

# ORANGE COUNTY BUSINESS JOURNAL

## HUMAN RESOURCES GUIDE

### Let's Do Lunch: The Effect of the "Brinker" Decision on Meal And Rest Periods in California

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**O**n July 22, 2008, California employers finally got the "free lunch" they deserved when the Court of Appeal issued its decision in *Brinker Restaurant Corp. v. Superior Court*. However, employers are cautioned to wait to see if the decision in Brinker is upheld by the California Supreme Court before modifying their meal and rest period policies.

#### The landmark Brinker decision

As we all know by now, California employers have been inundated with an avalanche of "bet the company" wage and hour class actions over the last several years. Most of these class actions include claims for alleged meal and rest period violations, where the potential liability is often in the millions of dollars.

Like many other employers, Brinker Restaurant Corp. was hit with a class action that contained claims for alleged meal and rest period violations. Fortunately, on appeal, the Court rejected class certification of these claims. Brinker held that employers are not obligated to ensure that employees actually take meal and rest periods, and therefore employers cannot be held liable for alleged meal and rest period violations unless employees are forced to forgo these periods.

We are particularly proud to note that the Court cited with approval the amicus brief filed by our law firm in support of Brinker's position on this key issue.

#### What does the word "provide" really mean?

Of primary importance was the Court's analysis of what it means to "provide" employees with uninterrupted 30-minute meal periods, as required by Labor Code Section 512. The Court held that while employers cannot impede, discourage or dissuade employees from taking meal periods, they need not ensure that these periods are actually taken. Rather, the obligation to provide employees with meal periods means only that employers must make these periods available to employees.

The Court agreed that requiring employers to ensure that meal periods are taken would allow employees to manipulate the process because they could earn additional premium pay simply by skipping meal periods that they were authorized to take. The Court also noted that for most employers, making sure that all employees take meal periods each day would be an impossible task. Employers should not be forced to police their employees and force them to take meal periods.

#### So when do I get my lunch break?

The Court also clarified the ongoing debates over when the meal period is due and how many are meal periods are due. Fortunately, Brinker rejected the "rolling five" theory regarding the timing of the meal periods. The "rolling five" theory previously supported the position that employers were required to provide employees with a second meal period if they were going to work more than five hours after the end of a meal period taken earlier in the day. This theory rejected the practice of "early lunching" where employees were required to take their meal periods soon after they arrived for their shifts, after which they would work up to nine hours without an additional meal period. In finding that this early lunching practice was permissible, Brinker noted

that Labor Code Section 512 establishes an obligation only to provide an employee with a meal period if he or she works more than five hours per day, but does not specify when that meal period must be taken. Thus, the early lunching practice could not be used to demonstrate a violation of California's meal period requirements.

Brinker makes clear that employers are not required to provide employees with meal periods within their first five hours of work. Instead, it is sufficient that each employee is provided with a meal period sometime during his or her shift. Employers must provide a second meal period to employees only when they work in excess of 10 hours on a shift.

#### What about my ten-minute break?

The Court ruled similarly with respect to rest periods, finding that employers cannot be held liable on such claims unless they impede, discourage or dissuade employees from taking these rest periods. As with meal periods, employers are not obligated to ensure that employees actually take rest periods.

Brinker further held that these rest periods need not be provided in the middle of each work period if to do so would be impractical. As long as employers make rest periods available to employees, and strive, where practicable, to schedule them in the middle of the first four-hour work period, employers are in compliance with California law.

#### How does this decision affect wage & hour class actions in general?

As a result of this holding, it should be substantially more difficult for employees to obtain class certification on meal and rest period claims. This ruling indicates that, absent a class-wide policy prohibiting meal and rest breaks, or evidence that an employer impeded or discouraged employees from taking breaks, class certification will likely not be appropriate.

Of particular significance, the Court held that an employer's time records alone cannot be used to justify class certification because such records show only whether or not a meal period was taken, and cannot show why an employee did not take a meal break.

[Brinker also discussed problems with "off the clock" class action claims which are not the subject of this article.]

#### So now what do we do?

The Brinker decision represented a welcome relief to California employers, since the Court finally seemed to take into consideration how businesses are actually run on a day to day basis in the real world. It is a huge leap in the right direction for a more reasonable interpretation of the law in this area.

However, employers should not rejoice just yet, as it is almost certain that the California Supreme Court will weigh in on this critical decision. Therefore, employers are recommended to take a conservative approach and wait until the final word on this issue from the California Supreme Court before making significant changes to their meal and rest period policies.

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