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Client Alert

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California Court Clarifies Meal and Rest Period Obligations for Employers and Finds Claims Not Suitable for Class Action

The California Court of Appeal has issued an important new decision that significantly impacts employee meal period and rest break requirements under state law. *Brinker Rest. Corp. v. Superior Ct.*, 2008 WL 2806613 (July 22, 2008). The decision holds that a California employer need only provide meal periods and rest breaks, and does not need to ensure that they are taken as long as the employer does not impede the employees' right to use these times off for the intended purposes. The decision provides guidance to employers regarding the obligation to provide meal and rest breaks to employees, how many breaks must be provided, when those breaks can be taken and the circumstances that would support certification of a class action alleging violations of these and related rules. However, because the decision is arguably at odds with prior California authority and will likely be appealed to the California Supreme Court, employers who choose to immediately rely on this decision and relax their policies or practices for enforcement of meal periods and rest breaks may be placing themselves at risk. As discussed below, prudent employers should wait until the California Supreme Court has either rejected a request for review or issued its own opinion regarding California employers' meal period obligations.

Denial of Certification of Meal and Rest Break Claims for Class of 59,000 Employees Reviewed

The *Brinker* class action was filed by five plaintiffs on behalf of approximately 59,000 current and former California employees of Brinker Restaurant Corporation, which currently operates 137 restaurants in California, including Chili's Grill & Bar, Romano's Macaroni Grill, and Maggiano's Little Italy. The lawsuit (which came on the heels of a $10 million dollar settlement paid by Brinker to resolve a separate suit brought against it by the California Division of Labor Standards Enforcement alleging meal period and rest break violations) alleged that Brinker had failed to provide its non-exempt employees with timely rest breaks, improperly required them to take early meal breaks towards the beginning of their shifts, failed to ensure they took timely additional meal breaks after each five-hour period of work, improperly altered employee time records, and failed to compensate employees for work performed "off the clock" during meal periods.

In moving for class certification, plaintiffs submitted declarations from 33 current and former hourly employees who claimed they had not been provided timely meal periods and/or rest breaks. Plaintiffs argued that statistical survey evidence and summary reports could be obtained from Brinker's electronic payroll and timekeeping records to establish claims on a class-wide basis. Opposing the motion, Brinker argued that it had written policies informing employees of their right to take meal periods and rest breaks and prohibiting employees from working off the clock. Brinker submitted 630 declarations of its own from hourly employees and managers detailing the different methods that were used at its various restaurant locations to provide meal periods and rest breaks to its employees. After the trial court certified the class, Brinker petitioned the California Court of Appeal to review and reverse the trial court's order. The California Court of Appeal granted Brinker's petition and reversed the trial court's order, but after further filings then decided to modify its opinion. Upon

further consideration and briefing by the parties, the Court of Appeal published an expanded new decision, again sustaining Brinker's position.

Employers Need Not Ensure That Meal and Rest Breaks Are Taken

In its published decision, *Brinker* held that while employers cannot impede, discourage or dissuade employees from taking meal and rest periods, they need not ensure that that meal periods and rest breaks are actually taken by the employees. Rather, employers can satisfy their meal period and rest break obligations simply by making breaks available. In reaching this conclusion, *Brinker* relied on two recent federal court decisions that applied California law and reached the same result, *Brown v. Federal Express Corp.* and *White v. Starbucks Corp*. The Brinker court also considered *Cicairos v. Summit Logistics, Inc.*, a prior decision from the California Court of Appeal, and determined that language in *Cicairos* which states that an employer must ensure that workers are actually relieved of all duty during their meal periods should be read in light of the facts of that case and is not inconsistent with the *Brinker* panel's view that employers must offer, provide, authorize and permit a break – but need not ensure that the break is taken. Where employers know that their employees' job duties prevent them from taking meal breaks and where management policies or practices (such as understaffing) effectively deprive employees of an opportunity to take meal breaks, an employer cannot meet its meal-period obligation merely by assuming that meal breaks are taken. However, where the employers' policies and the employees' job duties do not deprive employees of the ability to take meal breaks, the employer need only make meal periods available and need not ensure that breaks are actually taken.

No Right to "Rolling Five-Hour Meal Period"

Brinker also rejected plaintiffs' "rolling five-hour meal period" claim, which was that employers are required to provide a separate meal period for every five consecutive hours of work performed by an employee and that a second meal period should be provided five hours after the completion of the first meal period. In so doing, *Brinker* confirmed that a single 30 minute meal period must be provided for each day on which the employee works more than five hours, and a second meal period must be provided for each day on which the employee works more than 10 hours. It also confirmed that meal and rest breaks can be waived by employees and that such waivers need not be documented in writing.

Flexibility Allowed in Timing and Scheduling of Meal and Rest Breaks

On the issue of timing, *Brinker* held that rest breaks need not be taken in the middle of every four hours of work performed by an employee if it would be impractical to do so. Employees also need not take their first rest break before the first scheduled meal period if it would be impractical to do so. Although adhering to such schedules for rest breaks is ideal, where the nature of the work or the circumstances of a particular employee make it impractical to do so, employers and employees have the discretion to schedule breaks at other times. This provides the employer with the flexibility necessary to ensure adequate staffing during peak business hours and permits employees to provide optimum service to customers and maximize their tips. Similarly, *Brinker* found no authority to support any restriction on the timing of meal periods. The court, therefore, rejected plaintiffs' arguments that meal periods must be provided in the middle of an employee's shift and that "early lunches" provided near the beginning of a shift were not valid meal breaks.

Class Action Improper Where Individualized Determinations Predominate Claims

In the absence of evidence of uniform policies and practices that violated California wage and hour laws, *Brinker* held that certification of the class was improper. Issues such as whether the timing of a particular rest break was reasonable under the circumstances, whether a particular meal period or rest break was waived, whether an employee missed a particular break or took less than a full break due to employer coercion or independent choice, whether a particular employee was prevented from taking a particular break, whether a particular change to an employee's time card was authorized and legitimate, and whether the employer knew or should have known that a particular employee had performed work "off the clock" all required individualized determinations that made class treatment of the claims impossible. Plaintiffs' reliance on payroll records, timesheets and statistical survey evidence could not remedy these problems, as such evidence only establishes whether and when a break was or was not taken, but does not reflect the reasons why.

The *Brinker* court was careful to note that its holding does not dictate that meal period and rest break claims can never properly be certified as a class action. However, it does suggest that class action suits for these claims are not appropriate where there is no evidence of a uniform policy or practice of preventing employees from taking just breaks. Similarly, *Brinker* suggests that class action suits for "off the clock" claims are not appropriate where there is no evidence of the employer's actual or constructive knowledge of work performed "off the clock" or of a policy or practice to coerce or encourage employees to perform such work.

Implications for Employers

Although the *Brinker* opinion presents the possibility that fewer wage-and-hour class actions will be filed and certified in California, unfortunately, its future remains uncertain. Governor Schwarzenegger's office was quick to issue a press release hailing the "clarity" of the *Brinker* decision, but plaintiffs' counsel have already stated that they plan to petition the California Supreme Court to review the case. If

review is granted, the *Brinker* opinion would most likely be superseded and employers could no longer rely on the opinion pending the California Supreme Court's final decision (which could be years away).

Employers should remain vigilant in their efforts to maintain workplaces that are compliant with California's arcane and atypical wage-and-hour rules. Making sure that adequate meal period, rest break and work "off the clock" policies are in place and that employees are aware of and acknowledge them is key. While employers ultimately may not be required to ensure that breaks are taken, they should exercise caution in assigning job duties, staffing the workplace and scheduling shifts so that employees are not inadvertently deprived of the ability to take meal periods and rest breaks or pressured into performing work "off the clock."

The Proskauer Wage-Hour Practice Group has expertise regarding meal period and rest break regulations, all forms of "off the clock" litigation, and the myriad other pay practices issues facing California employers. 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 the *Brinker* decision and its potential impact on your workplace.

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