The Court's decision on the second issue was likewise good news for employers. After again detailing the long history of the Wage Order language on the timing of meal periods, the Court provided its interpretation in holding that for employees working shifts in excess of six hours, a meal period must be provided sometime within the first five hours of work.[7] Further, an employer must provide a second meal period no later than the end of an employee's tenth hour of work.[8] The Court flatly rejected the appellant's proposed rule of a "rolling" five-hour period for breaks, by which an employee must be provided a meal break for every five hour period of work, i.e., an employee taking a meal break in the first hour of an eight-hour shift would be entitled to another break after working five more hours before the end of the eight-hour shift.

In less anticipated but also important aspects of the opinion, the Court reversed the Court of Appeal and upheld certification of a rest period subclass in the underlying litigation. In doing so the Court relied upon and affirmed the current standard for such certifications – whether a common policy or practice of the employer worked to cause the alleged Labor Code violation.[9] In this instance, Brinker had a uniform rest break policy that expressly provided for a first rest break for shifts over four hours, but did not address the allowance of a second rest break for shifts longer than six, but shorter than eight, hours. The Court held that the appellant could therefore allege a common policy that violates the Labor Code requirements for the provision of rest breaks.[10]

Finally, the Court rejected the appellant's bid to overturn the denial of certification of off-the-clock claims against Brinker. Unlike the rest period claims, there was no evidence of a common policy or practice by Brinker that fostered off-the-clock work. Indeed, the Court pointed out that Brinker's express policy was a disavowal and prohibition of off-the-clock work. As a consequence, "where no substantial evidence points to a uniform, companywide policy, proof of off-the-clock liability would have had to continue in an employee-by-employee fashion, demonstrating who worked off the clock, how long they worked, and whether Brinker knew or should have known of their work."[11] Thus, the Court has reinforced what has become a fairly high bar to plaintiffs seeking to litigate rest period and off-the-clock claims on a class-wide basis – a required showing of an unlawful uniform, companywide policy or practice underpinning purported rest period and/or off-the-clock wage violations.

To learn more about this decision or the meal and rest break requirements for California employers, please contact **Jim McNeill**, **Bill Earley**, **Bob Cocchia** or any of McKenna Long & Aldridge's other Employer Services Group attorneys.

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[1] *Brinker Restaurant Corporation et al. v. Super. Ct. (Hohnbaum et al.)*, Cal. Sup. Ct. Case No. S166350.

[2] The California Industrial Welfare Commission ("IWC") issues wage orders on an industry-by-industry basis.

[3] *Brinker* at p.36.

[4] *Id.* at p.36-37.

[5] *Brinker*, Concurring Opinion at p.1 (emphasis in original).

[6] Id.

[7] *Brinker*, at p.37.

[8] Id.

[9] *Brinker*, at p.24-26.

[10] *Id.* at p.26.

[11] *Id.* at p.52-53.