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Labor and Employment Client Service Group

To: Our Clients and Friends April 13, 2012

California Supreme Court Provides Guidance On Meal And Break Requirements

On April 12, 2012, the California Supreme Court, in *Brinker v. Superior Court*, delivered long awaited guidance on California meal and rest break requirements for non-exempt employees. Anyone with employees in California should promptly consider the implications of this decision on their break policies and practices and make all changes necessary to comply with the court's interpretation of the break requirements. The decision also clarified what it describes as uncertainties with respect to handling of wage and hour class certifications.

What's This All About?

The court's decision provides guidance on several hotly contested topics, but also leaves open a number of issues that will undoubtedly be the subject of continued litigation for years to come. The California Labor Code and Industrial Welfare Commission's Wage Orders ("wage orders") obligate employers to afford their non-exempt employees with meal and rest periods during the work day. At the heart of the dispute in *Brinker* were differing interpretations of the scope and timing of the requirements for meal and rest periods. The court broke down its findings with respect to the California rules for meal periods, rest periods, and off-the-clock work as follows:

Meal Periods

The Scope of Employer's Duty to Provide Meal Periods Does Not Require Ensuring Meal Periods Are Taken

At first blush, the California Supreme Court's analysis of meal period requirements seems largely favorable for employers, after all the court rejected the contention that employers have an affirmative obligation to "ensure" that the employees do not work during the meal period. It does not, however, fully embrace the employer's argument that its obligation is only to make meal periods "available," with no responsibility for whether they are taken. Instead, the court found that the employer's obligation to provide an "off-duty" meal period is satisfied if:

1. it relieves its employees of all duty;

2. relinquishes control over their activities;

3. permits them a reasonable opportunity to take an uninterrupted 30-minute break; and

4. does not impede or discourage them from doing so.

The court recognized that what would be sufficient to meet the above standards would likely vary from "industry to industry" and declined to delineate the full range of approaches that might be sufficient to satisfy the law. This is welcome relief for employers from the one-size-fits-all approach advocated by the plaintiffs' bar.

While the court stated an employer is not obligated to police breaks and ensure that no work is performed, the court did caution that "employers may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks" and that governing law does not "countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks."

The court also clarified the employer's obligation to pay the hour of premium pay for work performed during meal periods. The obligation is not triggered simply because the employer knew or should have known that an employee was working during an authorized meal period. Thus, employees cannot generate liability for meal period premiums simply by choosing to work during meal periods, though employers are still obligated to count the meal period as hours worked and pay employees for the time if they have knowledge that the work occurred. The premium pay obligation is only triggered if the employer fails to comply with the four requirements referenced above.

There Is No "Rolling" Five-Hour Meal Period Requirement

The plaintiff challenged Brinker's practice of early lunching, in which employees were required to take meal periods early in their shift so that they could be available to serve customers during peak periods of demand. The plaintiff contended that the requirement that employers provide a meal period no later than the end of the employees' fifth hour of work means that employees must not be allowed to work more than five hours without a meal period. He contended that the duty to provide a meal period should be measured using a rolling five-hour time period such that if an employee took a meal period two hours into an eight-hour shift, the employee should be provided a second meal period during that shift even though it did not exceed ten hours.

The court rejected the plaintiff's arguments for a rolling five-hour requirement. Rather, the court confirmed that, absent a valid waiver, the first meal period must be provided no later than the end of the employee's fifth hour of work, and the second meal period must be provided no later than the end of the employee's tenth hour of work.

Rest Breaks

The Meaning of a "Major Fraction" of a Four-Hour Period

The wage orders provide that employers must authorize and permit employees to take rest periods in the amount of 10 minutes net rest time per four hours worked "or major fraction thereof." The wage orders also provide that a rest period need not be authorized for employees whose total daily work time is less than three and one-half hours. The parties disputed the meaning of the phrase "major fraction thereof."

The court held, "Though not defined in the wage order, a 'major fraction' long has been understood—legally, mathematically, and linguistically—to mean a fraction greater than one-half." The court further explained that the rest time that must be permitted is determined by dividing the number of hours worked by four, and rounding down if the fractional part is less than or equal two hours, and up if it is more than two hours. Thus, employees are entitled to rest periods as follows:

- one ten-minute rest period on shifts from three and one-half to six hours in length;
- two ten-minute rest periods on shifts more than six hours up to 10 hours in length; and
- three ten-minute rest periods on shifts more than 10 hours up to 14 hours; and so on.

Timing of Rest Periods

The plaintiff contended that employers have a legal duty to permit employees to take a rest period before any meal period. The court disagreed, finding nothing in the wage orders that speaks to the sequence of meal and rest breaks. Rather, the only constraint on the timing of rest breaks is that they must fall in the middle of work periods "insofar as practicable." The court stated, "Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible." The court added that it was expressing no opinion on "what considerations might be legally sufficient to justify such a departure."

The court acknowledged that California's Division of Labor Standards Enforcement has expressed the view that in a typical eight-hour shift, both rest periods should not occur before the meal period. But the court pointed out that this view does not universally extend to short shifts and long shifts. For example, there is no requirement that employees working a six-hour shift receive their rest period before their meal period.

Off-the-Clock Work

The plaintiff's off-the-clock claims were derivative of his meal period claims. He contended that because he worked during his meal periods he should have been paid for that time. But the court found that he had failed to demonstrate that Brinker had a common policy of failing to pay for all hours worked. In fact, Brinker had a written policy prohibiting employees from working before they clocked in and from working off-the-clock. Brinker also required employees to notify their managers immediately if they believed their time records were not accurate. Plaintiff produced no evidence of a

systematic policy or practice inconsistent with Brinker's written policies, such as pressuring employees to work off-the-clock.

The court further found that the fact that employees were clocked out for meal periods created a presumption that they were doing no work. The plaintiff and the putative class members had the burden to rebut this presumption. The plaintiff's anecdotal evidence consisting of a handful of individuals who claimed to have worked off-the-clock failed to meet this burden.

The wage orders expressly require employers to record the time that meal periods are taken unless all operations cease. By creating a rebuttable presumption that employees are not working when clocked out, the *Brinker* opinion provides a clear advantage to employers who comply with this requirement in defending against off-the-clock claims. In the concurring opinion, Justice Werdegar stressed that employers who do not comply with this requirement are subject to a rebuttable presumption that employees were not relieved of all duty and that no meal period was provided. The concurring opinion further stressed that employers who do not record meal periods and who contend employees have waived them have the burden of pleading and proving that employees did in fact waive their meal periods.

Class Certification

The court affirmed the trial court's certification of a rest period subclass because class-wide liability could be established based on Brinker's uniform written policy that failed to give full effect to the "major fraction" language in the wage order. It remanded the class certification ruling on the meal period subclass solely because the class definition improperly included the plaintiff's rolling five-hour time period theory and thus embraced employees who had no claim against Brinker in light of the court's rejection of the plaintiff's theory. It affirmed the denial of class certification on the off-the-clock work subclass, because the plaintiff failed to produce substantial evidence of a uniform, companywide policy or practice of requiring employees to work unpaid time.

The court's rulings with respect to class certification issues likely will not provide employers with much-needed relief from meal and rest period litigation. Rather, it will likely cause the plaintiffs' bar to more carefully craft their theories of recovery when seeking certification. In a concurring opinion, Justice Werdegar provided the plaintiffs' bar with some guidance for doing so, suggesting representative testimony, surveys and statistical analysis as available tools.

What Should Employers Do?

In light of this decision providing guidance for California meal period and rest break practices, employers must more than ever:

- Make sure written rest and meal period policies contain a full and complete statement of California law, including stating when second meal periods are provided and when second and third rest periods are authorized and permitted.
- Provide a first meal period that begins no later than the end of five hours of work. When required, provide a second meal period that begins no later than the end of 10 hours of work.

- Provide employees with uninterrupted meal periods for a minimum of 30 minutes during which time they are relieved of all duty.
- Consider providing meal periods longer than 30 minutes to make sure they are at least 30 minutes.
- Encourage employees to take meal and rest periods away from their desks or work areas to reduce the potential for interruptions.
- Make a good faith effort to authorize and permit rest periods in the middle of each four-hour work period, unless practical considerations render doing so infeasible.
- Do not discourage employees with duty-free meal periods from leaving the premises.
- For employees who work in the field or without direct supervision and control, make sure their work circumstances provide a realistic opportunity to take duty-free rest and meal periods.
- Provide employees with a means of reporting circumstances that prevent them from being relieved of all duty.
- Avoid auto-deduct policies for meal periods. Maintain accurate and complete records of the beginning and ending times of employee meal periods, even for employees who work in the field or do not have access to time clocks.
- If auto-deduct policies cannot be avoided, provide a means for employees to report that they worked during their meal period so that they can be paid for all hours worked.
- Review or establish clear procedures for employees to timely report missed meal or rest periods.
- Modify payroll practices to ensure that employees are promptly paid for meal or rest period non-compliance in a manner similar to the way overtime is reported and paid each pay period.
- Update timekeeping policies in employee handbooks to clearly prohibit off-the-clock work. Provide a means for employees to report circumstances in which they have felt compelled to work off-the-clock.
- Train managers and supervisors regarding strict compliance with the meal and rest period requirements, including not interrupting employee breaks. Discipline managers and supervisors who pressure, discourage, or impede employees from taking breaks.
- Enforce timekeeping requirements and discipline employees for failure to report meal breaks and require supervisory authorization to not take proper meal breaks.

Bryan Cave LLP has substantial experience advising employers regarding compliance with California wage and hour law.

Please contact any member of Bryan Cave's Labor and Employment Client Service Group with any questions or if you need assistance.