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California Meal Period Compliance Update: Three New Cases Offer Guidance on the "Provide" Versus "Ensure" Debate

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OVERVIEW

The single most important unresolved issue in California employment law today is the meaning of the obligation of employers to provide meal periods to employees. Does "provide" mean employers must force employees to take meal periods or make meal periods available?

The answer to this question will have enormous consequences. After the California Supreme Court ruled in *Murphy v. Kenneth Cole*, 40 Cal. 4th 1094 (2007), that the meal period violation payment in California Labor Code section 226.7 is a wage and thus subject to at least a three-year statute of limitations, a virtual flood of meal period class actions have been filed. If the law in California is that the obligation to "provide" meal periods means to "ensure" that employees take them, whether or not employees want an unpaid thirty-minute meal period, then virtually every employer in California faces huge risks. The appropriateness of class certification in meal period cases turns on the definition of "provide." In the only certified meal period case that has gone to trial in California, *Savaglio v. Wal-Mart Stores, Inc.*, the court instructed the jury that "provide" meant that Wal-Mart had to "do more than merely *offer* the opportunity for a meal period to its employees." As a result, the jury awarded in excess of $172 million, including punitive damages, to a class of 116,000 employees based on a finding that Wal-Mart failed to *ensure* that employees took their meal periods. The *Savaglio* case is on appeal in the First Appellate District, with briefing not scheduled to be completed until Summer 2008.

Three recent opinions give some renewed hope to employers on the direction this issue may be headed. The federal courts in *White v. Starbucks* and *Moreno v. Guerrero Mexican Food Products, Inc.* each held that employers are not required to force employees to take meal periods, but have an affirmative duty to make meal periods available. In *Brinker Restaurant Corp. v. Sup. Ct.* (*Hohnbaum*), a meal and rest period class action certified by the trial court, the Fourth Appellate District did not directly decide the "provide" versus "ensure" issue, but did cite and quote *White v. Starbucks.*

In this Alert, we summarize these three new decisions to keep our clients updated on this critical developing issue. In addition, we summarize other relevant issues addressed in the *Brinker* opinion, including the court's rejection of the so-called "rolling five-hour" meal period requirement and the court's reversal of class certification on the rest break and off-the-clock claims.

Unfortunately, despite the recent helpful guidance from the courts, the "provide" versus "ensure" debate is not likely to be resolved definitively for the foreseeable future. Currently only the *White* decision is published;[1] *Moreno* and *Brinker* cannot be cited as legal authority at this time.[2] Ultimately the issue must be decided by the California Supreme Court, but any such ruling may well be a long way off. In the meantime, employers should exercise extreme caution and vigilance by making meal and rest periods available and monitoring meal and rest period compliance.

THE MOST CRITICAL UNANSWERED STATUTORY INTERPRETATION ISSUE: DOES "PROVIDE" MEAN "ENSURE" OR "MAKE AVAILABLE"?

The rules that govern meal periods in California are set forth in California Labor Code sections 226.7 and 512

and the Industrial Welfare Commission ("IWC") Wage Orders.

Section 226.7(a) provides that "[n]o employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." Section 226.7(b) provides that, for each work day that the meal or rest period is not provided, the employer "shall pay the employee one additional hour of pay at the employee's regular rate of compensation."

Section 512(a) provides that "[a]n employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the period may be waived by mutual consent of both the employer and employee." Further, "[a]n employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

The meal period obligation is stated slightly differently in the IWC Wage Orders ("No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes . . . ."). [3] The Wage Orders also provide an exception for on-duty meal periods under certain circumstances.

The upshot of these rules is that employers must pay employees a one-hour premium for non-compliant meal periods. The potential financial impact of this premium pay requirement, both in terms of litigation exposure risk and the cost of future premium pay assessments, hinges on the definition of "provide." Yet nowhere do these statutes define this term.

Only one California state court, the Third Appellate District in *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005), has addressed the meaning of "provide" in a published opinion. There, the plaintiff truck drivers demonstrated that the company did not schedule meal or rest periods, did not have activity codes for meal and rest breaks in the computerized time-tracking system that the drivers used when they were on the road, and pressured drivers to make more than one daily trip so they felt they did not have time to stop for lunch. The evidence showed that "most drivers ate their meals while driving or else skipped a meal nearly every working day." *Id.* at 962. Based on these facts, and citing to a January 28, 2002 opinion letter from the California Division of Labor Standards Enforcement ("DLSE") which states that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty,'" as well as IWC Wage Order No. 9, which requires employers to record meal periods, the court concluded that the company had failed to provide compliant meal periods. Affirming summary judgment for the employees, the court explained that "the defendant's obligation to provide the plaintiffs with an adequate meal period is not satisfied by assuming that the meal periods were taken." *Id.* While the holding in *Cicairos* was unfortunate for employers, in most cases the facts should be distinguishable, as described in *White v. Starbucks*.

RECENT CASES SUPPORT THE EMPLOYER POSITION THAT "PROVIDE" MEANS TO "MAKE AVAILABLE"

White v. Starbucks

White was the first federal court decision interpreting the meaning of "provide" in the context of a meal period claim. Granting summary judgment for the employer, the *White* court held that "provide" means an employer must "offer," not "ensure," meal periods. 497 F. Supp. 2d at 1089. The court explained: "The California Supreme Court, if faced with this issue, would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was *forced to forego* his meal breaks as opposed to merely showing that he did not take them regardless of the reason."

The plaintiff, a store manager, testified at deposition that he did not recall ever missing a meal period when he worked at one store location, and that any meal periods he missed at another store location were the result of "[his] decision to skip those meal periods." These facts, said the court, were factually distinguishable from *Cicairos.* "The defendant in *Cicairos* knew that employees were driving while eating and did not take steps to address the situation. This, in combination with

management policies, effectively deprived the drivers of their breaks." *Id.*

The court also distinguished employees in the transportation industry from other employees, noting that "making employers ensurers of meal periods would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which employers may have hundreds or thousands of employees working across multiple shifts." *Id.* The court explained:

> Under White's reading of *Cicairos,* an employer with no reason to suspect that employees were missing breaks would have to find a way to force employees to take breaks or would have to pay an additional hour of pay every time an employee voluntarily chose to forego a break. This suggests a situation in which a company punishes an employee who foregoes a break only to be punished itself by having to pay the employee. In effect, employees would be able 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 of 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 perverse and incoherent incentives.

Id.

Moreno, et al. v. Guerrero Mexican Food Products, Inc., et al.

In *Moreno,* The Honorable Dale S. Fischer of the United States District Court for the Central District of California held that California's meal period rules affirmatively obligate employers to notify employees that they are free to take a thirty-minute off-duty break. However, these rules do "not suggest any obligation to ensure that employees take advantage of what is made available to them." Case No. CV 05-7737 DSF (PLAx) (C.D. Cal. Oct. 11, 2007).

The plaintiffs, on behalf of a putative class of drivers who alleged they were denied meal periods, argued at summary judgment that Labor Code sections 226.7 and 512, when read together with the applicable IWC Wage Order for the transportation industry, required the company to "ensure" that they took meal breaks even when they were on the road. The court disagreed, citing the statutory language requiring employers only to "provide" meal periods, and the definition of "provide" in Merriam Webster's Collegiate Dictionary ("[t]he word 'provide' means 'to supply or make available'"). The court also rejected the plaintiffs' contention that the language in the IWC Wage Orders imposes a duty to enforce meal periods, noting that the language "is also consistent with an obligation to provide a meal break, rather than to ensure that employees cease working during that time."

Concurring with the rationale in *White v. Starbucks*, Judge Fischer explained that the "ensure" obligation sought by plaintiffs would not be practical in many industries ("requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or who, as with Plaintiffs, do not remain in contact with the employer during the day."). Further, the "ensure" obligation "would create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws." For all of these reasons, Judge Fischer did "not believe that the California Supreme Court would adopt the enforcement rule advocated by Plaintiffs."

Despite the court's helpful holding on the applicable legal standard, Judge Fischer determined there were triable issues of fact and denied the company's motion for summary judgment on the meal period claim. Specifically, the evidence showed that, prior to February 2006, the employer had only "informally, verbally advised [employees] of their meal break rights," which the court held was insufficient to establish that the company had adequately authorized employees to take their meal periods. The company also could not satisfy its obligation to authorize meal periods by "ceding this task to Plaintiffs' union." After February 2006, the company formally notified the drivers that they were entitled to take meal breaks and required them to record such breaks on their hand held computers. But even then, the evidence demonstrated that some drivers had routes that were sufficiently flexible to allow meal breaks, and others were so fully scheduled that no meal break was feasible. Further, the company never informed the drivers of their right to take two meal periods if they worked more then ten hours in a day. Based on these facts, and citing to

Cicairos v. Summit Logistics, Inc., the court concluded that in some instances the company did not "provide" meal periods as required under California law. Nevertheless, while denying the company's summary judgment motion, the court noted that "the evidence submitted by Plaintiffs strongly suggests that this claim cannot properly be tried as a class claim."

Brinker Restaurant Corp., et al. v. Sup. Ct. (Hohnbaum, et al.)

In the much-awaited, though unpublished, *Brinker* decision, California's Fourth Appellate District issued guidance on multiple meal and rest period issues that have been closely watched in employment law circles. Case No. DO49331 (Cal. Ct. App. Oct. 12, 2007). In vacating the trial court's order certifying meal period, rest period and off-the-clock subclasses, the *Brinker* court examined four important issues: (1) the meaning of the word "provide" in Labor Code section 512; (2) whether section 512 requires employers to provide meal periods for every five consecutive hours an employee works (the "rolling five-hour" meal period issue); (3) the scheduling of rest breaks in relation to meal periods; and (4) the applicable standards for class certification of meal period, rest period and off-the-clock claims.

Brinker Restaurant Corp. operates 137 restaurants in California. Brinker's meal period policy provides that employees are entitled to a 30-minute meal period, for which they must clock-out, when they work a shift exceeding five hours. Brinker's rest period policy provides that employees who work more than 3.5 hours during a shift are eligible for a ten-minute break for each four hours that they work. The policy clearly states that failure to follow the meal period and rest break policies could result in disciplinary action up to and including termination. Brinker's policy also prohibits employees from working without first clocking-in and notifies employees that working off-the-clock violates company policy.

In *Brinker*, five plaintiffs brought a class action alleging that the company failed to provide certain meal and rest periods or compensation in lieu thereof, and that employees worked off-the-clock during meal periods or their managers "shaved" their time by adjusting employee payroll records to reflect shifts of less than five hours. The trial court granted plaintiffs' motion for certification of rest period, meal period and off-the-clock subclasses; Brinker challenged the certification order in a writ of mandamus. In issuing the writ vacating the certification order, the Fourth Appellate District provided the following analysis on these key issues.

Failure to Ensure Meal Periods

The Fourth Appellate District concluded that meal period cases cannot be decided without first resolving the issue of whether "provide" means "ensure," as the plaintiffs contended, and whether an employer has a duty to ensure that its hourly employees actually take the meal periods provided. "Without deciding this issue, the court could not adequately evaluate whether common questions regarding plaintiffs' meal period claim predominate over individual issues." Therefore, the court vacated the trial court's certification of the meal period class and remanded the matter with directions to the trial court to decide this issue.

In so holding, the Fourth Appellate District gave strong hints about the result it expected. First, the court referenced the dictionary definition of "provide" as "to supply or make available." Second, the court cited *White v. Starbucks*, emphasizing its conclusion that "the California Supreme Court . . . would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks." Finally, the court suggested that if the trial court determined that an employer has no duty to ensure that its employees actually take meal periods, then it would have to decide "whether common issues would be substantially outweighed by the individual inquiries that would be required at trial to determine whether each alleged instance of a missed or shortened meal period was the result of an employee's personal choice or a manager's coercion." In short, certification would not be appropriate because individual issues would predominate.

Thus, even though *Brinker* did not decide the definition of "provide," the court's holding on the meal period claim gives important guidance for courts and employers on this critical issue.

"Rolling Five-Hour" Meal Periods

Assume an employee works 9-12 and 12:30-5:30, but plaintiffs contend that, even though the statute appears to require a second meal period only after ten hours of

work, a second meal period is actually required after any five consecutive hours of work time. In our example, plaintiffs would contend that there would be a violation if an employee worked any overtime at all without receiving a second meal period. This is the so-called "rolling five hours" argument.

The Fourth Appellate District held that the trial court erred in determining that California has a "rolling five-hour" meal period requirement ("We conclude that the court's rolling five-hour meal period ruling . . . was erroneous, and thus the class certification order rests on improper criteria. . . ."). The court reasoned that section 512 does not contemplate a rolling five-hour meal period because, under such a rule, an employer never would reach the question of whether an employee had worked the ten hours necessary to trigger the second meal. Instead, this interpretation of the statute would require the employer to, in effect, reset the clock upon the employee's return from the first meal period. According to the court, "[t]his interpretation of section 512(a) effectively ignores and renders surplusage about half of the governing language set forth in that subdivision."

This holding is important so that employers may avoid the contention that there is a *per se* violation of California's second meal period requirement any time their records show that an employee works more than five hours after taking a first meal period.

Scheduling of Rest Breaks and Certification of Rest Break Claims

The Fourth Appellate District vacated the trial court's certification of the rest break class on the grounds that the trial court's order rested on improper criteria and incorrect assumptions, namely, plaintiffs' assertion that California law requires (a) a ten-minute rest break for every three-and-a-half hours of work, and (b) a rest break *before* the first meal period. The court explained:

> Had the court properly determined that (1) employees need be afforded only one 10-minute rest break every four hours 'or major fraction thereof,' (2) rest breaks need be afforded in the middle of that four-hour period only when 'practicable,' and (3) employers are not required to ensure that employees take the rest breaks properly provided to them . . . only individual questions would have remained, and the court in the proper exercise of its legal discretion would have denied class certification, with respect to plaintiffs' rest break claims because the trier of fact cannot determine on a class-wide basis whether members of the proposed class of *Brinker* employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced choice to waive such breaks and continue working.

Although only a minority of trial courts have certified rest period class actions, the *Brinker* decision reinforces the proper standards that should be applied in these cases.

Certification of Off-the-Clock Claims

Brinker argued that certification of the off-the-clock claim was improper because plaintiffs had not cited to any policy that permitted off-the-clock work or allowed shaving of time from payroll records. The Fourth Appellate District agreed, concluding that the trial court had not examined the elements that had to be proven to prevail on the off-the-clock claim, and that it "was required to perform such an examination before certifying these claims for class treatment. . . ." Accordingly, the court remanded the claim with direction that the trial court consider the elements of the claim and whether common issues predominate.

CONCLUSION

With the prospect of a potentially lengthy wait before the California Supreme Court resolves the "provide" versus "ensure" debate, uncertainty remains. In the meantime, while this may be more than the law requires, we recommend the following:

- ***Implement*** a written meal period policy that makes available off-duty meal periods of no less than thirty minutes to commence no later than the end of the fifth hour of the employee's shift, and second meal periods for employees who work more than ten hours in a day;
- ***Communicate*** this policy to all non-exempt employees and their managers;
- ***Train*** employees and their managers about the importance of following the company's meal period policy;

- ***Schedule*** non-exempt employees so that they are able to take daily meal periods;
- ***Monitor*** meal period compliance by employees;
- ***Investigate*** repeated instances of missing, late and short meal periods to determine whether employees are being prevented from taking meal periods, or choosing voluntarily to forego the meal periods made available to them;
- ***Make*** a policy decision on the following alternatives: (1) pay the one-hour premium for all missed, late or short meal periods, or (2) pay the premium in all instances where employees have been prevented from taking meal periods; and
- ***Discipline*** employees and managers who fail to follow the company's meal period policy.

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[1] 497 F. Supp. 2d 1080 (N.D. Cal. 2007).

[2] The California Employment Law Council ("CELC") and other employer associations requested publication of the *Brinker* decision. Plaintiffs filed a petition for review with the California Supreme Court. Thereafter, the Court of Appeal wrote to the California Supreme Court, stated that the last line of the decision making it final when issued was in error, asked for an immediate remand to restore jurisdiction in the Court of Appeal, and recommended that "the opinion not be published on the ground that it does not yet meet the standards for publication." On October 31, 2007, the Supreme Court transferred the case back to the Court of Appeal with directions to vacate its opinion and reconsider the matter as it sees fit, and denied as moot the requests for publication and the plaintiffs' petition for review.

[3] *E.g.*, IWC Wage Order 4-2001(11)(A); CAL. CODE REGS., tit. 8, § 11010. There are seventeen Wage Orders governing various industries, each containing a provision governing meal periods. Ten of the seventeen Wage Orders contain similar language. The remaining seven contain variances applicable to certain industries.