California Supreme Court to Determine Whether Employers Must Enforce the Taking of Meal Breaks

By Laura Koch

Three years after granting review, the California Supreme Court finally held oral arguments last week in *Brinker Restaurant Corp. v. Superior Court*. I attended the oral arguments in San Francisco because of the importance of this decision to small business owners like our clients. Two important issues that have been awaiting resolution are whether under California law there is a duty to enforce the taking of meal breaks, and how breaks must be timed.

Fired for Working Through Lunch?

Eight years ago, employees of Brinker Restaurant Corporation, which operates Chili's restaurants, sued the company for depriving them of required meal and rest breaks. The main issue in *Brinker* is the interpretation of California Labor Code § 512, which requires an employer to provide a 30-minute meal break for a work period of more than five hours.

The employees, challenging a holding by the Fourth District Court of Appeal, take the position that the term "provide" imposes an affirmative duty on employers to ensure that employees take meal periods. During oral arguments on November 8, 2011, the plaintiffs' attorney acknowledged under grilling by the justices that under the plaintiffs' interpretation, an employee could be subject to an employer's progressive discipline policy for not taking a required break. The plaintiffs' attorney equated this situation with unauthorized overtime, where the employee gets paid but is also subject to discipline.

Several justices appeared dissatisfied, questioning whether the plaintiffs' interpretation is the most protective of workers. Justice Joyce Kennard also challenged the practical ability of an employer with hundreds or thousands of employees to ensure that they are all taking required meal breaks. When the plaintiffs' attorney responded that employers have many workable options for scheduling and ensuring the taking of meal breaks, Justice Goodwin Liu jumped in with a concern that this could be "kind of coercive."

Pointing out that the hallmark of a meal period is the employer's suspension of control over the employee, Justice Liu appeared troubled by the idea that a worker who chose to work through breaks because of loving his or her job could be subject to discipline, or even fired. Justices Carol Corrigan and Marvin Baxter expressed similar concerns. The attorney attempted to direct the justices to the textual support for the plaintiffs' interpretation and to analogize to other situations where employers exercise control over hours worked; however, the justices were more focused on the pitfalls of enforcement of breaks.

According to the plaintiffs' attorney, unless employers are held accountable for ensuring breaks, many of the most vulnerable workers in our state will not get meal periods, despite the importance of these breaks to the health and welfare of workers. Although the justices did not respond to this argument at the time, the written opinion needs to address this issue directly.

When Must Meal Breaks Be Taken?

Another issue of practical concern in the *Brinker* case is the timing of breaks under Labor Code § 512 and the applicable wage order. Under Brinker's proposed interpretation, employers are required to provide one meal break per day, as long as the work day is less than ten hours. This allows industries with a rush period, such as restaurants, to schedule meal periods so that they the maximum number of staff are available when needed.

The plaintiffs urge a "rolling five hour" rule that requires a break for every five consecutive hours of work. Without such a rule, an employee could be scheduled to take lunch after an hour of work and then be required to work up to nine more hours without a second meal period.

A rolling five hour rule may protect employees, but it presents challenges for employers. To avoid the need to provide a second meal period, the employer must schedule the break close to the middle of the shift, even if this is a peak business time. Some employees also object to a rule that forces them to take a meal break after five hours without regard to the task they are engaged in. Justice Kennard quoted from a Labor Commission hearing in which employees in some industries expressed the need for more flexibility.

The Impact of *Brinker*

The long-awaited opinion in *Brinker* is critically important. As an interpretation of existing law, the decision will be applied retrospectively, but the Supreme Court waited three years to hear the case. Many other cases were also placed in limbo while waiting for this decision.

If the Court interprets the law to require employers to affirmatively ensure meal breaks, it may expose some employers to significant liability. The penalty for failing to provide an employee with a meal or rest period is an additional hour of pay, and the employeer may be liable for up to two hours of this premium pay per day. *See* California Labor Code § 226.7(b). Even for a small business with a handful of nonexempt employees, the consequences of noncompliance over an extended period of time can be devastating.

Likely Outcome and Recommendations for Employers

As is the case with most decisions interpreting California employment law, the decision here will have broad implications, making things easier for some and more burdensome for others; however, oral arguments do not always provide reliable clues about what is to come. Justices who attack a particular argument may be giving voice to their own concerns, or may be taking a devil's advocate position that allows them to flesh out potential objections by those on the other side.

That being said, it appears the Court is leaning toward an interpretation that does not require employers to ensure or enforce the taking of meal breaks, only to affirmatively make them available. The justices also seemed more inclined to find that a rolling five hour rule applies to the timing of meal periods.

The decision in *Brinker* is due by the beginning of February 2012. In the meantime, if you are an employer, take this opportunity to make sure that:
(1) you have clear written policies authorizing and permitting rest periods to employees;
(2) you provide and document 30-minute meal periods during which employees are relieved of duty;
(3) the work environment does nothing to implicitly or explicitly discourage or impede the taking of these breaks.

Whatever the outcome in *Brinker*, Bay Oak Law will provide analysis of the impact and practical advice for employers, so be sure to check back with us.

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