

CALIFORNIA EMPLOYERS GET A BREAK WITH BRINKER (BUT WHAT DOES IT REALLY MEAN?)

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A CAUTIOUS SIGH OF RELIEF

For California employers, a recent appellate court decision has resulted in a cautious sigh of relief because it dramatically reduces the scope of what employers are required to do to be in compliance with meal and rest break regulations and sets a higher bar for meeting the test for class action certification. The case, *Brinker Restaurant Corporation et al. v. The Superior Court of San Diego County*,¹ overturned Judge Patricia Cowett's decision to certify a class in *Brinker Restaurant Corporation, et al. v. Hohnbaum, et al.*, a case in which plaintiffs as-

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serted that the employer violated wage and hour laws regarding rest breaks, meal periods, and off-the-clock work. In its ruling, the appellate court applied a new interpretation of California labor law and potentially changed employers' legal obligations for providing timely and uninterrupted rest breaks and meal periods.

Prior to *Brinker*, the California Division of Labor Standards Enforcement (DLSE), the enforcement arm for state wage and hour laws², interpreted the regulations more strictly to require that employers *ensure* employees take their meal periods and rest breaks. This led to investigations and judgments by the agency that presumably resulted in its finding more "violations" and imposing more responsibilities and obligations on employers than is required by *Brinker*. Although the statutes and regulations themselves have not changed, *Brinker* changed expectations of what employers should do to be in compliance with these laws, giving employers more flex-

ibility in the timing and waiver of meal and rest breaks.

WHAT HAS CHANGED?

A list of changes set forth in *Brinker* is presented below:

■ **While employers cannot impede, discourage, or dissuade employees from taking rest breaks and meal periods, employers need only provide and not ensure that rest breaks and meal periods are taken.**

This may mean that employers do not have to account for missed or shorted breaks because the empirical record itself does not reflect the reason why these breaks were missed. Employers may in fact have provided meal periods or authorized and made available rest breaks to employees, but employees may have chosen not to take them.

■ **The taking of rest breaks need not occur in the middle of a four-hour work period.** Under California wage and hour law, employ-

ers are required to authorize and permit a rest break every four hours or major fraction thereof, and insofar as practicable the break should be in the middle of each work period. However, *Brinker* gives substantial discretion to employers with respect to the timing of the rest break allowing for business need to dictate when rest breaks are practicable, if taken at all. Moreover, a rest break need not precede a meal period.

- **A meal period does not need to be offered every five consecutive hours of work.** Previously, the DLSE interpreted state wage and hour law to require that employers must provide a meal period to employees for any five consecutive hours of work (termed a rolling five-hour meal period). This means that if an employee takes an “early lunch” at the beginning of the five hour work period, a second meal period would be earned after five consecutive hours passed. Under *Brinker*, the number of meal periods earned is based on the total number of hours worked, regardless of when the meal period is actually taken. Thus, an employee could work up to but not more than 10 consecutive hours after an early lunch and receive no additional meal breaks.
- **Employers are not liable for employees working off-the-clock unless they knew or should have known this was occurring.** Both state and federal wage and hour law require employers to keep accurate

records of worked time and to compensate employees for all time worked. Under *Brinker*, employers may have a defense to employees’ compensation claims for those who work off-the-clock (e.g., before clocking-in, after clocking-out, or during meal and rest breaks). The employer can challenge the validity of off-the-clock claims by examining the facts surrounding the occurrence of such events, including what steps managers took to ensure employees did not work off-the-clock, whether management knew or should have known about the employees’ having performed off-the-clock work, and the reason employees performed work without accurately documenting their work time.

- **When employers have meal and rest break policies that comply with the law and there is evidence that employers took steps to ensure these policies were followed, instances of missed, shorted or interrupted meal and rest breaks can vary by employee and may not be amenable to class treatment.** Class actions are an efficient way to deal with multiple claims by similarly situated persons who have a well-defined community of interest, and for which matters of law and fact are common and best handled as a group. With respect to meal and rest breaks, it is likely to be more difficult for plaintiffs to argue successfully for class certification if they need to show that an employer had a

class-wide policy prohibiting meal and rest breaks. Mere statistical and survey evidence based on time records and employee self-reports showing missed, shorted, or interrupted meal and rest breaks are insufficient for establishing class-wide violations because they do not reveal the reasons *why* these events occurred. For example, an employee’s choice to miss, short, or interrupt his break is an important consideration in evaluating potential violations of the law and thus, according to *Brinker*, these occurrences are best investigated individually.

HOW TO RESPOND IN LIGHT OF BRINKER

First, one should keep in mind that the future of *Brinker* is uncertain. The plaintiffs have petitioned the California Supreme Court for review, and if the Court takes the case *Brinker* will automatically depublish and may not be relied upon until the case is resolved by the Supreme Court. Accordingly, employers would be wise to proceed cautiously and maintain or adopt policies and practices that ensure protection against future liability consistent with pre-*Brinker* interpretation of the laws.

Second, employers should audit their current policies and practices to identify potential areas of concern regardless of how the *Brinker* case unfolds. To this end, we suggest management take the following actions to lower its risk of meal and rest break violations and subsequent individual or class action claims. While we don’t know how long the *Brinker* rulings will be in effect, the laws themselves have not changed and

should provide stable ground for building a solid foundation of good meal and rest break policies and practices that work for the business and employees.

ORGANIZATIONAL INFRASTRUCTURE

Several actions can be taken to ensure the organizational infrastructure supports compliance with meal and rest breaks laws. By infrastructure, we mean the “bricks and mortar” of the organizational structure that direct management and employee actions to a specific end. When these elements of the infrastructure are in place, it is less likely that violations can occur, and when they do, they are easily identified. A lack of clarity regarding whether a violation has occurred due to an insufficient infrastructure hamstrings employers in their efforts to minimize their risk. The following elements of infrastructure are recommended:

- **Clear, unambiguous and definitive meal and rest break policies.** While an obvious recommendation, it is surprising how many companies have policies that are incomplete, poorly understood, or inconsistently implemented. This element should be the first “brick” in the infrastructure. It says what employees can and cannot do, what managers’ obligations are to employees with respect to providing meal and rest breaks, and what actions are to be taken when the policies are not followed or exceptions to policies occur.
- **An accurate timekeeping system with an exception review and resolu-**

tion process. The time-keeping equipment should be easy to use and readily accessible to all non-exempt employees to enable accurate and consistent recording of time worked. Time records should be accessible for review and validation to ensure accurate payment of wages. A high integrity process for identifying and resolving “exceptions” to time records, either because of missed or incorrect swipes or similar issues, is essential for maintaining the accuracy of time data and ensuring that all exceptions are properly handled (e.g., sign-offs from employees when records are changed, manager approvals for overtime). For each exception, there should be a record of the reason for the missed, short or interrupted break organized by employee for the purpose of identifying potential problems and assembling a defense for the employer in the event of a legal claim. Employee involvement in the exception review process is key to ensuring the integrity of time data and builds employee confidence in the timekeeping system’s credibility. Of course, if the exception review process reveals that employees are not being provided with their meal periods or rest breaks, the employer must promptly remedy the situation and then pay affected employees for the missed meal period or rest break.

- **An independent audit of meal and rest break compliance by review of time records and reasons for**

missed, short or interrupted breaks. Although management can audit its own records and exceptions, an independent review of the records can add an extra layer of security to ensure that company policies and procedures are being followed to the letter. In some companies, it is appropriate for the internal audit department to conduct such an audit along with other due diligence duties. In other companies, it may make sense to retain an outside party to conduct the audit to ensure its independence and impartiality. An absence of such an audit runs the risk that senior management will not be informed of significant problems with meal and rest break compliance in a timely fashion.

- **A consistent and transparent time adjustment procedure that prevents abuse.** Employees should be able to see what changes have been made to their time records so that they can verify that the edited records are in fact accurate. Having this built-in verification process will discourage abuses of time change capability such as time-shaving that can result from pressure to control labor costs and to stay within labor budgets. It will also encourage open discussion of time worked which may lead to improvements in other areas of store management such as staffing.
- **A clear and consistent discipline policy for meal and rest break violators.** Actions for disciplining managers and employees who choose

to violate company meal and rest break policies need to be clearly stated and enforced to discourage violations of policies and to standardize treatment of violators. Both managers and employees have a role in ensuring meal and rest break compliance, and this role should be well-known to both. The importance of compliance should be clearly communicated and the consequences for non-compliance clearly understood.

- **A labor scheduling system and staffing process to ensure sufficient labor is available to implement breaks.** Labor models which are used to determine the staffing requirements for a business operation should take into account the time required for all employees to take their earned breaks. To the extent these models don't include sufficient time for breaks, the company is likely to struggle to meet its obligation to provide meal and rest breaks to its employees, regardless of their timing. Similarly, staffing should be sufficient to allow coverage for employees while they take their breaks.
- **Job design to remove disincentives for taking breaks.** Some job designs do not allow employees to freely choose whether they take a break or not. Time and productivity pressure in some jobs may result in negative consequences for employees if they take their breaks. For example, if packages have to be delivered by a certain hour, widgets have to be produced to meet a

quota, tasks have to be finished by the end of the day, or compensation is dependent on being on-duty, employees may feel compelled to skip their breaks or work during their breaks to avoid negative consequences or to ensure they meet expectations. Job designs should be reviewed to understand whether these conditions exist so that companies can adjust the design to accommodate breaks should employees choose to take them. If a change in job design to lessen time or productivity pressure is not desired, employers can explore the option of meal period waivers when applicable to maintain compliance while giving employees a real choice to take a break or not.

- **Work scheduling system that plans for breaks.** Companies vary a great deal in the sophistication of their weekly work scheduling process. The less sophisticated the system, the greater room for error in assigning staff to shifts to adequately cover business need as well as planned breaks. Electronic systems that automatically account for rest breaks and meal periods have the greatest opportunity for compliance because human error is reduced. Additionally, the official break schedule can be displayed for employee review to ensure that employees know when breaks are provided and scheduled.

MANAGEMENT PRACTICE

Management's use of the systems and tools made available within

the organizational infrastructure is also essential for effective compliance with meal and rest break laws. Below are additional recommendations for managers who execute the company's policies, procedures, practices and rules on the ground. Without managers' cooperation and commitment in their effective execution, elements of the organizational infrastructure will not serve their purpose, and the employer will be left unprotected.

- **Enforcement of meal and rest break policies.** Specific management behaviors for effective enforcement of the company's meal and rest break policies should be identified and communicated to all managers. Appropriate behaviors should be trained and reinforced periodically to ensure retention of the information, and in cases of high turnover, management has an extra duty to ensure that all new managers are proficient in effective enforcement. Audits of managers' understanding of effective enforcement should be periodically conducted.
- **Resolution of exceptions.** In addition to tracking exceptions and recording reasons for missed, shorted or interrupted meal and rest breaks, management should identify and investigate patterns of exceptions because they could reveal other problems that need to be resolved. For example, excessive exceptions by a single employee may signal a problem with the job design, workload, supervision, or other factors that result in missed, shorted

or interrupted breaks, a result that may not be desired by the employee. In such cases, proper resolution of exceptions may lead to greater compliance and more satisfied employees.

■ **Evaluation of company policies, practices and systems that affect meal and rest break compliance.** Sometimes looking at aspects of the organization piece by piece prevents you from seeing what is actually going on at a higher level. Upper management needs to review the interaction and intersection of all systems that serve to support or may even conflict with meal and rest break compliance. While at the ground level management may believe that each system is doing what it is supposed to do and working fine, the interdependence of these systems may tell another story. For example, the performance appraisal and compensation system may drive managers to make decisions which conflict with company guidelines on breaks. Similarly, financial pres-

ures on store managers may drive them to cut staffing so low that there is insufficient coverage for breaks. Also, the company's emphasis on a customer service-oriented culture may encourage employees to assist customers rather than be seen "going on break." Upper management needs to have a commitment to looking at how all the operations and systems work together and note where conflicts and inconsistencies which serve to threaten meal and rest break compliance exist. With this high-level view, management can take the necessary steps to fully integrate the pieces.

CONCLUSION

Overall, what has *Brinker* taught us? Whether you operate a business in California or elsewhere, *Brinker* reminds us of the importance of clear and unambiguous policies consistently applied across the organization to reduce the risk of non-compliance. Without the guidepost of such policies, compliance is likely to be hit-or-miss. It also reminds us of the importance of accurate recordkeeping

and tracking reasons for exceptions. Accurate recordkeeping and appropriate resolution of exceptions are the bedrock of a defense to meal and rest break claims because they reflect how consistently an employer implements and enforces its policies, and should missed, shorted or interrupted breaks occur, the employer knows why. *Brinker* also teaches us the importance of training all managers and employees in proper compliance behavior. States vary in their meal and rest break laws, and each has its own enforcement agency that interprets these laws for employers. Regardless of these differences, one is left with the realization that meal and rest break compliance is something that can be managed effectively given the right systems, the right tools, and the right commitment.

NOTES

1. *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25, 80 Cal. Rptr. 3d 781, 156 Lab. Cas. (CCH) P 60647 (4th Dist. 2008), review filed, (Aug. 29, 2008).
2. Wage and hour laws in California are collected in the California Labor Code and various Industrial Welfare Commission Wage Orders. Specifically Wage Order 5-2001 and California Labor Code sections 226, 226.7, and 512 were at issue in *Brinker*.