



Brinker: Meal and Rest Periods Clarified, But...

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On April 12, 2012, the California Supreme Court issued its long-awaited decision in *Brinker Restaurant v. Superior Court*. The unanimous decision provides welcome relief to employers with respect to their obligations in providing meal periods and rest breaks, and the timing of those meal periods and rest breaks. However, in addressing the class certification issues, the Court stopped short of making determinations that effectively would have sounded the death knell to class actions based on issues concerning meal periods and rest breaks.

Meal Periods

1. Scope of an Employer's Duty

The Court first considered what it means for an employer to provide a meal period to a nonexempt employee. Rejecting the plaintiff's argument that an employer is obligated to "ensure" that the employee stops work for 30 minutes, the Court held that an employer must relieve the employee of all duty for the designated meal period, but need not ensure that the employee does no work during the meal period. More specifically, the employer must relieve the employee of all duties, relinquish control over the employee's activities and permit the employee a reasonable opportunity to take an uninterrupted meal period, without impeding or discouraging the employee from doing so.

Because the employer is not obligated to police meal breaks and ensure that no work is performed during the meal period, bona fide relief from duty and the relinquishing of control satisfies the employer's obligations. Work by a relieved employee during a meal period does not thereby place the employer in violation of its obligation to provide a meal period, nor does it create liability for the one hour of premium pay established by statute and the Wage Orders for failure to provide a meal period. However, the employer will be required to pay the employee for work done during the meal period (at the employee's regular rate, or overtime rate, if applicable), if the employer "knew or should have known" that the employee was working during the meal period.

2. Timing of the Meal Period

The Court next turned to the timing of the meal period, addressing the questions of (i) when each meal period must begin, (ii) when a second meal period is required, and (iii) whether any additional timing requirements are imposed by statute or Wage Order. After extensive discussion regarding the wording and history of the applicable provisions, the Court made several definitive conclusions.

First, the Court held that the first meal period must begin no later than the end of an employee's fifth hour of work, and a second period (if required) must begin no later than an employee's tenth hour of work.

Second, the Court held that a second meal period is required only when the employee is employed for a work period of more than 10 hours per day (unless a waiver is allowed by statute). The Court expressly rejected

the plaintiff's argument that a second meal period is required when over five hours of work remain after the end of the first meal period—the so-called "rolling five hour" meal period.

Third, the Court expressly held that the statute and Wage Orders do not impose any timing requirements beyond an employer's obligation to provide a first meal period after no more than five hours of work, and a second meal period after no more than 10 hours of work. Specifically, there is no requirement that the meal period occur sometime *after* a required rest period, nor is there a requirement that a meal period begin "no earlier than" any specific time in the work period.

Rest Periods

1. Scope of an Employer's Duty

Because the Wage Orders require an employer to give employees a 10-minute rest break for each four hours of work "or major fraction thereof," the Court first had to consider the meaning of the phrase "major fraction." The Court determined that this phrase long has been understood to mean a fraction greater than one-half. Accordingly, the Court held that the rest time that must be permitted is the number of hours worked divided by four, rounded down if the fractional part is half or less than half, and up if it is more, i.e., a "major fraction," times 10 minutes.

Thus, recognizing that a rest period need not be authorized for employees whose daily work time is less than three and one-half hours, the Court summarized the rest period entitlement as follows: Employees are entitled to a 10-minute rest period for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on, in 10-minute increments.

2. Timing of Rest Periods

Plaintiff argued that employers are legally required to permit their employees to take a rest period before any meal period is taken. The Court rejected this argument, finding that neither the statute nor the Wage Orders speak to the sequence of meal periods and rest breaks. However, the Court stated that, as a general matter in the context of an eight-hour shift, one rest break should fall on either side of the meal period, but that this general rule might be altered by shorter or longer shifts and other factors that make such scheduling impracticable.

The Court found that the only constraint on the timing of a rest break is that it fall in the middle of a work period "insofar as practicable." Accordingly, employers have a duty to make a good faith effort to authorize and permit a rest break in the middle of each work period, but employers may deviate from this requirement when practical considerations render this condition infeasible. The Court did not offer



an opinion as to what considerations might be legally sufficient to justify such a departure.

Class Certification Issues

The trial court had certified all the subclasses sought by plaintiffs. The Court of Appeal reversed all these certifications. The California Supreme Court's holding as to these certifications was mixed. In making these rulings, the Court set forth some general principles.

First, as a general rule, if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members of the class must individually prove their damages.

Second, the decision to certify a class rests squarely within the discretion of the trial court, and that decision is afforded great deference on appeal.

Third, although the certification inquiry generally should not involve an inquiry into the legal and factual issues concerning the merits of the case, to the extent that the propriety of certification depends upon disputed threshold legal or factual questions, a court can and must resolve them.

Applying these principles, the Court held as follows:

- The theory of liability that Brinker had a uniform, corporate policy that violated the "major fraction" provision regarding rest periods supported the trial court's certification of the rest period subclass.
- Because the defined meal period subclass included members with no possible claim (because their claim was based on an erroneous "rolling five hour" theory of liability), the Court remanded the question of meal period subclass certification to the trial court for reconsideration in light of the Court's clarification of the law concerning meal periods.
- In the absence of a uniform, companywide policy or practice requiring off-the-clock work (in fact, Brinker had a policy precluding off-the-clock work), the Court vacated certification of the off-the-clock-work subclass, because proof of liability would have to be made on an employee-by-employee basis.

In a separate concurring opinion, Justice Werdegar (who also authored the majority opinion), joined by Justice Liu, emphasized that the Court's remand of the meal-period class certification issue does not suggest an endorsement of Brinker's argument that the question of why a meal period was missed renders meal period claims *categorically* uncertifiable. Justice Werdegar further emphasized an employer's obligation to record meal periods taken by employees for a shift over five hours, and stated that, if an employer's records fail to show that such a meal period was taken, there will be a rebuttable presumption that the employee was not relieved of duty and that no meal period was provided. The burden of proof is on the employer to overcome the presumption.

Conclusion

The *Brinker* decision generally is good news for employers, because it eliminates the argument that employers are required to ensure that their employees actually take the meal periods they are provided, and because it rejects the "rolling five hours" theory for a meal period requirement. Nevertheless, the decision compels employers to examine their policies, and to make sure that they comply with the meal period and rest period pronouncements of the California Supreme Court. Although the *Brinker* decision has set back the plaintiffs' bar in their campaign of class actions on these provisions, it was not a knockout punch and it is likely that some of these class actions will continue in one form or another.



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