A Timely Analysis of Legal Developments

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The California Supreme Court has granted review in *Brinker Restaurants v. Superior Court.* California employers now await a definitive answer to the question: Are employers responsible for ensuring that employees take their required meal breaks or is it sufficient for employers to provide the opportunity for breaks?

California Supreme Court Grants Review to Brinker - Employers Await Answer on Meal Period Obligations

By AnnaMary E. Gannon

In a previous ASAP, "*A Ray of Hope: California Court of Appeal Decides Compliance with Meal Period Obligation Requires an Opportunity, Not a Guarantee*," July 2008, employers were cautioned that the court of appeal's decision was not likely to be the last word on the subject. As anticipated, on October 22, 2008, the California Supreme Court granted review in *Brinker Restaurants v. Superior Court (Hohnbaum)*.[1] As a result, the Court of Appeal decision is now "depublished" and cannot be cited or relied upon as precedent.

On October 28, 2008, a California Court of Appeal in *Brinkley v. Public Storage, Inc*. (No. B200513) held that California meal period laws "do not obligate employees to take meal periods or employers to ensure that meal periods are taken." This is now the only published California Court of Appeal decision holding that employers only have to provide the opportunity for meal period breaks and are not responsible for ensuring that employees actually take their required meal breaks. A number of California federal courts have arrived at this same conclusion.[2] But the court in *Brinkley* went beyond *Brinker Restaurants* and held that the meal break need not necessarily be during the first five hours of the shift.

The Division of Labor Standards Enforcement

When the court of appeal decision in *Brinker* was announced, the California Labor Commissioner issued a directive to her enforcement staff (the Division of Labor Standards Enforcement (DLSE)) to apply *Brinker* to all claims for missed meal and breaks. On October 23, 2008, the Labor Commissioner officially withdrew that July 22, 2008 enforcement memorandum, but went to some effort to argue in essence that the court of appeal's conclusion in *Brinker* was based on sound reasoning. The Labor Commission stated that until the California Supreme Court decides Brinker, the enforcement staff should rely on the language of the statute and wage orders, and available case law including "recent, persuasive federal court opinions," which taken

together demonstrate there is "compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken."

While indicating that the DLSE in pending or future matters should apply a standard that states must "provide" employees with a duty free meal period, but are not affirmatively obligated to "ensure" employees actually take such meal periods, the Labor Commissioner also emphasized the following points:

- An employer does not satisfy its obligations under the Labor Code and applicable wage orders if its policies or practices prevent or discourage employees from taking their meal periods.
- An employer's obligation to provide employees with an adequate meal period is not satisfied merely by assuming that meal periods were taken. At the same time, the Labor Commissioner noted that policies that encourage employees to take their meal breaks by disciplining and terminating employees who choose not to take their full 30-minute meal periods result "in harm to workers."
- The first meal period provided by an employer must commence prior to the end of the fifth hour of work, unless otherwise expressly permitted by the applicable wage order.
- An employer must provide a second meal period for any employee employed for a work period of more than ten hours per day, except that if the total hours worked are no more than 12 hours, the second meal period may be waived by mutual consent of the employer and employee only if the first meal period was not waived.
- Except for the second meal period for employees who work more than ten hours, there is no obligation to provide additional meal periods during the course of the workday, including instances when employees work for a period of more than five hours between meal periods (the so-called "rolling five hour rule") and the Division of Labor Standards Enforcement will not interpret the meal period provisions to require a meal period every five hours.
- Employers have a duty to record their employees' meal periods. The only exception is for meal periods during which operations cease.
- No employer shall require any employee to work during any meal period mandated by an applicable order of the Industrial Welfare Commission. If an employer fails to provide a required meal period, the employer shall pay the employee one additional hour of pay at the employee's regular rate of pay for each work day that the meal period was not provided.

What's an Employer to Do?

Until the Supreme Court speaks, employers can take some comfort that the Labor Commissioner will apply a "provide" rather than "ensure" standard, which should lead to the denial of claims for missed meal periods when the employer can show it has policies and procedures in place for the provision of meal periods and that it does not prevent or discourage employees from taking those breaks. As part of an employer's policies and procedures, supervisors and coworkers should be trained that an employee is entitled to an uninterrupted 30-minute meal break and should not be pressed into service, or interrupted with work-related questions, during the meal period.

Employers are also well-advised to review all time records to verify that an employee took his or her 30-minute meal break(s). If no break was taken, the employer needs to determine the reason it was not taken. If this was a matter of choice, a prudent employer will maintain a written record to that effect, acknowledged by the employee. If the press of business prevented the employee from taking a meal break, the employee should be paid the extra hour of compensation.

There is less guidance for employers who prefer to schedule meal periods at or near the beginning of a shift, rather than at the mid-point. Although the Labor Commissioner is clear that, until there is legal authority to the contrary, there is no "rolling five hour rule," she did not address the question of when during a shift a meal must be scheduled.

It is difficult to predict with any certainty when the Supreme Court will issue an opinion in *Brinker*. As at the court of appeal level, a large number of "friends of the court," on both sides of the argument, will seek permission to file *amicus* briefs. After that, the court will schedule the case for oral argument and then take it under submission. Although the court has no deadline for issuing its opinion, as a very general rule-of-thumb, employers should not expect a decision until well into 2009, or, more likely, 2010.

As stated in the earlier ASAP, even if the California Supreme Court adopts the "provide the opportunity" standard for meal periods, meal period class action litigation in California will not end. Employees and the plaintiffs' bar can be expected to allege that while the employer had policies and procedures for meal breaks, in fact, the employees were prevented or discouraged from taking their breaks because no one was assigned to relieve them, supervisors pressed them back into service before they had the opportunity to take a full 30-minute break, or they were interrupted by colleagues with work-related issues.

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[1] 165 Cal. App. 4th 25 (2008).

[2] *Brown v. Federal Express Corp*., 249 F.R.D. 580, 585 (C.D. Cal. 2008); *Kimoto v. McDonald's Corp*., 2008 WL 409611 (C.D. Cal. Aug. 28, 2008); *Gabriella v. Wells Fargo Fin., Inc*., 2008 WL 3200190 (N.D. Cal. Aug. 4, 2008); *Perez v. Safety-Kleen Sys., Inc*., 2008 WL 2949268 (N.D. Cal. July 28, 2008); *Salazar v. Avis Budget Group*, 251 F.R.D. 529 (C.D. Cal. July 2, 2008); *Kenny v. Supercuts*, 2008 WL 2265194 (N.D. Cal. June 2, 2008); *White v. Starbucks*, 497 F. Supp. 2d 1080 (N.D. Cal. 2007).