

## **IT'S ONLY A MATTER OF TIME: BE AWARE OF MEAL AND REST BREAK DEVELOPMENTS BEFORE YOU GET CLOCKED BY PENALTIES**

For years, employers and employees have been anxiously waiting while the following unsettled questions about meal and rest breaks simmered: (1) whether employers may simply make meal breaks available to employee or are further required to ensure that employees take them; (2) whether a meal period may be taken at the beginning of a shift and/or may take place before any rest breaks are taken; and (3) what an employer's wage obligations are when an employee decides to work through the meal period made available to him/her by the employer.

These questions have been percolating since 2002, when cooks, stewards, buspersons, wait staff and other hourly restaurant employees of Brinker Restaurant Corporation (which owns popular restaurants including Chili's and Maggiano's) claimed they were required to work through their meal break, work "off the clock," and/or to take their meal period at the less-busy beginning of their shifts rather than in the busier middle part of their shifts. For a decade, these claims have been considered first by the Division of Labor Standards Enforcement ("DLSE") and then by the courts. Earlier this year, the California Supreme Court finally gave everyone a break by issuing its decision in *Brinker Restaurant Corporation v. Superior Court*.

### **What Are an Employer's Obligations Regarding "Providing" Meal Periods After *Brinker*?**

The California Labor Code provides that employers "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." Prior to *Brinker*, much of the litigation focused on how far employers were required to go to make sure employees were taking meal breaks. The *Brinker* court finally settled the issue, holding that an employer must make the 30 minute meal period available to employees by affording employees the opportunity for "uninterrupted half-hour meal periods in which they are relieved of any duty or employer control and are free to come and go as they please." In order to be free of control, the employee must be permitted to leave the employer's premises during a meal period. However, notwithstanding these requirements, *Brinker* makes clear that employers need not ensure that the employees do no work during that period or that the employees actually leave the premises.

If an employer makes meal periods available to employees and knows or reasonably should know that the employee continues to work through their meal period, the employer must pay the employee for the time worked. However, because an employer is not required to "ensure" the taking of the meal period, an employee who declines to take the meal period will not be entitled to receive premium pay on top of pay for the time worked.

While this decision certainly takes some of the heat off employers, the Court warned that employers who implement a "formal" written policy which provides for meal breaks may still be on the hook if they then undermine the policy by allowing supervisors and managers to

discourage or impede employees from taking their breaks, such as by pressuring employees to perform their duties in ways that effectively omit breaks (even if the supervisors never tell the employees they cannot take their breaks). For example, a court could find that compensation practices which reward those employees who skip their breaks over those who take their breaks might effectively “coerce” employees to miss their breaks in violation of the law.

### **The “Early Lunching” Issue**

Relying on the California Labor Code language that, “[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 . . .,” the employees in *Brinker* who worked 10-hour shifts and who took their first meal break at the beginning of their shift argued that taking their second meal period more than 5 hours after the end of their first meal period violated the Labor Code. The *Brinker* Court disagreed, finding that an employer is not required to worry about the number of hours between the first and second meal period as long as it “provide[s] a meal period after no more than five hours of work and a second meal period after no more than 10 hours of work.” Thus, an employer is in compliance with the law if, for example, it provides an employee with a meal period in the first half-hour of his or her shift and another meal period in the seventh hour of the shift, even though there is more than five hours between the two meal periods.

### **How Does *Brinker* Affect Meal Waivers and On-Duty Meal Periods?**

Employers should be aware that *Brinker* did not alter California requirements regarding meal period waivers or situations in which employers may properly have on-duty meal periods.

Meal period waivers are permissible only when both the employee and the employer mutually agree to a waiver and (1) the employee works more than 5 hours but less than 6 hours in the they day, or (2) where the employee works more than 10 hours but less than 12 hours and the first meal period was not waived.

Where a meal period waiver is proper, the employer must still pay the employee for the regular time worked, but need not pay premium pay.

An *on-duty meal period* is the exception to the general rule that the employee must be relieved of all duty during the meal period. An employer is only excused from paying premium pay for an employee who remains on-duty during their meal period if an employer can establish all of the following circumstances:

- The nature of the work prevents an employee from being relieved of all duty;
- There is a written agreement signed by both the employer and employee;
- The meal period is paid;
- The employee is notified that he or she can revoke the agreement at any time in writing (this element is not applicable to Wage Order 14 for Agricultural Occupations).

Whether the nature of the work prevents an employee from being relieved of all duty is a very fact-specific question, and is found to be applicable only in extremely limited circumstances, such as when a concrete truck driver agreed to an on-duty meal break because the concrete would harden if he stopped working for 30 minutes. Therefore, employers should consult with counsel before relying on this exception.

Again, assuming an on-duty meal period is proper, the employer must still pay the employee for the time worked as straight time, and must further pay for any overtime that may occur as a result of the employee working through his or her meal period).

### **How Many Rest Periods Do Employers Need to Offer and When?**

An employer must authorize and permit its employees to take one rest period every four hours or major fraction thereof, unless the employee works less than 3 1/2 hours in the day. As the Court explained in *Brinker*:

Employees are entitled to 10 minutes rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.

While the *Brinker* court acknowledged that “in the context of any eight hour shift, [a]s a general matter,” one rest break should fall on either side of the meals break,” it acknowledged that it might be acceptable to deviate from this “general” rule where shorter or longer shifts or other factors “render such scheduling impracticable.”

As with meal breaks, employers need not “ensure” that employees take their rest periods.

### **The Issue of “Off the Clock” Certification**

A big issue in *Brinker* was whether employees could get class certification of claims that they were forced to work “off the clock” (i.e. work when they were clocked out for their meal periods). In light of *Brinker*’s formal written policies prohibiting “off the clock” work, the Court held that employees would have to individually demonstrate on a case-by-case basis that they were coerced to work off the clock, making class certification improper.

### **Best Practices for Employers to Comply With Meal and Rest Period Laws**

We recommend that employers engage in the following practices to minimize exposure for meal and rest break claims:

1. Distribute (and enforce) written meal and rest period policies which advise employees of their rights and make sure they make sense in light of your Company’s operations and needs. Regularly remind employees of these policies at staff meetings, and obtain written acknowledgements that employees have reviewed the policies. Many employers and employment attorneys are taking this practice one step further and insisting that employees take and record their meal periods of at least 30 minutes every day.

2. Schedule and post meal period times when possible.
3. Provide a mechanism for employees to lodge any complaints about violations (including interrupted meal periods as well as missed meal periods) and thoroughly investigate all such complaints.
4. Train all supervisors not to discourage or prevent employees from taking their meal or rest breaks.
5. Consistently discipline employees and managers who violate meal and rest period policies. (Note: In several post-*Brinker* cases, the courts, in refusing to allow the employees to pursue meal and rest period class actions, emphasized the fact that the employer disciplined employees for not taking breaks or not following the meal and rest period policies)
6. Beware of compensation or promotion systems that may have the effect of rewarding or favoring employees who skip their meal and rest periods.
7. Beware of staffing issues that impede employees' ability to take meal and rest breaks.
8. Require all hourly nonexempt employees to clock in and out for meal periods since employers have the burden of establishing that meal periods are provided.
9. Where possible, set up systems that prevent employees from working while they are clocked out (such as by linking the time entry system to an employee's computer or other machinery used for their job).
10. Regularly obtain signatures from employees on their time records (preferably each pay period or at least once a month), acknowledging that they have been authorized to take their meal and rest periods.
11. Conduct a regular audit of time entry records to make sure that policies are being followed and to look for any patterns of missed breaks.
12. Make sure that a system is implemented to continue to pay premiums equal to an extra hour of pay in cases where employees are not provided meal or rest periods in accordance with law.
13. Confirm meal period waivers in writing, reflecting the mutual consent of the employer and the employee, and make sure that the other requirements (as described above) are met.
14. Avoid relying on the on-duty meal break exception if at all possible as it is extremely difficult to establish that the nature of the work prevents an employee from being relieved of all duty.