

Providing A Seat And Time To Eat To Calif. Employees

Law360, New York (November 04, 2011, 12:41 PM ET) -- On Nov. 8, 2011, the California Supreme Court will hear oral argument in *Brinker Restaurant Corp. v. Superior Court*. The court's long-anticipated decision is expected to clarify the statutory language and regulations regarding the extent of an employer's obligation to provide meal periods and rest breaks to non-exempt employees under the California Labor Code and the associated wage orders.

These same wage orders issued by the Industrial Welfare Commission contain a variety of different provisions governing wages, hours and working conditions of California employees. The provision, known as the "suitable seating" rule, which is contained in most of the IWC wage orders, has become one of the newest trending areas of class action lawsuits in California.

As such, the Supreme Court's determination of what "provide" means in *Brinker* — as applied in the meal period and rest break context — likely will impact the interpretation and application of the term "provide" in other provisions of the wage orders, especially with regard to the suitable seating rule. The suitable seating cases gained notoriety through the California Court of Appeal's decision in *Bright v. 99 Cents Only Stores*.

In *Bright*, the Court of Appeal held that aggrieved employees potentially could recover Private Attorney General Act civil penalties for violations of a wage order pursuant to Labor Code section 1198, based on the alleged failure of the company to provide suitable seats to its employees. A subsequent Court of Appeal decision, *Home Depot USA Inc. v. Superior Court*, reached the same conclusion.

Prior to *Bright* and *Home Depot*, the suitable seating provision of the wage orders had been a quiet area of litigation, largely due to the absence of penalties recoverable for alleged violations. But thanks to the passage in 2004 of PAGA, aggrieved employees now are able to file representative actions to enforce various provisions of the Labor Code that previously had not provided for the recovery of monetary penalties by private litigants.

As a result, PAGA has created a potentially lucrative area of recovery for plaintiffs and their counsel and, thus, has become a highly litigated hot-topic area of California law.

Although the employees in *Bright* and *Home Depot* alleged violations of the suitable seating rule, neither decision provided guidance as to what the requisite standard actually is.

Because there is no binding authority interpreting the seating provision of the wage orders, employers largely have been left to wonder what California courts will find is proper compliance with the wage orders' various directives in the seating provision. Questions, thus, arise as to the phrases "shall be provided with suitable seats," "when the nature of the work reasonably permits the use of seats," "nature of the work requires standing," "suitable seats shall be placed in reasonable proximity to the work area," and "interfere with the performance of their duties."

In particular, employers have struggled with what it means to provide suitable seats and necessarily have looked to what the word "provide" means elsewhere in the wage orders, especially in the context of meal periods and rest breaks.

The Court of Appeal issued its decision in *Brinker* in 2007. Among the notable holdings in that decision was the court's finding that employers are not automatically liable for Labor Code violations simply because a meal period or rest break was missed by an employee. The court, instead, concluded that the Labor Code requires employers to provide meal periods and rest breaks by making them available, but they need not ensure that such breaks are taken.

Since that time, numerous state and federal courts in California have weighed in on what the term "provide" means in that context. Now, after waiting almost three years since the Supreme Court granted the petition for review in *Brinker*, the time draws nigh for the court's ruling.

The sphere of influence of the Supreme Court's upcoming decision in *Brinker* will undoubtedly extend beyond meal period and rest break cases, potentially directing the future course of suitable seating litigation.

Should the Supreme Court uphold the appellate court's employer-friendly decision, companies likely will be able to point to a solid definition of what "provide" means in the context of the wage orders to defend themselves from these types of employment claims.

In fact, this argument already has been successfully raised in such a seating case in the federal court matter of *Green v. Bank of America*. In *Green*, the Honorable Manuel Real of the Central District of California found that, by applying common sense and the current view of what it means to "provide" in the context of meal periods and rest breaks, i.e., to make available, an employer cannot fail to provide seats where an employee has not made a request for such a seat. Judge Real's holding dictated that it is an employee's burden to allege and prove that such a seat request was made and improperly denied by the employer.

However, should the Supreme Court reverse the Court of Appeal's decision in *Brinker*, companies operating in California should be prepared for an onslaught of new employment class actions. A loose reading of "provide" by the Supreme Court, and a finding for the employees in *Brinker*, potentially would mean that it is an employer's obligation to ensure that meal and rest breaks actually are taken.

Applying such a broad definition of "provide" to the wage orders' seating provision would no doubt thrust the already-trending seating cases further forward. Employers then will be left to litigate the meaning of the other uncertain areas of the provision, including what is meant by "reasonable proximity," "nature of the work reasonably permits the use of seats," and, conversely, that the "nature of the work requires standing."

Employers will need to be prepared to present solid business justifications for their failure to provide seats to their employees and may struggle through the uncertainty of the meaning of these other phrases in the absence of binding authority that clarifies these various points.

Although an employer-friendly decision in Brinker may provide a simple retort for employers in cases where employees have not actually requested seats, an employee-friendly holding could nevertheless open the door to an onslaught of seating litigation, leading to future disputes of what is meant by the unclear meaning of the other phrases in the provision.

With the continued popularity of class action lawsuits in California and across the country, and the migration into formerly quiet areas of employment law, employers have even more reason to follow the Supreme Court's consideration of the issues in Brinker at the Nov. 8 hearing and be cognizant of the greater impact of the Brinker decision.

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