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Is *Immoos* A Bigger Win For Employers Than *Brinker*?

By Jimmie Johnson (Irvine)

On April 12th, 2012, the California Supreme Court issued its long-awaited decision in *Brinker Restaurant Corp. v. Superior Court*. The decision finally determined that employers do not need to ensure that their employees take advantage of legally-mandated meal and rest periods. Employers need only provide employees the opportunity to do so. An employer is not liable for a missed meal or rest period if such a break is provided but the employee voluntarily chooses not to take one – or voluntarily chooses to work during the break or end the break early. We reported on the decision in a Legal Alert, which you can access at www.laborlawyers.com.

Brinker will make it much more difficult for employees to prevail in meal and rest period cases. However, the motivation for attorneys to sue has remained, largely because of the lure of attorneys' fees. At the time of the *Brinker* decision, it was widely believed that employees were entitled to an award of attorneys' fees if they prevailed on a meal or rest period claim. So, despite the *Brinker* decision, plaintiffs' attorneys still had an incentive to bring unlikely meal and rest period claims because the mere threat of a potential attorneys' fees award would still bring employers to the settlement negotiation table. Far be it from a plaintiff's attorney not to take advantage of the extortive effect of the Damoclean-attorneys'-fee sword hanging above an employer's head for what would otherwise be an entirely frivolous claim.

And then came *Kirby v. Immoos Fire Protect., Inc.*.

How The Landscape Has Changed

On April 30th, 2012 – a little more than two weeks after *Brinker* – the California Supreme court issued its decision in *Immoos*, determining that employees were not entitled to attorneys' fees when prevailing on a meal or rest period claim.

In *Immoos*, the employer prevailed on a claim for missed rest periods. As part of the claim, the employees had sought an additional hour of pay for each alleged missed rest period as provided by section 226.7 of the state Labor Code. In a previous case (*Murphy v. Kenneth Cole Productions, Inc.*,) the California Supreme Court had determined that the additional hour of pay for a missed rest period was a "wage."

In turn, Labor Code section 218.5 provides that a prevailing party (either a plaintiff or defendant) had the right to attorneys' fees for any claim "brought for the nonpayment of wages." Accordingly, having prevailed on the rest-period claim for which the plaintiffs had sought the missed-rest-period wage, the employer in *Immoos* sought an award of attorneys' fees.

Prior to the *Immoos* decision, several prevailing employees in other cases had sought and received from lower courts awards of attorneys' fees on meal and rest period claims. The courts in those cases had awarded the attorneys' fees pursuant to Labor Code sections 218.5 and 1194. But where Section 218.5 provides reimbursement to both prevailing plaintiffs and defendants for their attorneys' fees incurred on any wage claim, Section 1194 only provides reimbursement to *prevailing plaintiffs* for their attorneys' fees on the narrow categories of minimum wage and overtime wage claims. In an earlier case (*Earley v. Superior Court)*, the California District Court of Appeal determined that Section 1194 trumped Section 218.5 in minimum wage and overtime wage claims – and that only prevailing plaintiffs, not prevailing employers, were entitled to an award of attorneys' fees in such matters. As a result, the employees in *Immoos* argued that the additional hour of wages provided in a rest-period case was a type of minimum wage, that Section 1194 therefore controlled the matter, and that the employer was not entitled to attorneys' fees.

If No One Gets Attorneys' Fees, Employers Win

The *Immoos* decision first rejected the plaintiffs' contention that the one-hour wage provided by the Labor Code for rest-period violations was a minimum wage or overtime wage subject to Labor Code section 1194. The Court determined that the term "minimum wage" referred to minimum wage rates set by statute or regulation – not additional wages required by law when an employer acts unlawfully.

The Court further determined that the term "overtime" referred to the premium wage rate set by statute or regulation when an employee works in excess of a certain number of prescribed hours set by law. The Court then also found that a claim for a missed meal or rest period is not one "brought for" the nonpayment of wages subject to Section 218.5, but rather one made "on account of" the nonpayment of wages which provides no statutory right for attorneys' fees.

To sum it up, the California Supreme Court decided that neither a prevailing plaintiff nor a prevailing employer is entitled to attorneys' fees in meal and rest period claims. In turn, now, plaintiffs' attorneys have far less incentive to file meal and rest period claims because 1) *Brinker* makes such claims far less likely to succeed; and 2) *Immoos* removes or limits the foreboding attorneys' fee impetus for settlement.

Indeed, employees will also face potential obstacles in attempting to seek reimbursement for their attorneys' fees on other causes of action alleging meal and rest-period claims as predicate violations. Under the Business and Professions Code, there is no provision for attorneys' fees to a prevailing party. Under the Private Attorneys General Act (PAGA), there is a one-year statute of limitations, exhaustion requirements, and judicial discretion to curtail relief under the statute if the result would be "unjust, arbitrary, and oppressive, or confiscatory." These limitations, read together, could give judges discretion to significantly limit the amount of "reasonable" attorneys' fees that are subject to reimbursement under the statute.

Undoubtedly, meal and rest period claims will continue to be filed where such claims are strong, or may be included as "throw-away" claims in complaints where other causes of action are the real driving force behind the litigation. However, much like *Brinker*, the *Immoos* decision may serve as yet another severe blow to plaintiffs' attorneys seeking to harvest settlements with marginal meal and rest period claims. Consequently, unless the California legislature enacts new laws or amends existing ones, it may well be that the days of plaintiffs filing frivolous meal and rest period claims and demanding significant settlement amounts for such claims will belong to the history books.

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A Closer Look At The *Brinker* Decision

By John K. Skousen (Irvine)

On April 12, 2012, the California Supreme Court decided *Brinker Restaurant Corporation v. Superior Court (Hohnbaum),* pending since 2008. We reported on the decision in a Legal Alert, and in an extended webinar, which you can access at www.laborlawyers.com. Because it's such a significant decision, more remains to be said.

Much-Needed Clarification

California recognizes two kinds of meal periods: off-duty and on-duty. An on-duty meal period is permitted only when the nature of the work prevents the employee from being relieved of all duty, the employee is paid, and there is a written agreement with a right to revoke the agreement. Unless there is a valid on-duty meal period agreement, an employer is required to affirmatively relieve employees of duty during a meal period of at least 30 uninterrupted minutes (e.g., must be permitted to leave premises).

Although the *Brinker* decision did not change many of the compliance standards for meal periods, the rules were clarified in vitally important particulars:

First, the *Brinker* court handed down a clear standard regarding an employer's duty to "provide" a meal period. Specifically, an employer satisfies this obligation if it 1) 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. Of course, the devil is in the details.

Second, during a permitted meal period, "[t]he employer is not obligated to police meal breaks and ensure no work thereafter is performed." In fact, the Court made clear that as long as an employee was relieved of duty and free to do what the employee chooses to do during the meal period, work could continue strictly on the employee's part without the employer committing a violation of the meal-period laws. That being said, many employers may prefer to keep the reins tight. Indeed, some types of industries may require tighter control for administering meal periods due to the nature of the work.

Employers may choose to prohibit work during off-duty meal periods, because 1) they are still required to pay for all work "suffered and permitted" to be done; 2) meal periods that are shortened may not be "bona fide" under the Fair Labor Standards Act, and thus, also would have to be paid working time; and 3) without proper documentation, it may be difficult to defend negative inferences from time records that contain short or late meal periods. Again, the outcomes will be very fact specific.

Third, the Court rejected the "rolling-five" rule which would have required a meal period for every five hours of work, resulting in more than two meal periods per day when employees work more than two five-hour segments in a work day (compare rest periods, where a 10-minute rest period is due for each and every 4 hours of work or major fraction thereof).

The Court explained when meal periods should be permitted to commence throughout the work day. Specifically, the first meal period must be permitted to commence no later than after five hours of work or the start of the sixth hour of work (5.0 hours on the clock). The second meal period must be permitted to commence no later than after ten hours of work or the start of the eleventh hour of work (10.0 hours on the clock).

Reading together this strict timing requirement with the more relaxed definition of what it means to "provide" a meal period, potential pitfalls exist. Employers are not automatically liable when employees unilaterally take a late meal period otherwise provided timely, but be very cautious in scheduling meal periods in a manner that pushes, or may tend to push, employees involuntarily into commencing meal periods after the deadlines.

As long as you understand what Brinker's ruling regarding meal-period compliance means, you should be able to maneuver around the potential landmines that remain and develop an interactive policy with permissible flexibility that fully complies with the law.

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