



Meal And Rest Period Decision to Be Reviewed by High Court

Insights

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Last July we reported on *Brinker Restaurant Corp. v. Superior Court*, an employer-friendly decision by a California Appeals court which addressed the legal standards under California's laws on meals and rest periods for employees.

On October 22, 2008, the California Supreme Court granted review of *Brinker* and the decision is at risk.

A Quick Review of the Case

Among other things, the appellate decision held that: 1) while employers cannot impede, discourage or dissuade employees from taking rest periods, they need only provide, not "ensure," that rest periods are taken; 2) employers need only authorize and permit rest periods every four hours or major fraction thereof, and if it is impracticable, these rest periods need not be in the middle of each work period; 3) employers are not required to provide a meal period for every five consecutive hours worked (rejecting the "rolling five hour" theory); 4) as with rest periods, while employers cannot impede, discourage or dissuade employees from taking meal periods, they need only provide them and not ensure they are taken; and 5) while employers cannot coerce, require or compel employees to work off the clock, they can only be held liable for employees working off the clock if they knew or should have known they were doing so.

The grant of review by the Supreme Court automatically *vacated* the appeals court's decision, which can no longer be relied upon as binding precedent. But one day after the Supreme Court's decision to grant review, the Division of Labor Standards Enforcement (DLSE), California's equivalent of the federal Department of Labor, issued an internal staff memorandum which essentially followed the reasoning of *Brinker*. This means that the DLSE's enforcement position will continue to follow the more flexible rationale of the *Brinker* decision until the Supreme Court issues its decision on review of *Brinker*.

What This Means for Employers

The *Brinker* decision was greeted with enthusiasm by employers across California, as it finally gave clarity to an otherwise murky area of the law. Now that review has been granted, the question employers now face is how they should interpret the law governing meal and rest periods while waiting for a final decision.

First and foremost, the issues on review are not likely to be resolved in the immediate future. It could be a year or more before the Supreme Court rules on this case. But employers can take comfort in the fact that at least one court has chosen to follow the rationale set forth in *Brinker* even though the court's decision was vacated. In *Brinkley v. Public Storage, Inc.*, the Second Appellate District came to the same conclusion as the appellate court in *Brinker*. While this decision may be overruled by a contrary decision by the Supreme Court in its review of *Brinker*, this new case, at the very least, will give employers good precedent to cite while *Brinker* is pending. Oddly, the case names are similar and may cause more confusion. In the meantime, even though the DLSE and at least one appellate decision continue to follow the rationale of *Brinker*, it is unclear how the Supreme Court will rule.

For example, although the wording is somewhat unclear, the Wage Orders arguably require that employees not work five hours without being provided a 30-minute meal period. You should continue to use your best efforts to ensure that employees are taking the required meal and rest breaks, and you should consider avoiding scheduling breaks too early or too late in employees' shifts, just in case the Supreme Court adopts a "rolling five hour" measuring period for meal breaks.

You should also strictly maintain records of meal periods by those employees who are subject to meal period laws, documenting the beginning and ending time of your employees' meal periods. Rest periods need not be recorded, but we recommend collecting periodic acknowledgments from employees receiving rest periods in order to establish systematic compliance. Supervisory efforts to assure meal and rest period compliance will be enhanced by accurate and routine recordkeeping.

If you're unsure about whether you are in compliance, give us a call. We would be happy to set up a wage and hour audit to make sure your company is safe.

For more information, contact any attorney in one of our California offices:

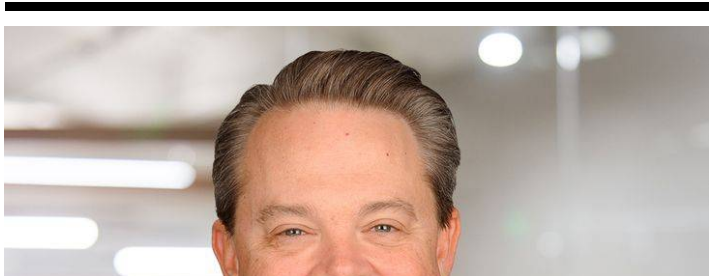
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