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LABOR AND EMPLOYMENT NEWS ALERT

CALIFORNIA SUPREME COURT ISSUES ITS LONG AWAITED DECISION IN *BRINKER*

By Gayle Athanacio and Sharon Ongerth Rossi

On April 12, 2012, the California Supreme Court issued its much anticipated opinion in *Brinker Restaurant Corporation v. Superior Court* ("*Brinker*"). (A copy of the complete opinion can be found here). The unanimous opinion clarifies employers' obligations with regard to meal and rest breaks for non-exempt employees, and addresses related class certification issues.

Finding in favor of the employer on the critical issues of whether employers are obligated to "ensure" employees actually take meal breaks (they are not), and whether employers must provide meal breaks for any five hour increment of work (they do not), the Court's analysis nonetheless leaves open questions as to what is required to establish compliance with the meal and rest break laws.

Below we identify the key meal and rest break issues addressed in *Brinker* and some of the important questions left open:

MEAL BREAKS

***What the Law Says*:** Subject to waiver in certain limited circumstances, California Labor Code section 512 states, "[a]n employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes . . . . An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes."

Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty and when the parties agree in

writing to an on-the-job paid meal period. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

What the Supreme Court Says the Law Means:

- *An employer is not obligated to police meal breaks or ensure that employees have actually stopped working during their scheduled break.*

- While an employer must provide a first meal period after no more than 5 hours of work and a second meal period after no more than 10 hours of work, there are no other "timing" requirements on meal breaks. Thus, an employer is free to schedule an employee's meal break within the first few hours of an employee's shift.

- An employer will have complied with its obligation to provide meal breaks if it relieves the 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. However, the Court noted that "what will suffice may vary from industry to industry" and could not "delineate the full range of approaches that in each instance might be sufficient to satisfy the law."

- Additionally, an employer that provides a legally compliant meal break but nonetheless *knows or has reason to know* that the employee is performing work during the meal period, has not violated its meal period obligations and owes no premium pay, *but will owe the employee regular compensation for the time worked.*

REST BREAKS

What the Law Says: I.W.C. Wage Order No. 5, subdivision 12(A) provides, "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours."

What the Supreme Court Says the Law Means:

Expressly rejecting the employers' and appellate court-endorsed argument that rest breaks need only be provided for every 4 hour increment of work, the Court concluded that non-exempt employees are entitled to:

- A ten-minute rest break for shifts from 3 ½ to 6 hours; a second 10 minute rest break for shifts of more than 6 hours up to 10 hours; a third 10 minute rest break for shifts of more than 10 and up to 14 hours, and so on.

The Court also held that:

- Employers must, in good faith, allow employees to take their rest breaks in the middle of each work period; deviation from this preferred course is only authorized where "practical considerations render it infeasible." Notably, the Court did not address what showing would be required or what "practical considerations" would justify a rest break not in the middle of the work period.

- Additionally, although there is no legal duty to provide a rest break before a meal break, generally during an 8 hour shift, one rest break should be before the meal break and one after.

CLASS CERTIFICATION OF REST AND MEAL BREAK AND RELATED "OFF THE CLOCK" CLAIMS

Brinker's consideration of the appropriateness of certification of the various claims is notable in several material respects.

Avoiding Any Determination of Contested Factual or Legal Issues: Reaffirming the broad discretion trial courts have in class certification determinations, and that some inquiry into the merits of a case may be required, *Brinker* encourages trial courts to certify a class without resolving disputed threshold legal and factual issues, unless those issues were truly necessary to determining the proprietary of certification.

Rest Break Claims: The *Brinker* Court concluded the trial court properly certified a subclass of employees on rest break violations claims where the employers' written policy provided that employees were entitled to one 10-minute rest break

per 4 hours work. Uncertainty as to whether employees in fact were given a second break for shifts longer than 6 but less than 8 hours, and whether employees waived their second rest break, was insufficient to reverse the trial court's decision to certify the class.

Meal Break Claims: The *Brinker* Court concluded that the trial court certified an overbroad class as a result of its erroneous conclusion that meal breaks must be timed so that an employee gets a meal break for any 5 hour increment of work. Consequently, the Court remanded for reconsideration the question of whether a meal break subclass should be certified in light of its clarification of the law. Significantly, the Court in its majority opinion provided no insights into whether the meal break subclass was properly certified.

"Off-the-Clock" Claims: The Court rejected the trial court's certification of the "off-the-clock" claims since the only common proof presented (Brinker's handbook) evidenced a uniform policy of *prohibiting* "off-the-clock" work. The Court concluded that anecdotal evidence of a handful of instances of "off-the-clock" work was insufficient to warrant class certification. Further, the Court noted that where employees are clocked out, a presumption arises that they are not performing work. The Court, however, referring to out-of-state cases cited by plaintiff, suggested that substantial evidence of a systematic company policy to pressure or require employees to work "off-the-clock" may be sufficient to support class certification.

A Cautionary Tale – Justice Werdegar's Concurring Opinion:

While the Court in its majority decision expressed no opinion as to the appropriateness of class certification on the meal break claims at issue in *Brinker*, Justice Werdegar, who also authored the unanimous majority opinion, issued a concurring opinion generally supportive of class certification in wage/hour cases. Justice Goodwin Liu joined in the concurrence.

In the concurring opinion, Justice Werdegar espoused the benefits of class certification, and expressly rejected the notion that a meal break claim was "*categorically* uncertifiable." Justice Werdegar also noted that if an employer's records show no meal period was taken for a given shift of over 5 hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal break was provided. Justice Werdegar also suggests that an employer's failure to maintain records will support, rather than undermine, class certification.

Further, Justice Werdegar reiterated support for the use of representative testimony, surveys and statistical analysis as "available tools to render manageable determinations of the extent of liability." In all, one should expect Justice Wegedar's concurring opinion to be viewed as guide for future class certification motions.

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As the lower courts grapple with the implications of *Brinker*, employers would be well-advised to consider the Court's clarification of the law and ensure their policies and practices are fully compliant. If you have questions on how this ruling may affect you, please contact the Rogers Joseph O'Donnell attorney with whom you regularly work, or any member of our Labor and Employment Practice Group.

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