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CLIENT ALERT

Brinker – Was It Worth The Wait For Employers?

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The California Supreme Court's ruling last week in *Brinker Restaurant Corp. et al. v. Superior Court* provides some welcome news to California employers who had been waiting for clarification about their obligations pertaining to meal and rest breaks. Yet the decision confirms that meal and rest break class actions remain a challenge for even the most sophisticated employers.

Principal Rulings

The big news in *Brinker* is that while employers must ensure that non-exempt employees in California are offered an opportunity to take meal breaks, they are "not obligated to police meal breaks and ensure no work thereafter is performed." The proper interpretation of the term "provide" in the Labor Code had long divided the lower courts, leading to widespread class action litigation and – because of the consequences of uncertainty – large settlements. *Brinker* ends this debate.

The other big news of *Brinker* concerns the Court's clarifications of certain rules regarding the number and timing of meal and rest breaks. This part of the decision should prompt employers to review and update relevant policies.

Brinker's Guidance Regarding the Number and Timing of Meal and Rest Breaks

The *Brinker* Court clarified the standing wage order regarding the number – and timing – of required breaks. In so doing, the Court dismissed interpretations of law that had been advocated by plaintiffs' lawyers in class action litigation. The Court explained that meal breaks and rest breaks can and should be treated as separate obligations, and that current law does not mandate the order in which meal and rest breaks are to be taken. The employer is responsible, however, to ensure that the right number of breaks are provided, and at the right time intervals.

Meal Breaks: The Court held that employers meet their meal break obligations by providing one such break any time before the end of an employee's fifth hour of work and one more such break before the end of the employee's tenth hour of work. Meal breaks can be taken early in a shift – even before any rest break. Rejecting the plaintiff's "rolling five" argument, the Court wrote, "we cannot agree that the current [wage order] limits to five hours the amount of work after a meal." Thus, as an illustration, an employee who takes a meal break in the first two hours of an eight-hour shift need not be provided a second meal break before the end of the shift simply because he has worked another five hours prior to the end of the shift.

Rest Breaks: Employers must permit a ten-minute rest break for every four hours of work or "major fraction thereof" (which the Court defined as two hours) for employees working more than a total of 3.5 hours in a shift. The rest breaks should be scheduled around the middle of each work period, but employers "may deviate from that preferred course where practical considerations render it infeasible." However, the extent of employers' flexibility in this regard remains undefined and may be further tested in litigation.

Updating Employer Policies

The Court's decision that employers are not required to actually ensure that employees take a meal break will liberate California employers from the obligation of supervising their employees' meal breaks to ensure that no work is performed during the break. But, notwithstanding suggestions made in some early reactions to the decision, *Brinker* does not give California employers a free pass on this issue. While the Court was explicit in rejecting the contention that proof of knowledge by an employer that employees are working through meal periods should subject an employer to liability, its opinion is equally clear that employers must apply their meal break policies in good faith, and must not coerce – or incentivize – employees to work through meal breaks. Sophisticated employers may decide to resist the urge to relax their policies on this issue.

In any case, the Court's ruling should prompt employers to review and update their policies to ensure they reflect the proper meal and rest break standards. Compliance measures should also include providing appropriate training and reminders to managers as to the importance of adhering to these standards, and instructing employees about easy mechanisms for reporting any denial of a meal or rest break in violation of applicable policies.

Brinker does not disturb several long-standing aspects of California meal/rest break law. For example, it remains undisputed that employees are entitled to an hour of premium pay if the employer requires them to forego a meal or rest break. Employer policies aimed at ensuring compliance with such requirements – such as the automated payment of premium pay when time records indicate that an employee has not recorded a required meal break – should be maintained. Where possible, employees should be required to affirm that they received all required breaks and that any missed break was a voluntary choice. Moreover, on-going challenges by employees who perform work away from the workplace (for example, those expected to complete administrative tasks at home before or after work) could present new challenges to the calculation of the number of required rest breaks. This is because the applicable wage orders tie the number of rest breaks to the "total hours worked." Likewise, whether a rest break is even required is based on the "total daily work time." In short, vigilance and attention to both policy design and enforcement remain the order of the day.

The Litigation Angle - Class Actions Survive

The *Brinker* Court reached three distinct rulings regarding three different subclasses at issue in the litigation. *First*, the Court held that the plaintiff's proposed class claim for off the clock work, which was closely tied to the meal break claim, could not be certified. The Court focused on the lack of a common policy regarding off the clock work and found that the only existing policy in this area was the employer's explicit ban on off the clock work. The Court also reaffirmed that plaintiffs in off the clock cases must prove that the employer knew or should have known of the alleged unpaid work. Thus, in the absence of an illegal policy, the off the clock claims devolved into highly individualized claims of wage and hour violations – not the stuff of class actions. On this point, *Brinker* is in harmony with the February 6, 2012 decision of the California Court of Appeals (First Appellate District) in *Duran v. U.S. Bank NA.* While two decisions normally are not enough to constitute a trend, the Court's reasoning on this point provides employers with strong arguments to fight class action certification of such claims.

Second, with respect to the propriety of the employer's meal break policy itself, the Court remanded the case for an examination of the class certification issues under the proper standard for "providing" a meal break. Justice Werdegar, who authored the Court's opinion, wrote a separate concurring opinion emphasizing that the Court had not accepted the employer's argument that missed meal break class claims could never be certified: "In returning the case for reconsideration, the opinion of the court does not endorse Brinker's argument, accepted by the Court of Appeal, that the question why a meal period was missed renders

meal period claims *categorically* uncertifiable." (emphasis in original). This part of the case is sure to provide comfort to the plaintiffs' bar regarding the prospects for future class actions.

Third, the Court concluded that class certification was appropriate with regard to the plaintiff's claim that the employer's rest break policies did not meet the requirements set forth by law. The Court focused on the uniformity of the Brinker rest break policy, finding that it was violative of the rest break rules earlier articulated and, therefore, "by its nature a common question eminently suited for class treatment." This holding underscores the viability of class action litigation that challenges an employer's written policies.

These holdings confirm that *Brinker* does not sound the death knell for meal and rest break litigation. Rather, it emphasizes the need for employers to adopt policies that are clear in setting forth the minimum requirements of the Labor Code and applicable wage orders. Development of such policies, in turn, should refute the contention that the employer maintains a common policy in violation of the wage and hour laws, thus making it more difficult for plaintiffs to be successful in arguing for class certification of meal and rest break claims.

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