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A Win for Employers in Brinker: Meal Periods in California Need Not Be Ensured, or Furnished on a "Rolling Five-Hour" Basis

BY LESLIE ABBOTT, JEFFREY D. WOHL & HOLLY LAKE

After more than three years since review first was requested, the California Supreme Court rendered a unanimous decision yesterday in *Brinker Restaurant Corp. v. Superior Court*, No. S166350 (Apr. 12, 2012). For employers, the wait was worth it, as the court delivered a clean win on the two central legal issues: (1) what it means to "provide" a meal period, and (2) when a second meal period is due.

The Supreme Court agreed with employers that the obligation to "provide" does not require employers to ensure that employees actually take meal periods during which they perform no work. "[T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed." Rather, the Court held employers simply must provide 30-minute, duty-free meal periods. "[W]ork by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay." As a consequence, absent proof of a specific employer policy or classwide practice that makes timely, off-duty meal periods unavailable, plaintiffs should have difficulty obtaining class certification of meal-period claims.

The Supreme Court also upheld the defense position that the duty to provide a second meal period arises only after ten hours of work. In so holding, the Court rejected the plaintiffs' contention that a second meal period must be provided within five hours after the end of the first meal period (the so-called "rolling five-hour" theory that plaintiffs had proposed).

Additionally, the Court clarified the rest period rules. Employers must authorize and permit employees to take a ten-minute rest period for each four-hour period in which they work any amount of time in excess of two hours, unless an employee's total daily work time is less than 3-1/2 hours. Further, although the "general rule" in a typical 8-hour shift is that "one rest break should fall on either side of the meal break," the sequencing of meal and rest breaks may be altered depending on factors such as shift length.

Employers Must Provide Off-Duty Meal Periods, But Need Not Ensure They Are Taken

Under California Labor Code section 512, an employer must "provide" non-exempt employees with a first meal period after five hours of work and a second meal period after 10 hours of work. California

Labor Code section 226.7 makes the employer who fails to provide a meal period required by the applicable Wage Order liable for one additional hour of pay per day of violation.

Guided by the plain language of section 512, its legislative history, and the text of the applicable Wage Order, the Supreme Court rejected the plaintiffs' contention that to "provide" a meal period means an employer not only must ensure they are made available, but also "that employees do no work during meal periods." The Court explained: "The difficulty with the view that an employer must ensure no work is done – *i.e.*, prohibit work – is that it lacks any textual basis in the wage order or statute."

Instead, the Court reaffirmed that once a meal period obligation is triggered, "an employer is put to a choice: it must (1) afford an off duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on duty meal period if circumstances permit." Employers who abide by one of these three options will not be liable for premium pay under Labor Code section 226.7 "whether or not work continues." However, as the Supreme Court observed, an employer normally must provide straight time pay when "it 'knew or reasonably should have known that the worker was working through the authorized meal period.'"

Thus, the Supreme Court affirmed the Court of Appeal and the near unanimous view of state and federal courts in California that the obligation to provide meal periods does not require employers to ensure that they actually are taken. Accordingly, the mere fact that employees did not take their meal periods will not, by itself, result in liability. Instead, employees claiming they were deprived of meal periods must point to employer conduct that resulted in their inability to take a break from work. Nonetheless, because the Supreme Court did not unequivocally rule out the appropriateness of class certification under certain circumstances, employers must heed the Court's caution that "an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." The Court indicated such pressure might include "an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks."

Second Meal Periods Are Due Only After Ten Hours of Work

As to the timing of meal periods, the Supreme Court initially confirmed that "first meal periods must start after no more than five hours." Next, the Court affirmed the Court of Appeal's holding that the obligation to provide a second meal period attaches after 10 total hours of work, not merely after five hours of work following the end of the first meal period. The Court relied on the plain language of Labor Code section 512 and rejected the plaintiffs' contention that the Wage Order imposed meal timing requirements beyond those in section 512. The Court held: "Under the wage order, as under the statute, an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." Therefore, employees have no claim for second meal period violations unless their work shifts exceed 10 hours.

Rest Period Rules

The Supreme Court explained an employer's obligation under the Wage Orders to authorize and permit rest periods of ten minutes for each four hours of work or major fraction thereof. The Court first confirmed that employers do not need to authorize or permit rest periods for employees who work shifts under 3-1/2 hours. Next, the Court held that the "or major fraction thereof" language, as applied to a four-hour work period, means "any amount of time in excess of two hours." The Court thus used a simple mathematical formula to determine the amount of rest time due on any given day:

"the number of hours worked divided by four, rounded down if the fractional part is half or less than half and up if it is more (a 'major fraction'), times 10 minutes."

Applying this formula, employees are entitled to the following total amount of rest period time per shift (with each 10-minute increment offered as a separate break):

- 10 minutes' rest for shifts from 3-1/2 to 6 hours in length;
- 20 minutes' rest for shifts of more than 6 hours up to 10 hours;
- 30 minutes' rest for shifts of more than 10 hours up to 14 hours;
- Additional rest time is required per the formula for shifts exceeding 14 hours.

The Court also addressed the timing of rest periods. Plaintiffs contended the Wage Order prohibits scheduling a meal period prior to a first rest period, but the Court found no textual support for this position. In an eight-hour shift, the Court noted that generally one rest break should fall on either side of the meal break, but rejected the plaintiffs' broader argument that a rest break always must precede a meal break. Thus, the sequencing of breaks may be determined by shift length and other factors. For example, the Court held it would not be unlawful for an employee who works a six-hour shift and is entitled to one rest break and one meal break to take the meal break at the two-hour mark and the rest break at the four-hour mark.

Class Certification Standards

The Supreme Court devoted significant space to a discussion of the appropriate class certification standards. The Court made clear that a trial court is not necessarily required to resolve the disputed threshold legal or factual questions before deciding a class certification motion, as the Court of Appeal below had held. However, citing *Wal-Mart Stores, Inc. v. Dukes*, the Court acknowledged that "'issues affecting the merits of a case may be enmeshed with class action requirements'" and, thus, courts "may properly evaluate" evidence or legal issues that are germane to both certification and the merits.

At bottom, "[p]resented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them . . . [H]owever, a court generally should eschew resolution of such issues unless necessary . . . Consequently, a trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision."

Based on this framework, the Supreme Court resolved the certification issues as follows:

- Meal Period Claim. The meal period class certified by the trial court included members who had not received meal periods on a "rolling five-hour" basis and, thus, was overinclusive in light of the Supreme Court's rejection of this theory of recovery. The Court remanded the certification of the meal period class to the trial court because the class definition "embraces individuals who now have no claim against Brinker." However, the Court found it still may be possible for employees to obtain class certification of a meal period case in certain circumstances. For example, the concurring opinion (of only two Justices) suggested a

potential certification where plaintiffs can show that the employer adopted a common policy or practice preventing the taking of meal periods as a practical matter. The concurring opinion emphasized it is an employer's burden to establish a "waiver" of meal periods as an affirmative defense. Nonetheless, it will now be much more difficult for plaintiffs to obtain class certification of a meal break claim where an employer maintains a valid meal period policy.

- Rest Break Claim. The Supreme Court reversed the Court of Appeal and affirmed the trial court's certification of a rest period class, but it did so under the unique factual circumstances of the case. The Court found that certification of a rest break class was appropriate under "the theory that Brinker adopted a uniform corporate rest break policy that violates Wage Order No. 5 because it fails to give full effect to the 'major fraction' language of subdivision 12(A)." Brinker's policy informed employees that they were entitled to a rest break for each four hours that they work, without mentioning "or major fraction thereof." This created a class-wide issue, according to the Court, of whether Brinker authorized and permitted sufficient rest periods. The fact that employees could choose not to take breaks did not create individualized issues where the employer gave them no choice in the first instance. Here, Brinker conceded the existence of its common and uniform rest break policy which created a class issue, particularly given that the plaintiffs had supplied some evidence that rest breaks were not always permitted.

- Off-the-Clock Claim. The Supreme Court agreed with the Court of Appeal that the trial court had abused its discretion in certifying an off-the-clock subclass. It found that plaintiffs had not produced substantial evidence of a systematic company policy to pressure or require employees to work off the clock; to the contrary, Brinker's written policy specifically prohibited employees from working off the clock for any reason. Thus, the Court found a lack of common proof of an off-the-clock violation and found instead that individual issues predominated.

Impact of *Brinker* and Recommendations

The most immediate consequence of *Brinker* is on pending and threatened litigation.

Brinker should result in certification of fewer meal- and rest-period classes because individual questions will normally predominate as to why a particular meal or rest period was not taken unless there is proof that a specific policy or practice makes compliant breaks unavailable. To date, class claims alleging meal-period violations have focused on statistics of non-compliance drawn from the employer's punch-clock records. The Court's decision shifts the focus in these cases away from whether employees took their meal periods to why they missed them. Indeed, most courts that have rejected the "ensure" standard have largely declined to certify meal-period classes precisely because classwide proof generally cannot determine why a group of employees did not take their meal periods.

Nevertheless, the potential reprieve from meal-period class claims should not be mistaken for an opportunity to relent from compliance efforts. Plaintiffs will still argue for liability where employers have not maintained compliant policies or are lax in monitoring compliance. They will also seize on the fact that the Supreme Court still views it possible to certify at least some meal-period cases. (Indeed, the result in the case, for Brinker itself, was a remand to the trial court to reconsider the issue of class certification of the meal period claim; the Court did not hold that the meal period class necessarily was

erroneously certified.) Plaintiffs in appropriate cases will continue to contend they have sufficient facts to show that off-duty meal periods were not provided.

Employers should promptly review their policies and practices regarding meal and rest periods for consistency with the Supreme Court's dictates and to help guard against claims of common proof. The fact that an employee chooses not to take a meal period may not result in strict liability for meal-period premiums under Labor Code section 226.7. However, plaintiffs will argue that a pattern of missed, late or short meal periods supports a claim that their employer did not in fact provide them. Accordingly:

- First, draft policies that clearly state employees are entitled to take an off-duty, thirty-minute meal break no later than the end of the fifth hour of work, and a second off-duty, thirty-minute meal break after ten hours of work. Those policies will help undermine claims of common proof that the company deprives employees of meal periods.

- Second, make clear to managers and supervisors, as a matter of policy and in regular communications, that they should not interfere with employees' choosing to take meal periods. Be mindful of the Court's admonition against coercing or encouraging employees to skip breaks. Even in the absence of common policies, an established practice of supervisor interference may give rise to efforts by plaintiffs to certify meal period class actions.

- Third, require employees to record their actual meal period start and end times each day, except in limited circumstances such as when the employer ceases operations during meal breaks.

- Fourth, consider a timecard certification program whereby employees will attest whether they had an opportunity to take off-duty meal periods. We have worked with many employers on their state-of-the-art timecard certification programs, so please contact us if you need assistance.

- Fifth, continue to investigate complaints from employees about not being able to take breaks.

- Sixth, consider requiring employees to take their meal periods and discipline them and/or their supervisors if they choose not to do so. At oral argument, some Supreme Court justices expressed skepticism that an employer should be forced to discipline an employee who fails to comply with meal-period schedules. However, nothing in *Brinker* prevents an employer from disciplining non-compliant employees as part of a robust compliance program.

- Seventh, if an employer determines that it failed to make a compliant meal period available, the employer should pay the one-hour premium to avoid potential litigation.

Employers also should make sure that their rest period policies comply with the clarified rules discussed above.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Leslie L. Abbott
1.213.683.6310
leslieabbott@paulhastings.com

George W. Abele
1.213.683.6131
georgeabele@paulhastings.com

Orange County

James P. Carter
1.714.668.6206
jamescarter@paulhastings.com

Palo Alto

Bradford K. Newman
1.650.320.1827
bradfordnewman@paulhastings.com

San Diego

Mary C. Dollarhide
1.858.458.3019
marydollarhide@paulhastings.com

San Francisco

Thomas E. Geidt
1.415.856.7074
tomgeidt@paulhastings.com

E. Jeffrey Grube
1.415.856.7020
jeffgrube@paulhastings.com

Jeffrey D. Wohl
1.415.856.7255
jeffreywohl@paulhastings.com