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Meal and Rest Periods: Best Practices in Light of Brinker

By Jennifer Brown Shaw and Carolyn Burnette

The California Court of Appeal recently rendered an opinion in Brinker Restaurant Corp. v. Superior Court (Hohnbaum) which addresses several heavily litigated meal/rest period issues. While employers obviously welcomed the clarification provided by the ruling, lively celebration may be a bit premature. First, the case may find its way to the California Supreme Court. If the Supreme Court grants review as many anticipate, the law pre-Brinker will apply until the high Court rules. Additionally, the Legislature could decide to take a stand on Brinker as part of the continued budget stalemate. In that case, we may end up with compromise legislation and an unanticipated new law. For now, employers should exercise caution. Now is a good time to review meal/rest period best practices and ensure policies comply with the basic requirements of California law. This is critical because as discussed below, even if affirmed by the Supreme Court, Brinker is no help to employers without appropriate policies in place.

Background

Brinker Restaurant Corporation operates over 100 restaurants in California. Adam Hohnbaum represented a putative class of some 59,000 restaurant workers who are “non-exempt” from overtime, minimum wage, and meal period laws (i.e., servers and other non-management personnel). The plaintiffs alleged a number of claims against Brinker, including failure to provide non-exempt employees with mandated 10-minute rest periods for every four hours worked; failure to provide 30-minute meal periods as required by law; and requiring employees to perform work “off the

clock” when they were “punched out” for their meal periods.

Labor Code section 512(a) contains the basic meal period requirement: “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes. . . .” And, “an employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes.” The Industrial Welfare Commission Wage Orders, including section 11 of Wage Order 5-2001 applicable to the restaurant industry, contain a similar requirement.

Rest periods are mandated in section 12 of the Wage Orders: “Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted, as hours worked, for which there shall be no deduction from wages.”

When employers do not comply with the meal or rest period laws, Labor Code section 226.7 (and the applicable Wage Order sections noted above) require employers to pay a premium wage. The premium is due only when employers do not “provide” meal or rest periods.

With respect to “off-the-clock” work, the law requires payment of at least minimum wage for all “hours worked.” The Wage Orders define “hours worked,” in pertinent part, as “the time during which an employee is subject to

the control of an employer, [including] all the time the employee is suffered or permitted to work, whether or not required to do so”

Rest Periods

The plaintiffs in Brinker argued that an employer owes a rest period whenever an employee works more than two hours in each four-hour work period. The court rejected this argument and held instead that the number of required rest periods due is determined based on how many four-hour periods an employee works. So, although rest periods must be “scheduled” in the middle of each four-hour work period to the extent practicable, employees who work fewer than seven and one-half hours are entitled to one rest period, not two. The first rest period is due when an employee works “a major fraction” of the period between three and one-half and four hours.

The court also held that employers need not schedule a rest period to occur before the first meal period. The court confirmed, too, that rest periods need only be offered and employees may decide to forgo them. But employers cannot prevent or impede their employees from taking rest periods without paying the one-hour premium.

Meal Periods

The Brinker court’s most significant ruling on meal periods addressed the requirement in section 226.7 and the Wage Orders that employers “provide” meal periods to employees. The court held that the duty to “provide” does not mean employers are required to ensure employees actually take their meal periods on time for at least 30 minutes, or that employers “force” employees to do so. Employers are only responsible

for allowing employees to take meal periods.

The court also held that a meal period may be scheduled to start at any time before the fifth hour of work ends. After Brinker, there is no such thing as an impermissibly “early” meal period, so employees may come to work and take their meal period right away. Along the same lines, the court held that a second meal period need not occur within five hours of the end of the first meal period. Rather, the second meal period is due only after 10 hours of total work, even if the first meal period occurs very early in the shift. These holdings are contrary to the Division of Labor Standards Enforcement’s prior enforcement position. However, DLSE has issued an internal memorandum pledging to follow the court’s rulings in Brinker.

“Off the Clock” Work

The plaintiffs in Brinker alleged they worked during meal periods, despite having “punched out,” and that managers adjusted their time records to show employees were taking meal periods when they in fact were working. The plaintiffs wanted to be paid for the “off the clock” time. The court confirmed that employers must compensate employees for “off the clock” work, but only when they “knew or should have known” employees were working.

Best Practices

Although the fate of the Brinker decision is not yet known, there are various “best practices” employers should consider.

Employers must ensure their policies comply with applicable wage-hour laws. Brinker had an express policy

prohibiting “off the clock” work, and the plaintiffs did not prove the company had a consistent practice to the contrary. Based on these circumstances, the court refused to permit class certification because each employee would have to individually prove he or she worked “off the clock.” By avoiding class certification, Brinker obviously substantially limited its legal exposure.

This principle is equally applicable to meal/rest period policies. The Brinker court also denied class certification as to the plaintiffs’ meal period claims in part because Brinker’s policies complied with the law. In reaching this decision, the court distinguished the opinion in Cicairos v. Summit Logistics, Inc., in which a different court of appeal upheld certification of a class of truck drivers claiming they were denied meal periods because management allegedly discouraged employees from taking their required meal periods.

Although the court in Brinker ruled that employers need not “force” employees to take their meal/rest periods, the rule should not be treated as an invitation for employers to stop monitoring compliance with California’s meal and rest period requirements. Since the rest/meal period class action frenzy began several years ago, employers have implemented various procedures to ensure employees comply with the rules. Now is not the time to relax those efforts. Until there is a final decision in Brinker, or some Legislative resolution, employers should remain committed to their compliance efforts and take appropriate measures when employees do not comply with policies in this area.

DLSE Developments

Finally, the Brinker decision brought

some immediate clarification to the meal/rest period arena from an administrative perspective. As stated, the DLSE issued a memorandum on July 25, 2008, explaining the agency’s enforcement position after Brinker. The memorandum states that DLSE staff must apply Brinker to all pending matters effective immediately. Thus, although Brinker may cease to be citable in litigation as “good law” if the Supreme Court grants review, unless the DLSE reverses course, employers may rely on the decision’s rationale when faced with agency audits and claims.

This will be particularly helpful when employees or former employees seek relief for meal periods that were allegedly “too late” (*i.e.*, started after the fifth hour of work) or “too short” (*i.e.*, less than 30 minutes). The DLSE’s enforcement position will allow employers to argue that the meal period premium is not due in such circumstances unless the individual was in some way precluded from taking the meal period on time and/or for the full 30 minutes. In the case of former employees, this may eliminate any liability for “waiting time penalties” under Labor Code section 203, which provides for payment of up to 30 days of pay for unpaid “wages,” including the meal period premium, after separation of employment.

Conclusion

While Brinker is obviously a positive development, employers must proceed with caution. Employers with questions about implementing new practices and reducing their potential liability for rest and meal period violations should consult with experienced employment law counsel.

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Jennifer Brown Shaw is a partner at Shaw Valenza LLP. Her practice includes providing regular advice and counsel to private and public sector employers. She also develops and presents seminars on legal issues in the workplace for management and non-supervisory employees.

jshaw@shawvalenza.com



300 Montgomery Street, Suite 788
San Francisco, California 94104
Tel: (415) 983-5960
Fax: (415) 983-5963

520 Capitol Mall, Suite 630
Sacramento, California 95814
Tel: (916) 326-5150
Fax: (916) 497-0708

www.shawvalenza.com