THE DAILY RECORDER

October 23, 2007

Rest Break and Meal Period Claims After Murphy v. Kenneth Cole Productions

by Jennifer Brown Shaw

The California Supreme Court decided earlier this year, in Murphy v. Kenneth Cole Productions, that the one-hour premium employees receive for violation of meal break or rest period laws is a wage and not a penalty. Because the statute of limitations for unpaid wages is three years (or four years under an unfair competition theory), and the statute of limitations for penalties is only one year, Murphy means that multi-million class actions against state-wide employers are potentially three times more lucrative for plaintiffs and their lawyers. As a result, the plaintiffs' bar continues enthusiastically to file class actions alleging violations of the meal and break laws.

Although the Court in Murphy settled the statute of limitations issue, a number of liability issues regarding meal and rest break penalties remained undecided. The Court of Appeal in Brinker v. Superior Court (Hohnbaum), presently an unpublished decision, addressed several important unsettled issues, including whether rest periods must be affirmatively assured or merely "offered," and the timing of lawful meal periods.

Brinker Background

Brinker involved a class action in which the plaintiffs alleged widespread meal and rest break violations by Brinker Restaurant Corporation, a company alleged to operate 137 restaurants in California with an estimated 59,000 employees.

Class actions facilitate claims affecting hundreds or even thousands of potential plaintiffs. But for a court to entertain a class action, the common issues to be decided must "predominate" over individual ones. Common issues may predominate, for example, if the company has a uniformly applied policy that violates the law. Individual issues may predominate when the claims related to how a lawful policy is applied – or when otherwise lawful policies were not followed on an individual basis.

The superior court in Brinker certified the class, finding the common issues predominated over individual matters. The Court of Appeal held the superior court abused its discretion by certifying the class on the ground that the trial court misapplied the substantive law in deciding whether common or individual issues predominated.

Employers Must Merely "Authorize and Permit" Rest Breaks

The Labor Code and the Industrial Welfare Commission (IWC) Wage Orders require that employers "authorize and permit" a rest break "based on the total hours worked daily at the rate of 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 ½) hours." The rest break "insofar as practicable shall be in the middle of each work period" and "shall be counted as hours worked for which there shall be no deduction from wages."

The plaintiffs in Brinker claimed that they were "discouraged" from taking rest breaks, because they had to turn over their tables – and their tips – to other waiters while they were on break. The court said that the law requires rest breaks to be "authorized and permitted," but that does not mean the employer must ensure employees actually take the break. Therefore, the claim that employees were "discouraged" from taking breaks was not amenable to class treatment because whether an employee was discouraged from taking a break would be an individual determination. As a practical matter, it will be difficult to assert a class claim where it is undisputed that company policy "authorizes and permits" a lawful rest period.

Timing of Rest Breaks

The plaintiffs also claimed that company policy violated the law because they did not receive their rest breaks until after they had worked four hours. The court decided this claim also was not amenable to classwide determination. The Labor Code requires the rest break be taken close to the middle of a four-hour work period only if "practicable." "Practicable" is a fact-intensive standard. If Brinker is published and becomes binding authority, it may well be impossible for any class action based on rest period violations to be certified based on allegations that rest periods were provided untimely.

Because the Brinker decision only considered whether a class action was an appropriate procedure, employees with claims that they were denied rest breaks, or not allowed to take their rest break in the middle of their shift even when it was practicable, still may bring individual claims. The Court of Appeal simply ruled that individual factual issues will predominate over class claims with regard to whether the timing of rest breaks were practicable.

Early Meal Periods

The Labor Code and Wage Orders require every employee who works more than five hours to receive an unpaid meal period, except that employees who work six hours or less in a workday may agree to waive the meal period. Employees who work more than 10 hours must be given a second meal period. If they will not work more than 12 hours in the workday and did not waive their first meal period, employees may agree to waive the second meal period.

The state's Division of Labor Standards Enforcement (DLSE) and the plaintiffs' bar insist that no employee should work more than five hours without a meal period. For example, office workers who begin work at 9 a.m. should begin the meal period before 2:00 p.m. or the meal period is considered "late." Restaurants, such as those in Brinker, may encounter scheduling issues because meal times naturally are their busiest times. It is impractical for service staff and line cooks to simply abandon their customers for 30 minutes during the lunch service. Service staff earn their living on tips, so they make more money when the restaurant is busy, and do not want to leave their guests in the middle of a meal. Also, employees in many restaurants are provided a staff meal at the beginning of their shift, then discuss the day's specials with the chef before the rush starts.

The plaintiffs in Brinker claimed the "most egregious meal period violation" was the defendant's practice of "early lunching." Employees reporting to work would start the meal period within one hour of the start of their shift. Then they would work through the rush, and take another meal period after the rush if they ended up working 10 hours. (They could also waive the second meal break if their total shift was less than 12 hours, because they had not waived their first meal break.)

The Plaintiffs argued that this practice violated of the law because employees could end up working as much as nine hours between their first meal break and their second meal break. They relied on DLSE enforcement guidance requiring a "rolling five-hour" meal period; saying that no employee should ever work more than five consecutive hours without a meal break. Plaintiffs' interpretation was that an employee is entitled to a meal break no later than five hours after returning from their last meal period.

Brinker argued that employees started the meal period before the fifth hour of work ended, satisfying the law as written. Indeed, the Labor Code does not say when an employee must take a meal period, only that employees may not work more than five hours without a meal break or 10 hours without a second meal break. The court rejected the plaintiffs' arguments and the DLSE's enforcement position, reasoning that if the Legislature intended for an employer to furnish a meal period every five hours, there would have been no need for the statutory provision requiring a second meal period for employees who work 10 or more hours. For that reason, the Court of Appeal held there is no such thing as an "early lunch" violation.

The Extent of the Employer's Duty to Provide Meal Periods

The court in Brinker then considered another hotly contested area: whether the employer is required to force the

employees take their meal periods, or if it is sufficient to simply offer meal periods to employees. The DLSE takes the position that employers are liable if the employee does not actually take a timely meal period of at least 30 minutes, regardless of the employer's intentions and policies.

So far, the only court to have considered the issue is the U.S. District Court for the Northern District of California, in a decision involving state law wage-hour claims against Starbucks (White v. Starbucks). In that case, the court held that an employer meets its obligation if it makes meal breaks available to employees. As such, an "employee must show that he was forced to forego his meal breaks" to impose liability on the employer for meal period violations.

Unfortunately, the Court of Appeal in Brinker did not decide this issue of law. Instead, the court simply held that the trial court failed to decide whether meal periods must be merely offered or affirmatively ensured and remanded this issue to the Superior Court. White v. Starbucks remains the only case on point.

Importance of Clear Employment Policies in Avoiding Class Action Claims

It is important to note that the Court of Appeal in Brinker decided class certification was inappropriate in part because Brinker's policies complied with the Labor Code and the Wage Orders. Had the court decided the policies themselves were illegal, the decision might well have come out differently. For that reason, the Brinker case is a good reminder to employers to review their handbooks and policies to ensure they are in compliance with the current state of the law for rest breaks and meal periods.

In addition, the law remains unclear regarding whether employers are responsible for ensuring employees take timely meal periods, or whether the law requires only that such meal periods be offered. Therefore, employers must continue to take meal period obligations seriously. Until the law is clarified further, managers should schedule timely meal periods and not assume employees are free to skip them.

Reprinted by permission of The Daily Recorder.

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