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California Employers Get a Break on Meal and Rest Claims But Still Face Class Action Filings

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In a highly anticipated decision, on April 12 the California Supreme Court in Brinker Restaurant Corp. v. Superior Court *held that employers are not obligated to ensure that nonexempt employees take their meal breaks. However, the court's guidance on the timing of breaks will come as a surprise to many employers, and the court also left the door open for more class action lawsuits.*

The court in *Brinker*, in a unanimous opinion, held that California employers are required to relieve their nonexempt employees of all duty and give them an opportunity to take a meal break every five hours, but they are not required to "police" their employees' breaks or to ensure that no work is performed. The court did not delineate what will constitute sufficient "relief of all duty," commenting that it will vary from industry to industry. Nonetheless, it did hold that employers are not liable for premium pay if their nonexempt employees choose to work through their breaks.

The *Brinker* Court also addressed the timing of 30-minute meal breaks. It held that nonexempt employees are only entitled to a first meal period prior to the end of their fifth hour of work and a second meal period before the end of their tenth hour of work. It denied liability for an alleged "early-lunching" policy, i.e., a single meal period soon after beginning a shift followed by six or more hours worked without an additional meal period. In so doing it declined to adopt a "rolling five" rule which would have required employers to provide an additional meal break any time a nonexempt employee had worked five hours since the last meal break.

The court also provided important guidance on the timing of rest breaks. Most California wage orders require a 10-minute rest break for nonexempt employees for every four hours worked, or "major fraction thereof." *Brinker* acknowledged that the wage orders specify that no rest break is required if the employee works less than three and one-half hours and further held that the phrase "major fraction thereof" means more than 50% of the four-hour period. Accordingly, following *Brinker*, employees are entitled to one 10-minute rest break for shifts from three and one-half up to six hours in length, two 10-minute rest breaks for shifts of more than six hours but less than 10 hours, and so on. Although this interpretation is contrary to that of the defendant in *Brinker* and will come as a surprise to many employers, it does lay down a bright line rule that all employers will be in a position to implement going forward.

The *Brinker* Court further held that employers do not have a duty to permit their employees a rest period before any meal period. Rest periods must fall in the middle of work periods "insofar as practicable," but employers are not required to provide them at a particular time.

Finally, the court affirmed the Court of Appeal's decertification of a subclass alleging that the Brinker Corporation required employees to work off-the-clock during meal periods and altered employee time records to misreport the amount of time worked and break time taken. The court held that neither a common policy nor a common method of proof was apparent. Anecdotal evidence of a handful of individual instances in which employees worked off-the-clock, with or without their supervisor's knowledge, was insufficient to support a class-wide claim.

What This Decision Means for Employers

- Employers should ensure that their meal and rest break policies and practices comply with all applicable laws, including *Brinker*. Written policies should include clear language stating the number of hours that need to be worked to trigger the right to breaks consistent with *Brinker*. Breaks generally should be required and if, for a unique reason, an employee wants to skip their break and work through it instead, they should be required to obtain permission to do so.
- Because employers are obligated to relieve employees "of all duty" and give them an opportunity to take a break, employers should avoid practices that have the effect of pressuring employees to skip breaks. Work loads, scheduling and communications regarding breaks should consistently encourage break-taking as a company policy.
- Policies should also include a strong statement that it is against company policy to interfere with breaks, institute specific channels for reporting interference with breaks and contain anti-retaliation language to protect employees who report interference.
- Employers should provide training on policies and procedures regarding breaks.

Merits Need Not Be Addressed at Class Certification

Although the *Brinker* Court handed employers some significant victories, it also provided plaintiffs and their attorneys with some potential good news regarding class certification. The court explained that class treatment is appropriate where uniform employment policies have been consistently applied to a group of employees. The plaintiff had sought to certify several sub-classes of individual employees allegedly affected by Brinker's meal and rest break policies. Brinker had opposed class certification, claiming that it permitted its employees to take breaks. Beyond that, it argued that individual issues, such as whether employees chose to take their breaks, predominated and class treatment was thus inappropriate.

The trial court granted class certification. The Court of Appeal reversed the trial court, holding that it was error to certify three sub-classes without addressing the merits of the plaintiff's claims. Ultimately, the *Brinker* Court disagreed with the Court of Appeal holding that trial courts are not always required to resolve disputes over the legal elements of a claim prior to class certification. The court acknowledged and agreed with the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), in which the Court held that analyzing the propriety of class certification frequently will overlap with the merits of a plaintiff's claim, but went on to hold that "a court generally should eschew resolution of such issues unless necessary." Thus, under *Brinker*, certification may be appropriate even if disputed threshold legal and factual questions exist, as long as common issues predominate.

The author of the unanimous majority opinion also took the unusual step of writing a concurring opinion to state that rest and meal period claims are *not* "categorically" uncertifiable just because an employer asserts an affirmative defense that employees waived their opportunity to have a work-free break. Individual issues arising from the defense pose no per se bar to certification.

Accordingly, in the wake of *Brinker*, plaintiffs likely will argue that the trial court need not resolve the more difficult merits issues but should instead use the existence of these legal issues as a basis for certification and then decide these issues only after a class is certified. This result means that employers and other defendants could be forced to expend more resources to defend against class actions that ultimately will fail on the merits and that there will continue to be a strong financial incentive for plaintiffs' attorneys to pursue these claims.

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