A Closer Look At The Brinker Decision

Insights
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On April 12, 2012, the California Supreme Court decided *Brinker Restaurant Corporation v. Superior Court (Hohnbaum),* pending since 2008. We reported on the decision in a Legal Alert, and in an extended webinar. Because it's such a significant decision, more remains to be said.

Much-Needed Clarification
California recognizes two kinds of meal periods: off-duty and on-duty. An on-duty meal period is permitted only when the nature of the work prevents the employee from being relieved of all duty, the employee is paid, and there is a written agreement with a right to revoke the agreement. Unless there is a valid on-duty meal period agreement, an employer is required to affirmatively relieve employees of duty during a meal period of at least 30 uninterrupted minutes (e.g., must be permitted to leave premises).

Although the *Brinker* decision did not change many of the compliance standards for meal periods, the rules were clarified in vitally important particulars:

First, the *Brinker* court handed down a clear standard regarding an employer's duty to "provide" a meal period. Specifically, an employer satisfies this obligation if it 1) relieves its employees of all duty; 2) relinquishes control over their activities; 3) permits them a reasonable opportunity to take an uninterrupted 30-minute break; and 4) does not impede or discourage them from doing so. Of course, the devil is in the details.

Second, during a permitted meal period, "[t]he employer is not obligated to police meal breaks and ensure no work thereafter is performed." In fact, the Court made clear that as long as an employee was relieved of duty and free to do what the employee chooses to do during the meal period, work could continue strictly on the employee's part without the employer committing a violation of the meal-period laws. That being said, many employers may prefer to keep the reins tight. Indeed, some types of industries may require tighter control for administering meal periods due to the nature of the work.

Employers may choose to prohibit work during off-duty meal periods, because 1) they are still required to pay for all work "suffered and permitted" to be done; 2) meal periods that are shortened may not be "bona fide" under the Fair Labor Standards Act, and thus, also would have to be paid

working time; and 3) without proper documentation, it may be difficult to defend negative inferences from time records that contain short or late meal periods. Again, the outcomes will be very fact specific.

Third, the Court rejected the "rolling-five" rule which would have required a meal period for every five hours of work, resulting in more than two meal periods per day when employees work more than two five-hour segments in a work day (compare rest periods, where a 10-minute rest period is due for each and every 4 hours of work or major fraction thereof).

The Court explained when meal periods should be permitted to commence throughout the work day. Specifically, the first meal period must be permitted to commence no later than after five hours of work or the start of the sixth hour of work (5.0 hours on the clock). The second meal period must be permitted to commence no later than after ten hours of work or the start of the eleventh hour of work (10.0 hours on the clock).

Reading together this strict timing requirement with the more relaxed definition of what it means to "provide" a meal period, potential pitfalls exist. Employers are not automatically liable when employees unilaterally take a late meal period otherwise provided timely, but be very cautious in scheduling meal periods in a manner that pushes, or may tend to push, employees involuntarily into commencing meal periods after the deadlines.

As long as you understand what Brinker's ruling regarding meal-period compliance means, you should be able to maneuver around the potential landmines that remain and develop an interactive policy with permissible flexibility that fully complies with the law.

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