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## California Supreme Court to Review the *Brinker* Meal And Rest Break Class Action

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As many commentators had expected, on October 22, 2008, the California Supreme Court agreed to review the Court of Appeal decision regarding meal and rest breaks in *Brinker Restaurant Corp. v. Superior Court* (2008), 165 Cal. App. 4th 25. In that case, the appellate court concluded that California employers need only make meal and rest breaks “available” to employees, and are not required to “ensure” that employees actually take them. Because individualized inquiries were needed to determine whether and why an employee may have missed a break, the court concluded that such claims were not appropriate for class treatment.

While *Brinker* was celebrated by employers, who have faced numerous and expensive class action lawsuits alleging meal and rest break violations, many were rightly concerned that the decision would be reviewed, and perhaps overturned, by the Supreme Court. By granting review, the California Supreme Court has rendered *Brinker* invalid as legal authority, and employers can no longer rely on the decision.

The Supreme Court’s review of this decision should bring finality to the issue of whether meal and rest breaks need only be made “available” or whether employers must “ensure” that they be taken. Should the Supreme Court affirm *Brinker*, it will be more difficult than ever for plaintiffs to proceed with meal and rest break class actions. Should the Supreme Court reverse *Brinker*, the filing of meal and rest break class actions are likely to continue and, perhaps, even increase in number. Until the Supreme Court issues its opinion, employers would be wise to continue to follow the California Labor Code and Industrial Welfare Commission (“IWC”) Orders, and to continue to take steps to ensure that employees take breaks.

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