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ACT NOW ADVISORY

California Employers Must Be Prepared to Implement New Meal and Rest Break Practices on Short Notice

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By Michael S. Kun

Some were beginning to wonder whether it would ever happen. After more than two years, the California Supreme Court has announced a hearing date in the much-awaited *Brinker Restaurant Corp. v. Superior Court* case – November 8, 2011.

Unless the Supreme Court takes a detour, California employers should finally know the answer to a question that has long driven California's billion dollar wage and hour class action industry: Must an employer "ensure" that employees take meal and rest periods, or is it only required to make them "available" to employees?

If the Supreme Court rules that employers need only make them "available," wage and hour class actions will not grind to a halt. Plaintiffs' counsel will merely change their allegations to assert that meal and rest breaks were not made "available." But most employers should have valid defenses to such claims, and, perhaps just as importantly, they will not need to revise the way they operate.

However, if the Supreme Court rules that employers must "ensure" that meal and rest breaks are taken, virtually every employer that does business in California will be vulnerable to wage and hour actions reaching back *four years*.

What California Employers Should Do Now

Although it is tempting to do so, employers should not sit back and merely wait for the *Brinker* ruling. Instead, employers should:

- Draft policies and practices requiring employees to take their meal and rest periods; and

- Be prepared to implement new policies and practices *the very next day after the* Brinker *decision is announced in case the Supreme Court holds that breaks must be "ensured*."

With any luck, those policies and practices may never be needed. However, having those new policies and practices drawn up and ready to implement on short notice could help stave off future claims, damages, and penalties.

For more information about this Advisory or for additional guidance on drafting appropriate policies and practices, please contact:

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