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in this issue:

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A California Court of Appeal has issued its decision in *Brinker Restaurants v. Superior Court,* holding that employers only have to provide employees with an opportunity to take a meal period, and not ensure they take it. The court also ruled favorably for employers on meal and rest period timing and denied class certification based on its determinations of what the meal and rest period law requires.

California Edition
A Littler Mendelson California-specific Newsletter

A Ray of Hope: California Court of Appeal Decides Compliance with Meal Period Obligations Requires an Opportunity, Not a Guarantee

By AnnaMary E. Gannon and Lara K. Strauss

The eagerly-awaited *Brinker Restaurant Corporation v. Superior Court*, No. D049331 (July 22, 2008) decision on California meal and rest periods is out, and the news is encouraging for employers. The court held:

- Employers only have to provide an opportunity for employees to take meal periods, not ensure employees take them. If upheld on appeal, this standard would drastically change the current interpretation of meal period requirements in California.
- Meal periods do not have to start at a particular time. Only one meal period is required where an employee works more than five hours but less than ten in a workday.
- The same "provide an opportunity" rule applies to rest periods, which has always been the interpretation. Rest periods also do not have to be taken in the middle of a four-hour window when it is not practicable.
- Employers may not impede, discourage or dissuade employees from taking meal or rest periods.
- Employers will be held liable for employees working "off the clock" if they knew or should have known the employee was working "off the clock."

The court decided that the lower court should have considered this legal framework in evaluating whether or not to certify the class. Based on its own analysis of the issues within this legal framework, the court held that a class should not be certified because the reason an employee did not take any particular meal or rest period, or worked more hours than he or she was paid for requires individual inquiry.

Factual and Procedural Background

A group of hourly, nonexempt restaurant employees brought a class action against Brinker Restaurants. They claimed the company failed to provide them with meal and rest periods. They specifically challenged the company's practice of having employees take "early lunches" shortly after starting work and then work another five to ten additional hours without receiving another meal period. They also claimed that they should have received a rest break before the first meal break. Finally, they argued they worked "off the clock" during meal periods without pay.

The employees argued that because the court could look at time card records and standard company policies and practices to determine that violations occurred, it so should certify a class of all employees and former nonexempt employees extending back for four years. The trial court agreed with the employees and granted class certification. The class certification order was then appealed. The Court of Appeal issued an unpublished opinion last fall, which it certified for immediate review by the California Supreme Court. In an unusual twist, after the case went to the

California Supreme Court, the Court of Appeal asked to reconsider it. This latest decision is the Court of Appeal's reconsidered opinion, which was not certified for immediate review, meaning the case will now go back to the trial court.

Meal Periods

As every California employer should know, California law requires that employers "provide" employees who work more than five hours in a work day with a duty-free, 30-minute meal period. Employers must also provide a second meal period to employees who work more than ten hours in a work day.

The California Division of Labor Standards Enforcement's position is that employers must ensure employees take their 30-minute meal period. A number of courts have applied the same rule. The court in *Brinker*, however, disagreed. It held employers only have to provide an opportunity for employees to take the meal period. If employees choose not to take that opportunity, there is no violation.

In reaching its decision, the court in *Brinker* relied on the plain meaning of the word "provide." It quoted the definition of "provide" in Merriam-Webster's Collegiate Dictionary as "to supply or make available." The court also relied on the reasoning in two recent California federal court decisions, *White v. Starbucks Corp.*,[1] and *Brown v. Federal Express Corp.*,[2] both of which reached the same conclusion. The court in Brinker distinguished *Cicairos v. Summit Logistics, Inc.*,[3] and *Perez v. Safety-Kleen Systems*,[4] two cases cited for the "ensure" rule, on their facts because in those cases the employers did not make meal periods available for employees, and the employees were able to show that work demands denied employees an opportunity to take 30 minutes of duty-free time.

The court in *Brinker* also considered the question of meal period timing because the employees claimed they should have been given a second meal period any time they worked more than five hours in a row even though they did not work more than ten hours. The court looked to the meal period statute, which prohibits an employer from employing an employee "for a work period of more than five hours per day" without providing a 30-minute meal period.

The court held the "per day" language means employers do not have to provide a meal period for every five consecutive hours of work. The court also reasoned that the separate language requiring a second meal period when employees work more than ten hours would be pointless if employers had to provide a meal period for every five consecutive hours of work. The court held that the language in the Wage Orders referencing a 30-minute meal period requirement "per five hours or work" contradicted the statute and was invalid. Furthermore, the court found that the employer's practice of providing employees with an "early lunch" within the first few hours of an employee's arrival at work did not violate California law, even though that would mean that the employee might then work in excess of five hours without an additional meal period. An employer who provides one meal period when employees work more than five but fewer than ten hours would be in compliance.

The *Brinker* court also concluded that the meal period does not have to start at a particular time. This holding is especially important in the restaurant industry, where the midpoint of an employee's shift is often the busiest time of the day.

Rest Periods

California's Wage Orders require employers "authorize and permit" employees to take rest periods "at the rate of ten (10) minutes net rest time per four hours or major fraction thereof" and in the middle of each work period "insofar as practicable."

The court in *Brinker* confirmed the traditional interpretation of this language to mean that employers only have to give employees an opportunity to take rest periods. It also recognized that no particular start time is required for rest breaks. As long as employers make rest breaks available to and "strive, where practicable, to schedule them in the middle of the first four-hour work period," they have complied with the law. The court finally confirmed "major fraction thereof" means three and a half hours or more. A work period of less than three and a half hours does not trigger a rest break obligation.

Denial of Class Certification

With this legal framework in place, the court turned to whether the case was appropriate for treatment as a class action. The court concluded that because rest and meal breaks need only be made available and not ensured, the employees' claims involve individual inquiries. Similarly, determining employer knowledge of whether employees were working "off the clock" requires individual inquiries. For these reasons, class treatment was not appropriate, and the trial court was directed to deny the motion for class certification.

Words of Caution

Employers may be tempted to immediately adopt the new standard in *Brinker* and modify the way they handle meal periods. Such action would be premature. The holdings in the *Brinker* decision will almost certainly be appealed to the California Supreme Court and accepted for review. The waiting game will then begin again and remain until the California Supreme Court considers and finally decides these issues. In the meantime, on July 25, 2008, the Division of Labor Standards Enforcement issued a memorandum directing its staff to follow the *Brinker* rulings, effective immediately, and to apply them to pending cases.

Even if the California Supreme Court adopts the "provide the opportunity" standard for meal periods, meal period class action litigation in California will not end. Employees and the plaintiffs' bar will continue to try to meet the heightened standard, likely by claiming employers did not have a workable system for employees to take meal periods, or the realities of business demands and management pressure denied them an opportunity to take meal periods. Employers who have not

implemented policies and practices that permit employees to take their meal and rest breaks should do so now.

Even with these words of caution, the *Brinker* decision is some of the best news California employers have received on meal and rest periods and class certification in some time.

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[1] 497 F. Supp. 2d 1080 (N.D. Cal. 2007).
[2] No. ___, 2008 WL 906517 (C.D. Cal. 2008).
[3] 133 Cal. App. 4th 949, 962-63 (2005).
[4] No. ___, 2007 WL 1848037 (N.D. Cal. 2007).