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On November 8, 2011, the California Supreme Court heard oral arguments in *Brinker v. Superior Court* (Sup. Ct. Case No. S166350). This case raises issues about meal and rest periods that are of crucial importance to California employers. One of these issues is whether the requirement that employers "provide" a meal period means that employers must affirmatively ensure that employees take a meal period or merely that employers make such a meal period available. Another issue is whether an employer must provide a second meal period only when an employee works more than 10 hours during a day or must provide a meal period after any 5 consecutive hours of work (the so-called "rolling five" rule). In addition, the case will likely provide guidance as to when employees can bring class action suits to recover damages if an employer fails to provide meal periods as required.

Meal and rest period claims have been the basis for thousands of individual and class action lawsuits seeking to recover damages under the California Labor Code and Industrial Welfare Commission ("IWC") Orders. The Supreme Court's decision in *Brinker* may pave the way for more such lawsuits, which could cost California employers hundreds of millions of dollars. Therefore, the employer community watched the oral arguments carefully for clues as to the Court's thinking. Predicting the outcome of a case based on oral arguments is a notoriously imprecise art, and we will not try to make such a prediction here. However, we will advise you how some observers read the "tea leaves" of oral argument and what your company can do today to limit your potential exposure to meal and rest period claims.

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Brinker was originally filed as a class action lawsuit on behalf of employees of chain restaurant owner Brinker Restaurant Corp. The trial court certified the case as a class action, but the Court of Appeal reversed, holding that an employee who chooses to do so may skip his or her meal period so long as the employer (1) makes the meal period available; and (2) does not coerce the employee to skip the meal period. The Court of Appeal held that such determinations generally must be made on a case-by-case basis, and are not well-suited to decision on a class-wide basis. The Supreme Court then granted review. During the hour-long oral arguments, counsel for the parties fielded questions from the Court about the proper interpretation of the meal period laws and the suitability of class action litigation to resolve meal period claims.

"Providing" Meal Periods: Ensure or Make Available?

California Labor Code Section 512(a) states: "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 ...." A crucial issue in *Brinker* is the meaning of the word "providing" in Labor Code 512(a). Complicating matters, the meal period issue is also addressed in the various IWC Orders, which use somewhat different language. IWC Order 4 is typical. It provides: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes ...."

Despite the differing language, both parties and the Court seemed to focus on the meaning of the word "provide." Most of the Court's questions seemed skeptical of interpreting this word to mean that an employer must force an employee to take a meal period, even if the employee does not want to do so. Justice Liu asked whether such a rule would be inconsistent with the "hallmark" of a meal period – that the employer is supposed to suspend control over the employee. Plaintiff argued that an employee can do whatever he or she wants during a meal period, except work. Several Justices pressed this point and seemed unconvinced by Plaintiff's argument. Other Justices were concerned about the enforcement of such a rule, asking about the practicality of ensuring that hundreds or thousands of employees were actually taking a meal period. Plaintiff argued that, if an employee refused to take a meal period when ordered to do so, the employee would be insubordinate and subject to discipline. Several Justices asked whether such an approach was really in the best interest of the employees. Justice Kennard cited the DLSE amicus brief, which stressed the importance of flexibility in the work place, using examples of employees who might prefer not to take a meal period, such as a nurse providing emergency care for a patient or a truck driver forced to pull over to the side of the road to take a meal break.

On the whole, most observers seemed to agree that the Court was sympathetic to the argument that an employer's only obligation is to make a meal period available to employees, not to force employees to take a meal period against their will and on pain of disciplinary action. If so, this is certainly a good harbinger for California employers. Not only is it much more difficult to prove that an employer forced or coerced an employee to skip a meal period than it would be merely to prove that the meal period was skipped, it is also much more difficult to apply such a standard on a class-wide basis.

The Rolling Five Issue

As with the requirement that employers provide meal periods, there are different provisions in the Labor Code and the IWC Orders regarding the timing of meal periods. Labor Code Section 512(a) provides that:

"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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. 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...." (Emphasis added.)

The IWC Orders generally provide that:

"No employer shall employ any person for a work period of ***more than five (5) hours without a meal period*** of not less than 30 minutes except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee." (Emphasis added.)

The difference between focusing on the "more than 10 hours per day" language in the Labor Code and the "more than five hours" language in the IWC Order is illustrated by the following example: Assume an employee works 9½ hours during a day. If the rule is as set forth in the Labor Code, then the employee simply is not entitled to a second meal period during that day. However, under the "rolling five" rule, the employee might be entitled to a second meal period. For example, if the employee takes his or her first meal period after four hours, then the employee will be entitled to a second meal period after five more hours (*i.e.,* at hour 9) and would thus get two meal periods without working a 10-hour day.

The Court questioned both sides about whether these provisions could be harmonized. Plaintiff argued that the IWC Order provides more protection to employees and therefore trumps Section 512. Further, Plaintiff argued that California Labor Code Section 226.7[1] "explicitly incorporated" the IWC Order language and timing requirements. Defendant, on the other hand, argued that Section 512 and the IWC Order are not in harmony and that the statutory language governs over the IWC Order language. Defendant argued that statute and the IWC Orders say nothing about meal periods on a five-***consecutive***-hours basis, pointing out the use of "per day" language even in the IWC Order. Defendant repeatedly stressed that the IWC "knows how to say consecutive when it wants to," giving various examples.

On this issue, the Court seemed less sympathetic to the Defendant's position and focused more on the literal language of the statute and IWC Orders than on the practicalities of administering a rolling five rule. In his exchange with Defendant, Justice Liu implied that the language requires a meal break after each five-hour work period because otherwise the clause "except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived" would be surplus. In response to the argument that Section 512 expressly sets the bar for a second meal period at 10 hours per day, Justice Liu pointed out that this was not inconsistent with the IWC Order language – the IWC merely set a standard that was more protective of employees.

If the Court should decide that a rolling five rule applies, it would be bad news for employers who may have been operating under the assumption that a second meal period does not have to be made available to employees who do not work more than 10 hours per day. For example, employers who schedule employees to work 10-hour shifts on a regular basis would be in violation unless an employee's meal break was taken ***exactly*** at the 5-hour mark. Otherwise, either the work period before the meal break or the work period after the meal break would, necessarily, be longer than 5 hours. If an employer does not have an express rolling five policy, plaintiffs' attorneys will argue that class action treatment is appropriate since the employer (by its own policy) is not in compliance with legal requirements.

Class Action Treatment of Meal Period and Rest Break Claims

While spending less time on class action issues than on the underlying interpretation issues, the Justices did question the parties about whether meal and rest break issues were amenable to class treatment. Plaintiff argued that Brinker created an incentive for employees to work through meal periods because it did not have a tip-pooling policy. In the absence of such a policy, employees would lose tips during the time they were on break. When Justices Corrigan and Liu asked Plaintiff whether this meant that employers were ***required*** to implement tip-pooling policies, Plaintiff tried to shift the focus to other factual issues, including Brinker's alleged failure to provide timely rest breaks, failure to pay premium wages to employees who missed meal or rest periods, and failure to conduct compliance audits.

Justice Liu returned to a more practical approach in his questioning on this issue, asking how class treatment could be applied in rest period cases when Brinker (like most employers) did not have records of whether or when employees took rest breaks. Chief Justice Cantil-Sakauye also seemed interested in the practical impact of the Court's decision, asking whether the Court could apply its decision prospectively only.

On the whole, the Court did not seem to "tip its hand" as to its thinking about the class issues and seemed less inclined to ask questions about those issues. It is possible that this was because the Court is leaning toward Defendant's position on the meaning of "provide," which would (as noted above) make class treatment difficult to justify.

What Steps Employers May Need to Take to Prepare for the *Brinker* Decision

The Supreme Court is expected to hand down its decision in *Brinker* early next year. That decision will no doubt draw much attention to meal and rest break issues among both employees and plaintiffs' attorneys. California employers would be well-advised to review their policies and practices now to ensure themselves maximum protection against litigation in this area.

- Where it is feasible, employers should schedule meal and rest periods themselves, rather than leaving it to employees' discretion when to take these breaks. Of course, pending the outcome of *Brinker*, such periods should be scheduled to comply with whatever interpretation of the law the Court may adopt, include a rolling five rule.

- Policies and handbooks should be reviewed, and modified if necessary, to reflect the employer's policies regarding breaks. There should be clear and documented proof that employees have been instructed to take their breaks in a timely manner. Unless and until the *Brinker* Court rules otherwise, employers should have official policies based on a rolling five approach, since any other policy would open the employer to claims that class action treatment is justified based on the employer's policy. One way to ensure compliance with a rolling five rule is to require that meal periods be taken exactly five hours after the start of the work day.
- Employers should review their operational policies and practices with an eye to identifying anything that a plaintiff's attorney might cite as evidence that the employer is creating potentially coercive incentives for employees to work through their meal or rest breaks. Supervisors and managers should be trained to avoid doing anything that might be construed as encouraging employees to work through break periods and should not schedule workloads so that work "piles up" while employees are on breaks.
- Employees should be advised to inform their supervisor in advance if they foresee a need to miss a meal period, and the employer should have a protocol for dealing with such situations, including payment of premiums as appropriate, as well as disciplinary measures for employees who do not comply.
- Employers are required by law to keep records of employee meal break times. Employers should be sure that such records are kept and can be retrieved when needed. Employers who do not use a time clock or similar device for this purpose should consider having employees verify, on a weekly basis, the accuracy of their meal time records. Employers should never have supervisors prepare and submit time records on behalf of employees without having the employees confirm the accuracy of those records and should never permit supervisors to prepare mechanical or inaccurate time records for their employees (such as preparing the records in advance or turning in reproduced copies of the same time sheet week after week).
- To demonstrate their commitment to compliance with the meal and rest break laws, and to identify any problems that may exist, employers should conduct compliance audits periodically.

If you have any questions regarding this alert, please contact the authors or any other member of our Labor & Employment Department.

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1. Cal. Lab. Code § 226.7(b) provides that "[i]f an employer fails to provide an employee a meal period or rest period *in accordance with an applicable order of the Industrial Welfare Commission*, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." (Emphasis added.)

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