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California Court Of Appeal Decision Could Signal The Beginning Of The End Of Meal And Rest Break Class Actions

In a significant victory for California employers, the California Court of Appeal for the Fourth Appellate District issued its much anticipated published opinion in *Brinker Restaurant Corp. v. Superior Court* (July 22, 2008), Case No. D049331, reversing the trial court's order certifying a class in a wage-and-hour action for alleged meal and rest break violations and unpaid off-the-clock work.

Perhaps most importantly, in an matter of first impression, the Court concluded that California employers need only make meal and rest breaks *available* to employees, but are not required to *ensure* that employees actually take them.

While the decision may signal the end of the meal and rest break class actions that have been so prevalent in California in recent years, employers must be mindful that other Courts of Appeal within the state may reach different conclusions, as may the California Supreme Court, which likely will be called upon to resolve the issue of whether meal and rest periods must be made available or ensured, and, thus, whether they are appropriate for class treatment.

Case Overview

In *Brinker*, the named plaintiffs, seeking to represent a class of more than 59,000 hourly employees, sued Brinker Restaurant Corporation ("Brinker"), the operator of 137 restaurants in California for alleged meal and rest break violations, "early lunching" violations, uncompensated off-the-clock work and time-shaving.

Brinker had several written policies for meal and rest breaks and working off the clock. The meal and rest break policy required that each employee sign a form stating, "I am entitled to a 30-minute meal period when I work a shift that is over five hours." The same form also stated, "If I work over 3.5 hours during my shift, I understand that I am eligible for one ten-minute rest break for each four hours I work." An employee's failure to follow the policy could result in disciplinary action up to and including termination.

With respect to the issue of working off the clock, Brinker's policy stated, "It is your responsibility to clock in and clock out for every shift you work….[Y]ou may not begin working until you have clocked in. Working 'off the clock' for any reason is considered a violation of Company policy." The employee handbook also stated, "If you forget to clock in or out, or if you believe your time records are not recorded accurately, you must notify a Manager immediately, so the time can be accurately recorded for payroll purposes."

The plaintiffs alleged that Brinker violated California Labor Code and Industrial Welfare Commission ("IWC") Order No. 5 by failing to provide rest periods for every four hours or major fraction thereof worked per day to non-exempt employees, and failing to provide compensation for the missed rest periods. Plaintiffs also alleged that Brinker failed to provide meal periods for days on which non-exempt employees worked in excess of five hours, failed to provide meal periods altogether, failed to provide second meal periods for days that employees worked in excess of 10 hours, and failed to provide compensation for the missed meal periods.

The plaintiffs also claimed that Brinker engaged in unlawful "early lunching" by requiring employees to take meal periods soon after they arrived for their shifts, usually within the first hour, and then requiring them to work in excessive of five hours, sometimes more than nine, without an additional meal period.

The plaintiffs further alleged that Brinker unlawfully required its employees to work off the clock during meal periods.

In seeking class certification, plaintiffs asserted that common issues predominated over individual issues on all of their claims. The trial court agreed, granting the motion for certification and certifying the large class. Brinker sought review by the Court of Appeal.

The Court's Decision

As a preliminary matter, the Court of Appeal observed that a critical inquiry on a class certification motion is whether the theory of recovery advanced by the plaintiffs is likely to prove amenable to class treatment. In order to determine whether common questions of law or fact predominate, a trial court must examine issues framed by the pleadings and the law applicable to the causes of action alleged. More specifically, the trial court, in a wage and hour case, is required to determine the elements of the plaintiffs' claims.

The Court found that the trial court erred in not first determining which law applied to the plaintiffs' claims. Without reaching that threshold issue, the trial court could not determine if individual or common issues predominate and whether class treatment was proper. Because the elements of plaintiffs' claims could only be established by making an individual inquiry into each plaintiff's claims, class treatment was inappropriate.

1. Rest Break Claims

The Labor Code and the IWC Order require that employers "authorize and permit" a rest break, based on the total hours worked daily at a rate of 10 minutes net rest time per four hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half hours. The rest break "insofar as practicable shall be in the middle of the each work period and shall be counted as hours work for which there shall be no deduction from wages."

In interpreting the pertinent provisions of the IWC Order, the Court found that employees need be afforded only one 10-minute rest break every four hours "or major fraction thereof." Thus, for example, if an employee has a work period of seven hours, he is entitled to a rest period after four hours of work because he has worked a full four hours. It is only when an employee is scheduled for a shift of more than three and one-half hours but less than four hours, that he is entitled to a rest period before the four-hour mark. The Court also found that rest periods need be afforded in the middle of the four-hour period only when practicable and employers are not required to ensure that employees take the rest breaks properly provided to them in accordance with the provisions of the IWC Wage Orders.

Because the question of whether rest periods were prohibited by management or voluntarily declined by the each employee is an individualized inquiry, the Court concluded that the rest break claims were not amenable to class treatment.

2. Meal Break Claims

The Labor Code and Wage Order require every employee who works more than five hours to receive an unpaid meal period, except that employees who work six hours or less in a workday may agree to waive the meal period. Employees who work more than 10 hours must be given a second meal period. If they will not work more than 12 hours in the workday and did not waive their first meal period, employees may agree to waive the second meal period.

A. Rolling Five-Hour Meal Period

The plaintiffs asserted a rolling five-hour meal period claim, alleging that Brinker failed to provide or make available to its hourly employees a 30-minute uninterrupted meal period for every five consecutive hours of work. Related to this claim was plaintiffs' claim that Brinker's practice of requiring employees to take their meal periods soon after they arrived for their shifts, usually within the first hour, and then requiring the employees to work in excess of five hours, and sometimes more than nine hours straight, without an additional meal period was a meal period violation.

The plaintiffs argued that this practice violated the law because employees could end up working as much as nine hours between their first meal break and their second meal break. They relied on a California Division of Labor Standards Enforcement ("DLSE") enforcement guidance requiring a "rolling five-hour" meal period, saying that no employee should ever work more than five consecutive hours without a meal break. Plaintiffs' interpretation was that an employee is entitled to a meal break no later than five hours after returning from the last meal period.

Brinker argued that employees started the meal period before the fifth hour of work ended, satisfying the law as written. Indeed, the Labor Code does not state when an employee must take a meal period, only that employees may not work more than five hours without a meal break or more than 10 hours without a second meal break.

The Court rejected the plaintiffs' arguments and the DLSE's enforcement position, reasoning that if the legislature intended for an employer to furnish a meal period every five hours, there would have been no need for the statutory provision requiring a second meal period for employees who work 10 or more hours. For that reason, the Court of Appeal held there is no claim for an "early lunch" violation.

B. Whether Employers Must Ensure Employees Take Meal Breaks

Both Brinker and the plaintiffs requested that the Court decide the legal question of whether employers must ensure meal periods are taken or whether they must only be made available. The Court concluded that California law provides that an employer need not ensure employees actually take their meal breaks, but need only make them available. In reaching this conclusion, the Court reviewed recent federal district court cases, including *White v. Starbucks Corporation* (N.D. Cal. 2007) 497 F.Supp.2d 1080.

The *White* Court observed that finding otherwise would, in effect, allow employees "to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour pay for each violation. This cannot have been the intent of the California Legislature, and the court declines to find a rule that would create such a perverse and incoherent incentives." *Id.* at 497.

The *Brinker* Court agreed with *White*, holding that "public policy does not support the notion that meal breaks must be ensured. If this were the case, employers would be forced to police their employees and force them to take meal breaks."

C. Class Treatment of Meal Break Claims

Because the Court found that meal breaks need only be made available, not ensured, individual issues predominated, and the meal break claim was not amenable to class treatment. The Court found that the reason meal breaks were not taken can only be decided on a case-by-case basis. An individual inquiry in to each employee's claim was necessary to determine if Brinker failed to make the meal period available or the employee chose not take the meal period.

The Court also opined that the use of statistical information and the review of schedules and time sheets are not a viable method of proving meal break claims on a class-wide basis because they would not provide the reason for the missed breaks.

D. Off-the-Clock Claims

With respect to the plaintiffs' claims for off-the-clock work, the Court found that individual issues predominate and the resolution of such claims would require individual inquires into whether a given employee actually performed off-the-clock work and whether the employee's manager had actual or constructive knowledge of such work. The Court concluded that employers can only be held liable for off-the-clock claims if the employer knows or should have known the employee was working off the clock.

What This Means to Employers

As employers with operations in California know all too well, meal and rest break class actions have become prevalent over the last several years. These lawsuits generally alleged that employees have not taken timely breaks, or that the breaks did not last as long as they should have, regardless of whether it was the employees' choice not to take such breaks.

In addition to the expense of litigating these claims, ensuring that employees took timely breaks that lasted the proper length, as several agencies and lower courts had indicated was required (at least as to meal breaks), has proven to be a time-consuming, expensive and often futile endeavor for employers.

As the first Court of Appeal to address the issue of whether meal and rest breaks in fact must be ensured, instead of merely made available to employees, the *Brinker* Court has given employers some much needed guidance. The Court's conclusion – that the breaks need only be made available – is one that is certain to please employers throughout the state.

Employers would be wise to temper any optimism and proceed with caution. Other Courts of Appeal within the state may reach a different conclusion than the *Brinker* Court, as may the California Supreme Court, which is all but certain to be asked to weigh in on this important issue. *Brinker* could well signal the beginning of the end of the meal and rest break class actions that have become so prevalent. However, should other Courts of Appeal reach a different conclusion than the *Brinker* Court, or should the Supreme Court do so, *Brinker* could be rendered meaningless.

With this in mind, employers may wish to refrain from making dramatic changes to their operations in response to *Brinker* and wait until the issue of whether meal and rest breaks must be ensured, rather than just made available, is decided more conclusively.

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If you have any questions regarding the decision in *Brinker*, please contact **Michael Kun** at (310) 557-9501 or mkun@ebglaw.com, or **Kathryn McGuigan** at (310) 557-9570, kmcguigan@ebglaw.com.