

## Calif. Justices To Weigh Break Issue Left Open By Brinker

By Erin Coe

*Law360, San Diego (June 2, 2015, 10:31 PM ET)* -- The California Supreme Court recently agreed to hear a class action brought by ABM Industries Inc. security guards who claim they were illegally forced to be on call during breaks, and lawyers say the case gives the court a chance to clarify whether rest periods must be free from all work — an issue left unresolved in its Brinker decision.

The top state court in April granted the security guards' petition for review after the court of appeal in December vacated a \$90 million judgment against ABM Industries and found that California law did not require employers to relieve workers of all duties during breaks. The plaintiffs have argued that the facilities management company's policy of requiring security guards to carry a radio during their breaks ran afoul California's Labor Code because an on-call employee is not on a break.

The ABM case is important because it offers the state high court an opportunity to pick up where the California Supreme Court's landmark decision in *Brinker Restaurant Corp. v. Superior Court* left off, and to articulate what the standard is for rest breaks, according to Erin Connell, a partner at Orrick Herrington & Sutcliffe LLP.

In *Brinker*, the court held in 2012 that employers must relieve workers of their duties during meal breaks but are not obligated to ensure that employees do no work during breaks.

"Brinker clarified that employers need to make breaks available but don't need to police or ensure that they are taken," Connell said. "It didn't address the issue in this case: Does a break need to be free from all duty or control as is the case for meal breaks?"

If the California Supreme Court affirms the appellate court's ruling for ABM, it would further winnow down the potential wage-and-hour claims that employers have to face, according to Mark Romeo, a partner at Crowell & Moring LLP.

"In large part, *Brinker* held employers are not obligated to police meal breaks to ensure no work is done, and if the court [in the ABM case] upholds that on-call rest breaks are permitted, it would be another ruling in favor of employers and would go a long way toward eliminating another potential type of claim," he said.

A decision agreeing with the appellate court's decision also would reaffirm the strict adherence to the text of the California wage orders and Labor Code, language that is often at the center of wage-and-hour disputes, according to Romeo.

The court of appeal in December found that the state's Industrial Welfare Commission wage order covering rest breaks didn't include the requirement that an employee be "relieved of all duty," as opposed to the section covering meal breaks. It held that the commission could have prescribed that an employee be relieved of all duty during a rest period but did not do so, indicating that no such requirement was intended.

The court of appeal also held that the Labor Code detailed only that an employee not be required to work on a rest break, not that he or she be relieved of all duties, such as the duty to remain on call.

"The court of appeal said 'work' means something akin to exertion on the employer's behalf by the employee," Romeo said. "The court said an employer can't require an employee to engage in any action, but that simply being on-call is a 'state of being,' not an action. It will be interesting to see what the California Supreme Court does to deal with that and whether its interpretation is consistent with the court of appeal."

The court of appeal found that a big difference between meal and rest periods are meal breaks are unpaid time, while rest breaks are paid, and that may be a distinction that the California Supreme Court also considers, according to Dale Hudson, counsel at Nixon Peabody LLP.

"If you're paying someone during work hours, it doesn't seem unreasonable that they could be on call and still have a rest break," he said.

A California Supreme Court decision in favor of security guards could encourage copycat rest break suits and make it harder for employers to operate effectively, according to Hudson.

However, unless the California Supreme Court expands the issues before it, the case might result in a fairly narrow ruling since most employers don't have a written policy requiring employees to be available during rest breaks, he said. In addition to security companies, those that have such a policy might include employers overseeing ambulance drivers, nurses and other health care employees.

"The plaintiffs lawyers in this case are focusing on rest period policies that say employees have to be on call during their rest break and that's limited to certain industries," Hudson said.

Attorneys will be watching this case to see whether the California Supreme Court issues a limited ruling that essentially focuses on security guards or if its decision is written to apply to a wider range of employers, including those in the retail sector, according to John Mullan of Rudy Exelrod Zieff & Lowe LLP, which represents employees.

"The ruling could have a limited impact on security guards who are charged with important safety tasks," he said. "Or the court could issue a broad ruling that justifies retail employers saying employees have to stay on the floor during their break in case a customer needs assistance."

If it hands down a broader holding and finds there is no requirement that employees must be relieved of all of their duties during rest periods, that's going to have a significant effect on businesses and workers in the state, according to Mullan.

"Employers will have much more leeway to force employee to take on duties during rest periods," he said.

The case is Augustus v. ABM Security Services, case number S224853, in the Supreme Court of the State of California.

--Editing by Jeremy Barker.

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