AFTER *BRINKER*: GUIDANCE FOR CALIFORNIA EMPLOYERS IN LIGHT OF *BRINKER V. SUPERIOR COURT*

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In the days following the California Supreme Court's long-awaited decision in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum),* (2012) 53 Cal. 4th 1004, the legal media was abuzz with commentary analyzing the case. Now that the dust has settled, it is time to ask how this case will affect California employers.

A Brief Summary of *Brinker*

California requires employers to provide non-exempt employees with meal breaks (generally 30 minutes for five hours worked) and rest breaks (generally 10 minutes for four hours or "major fraction thereof" worked). Employers who fail to do so must pay premium wages.

Plaintiffs – cooks, servers, and other non-exempt employees of Brinker-owned restaurants like Chili's and Maggiano's – filed a class action suit alleging on behalf of three sub-classes that Brinker failed to provide meal breaks and rest breaks and required "off-the-clock" work. The trial court granted class certification, but the California Court of Appeal reversed, holding that the trial court erred by ruling on certification without first determining the scope of Brinker's duties to provide meal and rest breaks, and that any court, upon resolving those disputes, would have found that certification was inappropriate.

On review, the California Supreme Court reversed the Court of Appeal with respect to the meal break and rest break sub-classes, and ruled on a number of issues concerning meal and rest breaks that had been in question for years in the lower courts and among employers and employees.

The most significant and widely discussed portion of the *Brinker* opinion addresses the employer's duty to provide meal breaks. Is it sufficient to simply make meal breaks available? Or must the employer monitor and enforce that meal breaks are actually taken?

The Supreme Court held that an employer's obligation is to "relieve its employee of all duty" for the designated period, but that the employer need not "ensure" that no work is done. Thus, the employer's duty is satisfied if an employee (1) has at least 30 minutes uninterrupted, (2) is free to leave the premises, and (3) is relieved of all duty for the entire period. If an employer knows or has reason to know that an employee that was relieved of all duty is nonetheless working during a meal break, the employer is not necessarily in violation of the meal break law, since employees cannot manipulate the system to generate a meal break violation. At the same time, the Court noted that an employer may not undermine a formal meal break policy by purporting to relieve employees of their duties while pressuring or encouraging employees to work through their breaks.

Questions of timing and break amounts, which also had been in dispute for years, were answered by the Supreme Court as follows:

1. An employer may not wait until after the completion of five hours worked before providing a meal break. A first meal period must be provided no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's tenth hour of work, absent a valid waiver.

2. Employees are entitled to 10 minutes' rest for shifts from 3.5 to 6 hours in length, 20 minutes for shifts of more than 6 hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.

3. In so far as practicable, the first 10 minute rest break should be in the middle of the first four hours and the second 10 minute rest break in the middle of the second four hours, and so on.

4. The first rest break of the day need not precede the first meal break of the day.

The majority opinion did not squarely address the certifiability of the meal break sub-class, but the concurring opinion rejected Brinker's argument that meal break claims are categorically improper for class certification.

The concurrence noted that it is the employer's duty not only to provide meal breaks, but also to keep records of meal breaks, such that if the employer's records show no meal break, a rebuttable presumption arises that no meal break was provided. Thus, even if an employer raises individual questions as to why an employee missed a meal break, such questions would not necessarily defeat class certification.

The Plaintiffs' Bar Reacts

Some employers are no doubt wondering if this decision, and particularly its holding that employers need not ensure that their employees perform no work during meal breaks, will stem the tide of wage-and-hour litigation. If the commentary from the plaintiffs' bar provides any insight, the answer is "no." Since the decision was issued, plaintiff-oriented legal blogs have rushed to declare *Brinker* a victory for wage-and-hour plaintiffs. However, the commentary from the plaintiffs' bar provides useful insight into the tactics and strategies savvy plaintiffs' attorneys are likely to use going forward.

A recurring theme repeated by many plaintiffs' attorneys-turned-commentators is an emphasis on the Court's observation that an employer may not undermine a formal meal break policy by coercing employees to work through their breaks. Kimberly A. Kralowec (appellate counsel for the *Brinker* plaintiffs and blogger at "The UCL Practitioner") described this as a "major win for workers," claiming that employers must now take "active step[s]" to actually relieve employees of all duty, and that "[a]dopting a written policy… is not going to be enough." (The UCL Practitioner: Six takeaways from Brinker for California Workers, www.uclpractitioner.com, April 16, 2012.) Another commentator noted that, in the wake of *Brinker*, "[i]f you are an employee, and your employer… pushes you to get work done in a way that makes you work through lunch, then you still may assert meal period claims." (Bryan Schwartz Law, bryanschwartzlaw.blogspot.com, April 12, 2012.)

At least one commentator/plaintiffs' attorney has taken this a step further, combining the Court's admonitions regarding class certification with its observation 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," opined that "a trial court would have to accept the claim of a coercive policy to work during meal periods and could not adjudicate whether the policy actually existed at the time of certification." (The Complex Litigator, www.thecomplexlitigator.com, April 20, 2012.) Similarly, plaintiff-oriented commentators such as Ms. Kralowec have noted Judge Dean Pregerson's recent decision in the U.S. District Court for the Central District of California, in which he approvingly relied upon Justice Werdegar's concurring opinion that, where there is no record that a meal break was taken, it is the employer's burden to rebut the presumption that a meal was provided. (The UCL Practitioner: District court relies on Brinker Concurrence: *Ricaldi v. U.S. Investigation Services, LLC*, June 7, 2012.)

The plaintiffs' bar's commentary gives an idea of what employers can expect in a post-*Brinker* world: (1) plaintiffs will continue to bring class actions alleging informal, company-wide policies pressuring employees to work through meal breaks, likely focusing on the conduct of their immediate managers to establish the existence of such informal policies; (2) plaintiffs will argue that the mere allegation of such a coercive policy is sufficient to establish common issues for class certification; and (3) after class certification, the burden will be on the employer to prove that it adequately provided meal breaks, either by showing that meal breaks were actually taken, or by showing that it took active steps to relieve employees of all duty.

Best Practices Employers Should Follow After *Brinker*

In light of the *Brinker* decision and the plaintiffs' bar's reaction to it, California employers should consider the following practices to avoid falling prey to the next wave of wage-and-hour litigation:

1. Make sure that meal and rest period policies are in writing and comply with the Court's requirements. This should also include reviewing and revising meal period waivers and on-duty meal period agreements. Among other things, the policies should state the length of breaks that employees are permitted to take, the number of breaks allowed, and the timing of the breaks.

2. Create a system that allows employees to report missed breaks, untimely breaks, or interrupted breaks so that they can be dealt with. The system should also include the payment of the required premiums as necessary where breaks are missed in addition to appropriate compensation for any time that is worked when a break is not taken or is interrupted. Clearly communicate to employees that any interference with an employee's ability to take breaks should be immediately reported to Human Resources.

3. Although employers are not obligated to "police" the taking of meal breaks, employers may wish to facilitate the taking of breaks by creating schedules that identify meal and rest period times. Employers can also use computers to create reminders that are sent to employees which either remind employees to take breaks or schedule the breaks.

4. While maintaining policies that are consistent with the law is extremely important, equally significant is making sure that polices are complied with. Thus, those persons that are responsible for enforcing or carrying out wage and hour policies must act consistent with the policies.

5. Make sure that employees cannot argue that aspects of the work environment interfere with or impede the taking of breaks. Thus, to meet the *Brinker* standard that employees are relieved of all duty during breaks and that they take uninterrupted breaks, policies should include prohibitions against using cell phones, company email or other electronic communication methods while on breaks.

6. Train supervisors to ensure that they: (1) understand applicable wage and hour requirements under the law; (2) understand the employer's wage and hour policies; (3) know how to properly enforce wage and hour policies; and (4) do not engage in conduct that impedes the taking of breaks. The existence of policies that comply with an employer's duties may be reduced to a nullity if actions by supervisors contradict the policies. Advise supervisors that they are accountable for violations of company policy.

7. Audit time records.

8. Make sure that the applicable wage order is conspicuously posted in the workplace.

9. Maintain accurate records of breaks. Employers should consider ways to document breaks. Make sure that employees record the time they start and end each meal period each day. Consider using attestation forms where employees can periodically verify that they have received all breaks, have not missed any breaks, and/or have not been discouraged or prevented from taking breaks.

10. Encourage employees to take breaks away from their desks to discourage interruptions. For employees that work in the field, make sure that the circumstances of their work provide a realistic opportunity for taking breaks.