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Client Alert

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California Supreme Court's Grant of Review in *Brinker Rest. Corp.* Creates Uncertainty Regarding the Future of Meal and Rest Period Obligations

On October 22, 2008, the California Supreme Court granted review of and de-published *Brinker Rest. Corp. v. Superior Court*, 80 Cal. Rptr. 3d 781 (2008), an important recent decision that addressed employee meal period and rest break requirements under state law. As reported in an earlier Client Alert, the *Brinker* decision held that employers do not need to affirmatively ensure that employees actually take their meal and rest breaks. Instead, *Brinker* allowed employers to satisfy their meal and rest break obligations simply by making such breaks "available" to employees. *Brinker* further held that, in the absence of evidence of uniform policies and practices that violate California wage and hour laws, courts should not certify class action claims seeking meal period and rest break premium pay or compensation for work performed "off the clock," as such claims require individualized inquiries and thus are not appropriate for class treatment. With the California Supreme Court granting review of *Brinker*, the decision may no longer be cited as precedent and the validity of its holdings are cast into doubt.

Rushing in to fill this void, the California Division of Labor Standards Enforcement – the California State administrative agency tasked with enforcement of California's wage and hour regulations (including meal and rest break requirements) – has indicated that it will essentially continue to follow the standards set forth in the *Brinker* decision until the California Supreme Court issues its own opinion. The DLSE has withdrawn a memorandum to its staff issued on July 25, 2008, in which it instructed all DLSE staff to immediately apply the holdings of *Brinker* to all pending matters. In its place, it issued a detailed new memorandum on October 23, 2008, indicating that while the DLSE will no longer rely on *Brinker*, it has reached its own conclusion that the remaining valid state and federal cases, statutes and regulations essentially support the continued application of the holdings in *Brinker*, at least until the California Supreme Court provides further guidance.

In reaching this conclusion, the DLSE relied on several recent federal court decisions applying California law and reaching the same results as *Brinker*. These cases include *Brown v. Federal Express Corp*. and *White v. Starbucks Corp.*, which were cited in and relied upon by *Brinker*, as well as *Perez v. Safety-Kleen Systems, Inc.*, *Kenny v. Supercuts*, *Salazar v. Avis Budget Group*, *Kimoto v. McDonald's Corp.* and *Gabriella v. Wells Fargo Financial, Inc*. Several of these cases were decided after *Brinker* was issued, but before the California Supreme Court granted review. These holdings may reflect the view of federal courts in California that *Brinker* ultimately will be upheld.

Although the DLSE's new memorandum and the authority it relies upon provide employers with some basis for applying the relaxed standards set forth in *Brinker*, the future of California's meal and rest break requirements ultimately rests with the California Supreme Court, which may not issue its own opinion for many months. The last time the California Supreme Court reviewed a case involving meal periods and rest breaks, the Court took over a year to issue its opinion. That time, employers fared poorly: the Court found in *Murphy v. Kenneth Cole Productions Inc.* that the penalty payment under the California Labor Code for meal and rest break violations is a form of wages, expanding the statute of limitations for such claims from 1 year to at least 3 years and significantly

increasing the amount of employer liability. Accordingly, employers who decide to relax their policies or practices for the enforcement of meal and rest breaks ultimately may find themselves doing so at their own peril. Until the California Supreme Court resolves the issues raised by *Brinker*, any employer that is not vigilant in complying with a narrow interpretation of California's burdensome and impractical meal period statute by ensuring that a 30-minute meal is taken and recorded by each employee scheduled to work more than 5 hours in a day runs the risk of class action litigation and significant damages. Regardless of the ultimate outcome in *Brinker*, it is essential that employers maintain adequate meal period, rest break and work "off the clock" policies and that employees are made aware of and acknowledge them. Even those cases that support a relaxed approach to meal and rest break compliance still stress that employers must exercise caution in assigning reasonable job duties, adequately staffing the workplace, and scheduling appropriate shifts so that employees are not inadvertently deprived of the opportunity to take meal periods and rest breaks or pressured into performing work "off the clock."

The Proskauer Wage-Hour Practice Group has significant expertise in guiding clients through times of uncertainty and change in California labor law. Its members are available to assist you with these and other issues that may be of concern to you. Your Proskauer relationship attorney or any of the attorneys listed in this Alert is available at your convenience to discuss various ways to manage meal period and rest break requirements in California and the potential impact on your workplace.

Client Alert

Proskauer's nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers.

If you have any questions about the impact of this new decision, please contact your Proskauer relationship attorney or one of the attorneys listed below:

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