The Long & Winding Road Finally Comes to an End: The California Supreme Court Clarifies Meal & Rest Period Obligations

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The California Supreme Court finally issued its long-awaited decision in *Brinker Restaurant Corp. v. Superior Court*. In a unanimous opinion, the Court held employers (1) need only provide meal and rest periods, not ensure nor police that they are taken, (2) are not required to provide a meal period every five hours (no rolling meal periods), and (3) are required to provide rest periods of ten minutes for each four hours of work "or major fraction thereof."

The Court also addressed several class certification issues. The Court held that (1) a class should not have been certified regarding the employee's claims that they worked "off-the-clock" during their meal breaks without compensation because there was (a) a policy prohibiting off-the-clock work without compensation and (b) no evidence of a systematic company policy to pressure or require employees to work off the clock, (2) the trial court properly certified a rest period subclass on the basis that Brinker's rest period policy did not comply with Wage Order No. 5 by failing to take into consideration of "major fraction thereof", and (3) the trial court should reconsider the definition of the meal period subclass.

Overall, the decision is a significant victory for employers. Nonetheless, *Brinker* is not the death knell of wage and hour class actions.

Background

The claims against Brinker Restaurant Corporation (which operates Chili's Bar & Grill, Romano's Macaroni Grill, and Maggiano's Little Italy) have their genesis in an investigation conducted by the California Division of Labor Standards Enforcement. Starting in 2002, the DLSE investigated Brinker's alleged failure to provide meal and rest periods and filed suit against Brinker in 2002 in Los Angeles County Superior Court. The case

was settled for $10 million and a court-ordered injunction ensuring compliance with meal and rest period laws until September 2006.

Plaintiff Adam Hohnbaum then sued Brinker in San Diego County Superior Court alleging that Brinker failed to provide meal and rest periods, and required its employees to work off-the-clock. Hohnbaum later moved for class certification, alleging subclasses for rest period, meal period, and off-the-clock violations. The trial court granted his motion but the Court of Appeal reversed, holding that the class certification order was erroneous. The Court of Appeal held that the trial court failed to properly consider the elements of plaintiff's claims and, in undertaking this task itself, held that employers need only provide – not ensure – meal and rest periods, and were not required to provide a meal period for every five-hour period worked – the so-called "rolling" meal period. The Court of Appeal also held that employers could be held liable for employees working off-the-clock only if they knew or should have known their employees were doing so. The California Supreme Court granted Petition for Review on October 22, 2008.

Meal Periods

In addressing the meal period issues, the Supreme Court performed an in-depth analysis of the applicable wage order, noting that it simply states "[n]o 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." In rejecting plaintiff's argument that an employer must *ensure* that employees perform no work during their meal periods, the Court held that plaintiff's argument "lacks any textual basis in the wage order or statute." The Supreme Court summarized this issue by holding "[t]he employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute period, and does not impede or discourage them from doing so. ...On the other hand, an employer is not obligated to police meal periods and ensure no work thereafter is performed."

Turning to the issue of the timing of meal periods, the Supreme Court held that Labor Code section 512(a) requires that a meal period be provided before the end of the fifth hour worked and a second meal period be provided before the end of the tenth hour worked. The Supreme Court rejected plaintiff's argument that an employer is required to provide a meal period after every five-hour period worked, holding neither the statute nor Wage Order No. 5 can be so read. An employee is entitled to a second meal period only if he works ten hours.

Rest Periods

The Supreme Court also addressed an employer's obligation to provide rest periods, finding that the text of Wage Order No. 5 was dispositive: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) 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 (3½) hours." Interpreting "major fraction thereof" to mean a fraction greater than one-half, the Supreme Court held that an employee is entitled to 10 minutes of rest for working more than three-and-a-half but less than six hours, 20 minutes of rest for working more than six but less than 10 hours, and 30 minutes of rest for working more than 10 hours but less than 14.

Finding no textual support in the Wage Order, the Supreme Court rejected plaintiff's argument that employers have a legal duty to permit their employees a rest period before any meal period. According to

the Supreme Court, employers are "subject to a duty to make a good faith effort to authorize and permit rest periods in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible. At the certification stage, we have no occasion to decide, and express no opinion on, what considerations might be legally sufficient to justify such a departure."

Class Certification

Given that Brinker's rest break policy was alleged to violate the law because it did not authorize rest breaks for every major fraction of a four-hour work period, the Court held that class certification should have been affirmed. The Court also instructed the trial court to reconsider its certification of the meal period subclass because it had certified this subclass on the basis of a rolling-five-hour meal period standard which was incorrect. With respect to the "off-the-clock" subclass, finding no common issues, the Court held that the trial court erred in certifying a subclass based on "off-the-clock" work. Crucial to this finding was that Brinker had a policy to pay for all hours worked and there was no evidence of a systematic policy requiring employees to perform off-the-clock work.
Notably, with respect to class certification, Justice Wedegar, in a concurring opinion, emphasized that the question of why a meal period was missed does not render such a claim categorically uncertifiable and remanded to the trial court to determine whether sufficient methods exist to render class treatment manageable.

Best Practices for Employers

The Court's decision in *Brinker* provides much-needed clarification of employers' obligations regarding meal and rest periods. Given the Supreme Court's reliance on Brinker's meal and rest period policies in deciding the class certification issues, *Brinker* is a reminder that it is incumbent upon employers to both draft clear, concise policies and to ensure that these policies are uniformly implemented and applied. It is also important for employers to internally audit the workplace to ensure compliance with policies. Because *Brinker* will not prevent class actions on these issues, employers should develop well-written policies that are properly implemented, which can be an asset in defeating wage and hour class certification.

In auditing or revising their policies, employers should ensure employees are:

- permitted to take an unpaid and uninterrupted 30-minute meal period before the end of the fifth hour of work each day provided they are working more than five hours,
- voluntarily waiving in writing any meal period if they are working no more than six hours
- permitted to take a second unpaid and uninterrupted 30-minute meal period after 10 hours of work each day,
- accurately recording the time they begin and end their meal periods each day,
- reporting any time worked during a meal period due to work requirements, paid for the time worked, and paid a one hour of premium pay for that day *if* the employer did not relinquish control,
- permitted to take 10-minute paid rest periods as follows:
    - Three and a half hours or less = None
    - More than three and a half hours to six hours = One
    - More than six hours to 10 hours = Two
    - More than 10 hours to 14 hours = Three.

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