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Client Alert

Brinker Warrants Certification of Meal and Rest Break Class Claims in Two Recent California Decisions

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Following the California Supreme Court's highly anticipated decision in *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004 (2012), many courts in California became reluctant to certify class claims that alleged meal and rest break violations under California law. However, two recent decisions, *Bradley v. Networkers International, LLC,* No. D052365 (Cal. Ct. App. December 12, 2012), and *Ortega v. J.B. Hunt Transport, Inc.,* No. CV 07-8336-MWF (FMOx) (C.D. Cal. December 18, 2012), closed 2012 by reminding employers that meal and rest break class actions are not dead.

The plaintiffs in *Bradley* provided repair and installation services at telecommunications cell sites. They, like the class of individuals whom they sought to represent, were treated as independent contractors, pursuant to written agreements that they had signed. The plaintiffs alleged, among other claims, that they were misclassified, that they should have been treated as employees, and that they were denied the opportunity to take meal and rest breaks that should have been provided to them as employees. Networkers International asserted that it was not required to provide meal and rest breaks because it properly classified the plaintiffs as independent contractors.

The trial court had denied the plaintiffs' motion for class certification. The case then took trips to the Court of Appeal and to the California Supreme Court. After the issuance of *Brinker,* the case returned to the Court of Appeal, which reversed the trial court's decision. The Court of Appeal concluded that the plaintiffs' meal and rest break class claims should have been certified.

In its opinion, the Court of Appeal first addressed the foundational issue of whether the class members had been classified properly as independent contractors, not from the standpoint of resolving the merits of that issue, but from the perspective of whether class certification was appropriate. The Court of Appeal disagreed with Networkers International's argument that this issue required individualized proof, holding that "the focus is not on the particular task performed by the employee, but the global nature of the relationship between the worker and the hirer, and whether the hirer or the worker had the right to control the work." *Bradley* at 24. The Court of Appeal concluded that "the evidence likely to be relied upon by the parties would be largely uniform throughout the class." *Id.* at 24-25.

The Court of Appeal in *Bradley* then addressed the meal and rest break issue. Networkers International did not present evidence that the plaintiffs or putative class members took authorized rest or meal breaks or evidence that it provided such breaks. Instead, it attempted to distinguish *Brinker* on the grounds that the Supreme Court in that case found that a class may be certified if the company has a uniform policy that violated the law. Networkers International relied on the fact that it had no meal and rest break policy at all. The Court of

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Appeal was not persuaded. It held that evidence of the company's uniform practice of not providing breaks, along with the company's acknowledgment that it did not know whether the class members took breaks, warranted class certification of the meal and rest break claims, even in the absence of a uniform written policy. The Court of Appeal explained as follows:

> Here, plaintiffs' theory of recovery is based on Networkers' (uniform) *lack* of a rest and meal break policy and its (uniform) *failure* to authorize employees to take statutorily required rest and meal breaks. The lack of a meal/rest break policy and the uniform failure to authorize such breaks are matters of common proof. Although an employer could potentially defend these claims by arguing that it did have an informal or unwritten meal or rest break policy, this defense is also a matter of common proof.

Id. at 29-30 (emphasis in original).

In *Ortega,* the plaintiffs obtained an order from a federal district court certifying meal and rest break class claims. Those claims arose from allegations that the employer had a uniform policy or uniform lack of policy that violated the law. While certifying the class claims, the court stayed further proceedings while *Brinker* was pending. When the opinion in *Brinker* was released, the court lifted the stay, and the employer filed a motion to decertify the classes. The court concluded that *Brinker* did not preclude certification because common issues remained as to whether (a) with regard to meal breaks, the employer's policies "sufficiently 'provided' Plaintiffs with an opportunity to take code-compliant breaks and whether those breaks were properly recorded;" and (b) with regard to rest breaks, whether the employer "sufficiently 'provided' the opportunity for those breaks and whether JBH's policies compensated Plaintiffs for break time and missed breaks in compliance with the Labor Code." *See Ortega* at 4. The court rejected the company's argument, based on the United States Supreme Court's 2011 decision in *Wal-Mart Stores v. Dukes*, that a rigorous application of Rule 23's predominance and commonality requirements justified decertification, concluding that the company's arguments about the legality of its piece-rate compensation system were merits-based defenses immaterial to the question of whether class certification was appropriate. Accordingly, the court denied the employer's decertification motion.

The impact of *Bradley* and *Ortega* is straightforward: the absence of a written policy, standing alone, is not a basis on which California courts will deny class certification of meal and rest break claims. Instead, California courts may find class certification appropriate where plaintiffs claim that a uniform unwritten practice -- including those that are contrary to a compliant written policy -- is non-compliant. Thus, employers with operations in California can best insulate themselves from class certification of meal and rest break claims by ensuring that both their written policies and any unwritten practices do not violate wage and hour laws.

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