Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

WSGR ALERT

APRIL 2012

BRINKER RULING ANSWERS KEY WAGE AND HOUR QUESTIONS AFFECTING TECHNOLOGY COMPANIES AND OTHER CALIFORNIA EMPLOYERS

On April 12, 2012, the California Supreme Court issued its long-awaited decision in the *Brinker* case, ruling on several key questions regarding an employer's obligation to provide meal and rest breaks to its non-exempt employees. Wilson Sonsini Goodrich & Rosati filed a brief on behalf of *amicus curiae* TechNet in support of Brinker Restaurant Corporation in the case. The highly anticipated ruling clarified that employers are not required to force employees to take meal and rest breaks in order to comply with the law. The court's holding will help employers develop compliance solutions for their particular industries.

Summary of the Court's Decision

1. *When Has an Employer "Provided" a Meal Break?*

Under the California Labor Code, an employer must "provide" a meal break to employees at certain times during their shifts. The *Brinker* case clarifies what an employer is required to do, and, just as important, what it is not required to do, in order to satisfy this requirement.

The court determined that employers "provide" meal breaks by making available an uninterrupted 30-minute duty-free period during which employees can come and go as they please. Employers must give employees a reasonable opportunity to take meal breaks, they must "relieve" employees of all duty, and they must leave them "at liberty" to use the time for any purpose they wish. Employers that satisfy these requirements have met their obligation under California law.

An employer is not, however, required to "police" meal breaks to prevent employees from working during the provided meal period. The court specifically held that an employer is not obligated to ensure that no work is done during the meal period, but employers cannot coerce, incentivize, or otherwise encourage employees to skip meal breaks.

2. *How Many Meal Breaks Can an Employee Take Per Shift?*

The court also clarified when meal breaks must be provided within work shifts. The court held that after the first meal break is taken, an employee is entitled to a second meal break only after working ten hours total during the shift, and not after each five-hour mark. Specifically, the first meal break must occur no later than five hours into an employee's shift, subject to certain statutorily permissible waivers, and the second meal break must be provided after no more than ten hours of work. An employer is not required to provide a meal break after every five-hour period of work unless the entire shift totals ten hours. For example, an employee who takes a meal break after a few hours of work and then works an additional five hours is not entitled to a second meal break until he or she has worked ten hours total.

3. *How Many Rest Periods Must Be Provided and When Must They Occur?*

The court also outlined how many ten-minute rest periods must be given during an employee's shift:

- Shifts from 3.5 hours to 6 hours = 1 ten-minute rest period
- Shifts from 6 hours to 10 hours = 2 ten-minute rest periods
- Shifts from 10 hours to 14 hours = 3 ten-minute rest periods

The court confirmed that, when practicable, rest periods should be scheduled to occur roughly during the middle of a shift, but it noted that absolute precision is not required. Additionally, a shift including one meal break and two rest periods should be scheduled so that one rest period occurs on either side of the meal period, but this timing is not mandatory. There is no specific requirement that rest and meal breaks occur in any certain order.

Takeaways for California Employers

The *Brinker* decision helps inform an employer's policies regarding meal and rest breaks, and it provides many possible compliance solutions. The court noted that, at least with regard to providing meal periods, the details of a sufficient policy will vary from industry to industry, so employers should consider how to best create processes that will encourage compliance with the standards announced in *Brinker*. Thus, employers in certain industries, such as technology, may consider refining their policies and practices in ways that promote compliance based on their particular workforces and company structures. The following are examples of how to strengthen an employer's compliance

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programs with regard to meal and rest periods, and to minimize the risk of litigation:

1. *Adopt Clear Policies*

Employers should confirm that their meal and rest period policies reflect the court's holdings regarding the obligation to provide meal breaks and the required number of rest periods. If they do not, the policies should be revised. These policies should include the length of breaks and when those breaks normally would occur. A meal period policy should state that employees are entitled to a 30-minute meal period for every five hours of work to begin no later than the end of the fifth hour of their shifts, and that the break should be an uninterrupted period during which the employee is relieved of work-related duties. To minimize the risk of any technical non-compliance, a rest period policy should lay out the court's precise calculations: employees who are scheduled to work shifts of three-and-a-half to six hours should receive one ten-minute rest period, and employees who are scheduled to work a shift between six and ten hours should receive a second ten-minute rest period.

In addition to meal and rest period policies, employers should consider implementing an off-the-clock policy to help establish records of time actually worked. An off-the-clock policy should state that employees must not perform off-the-clock work and should record their time at work accurately.

2. *Communicate Policies to Employees through an Employee Handbook or Other Means*

The policies above should be included in an employee handbook and provided to all employees. The meal and rest break policies should be clear enough to notify employees that they are entitled to take their meal and rest breaks and are expected to contact human resources if they are prevented from doing so or if they are not provided breaks on any given day.

The court's decision makes it clear that good company policies will assist dramatically in defending meal and rest period class actions. Technology companies with employees who usually work online also may consider posting these policies on an easily accessible company webpage or intranet portal. In addition, employers should ensure that employees who do not work on-site receive communications regarding their right to breaks.

Another important part of communicating employees' rights to meal and rest periods is to post the applicable Wage Order of the Industrial Welfare Commission (IWC) (i.e., Wage Order 4 for Professional, Technical, Clerical, Mechanical and Similar Occupations) in the company's workplace.

Employers would be well-served to document employees' receipt of these policies. If the policy is distributed in written form, companies can use an acknowledgment form signed by each employee after receiving a handbook containing the meal and rest period policies. If the policy is distributed online, companies can use a checkbox to confirm that an employee has reviewed a new or updated policy. In the event of litigation, these acknowledgments are important evidence that employees have been informed of their right to meal and rest periods.

3. *Provide Training to Supervisors and Managers on Meal and Rest Period Policies*

The *Brinker* court noted that although the law does not require an employer to ensure that no work is done during a break, it still requires that an employer give employees the opportunity to take breaks without undercutting that policy by encouraging employees to skip the breaks or otherwise making it difficult for them to take breaks.

Supervisors and managers, who help set the tone of a workplace, should receive training both on the applicable wage and hour laws and, specifically, on the importance of not discouraging meal breaks or creating work schedules that make it impracticable to take breaks. The *Brinker* court's discussion of workplaces enforcing informal anti-break policies through ridicule, reprimand, or coercion makes it clear that a policy expressly informing employees of their right to meal and rest periods should go hand-in-hand with practices that do not disavow those policies through contradictory actions. Training supervisors and managers can help in this regard.

4. *Employees Should Document, and Employers Should Maintain, Accurate Records of Hours and Breaks*

Employers should consider ways to document both meal and rest breaks on timesheets, an online timekeeping program, or in some other fashion. Records of punching out for breaks and other "off-the-clock" time can be especially useful in demonstrating that breaks were given and that an employee was not working during his or her break. Indeed, the court stated that such practices entitle the employer to a presumption that no work was performed during off-the-clock time. In workplaces in which employees primarily use computers, those employees may clock in or out through a timekeeping interface, possibly in combination with pop-up or e-mail reminders to take breaks. Although employees may waive their rest periods and need only be "provided" a meal period, employers should consider documentation processes that best meet the needs of their workplaces. They should keep accurate records of all hours worked and breaks taken, whether by having the employee confirm on each day's timesheet that meal and rest periods were provided or by using a more robust approach of documenting the specific times during which the breaks were taken. Finally, a compliance program should include a procedure for employees to report any missed breaks so that employers are informed of such occurrences and can respond appropriately.

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5. Be Aware of Potential Overtime and Premium Pay Issues

Although the court indicated that employers need not prevent employees from working during their meal breaks, if an employer knows or should have known that an employee is working during a meal break, that time will be counted as "hours worked" for purposes of calculating wages, including overtime. For employers that already require employees to work eight hours each day, time worked during the meal period may result in liability for overtime because it extends the employee's total time worked during the day.

Employers also should be cautioned that *Brinker* makes it clear that employees continue to be entitled to premium pay if they are not "provided" meal or rest periods. The practice of properly paying any premiums when they are due helps to demonstrate a uniform policy of compliance.

Having a system to track employees' hours and breaks allows an employer to remind employees of their meal and rest break entitlements as needed, and to address overtime and premium pay issues. Employers should be aware of these potential issues and have procedures in place to identify them as soon as possible. They should communicate effectively with employees about their hours, meal and rest period entitlements, wages, and overtime.

6. *Carefully Evaluate Exempt/Non-Exempt and Independent Contractor/Employee Classifications*

In California, the distinction between exempt and non-exempt employees impacts a variety of applicable wage and hour laws. Accordingly, employers should work with counsel to undertake appropriate classification audits and carefully evaluate whether employees are properly classified to ensure that the applicable wage and hour laws are being satisfied with regard to all employees in the company. The same is true of independent contractor classification—employers should conduct the same thorough analysis when classifying a new hire as an independent contractor or employee, and then determine the exempt status of any employees, particularly since employers may be liable for meal and rest period violations related to misclassified independent contractors.

Conclusion

The *Brinker* decision resolves some long-standing questions regarding meal and rest periods, and employers can move forward with greater certainty about how these issues will be interpreted by the California courts. However, companies should keep in mind that well-drafted and properly executed policies, training, and documentation of meal and rest breaks, as well as hours worked, all play important parts in complying with the law.

Wilson Sonsini Goodrich & Rosati actively is following developments in employment law affecting technology companies and other employers in California and around the country. For more information on the *Brinker* decision or other employment issues, please contact Fred Alvarez, Ulrico Rosales, Marina Tsatalis, Charles Tait Graves, Laura Merritt, or another member of the firm's employment and trade secrets litigation practice.

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