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## supreme court decides *brinker*: an important win for employers

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MSK Client Alert

April 13, 2012

By Steven Schneider

On April 12, 2012 the California Supreme Court issued its much awaited meal and rest period decision in *Brinker v. Superior Court*.

### **Meal Periods**

Two meal period issues were before the Court – (1) the extent of an employer's duty to provide meal periods and (2) the timing requirements for meal periods.

With respect to the first issue, the Court rejected the plaintiffs' argument that, in addition to providing meal breaks, an employer must ensure that employees perform no work during those breaks. Rather, the Supreme Court stated that "an employer must relieve the employee of all duty for the designated period, **but need not ensure that the employee does no work.**" (Emphasis added.) Thus, as long as an employer provides, and relieves employees of all duty during, a legally required meal period, the employer will **not** be liable for an additional hour of pay (a "meal premium") when an employee nonetheless elects to perform work during the meal period. "At most," the Court noted, the employer will be liable for "straight pay" if it "knew or reasonably should have known that the worker was working through the authorized meal period." Of course, if the employer does not relieve the employee of all duty or the nature of the employee's work precludes him or her from taking a required meal period, then a meal premium will be owed.

The second issue concerned language in the wage order stating that an employee may not work for "a period of more than five hours per day" without receiving a 30-minute meal period. The Supreme Court rejected the plaintiffs' position that a 30-minute meal period is required whenever an employee works five or more consecutive hours (the so-called "rolling five" contention.) Rather, it concluded that a first meal period must be provided "after no more than five hours of work in a day" and a second meal period must commence after no

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more than ten hours of work. (For the motion picture industry and manufacturing employees covered by a collective bargaining agreement, the law permits the first meal period to commence after six hours of work.) Thus, even if an employee takes his or her first meal period early in a shift and then works five or more consecutive hours, **a second meal period is not required unless the employee has worked ten or more hours.** (For example, if an employee takes a 30-minute meal period after completing one hour of his or her shift and then works seven more hours, a second meal period would **not** be owed.)

### **Rest Periods**

Interpreting the rest period requirements, the Supreme Court held that California employees are entitled to one 10-minute rest period for any shift lasting from 3-1/2 to 6 hours, two 10-minute rest periods for shifts from 6 to 10 hours, and three 10-minute rest periods for shifts of more than 10 hours. Employees are not entitled to a rest period for shifts lasting longer than 2 but less than 3-1/2 hours.

Moreover, the Supreme Court rejected the plaintiffs' contention that employers must provide these rest periods in the middle of work periods and that the first rest period always must precede the first meal period. Rather, the Court found that the requirement to provide rest periods in the middle of work periods "insofar as practicable" means that employers are required "to make a good faith effort to authorize and permit rest breaks in the middle of each [four hour] work period, but may deviate from that preferred course where practical considerations render it infeasible." The Court did not, however, express any opinion as to "what considerations might be legally sufficient to justify such a departure."

### **Concurring Opinion**

Justice Werdegar, who authored the unanimous decision of the Court, also wrote a concurring opinion joined by one other Justice "to emphasize what our [unanimous] opinion does not say." In this concurring opinion, Justice Werdegar noted that, if an employer's timekeeping records do not show clocking out and back in for a meal period, "a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." Also, with respect to those meal periods that may be waived (i.e., the first when an employee will complete the day's work in six or fewer hours and the second if the employee will complete the day's work in twelve or fewer hours), the concurrence places the burden of proof on employers to establish that employees voluntarily waived meal periods.

*MSK will present an in depth discussion on the Brinker decision and its impact at our MSK Labor Department Breakfast Briefing to be held on May 3, 2012.*