



The Meal and Rest Break Saga Continues - California Court of Appeal Holds Employers are only Required to Provide Meal & Rest Breaks

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As we previously reported to you, two cases presently before the Supreme Court (*Brinker Restaurant v. S. C.*, review granted Oct. 22, 2008, S166350, and *Brinkley v. Public Storage*, review granted Jan. 14, 2009, S168806) will address whether employers are required to *ensure* that meal and rest periods are taken or only required to *provide* them.

As we wait for the California Supreme Court to decide this issue, in *Hernandez v. Chipotle Mexican Grill, Inc.* (No. B216004) the California Court of Appeal (Second Dist., Div. Eight) affirmed the trial court's denial of plaintiff's motion for class certification holding that:

1. Employers need only **provide** employees with breaks and are not required to ensure that the breaks are taken.
2. Individual issues predominated over common issues because the evidence showed that Chipotle did not have a universal practice with regard to breaks, and since the evidence varied over the degree to which breaks were received, denied or delayed to the extent that the court concluded that in order to prove Chipotle violated break laws, Hernandez would have to present an analysis restaurant-by-restaurant, and perhaps supervisor-by-supervisor.
3. Class treatment was not superior to individual actions because the court concluded that, based on the size of the class, there could be thousands of mini-trials. Complicating the issue was the fact that Chipotle paid for the

break time, so there was no incentive to correct erroneous time records. As a result, a trier of fact will have to ascertain if Chipotle employees actually missed breaks, or simply forgot to record them, as well as the reason why employees might have missed breaks or went back to work before completing them.

Because of the "sensitivity" of the break issue, we can only assume that Hernandez will petition the California Supreme Court for review – which will most likely be granted and held pending a decision in *Brinker*. While employers wait for a final decision on this important issue, we suggest that you review our October 2008 E-Alert addressing best practices for employers pending the California Supreme Court decision.

How Nossaman Can Help

The Nossaman Employment Practice Group assists private and public employers with addressing their wage and hour issues, including defending matters brought by individual and class action plaintiffs and enforcement agencies, as well as conducting audits, investigations, and training.

We will continue to monitor and update you with any new information on this subject. For more information, or if you have any questions regarding employment related issues, please contact us at employment@nossaman.com.